

Shutvet v Massa

2023 NY Slip Op 30443(U)

February 10, 2023

Supreme Court, New York County

Docket Number: Index No. 652936/2020

Judge: Melissa 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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DAVID SHUTVET, RIVA WILKINS, GARY NERLINGER,
PATRICIA GILCHRIST, LYLE GILLMAN, BOB BARNARD,
ARTHUR MELLON, WILLIAM FREEMAN,

Plaintiff,

INDEX NO. 652936/2020

MOTION DATE 01/10/2023,
01/10/2023

MOTION SEQ. NO. 008 009

- v -

JAMES MASSA, EDDIE HUEY, ROBERT MORELLO,
CINDY MEENGs, SERGE ABEND, JOHN PRICE, JAMES
SMITH, BRENT HARRIS, JOSEPH SKRAPITS, MILTON
LANGER, SCOTT LLOYD, GORDON GARRETT,
MATTHEW MORGANELLI,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 148, 149, 150, 151, 152, 153, 154, 155, 156, 160

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 009) 135, 136, 157, 158, 159

were read on this motion to/for DISMISS

INTRODUCTION

In Motion Seq. No. 08, Defendants Robert Morello, Cindy Meengs, Serge Abend, John Price, Brent Harris, Scott Lloyd, James Smith, Milton Langer, Joseph Skrapits, Gordon Garrett, and Matthew Morganelli move to dismiss Plaintiffs' amended complaint pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7). In Motion Seq. No. 09, Defendants James Massa ("Massa") and Eddie Huey ("Huey") adopt the other Defendants' arguments and seek to dismiss the amended complaint.

FACTUAL AND PROCEDURAL BACKGROUND

This is a breach of fiduciary duty action related to Defendants' alleged misconduct in their roles as directors, officers and/or employees of a Nevada software company, nonparty Giga Entertainment Media, Inc. ("GEM"). Plaintiffs are shareholders and/or former officers and directors of GEM. Defendant Massa is GEM's former CEO, Defendant Huey is GEM's former CTO, Defendant Morganelli is Massa's former personal assistant, and Defendant Garrett is GEM's former CFO. The other Defendants were members of GEM's board of directors. Plaintiffs allege that Defendants, while in control of GEM, breached their fiduciary duties to Plaintiffs in a litany of ways. Among other things, Plaintiffs allege that Defendants forced the company into bankruptcy in a scheme to purchase company assets for themselves through an LLC that they created (Amended Complaint, NYSCEF Doc. No. 118, ¶¶ 101, 221).

In June 2019, GEM filed for Chapter 7 bankruptcy in the Eastern District of Kentucky (*see In re Giga Entertainment Media, Inc.*, Case No. 19-51291). Subsequently, the bankruptcy trustee conducted an auction of GEM assets, and the same Plaintiffs as those appearing in this action purchased litigation rights pursuant to an Asset Purchase Agreement ("APA"). Under the APA, the Plaintiffs purchased the right to bring "[c]laims and causes of actions for avoidable transfers" and "[c]laims and causes of action . . . against prior directors, officers and shareholders of the company including . . . breach of fiduciary duty" (APA, NYSCEF Doc. No. 130, §§ 2.1[a]-[b]).

Plaintiffs then filed an adversary proceeding under the umbrella of the bankruptcy action (Bankruptcy Adversary Proceeding Complaint, NYSCEF Doc. No. 131). The Adversary Proceeding complaint was a complaint to avoid and recover preferential and fraudulent transfers that Defendants Massa and Huey allegedly made in their roles at GEM. In particular, the Adversary Proceeding complaint contained causes of action for: avoidance and recovery of preferential transfers under 11 USC §§ 547(b)(1) and 550 (first and second counts); avoidance and recovery

of fraudulent transfers under 11 USC §§ 544(b)(1), 548(a)(1)(A) and 550, as well as Kentucky's Uniform Voidable Transactions Act (third and fifth counts); avoidance and recovery of constructive fraudulent transfers under 11 USC §§ 548(a)(1)(B) and 550 (fourth count); and disallowance of claims under 11 USC § 502(d) (sixth count) (Bankruptcy Adversary Proceeding Complaint, pp. 7-16). Schedule A to the Adversary Proceeding complaint detailed the precise transfers that were at issue. For example, paragraph 1 of Schedule A states:

All payments of consulting fees to James Massa in excess of \$6,500 per month. Massa changed his consulting fee from \$6,500 per month to \$20,000 per month or more without formal authorization from the Board of Directors. (Claims relating to these payments are asserted against Defendant Massa).

(Bankruptcy Adversary Proceeding Complaint, Schedule A, ¶ 1).

Therefore, using that example, through the causes of action set forth in the main body of the Adversary Proceeding complaint, plaintiffs were seeking to have the bankruptcy court void any "consulting fees to James Massa in excess of \$6,500."

However, in addition to the numerous allegations relating to allegedly fraudulent or preferential transfers, the Adversary Proceeding complaint also included more general allegations of corporate mismanagement and breaches of fiduciary duty. For instance, plaintiffs alleged that Massa and Huey "intentionally mismanaged GEM to place it in bankruptcy," "set up a secret corporate entity," and made misrepresentations of material fact to investors, officers, and directors (Bankruptcy Adversary Proceeding Complaint, ¶ 18).

The bankruptcy court issued several key rulings related to the Adversary Proceeding. First, on June 2, 2021, the court dismissed the sixth count for disallowance of claims for lack of standing (June 2, 2021 Bankruptcy Order, NYSCEF Doc. No. 87). Then, on June 22, 2021, the court issued an order granting in part and denying in part defendants' motion to dismiss (June 22, 2021 Bankruptcy Order, NYSCEF Doc. No. 88). In that order, the court dismissed **without prejudice**

the five remaining causes of action only as to certain Schedule A transfers but not as to other Schedule A transfers (*id.*). In particular, the court stated that as to counts 1 and 2 of the Adversary Proceeding complaint, the claims “concerning the transactions listed in categories 2, 3, 9, and 20(c)-(g) of the Complaint’s Schedule A are not dismissed and will proceed forward” (*id.*, ¶ 1). Under the June 22, 2021 Bankruptcy Order, **all** transfers **other** than those described in paragraphs 2, 3, 9, and 20(c)-(g) of the Schedule A were dismissed, but **only** without prejudice.

Subsequently, the court issued an additional order on December 2, 2021, stating that “[a]ll remaining claims in Plaintiffs’ Complaint are **DISMISSED WITH PREJUDICE**” (*i.e.*, counts 1 and 2 to the extent they related to the transactions in categories 2, 3, 9, and 20[c]-[g] of the Schedule A) (December 2, 2021 Bankruptcy Order, NYSCEF Doc. No. 91 [emphasis added]). The court then issued an amended judgment on December 3, 2021 stating that the court had “entered orders dismissing all Counts of the Complaint,” and that, accordingly, plaintiffs’ complaint was “DISMISSED in full” (December 3, 2021 Bankruptcy Order, NYSCEF Doc. No. 93). The court noted, “This is a final judgment” (December 3, 2021 Bankruptcy Order). The bankruptcy court, however, never explicitly stated that the claims dismissed **without** prejudice by the June 22, 2021 order were now considered to be dismissed **with** prejudice.

Thus, the bankruptcy court apparently dismissed only **without prejudice** the first through fifth causes of action in the Adversary Proceeding complaint to the extent that those causes of action related to the following transfers described in the Schedule A:

1. All payments of consulting fees to James Massa in excess of \$6,500 per month. Massa changed his consulting fee from \$6,500 per month to \$20,000 per month or more without formal authorization from the Board of Directors. (Claims relating to these payments are asserted against Defendant Massa).
4. Unexplained Online Transfers from Debtor’s Accounts. No explanation is provided in the Company’s books and records as to the purpose of the transfer or the transferee for each of the following transactions:
 - a. 7/26/18 - \$21,000

- b. 7/30/18 - \$10,000
- c. 8/16/18 - \$38,000
- d. 8/24/18 - \$84,062.30
- e. 8/24/18 - Transfer to Wells Fargo \$5,000
- f. 8/30/18 - 80,000

(Claims relating to these payments are asserted against Defendants Massa and Huey).

5. Hotel Payments expensed to the Debtor which appear to be for hotel stays by James Massa. There is no explanation on the company records of the purpose or nature of each hotel stay and no backup documents are contained in the company records. There is no explanation of the hotel guest, no receipt, no explanation of the nature of the stay, or business conducted on each visit.

...

6. Unexplained Transfers from Debtor's Accounts. No explanation (or inadequate explanation) is provided in the Company's books and records as to the purpose of the transfer or the transferee for each of the following transactions.

- a. 7/26/18 - transfer - \$21,000
- b. 7/30/18 - transfer - \$10,040
- c. 8/16/18 - transfer to Payroll - \$38,000 (no breakdown of the payment is provided)
- d. 8/17/18 - transfer to money market \$2K
- e. 8/24/18 - transfer from money market - \$84,000
- f. 8/30/18 - transfer from money market - \$80,000
- g. 9/14/18 - \$19,000 transfer to checking
- h. 9/20/18 - \$5,000 transfer from money market
- i. 9/27/18 - \$33,850 payroll deposit (no breakdown of the payment is provided)
- j. 9/27/18 - \$33,850 transfer to checking
- k. 10/11/18 - \$10,000 - chase savings (deleted)
- l. 10/31/18 - \$12,000 - chase payroll - on line transfer to checking
- m. 10/31/18 - \$19,578.50 - wire transfer for payroll expense
- n. 11/14/18 - \$7800 - to payroll
- o. 11/19/18 - \$7658 - online transfer to payroll
- p. 11/21/18 - \$7650 - online transfer payroll

NOTABLY, alleged payroll transfers are haphazard, in uneven and changing amounts and company books are without explanation as to the payee or amount of specific payments. (Claims relating to these payments are asserted against Defendants Massa and Huey).

7. Check number 1795 in the amount of \$235 dated on or about 6/28/19 payable to incorporate.com. (Claims relating to these payments are asserted against Defendants Massa, and Huey and are not asserted against the transferee).

8. Extensive payments allegedly for Rent which are not properly explained including:

- a. series of payments to TIAA Financial from June 2018 forward logged as Lease Payments in the amount each of \$2,594.64.
- b. 7/5/18 - \$10,800 payment to We Works (Check 1785)
- c. 7/10/18 - \$10,000 payment to We Works (Check 1808)
- d. 7/20/18 - \$4,335 payment to 575 Fifth Avenue (ledgered as rent)

- e. 7/31/18 - \$2,000 payment to Altus (ledgered as rent)
- f. 8/13/18 - \$9,000 payment to We Works
- g. 8/29/18 - \$4,335 payment to 575 Fifth Avenue (ledgered as rent)
- h. 8/31/18 - \$5,719 payment to Webster Bank (ledgered as rent)
- i. 9/6/18 - \$6,800 – payment to We Works
- j. 9/27/18 - \$5719 payment to Altus (ledgered as rent)
- k. 10/3/18 - \$6,000 – payment to We Works
- l. 11/2/18 - \$5,719 payment to Altus (ledgered as rent)
- m. 2/4/19 - \$3,417.44 – payment to We Works
- n. 3/4/19 - \$3,522.14 – payment to We Works

Alleged rent payments are haphazard, in uneven and changing amounts and are made to multiple entities in concurrent time periods. (Claims relating to these payments are asserted against Defendants Massa and Huey and are not asserted against the named transferees).

- 10. Three unexplained payment to Lexi Ryan (no explanation for who Lexi Ryan in company books). Payments were: (a) 10/10/18 - \$7500; (b) 11/5/18 - \$5,000; (c) 11/5/18 - \$952.25 (Claims relating to these payments are asserted against Defendants Massa and Huey and are not asserted against Lexi Ryan).
- 11. Unexplained withdrawals with no explanation on the company's records
 - a. 10/25/18 - \$120,000 (no explanation for withdrawal)
 - b. 12/7/18 - \$4,000 PNC BANK - WITHDRAWAL. NO EXPLANATION

(Claims relating to these payments are asserted against Defendants Massa and Huey).
- 12. Unexplained Paypal payment with no explanation on the company's records in the amount of \$2,875 on 11/6/18. Claims relating to this payment are asserted against Defendants Massa and Huey.
- 13. Payment of \$15,000 dated 11/2/18 to Jared Striner listed as consulting fee. It is believed that this payment was made to Mr. Striner to pay an SEC fine levied against him in the same amount which would be prohibited. Claims relating to this payment are asserted against Defendants Massa and Huey.
- 14. Payment of \$2,500 on 1/16/19 to Travis Pregent who appears to be a personal injury attorney in Massachusetts. No explanation is provided for this payment on the company's books and records. Claims relating to this payment are asserted against Defendants Massa and Huey.
- 15. Payment of \$5,774.94 payable to Sprechman on 11/5/18. There is no explanation for this payment on the company's books and records. Claims relating to this payment are asserted against Defendants Massa and Huey but not against the stated transferee.
- 16. Payment of \$5,000 (unknown payee) on 1/30/19 for Meals and Entertainment (No recipient stated or detail provided of payment). Claims relating to this payment(s) are asserted against Defendants Massa and Huey.
- 17. \$10,400 transaction ledgered on 7/27/18 with no explanation or backup for the transaction. Claims relating to this payment are asserted against Defendants Massa and Huey.

18. \$3,000 check by the Debtor on or about February 20, 2019 (check is listed as number 20192). No explanation is provided for this payment and the payee cannot be identified from records provided by the Debtor. Claims relating to this payment are asserted against Defendants Massa and Huey.
19. Extensive “payroll payments” payments are ledgered on the Debtor’s books and records and reflected in PNC bank statements in haphazard amounts with no payment detail and in excess of the believed company payroll for each pay period. There are also PNC ACH payments in the bank statements for which transactions cannot be matched. It is believed that some of these payments are fraudulent to support improper payroll and other payments. The company has failed to provide or maintain records relating to these payments and has refused to provide these records. Claims relating to these payments are asserted against Defendants Massa and Huey but not against the transferee banks or payroll companies . . .
20. Several Transfer transactions occurred in Aslo Bank in April – May 2019 which had no explanation for the transfer transactions. The Debtor company has failed to provide or maintain records relating to these payments and has refused to provide these records. Claims relating to these payments are asserted against Defendants Massa and Huey but not against the transferee banks. Such payments appear as follows:
- a. 4/19/19 - \$2200 TRANSFER
 - b. 4/23/19 - \$5600 TRANSFER
21. Several Withdrawals were made from PNC bank in March – April 2019 which had no explanation for the withdrawals. The Debtor company has failed to provide or maintain records relating to these payments and has refused to provide these records. Claims relating to these payments are asserted against Defendants Massa and Huey but not against the transferee banks. Such payments appear as follows:
- a. 3/11/19 - \$4,000
 - b. 3/12/19 - \$1,000
 - c. 3/14/19 - \$10,000
 - d. 4/09 - \$7,679.43
 - e. 4/11 - \$5,000

(Schedule A).

Rather than continue to pursue their claims in bankruptcy court, Plaintiffs filed their original complaint in this action on October 6, 2021 (Complaint, NYSCEF Doc. No. 32).¹ The original complaint alleged, among other things, that Defendants Massa and Huey converted GEM corporate assets for personal use, “putting in false expenses for reimbursement” (Complaint, NYSCEF Doc. No. 32, ¶ 1), and that the other Defendants breached their duties to the company

¹ The Plaintiffs filed a notice of appeal of the orders dismissing the Adversary Proceeding complaint (*see* NYSCEF Doc. No. 106). However, the docket for the Adversary Proceeding shows that the appeal was dismissed for non-prosecution (*see In re: GIGA Entertainment Media, Inc.*, Case No. 21-8027, Doc. No. 84).

by failing to implement oversight procedures to monitor Massa and Huey (Complaint, ¶ 3). The complaint additionally alleged that Defendants intentionally bankrupted the company to convert software and start their own company (Complaint, ¶ 4). The complaint included causes of action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of employment contract, conversion, unjust enrichment, and an accounting (Complaint). Defendants filed motions to dismiss the original complaint, and oral argument was held on the motions on June 17, 2022. Plaintiff then filed the operative amended complaint, and the court denied the original motions to dismiss as moot.

The amended complaint includes a number of new allegations related to breach of fiduciary duty. In particular, Plaintiffs allege Defendants made misrepresentations to shareholders about the state of GEM (Amended Complaint, ¶¶ 124-129, 144-148), that Defendants improperly settled with creditors and paid vendors money that Plaintiffs claim GEM did not owe (Amended Complaint, ¶¶ 155-157, 161, 166), and that Defendants improperly formed the entity GLB2019, LLC in order to conceal their identities and acquire GEM assets in bankruptcy (Amended Complaint, ¶ 224). However, the amended complaint does not refer to any of the particular transactions set forth in Schedule A to the Adversary Proceeding complaint.

Defendants have renewed their motions to dismiss, arguing that Plaintiffs have failed to rebut the business judgment rule to hold the Defendants liable, that Plaintiffs have failed to plead their breach of fiduciary duty cause of action with sufficient particularity, and that res judicata and collateral estoppel preclude Plaintiffs' claims due to the prior judgment on the merits in the bankruptcy Adversary Proceeding. Defendants also argue that the Plaintiffs lack standing to sue Defendant Morganelli under the APA, that the conspiracy and aiding and abetting claims should

be dismissed due to the lack of an underlying tort, and that the accounting cause of action fails because Plaintiffs fail to allege a special relationship with Defendants.

For the following reasons, the motions to dismiss are granted.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord [plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see also *Chapman, Spira & Carlson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]; *Marabyan v 511 West 179 Realty Corp.*, 165 AD3d 581, 582 [1st Dept 2018]). On a motion to dismiss under CPLR 3211(a)(1), “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]; *Chen v Romona Keveza Collection LLC*, 208 AD3d 152, 157 [1st Dept 2022]). Pursuant to CPLR 3211(a)(5), a court will dismiss an action based on res judicata where the party had a “full and fair opportunity to litigate the claim in a prior proceeding based on the same transaction, but did not raise it therein” (*Schwartzreich v E.P.C. Carting Co., Inc.*, 246 AD2d 439, 440-441 [1st Dept 1998]).

1. Breach of Fiduciary Duty

The cause of action for breach of fiduciary duty is dismissed on the basis of res judicata as to Defendants Massa and Huey. It is dismissed as to the other Defendants on the basis of the business judgment rule and lack of standing.

a. Res Judicata

The cause of action for breach of fiduciary duty is dismissed pursuant to res judicata with respect to Defendants Massa and Huey. Generally, a court determining whether a prior action

precludes a current action should apply the res judicata rules followed in the jurisdiction that rendered the earlier decision (*see RM 18 Corp. v Bank of New York Mellon Trust Co., N.A.*, 104 AD3d 752, 756 [2d Dept 2013]). Here, because the prior proceeding was a federal bankruptcy action, federal common law rules relating to res judicata apply (*see Insurance Co. of State of Pennsylvania v HSBC Bank USA*, 10 NY3d 32, 38 [2008] [applying federal res judicata rules and finding that res judicata “applies with full force to matters decided by the bankruptcy courts”]; *Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 69 [2018]).² To establish claim preclusion, a party must show “(1) a final judgment on the merits, (2) identity or privity of parties, and (3) identity of claims in the two actions” (*Paramount Pictures Corp.*, 31 NY3d at 73; *see also Insurance Co. of State of Pennsylvania*, 10 NY3d at 38).

At the center of these motions is a dispute as to what preclusive effect the bankruptcy court’s orders have on the claims here. The court finds that the series of orders that the bankruptcy court issued in the Adversary Proceeding preclude the causes of action here as to Defendants Massa and Huey. The Plaintiffs in this case are the same plaintiffs who brought the Adversary Proceeding in bankruptcy court, and Defendants Massa and Huey appeared in both actions. Therefore, the only issues for assessing claim preclusion are whether there was a final judgment on the merits in the Adversary Proceeding and whether that judgment related to the claims in this action. However, these determinations are complicated by the fact that the bankruptcy court dismissed some claims in the Adversary Proceeding with prejudice and other claims without prejudice.

² In *Paramount Pictures Corporation v Allianz Risk Transfer AG*, 31 NY3d 64, 69 [2018], the court cited United States Supreme Court precedent for the propositions that (1) to evaluate the claim preclusive effect of judgments in federal question cases, the uniform federal rules of res judicata apply, and (2) to evaluate the claim preclusive effect of judgments in diversity cases, federal law incorporates the rules of preclusion applied by the state in which the federal court sits. The court went on to find that, where the prior action encompassed both federal and state law claims, federal preclusion doctrine governs (*id.* at 69-70). Here, the Adversary Proceeding complaint involved both federal and Kentucky statutory claims, so federal preclusion doctrine applies.

Plaintiffs are correct in their argument that an order dismissing an action without prejudice is not a final judgment on the merits and does not have preclusive effect (*see CitiMortgage, Inc. v Moran*, 188 AD3d 407, 408 [1st Dept 2020]; *Wormser Corp. v L'Oréal USA, Inc.*, 205 AD3d 496, 496 [1st Dept 2022]; *Condor Capital Corp. v CALS Investors, LLC*, 2023 WL 1786581, *1 [1st Dept Feb 7, 2023] [reversing dismissal on res judicata grounds where it was “not clear that the dismissal of the prior action was on the merits and with prejudice”]). However, Defendants are correct that, where res judicata does apply, it bars not just the claims that were brought in the prior action, but also claims that “could have been brought” in that action (*see Bradshaw v City of New York*, 200 AD3d 553, 553 [1st Dept 2021]; *East Hampton Capital LLC v Fergusson*, 183 AD3d 409, 409-410 [1st Dept 2020]; *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *Lane v Birnbaum*, 258 AD2d 389, 389 [1st Dept 1999]). Taken together, these rules permit Plaintiffs, at most, to pursue only claims that were dismissed **without prejudice** in the Adversary Proceeding (*see Breslin Realty Development Corp. v Shaw*, 72 AD3d 258, 264-265 [2d Dept 2010] [finding legal malpractice causes of action were barred as a matter of res judicata by the prior bankruptcy action involving attorney fees, and stating that, while a court can reserve issues for later resolution, any cause of action must be “expressly reserved” by the court]).

Thus, Plaintiffs were permitted to bring claims in this action relating only to the transfers that Defendants Massa and Huey allegedly were involved with, described in paragraphs 1, 4-8, 10-19, 20(a)-(b), and 21 of Schedule A to the Adversary Proceeding complaint. Plaintiffs have clearly not done so. The causes of action here (breach of fiduciary duty, aiding and abetting, conspiracy, and accounting) are entirely distinct from the avoidance and recovery causes of action in the bankruptcy Adversary Proceeding. Additionally, the amended complaint here does not refer to **any**

of the alleged transfers described in the Adversary Proceeding's complaint's Schedule A.³ Therefore, even if Plaintiffs are correct that the bankruptcy court expressly reserved particular issues for the state court, they cannot escape res judicata because those are not the issues that they have raised in their amended complaint. Rather, the December 2, 2021 order dismissing the remainder of the Adversary Proceeding complaint has claim preclusive effect as to the entirety of the amended complaint here, to the extent Plaintiffs raise claims that they could have brought against Defendants Massa and Huey in the prior action.

b. Business Judgment Rule

To the extent that there are any particularized allegations against the other director and officer Defendants related to breach of fiduciary duty, the cause of action is dismissed as to those other defendants based on the business judgment rule. The law of the state of incorporation governs whether or not the business judgment rule has been satisfied (*see Eccles v Shamrock Capital Advisors, LLC*, 209 AD3d 486, 487 [1st Dept 2022]; *Vilar v Rutledge*, 2012 N.Y. Misc. LEXIS 6356, *16 [Sup Ct, NY Cty Mar 9, 2012]).

Here, that state is Nevada. Under Nevada's business judgment rule, directors and officers are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation (*Guzman v Johnson*, 137 Nev. 126, 131 [2021]).⁴ In order to hold a defendant director

³ Even though the causes of action in the bankruptcy Adversary Proceeding complaint were for avoidance and recovery, the Adversary Proceeding complaint did contain general allegations that Defendants Massa and Huey "intentionally mismanaged GEM to place it in bankruptcy," set up a secret corporate entity to purchase GEM assets and made intentional misrepresentations of fact to investors (Bankruptcy Adversary Proceeding Complaint, ¶ 18). Those allegations are very similar to Plaintiffs' allegations throughout the amended complaint here (*see e.g.*, Amended Complaint, ¶ 229). This only strengthens the basis for res judicata because it shows that Plaintiffs were aware of these factual allegations when drafting the Adversary Proceeding complaint but simply chose not to base any actual causes of action on them. They cannot now be permitted a second chance to litigate what they knew about and could have litigated in bankruptcy court.

⁴ The court notes that this standard is generally similar under New York law (*see Owen v Hamilton*, 44 AD3d 452, 456 [1st Dept 2007] ["The business judgment rule bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes"] [internal citation and quotation marks omitted]).

or officer liable under a theory of breach of fiduciary duty, the plaintiff must “*both* rebut the business judgment rule's presumption of good faith *and* show a breach of fiduciary duty involving intentional misconduct, fraud, or a knowing violation of the law” (*id.*). To rebut the business judgment rule's presumption of good faith, the plaintiff must show that the defendant was “motivated by self-interest” (*id.* at 133; *see also In re Newport Corporation Shareholder Litigation*, 2022 WL 970210, *2 [Nev. Mar. 30, 2022]).

Plaintiffs have failed to meet their burden to rebut the business judgment rule. Plaintiffs, in their opposition papers, did not respond to Defendants' argument that Plaintiffs failed to allege self-interest and, therefore, Plaintiffs have conceded that argument. Nevertheless, Plaintiffs fail to allege nearly any particularized facts showing self-interest by Defendants other than Massa or Huey in the amended complaint. While Plaintiffs allege that these other Defendants took particular actions in concert with Massa and Huey—including, for example, covertly forming GLB2019, LLC (Amended Complaint, ¶ 110) and preparing a business plan presentation containing misrepresentations (Amended Complaint, ¶¶ 124-129)—Plaintiffs fail to allege how these Defendants acted in their own self-interest.

The allegation that comes closest to alleging self-interest is Plaintiffs' allegation that Defendants agreed to purchase the right to bring shareholder derivative suits from the Chapter 7 bankruptcy trustee to “protect [themselves] against costly, time-consuming, frivolous GEM derivative lawsuits . . . in their attempt to extract money from [them]” (Amended Complaint, ¶ 223). Even if this allegation shows self-interest, Plaintiffs do not allege that this constituted “intentional misconduct, fraud, or a knowing violation of law” (*Guzman v Johnson*, 137 Nev. 126, 131 [2021]; *see also Chur v Eighth Judicial District Court in and for County of Clark*, 136 Nev. 68, 75 [Nev. Feb 27, 2020] [finding that a claimant must show that the director or officer “had

knowledge that the alleged conduct was wrongful” in order to show a knowing violation of law or intentional misconduct]). Therefore, the breach of fiduciary duty claim against the other director and officer Defendants is dismissed.

c. Standing

The only Defendant who was not a director or officer, and therefore is outside the application of the business judgment rule, is Defendant Morganelli. Defendants correctly assert that Plaintiffs lack standing under the APA to sue Morganelli (*see* APA, § 2.1(b) [indicating that Plaintiffs purchased “Claims and causes of action . . . against prior directors, officers and shareholders of the company”]). As Morganelli was not an officer, but Massa’s personal assistant (Amended Complaint, ¶ 85), Plaintiffs do not have standing under the APA to bring any of the causes of action in the amended complaint against him.

2. Aiding and Abetting Breach of Fiduciary Duty and Conspiracy

The cause of action for aiding and abetting is also dismissed. Under both New York and Nevada law, a cause of action for aiding and abetting breach of fiduciary duty requires the existence of an underlying breach (*see Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]; *In re Amerco Derivative Litigation*, 127 Nev. 196, 225 [Nev. May 12, 2011]). Similarly, neither New York nor Nevada recognizes an independent cause of action for conspiracy, and the lack of an underlying primary tort requires dismissal of a cause of action for conspiracy (*see Kovkov v Law Firm of Dayrel Sewell, PLLC*, 182 AD3d 418, 418-419 [1st Dept 2020]; *Suarez-Smith v BAC Home Loans Servicing, LP*, 2011 WL 5025143, *4 [D. Nev. Oct 21, 2011] [dismissing claim for civil conspiracy because plaintiff failed to state a claim for purported underlying tort]). Here, the dismissal of the breach of fiduciary duty cause of action

above requires dismissal of both the aiding and abetting and conspiracy claims for lack of an underlying tort (see e.g. *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474-475 [1st Dept 2010]).

3. Accounting

Finally, the cause of action for an accounting is dismissed. To prevail on a cause of action for an accounting, a plaintiff must establish “the existence of a special relationship whereby a duty to account may arise” (see *Metropolitan Bank & Tr. Co. v Lopez*, 189 AD3d 443, 446 [1st Dept 2020]; *Wolfram v Pardee Homes of Nev.*, 2014 Nev. Dist. LEXIS 3348, **27-28 [Nev. Dist. Ct. Clark Cty. June 25, 2014]). Here, Plaintiffs have provided no basis whatsoever to support a claim that they, as shareholders of GEM, are in a special relationship with Defendants.

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

Accordingly, it is


ORDERED that Motion Seq. Nos. 08 and 09 are granted; and it is further

ORDERED that the amended complaint is dismissed with prejudice as to Defendant Morganelli; and it is further

ORDERED that the amended complaint is dismissed without prejudice as to all other Defendants.

02/10/2023

DATE



MELISSA CRANE, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE