SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ROBERT HOPKINS,

Plaintiff,

- v -

KENNETH ACKERMAN and SUNRISE CONSULTING LLC,

Defendants.

INDEX NO. 655010/2018

MOTION DATE _____

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 239, 240, 241, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 245-1, 258-1, 257-1, 262, 263, 264, 265, 266, 246-1, 253-1, 254-1, 256-1, 268, 269, 270, 271, 272
were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 238, 259, 260, 261, 267
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In motion sequence number 006, defendants Kenneth Ackerman and Sunrise Consulting LLC (Sunrise) move, pursuant to CPLR 3212, to dismiss the amended complaint. Plaintiff Robert Hopkins cross-moves, pursuant to CPLR 2221(e),[1] for leave to renew his motion to amend the complaint (motion seq. no. 003), which Justice Scarpulla denied, in part, in so far as Hopkins was not permitted to amend his breach of contract claim. (*See* NYSCEF Doc. No. [NYSCEF] 161, Decision and Order [motion seq. nos. 003 and 004].)

[1] Counsel mistakenly cites CPLR 3221(e) in the Notice of Cross-Motion. (NYSCEF 242.)

In motion sequence number 007, Hopkins moves, pursuant to CPLR 3212, for summary judgment dismissing defendants' counterclaims.

Background

On May 31, 2011, Funding America Management LLC (Management), as manager, and "persons who shall execute a Series Agreement, … as members"[2] entered into the Limited Liability Company Operating Agreement (Fund Operating Agreement) of Funding America LLC (Fund).[3] (NYSCEF 223, Fund Operating Agreement at 3.[4]) The purpose of Fund was "to invest in a diversified portfolio of structured settlements and pre settlement litigation … ." (*Id*. § 1.6.)

Section 1.3(b) of the Fund Operating Agreement provides that

> "Fund shall operate as a limited liability company issuing different Series, each having separate rights, powers or duties with respect to specified property or obligations or profits and losses associated with specified property or obligations and, to the extent provided in this Agreement or in the Separate Series Agreement for a particular Series, having a separate business purpose or investment objective from the Fund and any other Series. The terms of each Series shall be as set forth in this Agreement and a separate agreement establishing such Series (a 'Separate Series Agreement') substantially in the form of Exhibit A attached hereto, but with such changes therein as the Manager may determine, without the consent of any other person. For all purposes of the [Delaware Limited Liability Company] Act, this Agreement, together with each Separate Series Agreement, constitute the 'limited liability company agreement' of the Fund within the meaning of the Act. A Separate Series Agreement or counterpart signature page thereto shall be executed by or on behalf of the Fund. The terms and provisions of a Separate Series Agreement may have the effect of altering, supplementing or amending the terms and

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[2] Exhibit A to the Fund Operating Agreement is a Separate Series Agreement that created a new Series of Fund, Funding America LLC Series 2011-A. The Series Agreement was to be entered into by investors in Funding America LLC Series 2011-A and Fund.

[3] The e-filed copy of the May 2011 Fund Operating Agreement is not executed. The signature lines for Management, by Ackerman as CEO, and Funding America LLC Series 2011-A are blank. (NYSCEF 223, Fund Operating Agreement at 22.)

[4] NYSCEF pagination

> provisions hereof with respect to the Series created thereby, without compliance with the amendment provisions of Section 8.1. In the event of any inconsistency between the terms of this Agreement and those of a Separate Series Agreement, the terms of the Separate Series Agreement shall control with respect to the relevant Series only."

(NYSCEF 223, Fund Operating Agreement at 3-4.) Ackerman avers that there were 5 Series – A, B, C, D, and E – with defendant Sunrise owning A, B, and D, nonparty John Lettera owning C, and nonparty Steven Schapiro owning E. (NYSCEF 221, Ackerman aff ¶¶ 9-10.) Pursuant to Section 2.1 of the Fund Operating Agreement, each person who executed a Series Agreement, defined in the Fund Operating Agreement as "Member," agreed to make a capital contribution to Fund. (NYSCEF 223, Fund Operating Agreement at 8.) It is undisputed that Ackerman made capital contributions to Fund. (NYSCEF 234, Joint Statement of Undisputed Facts ¶ 7.)

In June 2011[5], Hopkins, Ackerman, and Lettera executed an Amended and Restated Operating Agreement (Management Operating Agreement) of Management. (NYSCEF 222, Management Operating Agreement.) Schedule A to the Management Operating Agreement provides that Hopkins, Ackerman, and Lettera are each 33% members of Management, and each made capital contributions of a $100. (*Id.* at 27.) Management's objective and purpose was

> "(a) making such investments as the Members may determine ('Specified Investments'), including equity investments in certain lawsuits evidenced by certain contracts entered into with respect to such lawsuit or representing the right to acquire any such contract representing an interest in a lawsuit, (b) serving as the Manager of [Funding America LLC], (c) managing such investments until their disposition or until the termination of the Company in accordance with this Agreement, which ever shall first occur and (d) engaging in such additional or other activities

[5] The Operating Agreement states that it is "dated as of April 20, 2011;" the members' signatures are dated June 2011. (NYSCEF 222, Management Operating Agreement.)

> related to the foregoing as the Members shall deem necessary or advisable, all upon the terms and conditions set forth in this Agreement."

(*Id.* § 1.3.)

Hopkins avers that he was a member of both Management and Fund, and a signatory to both Operating Agreements. (NYSCEF 241, Hopkins aff ¶ 5.) Hopkins states that he and another Fund Member, Damon Stevens[6], became concerned with the transparency into Funding America,[7] leading them to call for certain amendments to the Operating Agreements. (*Id.* ¶ 7.)

On November 12, 2013, nonparty Silvermine Holdings LLC, Sunrise, Hopkins and Stevens entered into the First Amendment to Management's Operating Agreement (Management Amendment). The Management Amendment amended, *inter alia*, Section 11 and Schedule A of the Management Operating Agreement, defining Management's Members as Silvermine Holdings LLC, Sunrise, Hopkins and Stevens with each holding a 25% interest. (NYSCEF 222, Management Operating Agreement at 28-29.) On December 15, 2013, Management's members executed a Resolution whereby Hopkins replaced Ackerman as Management's CEO. (NYSCEF 5, Resolution.) The Resolution stated that Hopkins was to "serve in that position for a period of three years or until he is replaced." (*Id.*)

In September 2013, the Series A, B, C, and D Members entered into the First Amendment to Fund's Operating Agreement, which deleted and replaced Section 2.4

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[6] Ackerman disputes that Stevens was a member of Fund. He states that Management hired Stevens in 2011, a personal injury attorney, to evaluate which cases Fund should invest in. (NYSCEF 221, Ackerman aff ¶ 16.)

[7] In his affidavit, Hopkins does not define "Funding America." Thus, it is unclear if he is referring to Management, the Fund, or both.

(b) (Distributions) of Fund's Operating Agreement (Fund Amendment). (NYSCEF 223, Fund Operating Agreement at 26-27.) Hopkins asserts that he executed the Fund Amendment, making him a member of Fund. (NYSCEF 241, Hopkins aff ¶ 10.)[8] Ackerman asserts that only he and Lettera are the Series Members. (NYSCEF 221, Ackerman aff ¶ 19.)

By the end of 2012, Fund stopped investing in cash advances against litigation claims (Advances). (NYSCEF 234, Joint Statement of Facts ¶ 6.) Ackerman states that he and Lettera stopped investing in Fund so they could see if their returns were what was anticipated. (NYSCEF 221, Ackerman aff ¶ 24.) Ackerman further states that, by the end of 2013, "it was clear the returns were not good," as they had not even recovered their initial capital contribution. (*Id.* ¶ 25.) It was not until approximately March 2015 that Fund's members broke even after making their capital contributions. (*See Id.*; NYSCEF 169, Amended Complaint ¶¶ 52-53; NYSCEF 241, Hopkins aff ¶ 12.)

On February 27, 2015, Lettera sent Hopkins a letter stating

> "Funding America and its officers and investors, do *not* want to be involved in raising capital or pursuing any further opportunities either through Funding America or any company affiliated with Funding America. For all intents and purposes, Funding America is winding down and only recovering proceeds from the realization of investments."

(NYSCEF 224, February 2015 Letter.) On March 22, 2025, Ackerman's counsel sent Hopkins a letter informing Hopkins that he was not authorized to use Funding America to solicit investments. (NYSCEF 227, March 2015 Letter.) On April 2, 2015, Hopkins

[8] There are four signatures on the Fund Amendment, but the document does not identify the signatories by name.

responded, stating that the March 2015 letter contained misrepresentations. (NYSCEF 228, April 2015 Email.)

In June 2015, The Lanier Law Firm, PLLC sent a check for $103,976.92 to Fund via Hopkins' Florida residence (Trevor Jones Advance). (NYSCEF 229, Check; NYSCEF 230, Lanier Law Firm Email; NYSCEF 231, Ackerman July 2015 Email.) On July 27, 2015, Hopkins sent Ackerman, Lettera, and Schapiro an email stating,

> "Pursuant to my powers as elected CEO of Funding America-12/15/2013[9], Please be advised of the following.
> 1) The new office of Funding America is - 218 SE 3rd Terrace Dania Beach, Florida 33004
> 2) All files and checks shall be sent to our new headquarters."

(NYSCEF 232, Hopkins July 2015 Email.)

In November 2015, Ackerman filed a police report advising the Broward County Sheriff's Office that Hopkins "opened an account in [Ackerman] companies [sic] name and cashed a $103,000 check fraudulently." (NYSCEF 244, Police Report at 2.) The March 2, 2016 case status on the police report was noted as "unfounded." (*Id*. at 1, 5.)

Hopkins made repeated requests to inspect "Funding America's" books and records (NYSCEF 250, Third Notice for Books and Records), which he asserts were never complied with. Hopkins' signature block on the Third Notice for Books and Records again identifies him as Fund's CEO. (*Id*.) In November 2015, Ackerman opened a new bank account for Fund at Wells Fargo. (NYSCEF 210, Wells Fargo Account Application; NYSCEF 251, January 2016 Email; NYSCEF 253-1, Wells Fargo Statement.) Ackerman wrote several checks from the Wells Fargo account to himself

[9] Although Hopkins directs the court to the Resolution wherein, he is appointed as CEO of Management, Hopkins has not presented any actual document evidencing that he was CEO of Fund with the exception of his own statements and emails he drafted.

and Sunrise. (NYSCEF 254-1, Withdrawals.) Hopkins asserts this conduct was improper.

On November 3, 2017, the Delaware Secretary of State cancelled Management. (NYSCEF 234, Joint Statement of Facts ¶ 10.) On November 7, 2017, the Delaware Secretary of State cancelled Fund. (*Id*. ¶ 9.)

In October 2018, Hopkins filed this action. (NYSCEF 1, Summons; NYSCEF 2, Complaint.) In May 2020, Hopkins amended his complaint asserting claims for breach of both Operating Agreements by refusing to provide books and records of Management and Fund and breach of fiduciary duty by excluding Hopkins from the day-to-day operations of Management and Fund, excluding Hopkins from the K-1 Schedules filed with the Management's and Fund's tax returns, and expropriating Hopkins' membership interests in Management and Fund. Defendants assert counterclaims against Hopkins for breach of Management's Operating Agreement (failure to pay operating expenses), breach of fiduciary duty (failure to pay operating expenses), breach of fiduciary duty (competing business venture), breach of fiduciary duty (stolen funds), tortious interference with contract, civil theft (Fla Stat § 772.11), conversion, money had and received, and libel per se. (NYSCEF 43, Amended Answer with Counterclaims.)

Discussion

Summary judgment is a drastic remedy that will be granted only where the movant demonstrates that no genuine triable issue of fact exists. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see generally* CPLR 3212.) Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted].) If the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

Defendants' Motion for Summary Judgment

Statute of Limitations – Breach of Fiduciary Duty

The parties do not dispute that New York's statute of limitations applies to Hopkins' breach of fiduciary duty claim. However, the parties do dispute whether a three-year or six-year limitations period is applicable.

> "New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging injury to property within meaning of CPLR 214 (4), which has a three-year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies. Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213 (8)."

(*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009] [internal quotation marks and citations omitted].) In the amended complaint, Hopkins seeks monetary damages as well as equitable relief in the form of an injunction and constructive trust. (NYSCEF 169, Amended Complaint at 22.) Thus, Hopkins argues that the six-year limitations period applies.

The Court of Appeals has held that, in determining whether the equitable relief sought is incidental to monetary damages also sought, a court must look "to the reality, rather than the form, of [the] action." (*IDT Corp.*, 12 NY3d at 139-

140 [citation omitted].) It must be reasonably asserted that "the relief demanded in the complaint . . . is equitable in nature and that a legal remedy would not be adequate." (*Id.* at 139 [internal quotation marks and citation omitted].)

Defendants argue that Hopkins' requested injunctive relief, seeking to enjoin defendants from taking any action on behalf of Management or Fund, is defective because Management and Fund no longer exist. It is undisputed that the Delaware Secretary of State cancelled both Management and Fund in November 2017. (NYSCEF 234, Joint Statement of Facts ¶¶ 9-10.) As both companies are no longer in existence by virtue of the cancellation by the Delaware Secretary State, it is not possible for defendants to act on the cancelled companies' behalf. Hopkins fails to address this issue in his papers and provides no reason for the court to determine otherwise.

Hopkins also seeks equitable relief in the form of a constructive trust on all Advances transferred to or received by defendants. Defendants assert that Hopkins lacks standing to seek this relief because the Advances are the assets of Fund and/or Management, and Justice Scarpulla twice held that derivative claims cannot be brought on behalf of cancelled LLCs. (NYSCEF 72, Decision and Order [mot. seq. no. 001] at 5 [holding that "because the Fund and Management are cancelled LLCs, plaintiffs lack standing to assert claims on their behalf"]; NYSCEF 160, Decision and Order [mot. seq. no. 003] [denying the portion of Hopkins' motion to amend his complaint to assert a breach of contract claim based on defendants' failure to pay distributions on the ground that it is a derivative claim].)

In response, Hopkins asserts that a constructive trust is proper because no party had the right to distribution of profits directly from Fund as per the operating agreements, and all profits should have flowed through Management. Hopkins further asserts that, since Ackerman's theft of the monies from Fund was "extracontractual," Hopkins has an equitable claim as to those monies. (*See* NYSCEF 239, Memo in Opp. at 29.)

"A constructive trust is an equitable remedy, and its purpose is to prevent unjust enrichment. Accordingly, it may be appropriate to impose a constructive trust in situations when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." (*Homapour v Harounian*, 182 AD3d 426, 427 [1st Dept 2020] [internal quotation marks and citations omitted].) Here, like in *Homapour*, the sole case relied on by Hopkins in support of his argument, the property at issue – the Advances – is the property of the LLC.

Pursuant to Fund's Operating Agreement each member made capital contributions to Fund (NYSCEF 223, Fund Operating Agreement § 2.1[a]), and Fund, in turn, invested in litigation financing, and received the proceeds from its investments. Fund was then to make distributions to its members and Management in accordance with Section 2.4 of its Operating Agreement, and after September 2013, the Fund Amendment. Thus, the harm suffered is that of the company as the Advances were its assets at the time Ackerman allegedly improperly distributed them to himself. (*See Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 [Del 2004].) A constructive trust on the

Advances is not a remedy available to Hopkins, individually. Once again, Hopkins fails to address his standing to seek this relief.

In his opposition, Hopkins also argues that he is entitled to an accounting, another form of equitable relief, triggering the six-year limitations period. Hopkins is correct that "the mere existence of a fiduciary relationship otherwise gives rise to a claim for an accounting" (*Mullin v WL Ross & Co. LLC*, 173 AD3d 520, 522 [1st Dept 2019] [citations omitted]); however, nowhere in the amended complaint does Hopkins seek an accounting.[10]

Further, even if an accounting is automatically triggered when a plaintiff states a claim for breach of fiduciary duty without requesting such, here, Hopkins asserts that he was damaged by Ackerman's failure to calculate and distribute Hopkins' share of the profits. Thus, Hopkins really seeks an accounting to ascertain his alleged damages, and where a plaintiff pursues an accounting for this purpose, the three-year limitation period applies. (*Webster v Forest Hills Care Ctr., LLC,* 164 AD3d 1499, 1501 [2d Dept 2018] [holding that "[s]ince the plaintiff primarily seeks damages and pursues an accounting merely to determine the amount of such damages, the three-year limitations period … is applicable."].)

Hopkins also asserts that a six-year limitations period applies because his breach of fiduciary duty claim is rooted in fraud. Hopkins alleges that Ackerman breached his fiduciary duty to Hopkins by freezing Hopkins out of Management

[10] In all of the cases relied on by Hopkins in support of this argument, the plaintiffs sought an accounting in their complaints.

and Fund in three ways: excluding him from day-to-day operations, excluding him from the companies' K-1s, and by taking away his membership interests. (*See* NYSCEF 169, Amended Complaint ¶¶ 89-91.)

To be governed by the six-year limitations period, Hopkins' breach of fiduciary claim must be "based on allegations of actual fraud." (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] [citations omitted].)

> "[C]ourts will not apply the fraud Statute of Limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims. Thus, where an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of Statute of Limitations, courts look for the reality, and the essence of the action and not its mere name."

(*Id.* [internal quotation marks and citations omitted].)

Here, Hopkins' breach of fiduciary duty claim is premised on allegations that Ackerman froze Hopkins out of Management and Fund by denying him visibility into the companies' bank accounts and books and records and instructing the companies' accountants to exclude Hopkins as a member on the K-1s. (*See* NYSCEF 169, Amended Complaint ¶¶ 62, 69-71.) Hopkins also asserts that Ackerman took away Hopkins' membership interests by directly distributing the Advances to himself. (*Id.* ¶¶ 58-59, 83, 90.)

Fraud is not an essential element to the breach of fiduciary duty claim. Hopkins need not prove fraud to prevail. Although Hopkins alleges that the tax returns are false, the heart of the issue is whether Hopkins was wrongly excluded because he was a member, not whether a fraud was committed by filing tax returns that excluded him. Further, the allegations that Ackerman filed a false police report against Hopkins do not advance Hopkins' claim. (*See id.* ¶ 68.)

Hopkins is not suing Ackerman for filing a false police report, he is suing defendants for improperly freezing him out of Management and Fund. Further, the allegations that Ackerman wrongly transferred distributions to his accounts also does not require a showing of fraud. The issue is whether Hopkins is a member of Management and Fund and whether he was wrongly frozen out of the companies. Allegations of fraud are not integral to this claim. Thus, the three-year limitations period applies.

This action was filed in October 2018. Defendants assert that Hopkins' breach of fiduciary duty claim accrued no later than March 2015. In support of their argument, defendants direct the court to the March 22, 2015 letter sent to Hopkins by Ackerman's attorney, which states, in relevant part,

> "You are not authorized to engage in any conversation, make any representation concerning, enter into any agreement, or undertake any action in furtherance of any plan to raise money on behalf of Funding America. You are also not authorized to make any representation concerning the business performance or success of Funding America in connection with bolstering your credibility with investors you may be soliciting on behalf of any other company. In sum, you are not authorized to use Funding America as part of any attempt by you or anyone working with you, to raise money from any investor. Your recent communications concerning Funding America, which you fully know is winding down, and for which you know you are prohibited from raising funds for any purpose, seem designed for an ulterior purpose. Our investigation into that, and into your conduct, including but not limited to, your actions in the fall of 2013, is ongoing. Please refrain from contacting Mr. Ackerman for any purposes."

(NYSCEF 227, March 22, 2015 Letter.) Defendants argue that this letter is clear evidence that Hopkins was on notice that he was not to act on behalf of Fund or Management, which essentially froze him out of the day-to-day operations. Further, Hopkins testified at his deposition that

> "Q In April of 2015, did you feel you were being pushed out of the company?
> A Yes.
> Q Okay. Let me make this clear, in April of 2015, you thought you were being pushed out of company specifically by my client, Mr. Ackerman, right?
> A I thought -- no, let me just rephrase that. I thought Mr. Ackerman was stealing the money. That's what I thought. Open and shut."

(NYSCEF 219, Dep Tr at 133:17-134:4.) Defendants have made a prima facie showing that Hopkins was aware of any alleged freeze out by April 2015 at the latest.

In response, Hopkins asserts that the acts he alleges in support of his breach of fiduciary claim occurred in November 2015 and March 2016, making his claim timely. Hopkins argues that Ackerman excluded him from Management and Fund by filing a false police report in November 2015, which the police investigated until March 2016. He also asserts that it was not until 2016 when he was excluded from the K-1s.

As to the breach of fiduciary duty based on defendants' exclusion of Hopkins from the day-to-day operations of Management and Fund, Hopkins fails to raise an issue of fact as to whether his claim accrued later than March or April 2015. Hopkins states that he "led [Management and Fund] day-to-day, with [Hopkins] responsible for marketing and lead generation. (NYSCEF 241, Hopkins aff ¶ 17.) Thus, when Hopkins received the March 2015 letter directing him not to use the companies to raise money from investors, "not to engage in any conversation, make any representation concerning, enter into any agreement, or undertake any action in furtherance of any plan to raise money," and not to even contact Ackerman, his claim for breach of fiduciary duty based

on exclusion from the companies' day-to-day operations arose. (NYSCEF 227, March 22, 2015 Letter.) Further, Hopkins own testimony provides that he believed he was being "pushed out" in April 2015.

The litigation between Stevens and Ackerman did not toll the statute of limitations. Hopkins asserts that he attempted to intervene in that litigation, but his attorney's pro hac application was denied. Hopkins' reliance on *American Pipe & Constr. Co. v Utah*, 414 US 538, 553 (1974), where the U.S. Supreme Court held that "the commencement of [a] class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status," is misplaced. This case is not in the same procedural posture as a class action, which the Court explained is a "truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." (*Id.* at 550.)

As to the portion of the claim based on the allegation that defendants breached their fiduciary duty by excluding Hopkins from the K-1 Schedules, this portion is timely as he was excluded in 2016 despite being included on prior K-1 Schedules. (*See* NYSCEF 256-1 and 257-1, 2016 Tax Returns; NYSCEF 36-38, 2013-2015 Tax Returns.)

Hopkins also asserts that defendants breached their fiduciary duty by expropriating Hopkins' membership interests. Hopkins argues that when Ackerman collected Advances and profits on Fund's behalf, which happened in November 2015 and later, Ackerman had an obligation to account for each check

Fund received and each time Ackerman transferred the monies to himself from Fund's account an independent breach occurred, starting the limitations period anew.

A "repeated and continuing failure to account and turn over proceeds" is a continued wrong which creates a new cause of action with each failure. (*Butler v Gibbons*, 173 AD2d 352, 353 [1st Dept 1991].) Based on the allegation that Ackerman continued to collect monies on Fund's behalf and then transferred those monies to Sunrise (NYSCEF 169, Amended Complaint ¶ 84), as well as the evidence presented in the form of 2016 Fund checks paying monies to Sunrise from Fund's account (NYSCEF 254-1), the court finds this portion of the breach of fiduciary duty claim timely.

Defendants assert that, to the extent Hopkins' damage is lost profits, Ackerman started taking profits from Fund in mid-2015, and thus, that is when the harm occurred. "A tort claim accrues as soon as the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint." (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009] [internal quotation marks and citation omitted].) In New York, damages are an essential part of a claim for breach of fiduciary duty. (*Id.*) However, under Delaware law, damages are not an element.[11] (*Beard Research, Inc. v Kates*, 8

[11] Pursuant to the internal affairs doctrine, Hopkins' claims are governed by Delaware law. (*See Eccles v Shamrock Capital Advisors, LLC*, 209 AD3d 486, 488 [1st Dept 2022] [citation omitted] ["internal affairs doctrine applies to an officer or director at the time of the conduct at issue"].) Hopkins cites New York law in support of a majority of his substantive arguments but does not explain why New York law would apply to his substantive claims or address choice of law.

Ad3d 573 [Del Ch 2010] ["A claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed and (2) that defendant breached that duty"].) Thus, this claim accrued when defendants allegedly breached their duty to Hopkins. This allegedly occurred when defendants excluded Hopkins from the K-1s in 2016 and when Ackerman transferred monies from Fund to Sunrise's account, transactions that occurred as late as 2016. Thus, defendants' argument fails.

Breach of Fiduciary Duty Claim

Defendants assert that Hopkins does not have a claim because defendants did not misappropriate company assets; rather, they merely were winding the companies down, with which Hopkins disagreed. Defendants direct the court to Ackerman's affidavit as well as his counsel's affirmation. On this record, the court cannot determine whether Ackerman was entitled to distribute the profits to himself from Fund, whether Hopkins was indeed a member of Fund, and whether Hopkins is entitled to any distributions as a member of Management and/or Fund, if he is found to be a member.

Defendants also argue that Hopkins is not entitled to the damages he seeks – profits through disgorgement, lost profits, or quantum meruit and attorneys' fees.[12]

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[12] In an amended response to defendants' interrogatories, Hopkins detailed the damages he seeks - "damages arising out of Defendants' illegally freezing-out Hopkins from the Companies in the form of disgorgement of Defendants' profits, Hopkins' lost profits, and/or quantum meruit of Hopkins's services in excess of $800,000, but in an amount to be demonstrated at trial; and/or damages for failure to provide books and records, in excess of $400,000, but in an amount to be demonstrated at trial; plus Plaintiff's attorneys' fees, in an amount to be demonstrated at trial." (NYSCEF 220.)

"[W]hen a fiduciary engages in acts of conscious wrongdoing and breaches of a fiduciary duty of loyalty, the wrongdoer must disgorge any profit made as a result of such wrongful conduct." (*Metro Storage Intl. LLC v Harron*, 275 A3d 810, 865-866 [Del Ch Ct 2022] [internal quotation marks and citation omitted].) "[I]t is inequitable to permit the fiduciary to profit … . Even if the corporation did not suffer actual harm, equity requires disgorgement of that profit." (*Kahn v Kolberg Kravis Roberts & Co., L.P.*, 23 A3d 831, 838 [Del 2011] [citation omitted].) Even if actual harm to the corporation is not required, this is still a remedy that belongs to the company and not the individual shareholder member. Here, Hopkins alleges that defendants wrongfully took profits from Management and Fund. Thus, any ill-gotten gains from those companies, belongs to those companies and not Hopkins, individually. The remedy of disgorgement is not available to his direct claim for breach of fiduciary duty.

Hopkins also seeks "lost profits" for defendants' breach of fiduciary duty. However, what Hopkins actually seeks is the distributions to which he was allegedly entitled, pursuant to Fund's Operating Agreement, if he was a member of Fund, which is a clear issue of fact. The court need not discuss "lost profits" as Hopkins has mislabeled the damages he actually seeks. Thus, the breach of fiduciary duty claim formed on the basis that he was excluded from the K-1s and his membership interests were expropriated goes forward to trial. Damages Hopkins seeks from distributions due him from Management, initially belongs to Management against Fund because Management did not receive distributions from Fund.

Quantum Meruit

Hopkins purported claim for quantum meruit, which is only raised in his amended response to defendants' interrogatories, is not properly before the court. It is not plead in the amended complaint and there is no motion pending seeking leave to file a second amended complaint adding this relief. (See CPLR 3013 ["Statements 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."].)

Attorneys' Fees

"Generally, under what is commonly known as the American Rule, absent express statutory provisions to the contrary, each party involved in litigation will bear only their individual attorneys' fees no matter what the outcome of the litigation." (*William Penn Partnership v Saliba*, 13 A3d 749, 758 [Del 2011] [internal quotation marks and citations omitted].) However, Delaware courts have awarded attorneys' fees when the court determined that a plaintiff who is successful on a breach of loyalty claim would not be adequately compensated. (*Id.*) In *William Penn Partnership*, the Delaware Supreme Court affirmed the Chancery Court's award of attorneys' fees on a breach of loyalty claim where plaintiffs "were left without a typical damage award because the Court's appraisal of the property came in at a value lower than the sale price," and thus, "[a]bsent this award, [plaintiffs] would have been penalized for bringing a successful claim against [defendants] for breach of their fiduciary duty of loyalty." (*Id.* at 759.)

There is no evidence here that Hopkins, if successful on this claim, would be left without adequate damages, requiring the court "to exercise its discretionary powers to fashion appropriate equitable relief" in the form of attorneys' fees. (*Id.* at 758.) Thus, Hopkins has not met his burden to stray from the application of the "American Rule."

Removal from K-1s

Defendants assert that Hopkins' removal from Fund's K-1s was not a breach of fiduciary duty because he was never a member of Fund. However, as previously stated, there is a genuine issue of fact as to whether Hopkins was a member of Fund. The evidence submitted by both parties raises an issue of fact which cannot be determined on this motion.

Exculpation Clause

In Delaware, exculpation clauses do not apply to violations of the duty of loyalty. (*Macrophage Therapeutics, Inc. v Goldberg*, 2021 Del. Ch. LEXIS 127, *32 [Del Ch Ct 2021] [citation omitted].) Thus, any exculpation clause in the Fund Operating Agreement is not appliable to this claim.

Tax Manager

Section 5.3 of the Management Operating Agreement designated Ackerman as the "Tax Matters Manager" of Management. (NYSCEF 222, Management Operating Agreement.) Section 1.9 (b) of the Fund Operating Agreement designated Management as the Tax Matters Partner for Fund. (NYSCEF 223, Fund Operating Agreement.) Defendants argue that Ackerman had a contractual duty to oversee Fund's tax returns and not a fiduciary one.

Therefore, defendants argue that Ackerman's action of correcting the Fund's tax returns to reflect that Hopkins was not a member of Fund cannot form the basis of a breach of fiduciary duty claim. This argument presumes that Hopkins is not a member of Fund, which cannot be determined on this motion, and thus, fails.

Breach of Contract Claim

In the amended complaint, Hopkins alleges that defendants breached the companies' Operating Agreements by failing to provide Hopkins with access to the books and records of Management and Fund. Defendants argue that there is no evidence that Hopkins took any steps to access the books and records. However, Hopkins submits evidence refuting this argument. (*See* NYSCEF 250, Third Notice for Books and Records.) Ackerman's contention that he never received the Third Notice for Books and Records only creates an issue of fact.

Defendants also argue that this claim fails because Hopkins is no longer a member of Management or Fund. However, the case relied on by defendants only addresses a former member's statutory right to inspect books and records, not a contractual right, as here. Thus, defendants' argument is not sufficiently supported. This claim is sustained.

Hopkins' Cross-Motion to Renew

Hopkins seeks leave to renew his motion to amend the complaint (motion seq. no. 003), which Justice Scarpulla denied, in part on May 4, 2020, in so far as Hopkins was not permitted to amend to add a direct claim for breach of the distribution provisions of the Management and Fund Operating Agreements. (*See* NYSCEF Doc. No. [NYSCEF] 161, Decision and Order [motion seq. nos. 003 and 004].) Judge

Scarpulla denied that portion to amend the complaint on the ground that such claim was derivative nature and could not be brought on behalf of a cancelled company. (*Id*. at 6.) Hopkins seeks to renew based on this court's decision in *Meissner v Yun*, 2020 WL 41648 (Sup Ct, NY County 2020) (Masley, J.), decision issued over four months prior to Judge Scarpulla's decision.

Pursuant to CPLR 2221 (e),

> "[a] motion for leave to renew:
> 1. shall be identified specifically as such;
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion."

Putting aside the fact that Hopkins does not provide justification as to why he did not present this case to Judge Scarpulla while his motion to amend was *sub judice*, this court's decision in Meissner did not change the law applied by Judge Scarpulla. In *Meissner*, this court held that, "[a]bsent an enforceable operating agreement for [the dissolved company] (either formal or informal), plaintiff has failed to establish a harm he sustained that is distinct from those which may flow indirectly to him through some harm that [the dissolved company] may have incurred." (*Meissner*, 2020 WL 41648, *4.) This court did not find anything in the record that "demonstrates that plaintiff was deprived of some contractual right with regard to the operations of [the dissolved company] that would constitute a direct injury sustained by him distinct from the injuries that would flow to him derivatively through [the dissolved company]." (*Id*. at *5.)

This court's decision in *Meissner* does not demonstrate a change in the law and does not warrant changing Judge Scarpulla's finding that the breach of contract claim was derivative in nature. The improper distribution of an asset of the company is an injury to the company. Hopkins' cross-motion is denied.

All additional arguments in regard to defendants' motion for summary judgment and Hopkins' cross-motion have been considered and do not yield a different result.

Hopkins' Motion for Summary Judgment

Defendants assert counterclaims against Hopkins for breach of Management's Operating Agreement (failure to pay operating expenses), breach of fiduciary duty (failure to pay operating expenses), breach of fiduciary duty (competing business venture), breach of fiduciary duty (stolen funds), tortious interference with contract, civil theft (Fla Stat § 772.11), conversion, money had and received, and libel per se. (NYSCEF 43, Amended Answer with Counterclaims.)

Breach of Contract and Breach of Fiduciary Duty (Failure to Pay Management's Operating Expenses)

Defendants allege that Hopkins, as a member of Management, was obligated to contribute funds for Management's operations, but Hopkins did not contribute, and defendants advanced the funds owed by Hopkins instead. (NYSCEF 175, Amended Answer with Counterclaims ¶¶ 93, 95-96.) Hopkins asserts that these counterclaims must be dismissed as they are derivative in

nature. Defendants assert that they are creditors, and thus, are permitted to bring these as direct claim under Delaware law.

In *CML V, LLC v Bax*, 6 A3d 238 (Del Ch 2010), the Chancery Court dismissed a creditor's derivative claims for lack of standing, holding Section 18-1002 of the Delaware LLC Act limits standing to bring a derivative action to a member or an assignee. However, the Chancery Court, citing to Delaware LLC Act § 18-502 (b), opined

> "that despite the lack of derivative standing, a creditor possesses a statutory right to enforce a member's obligation to make a contribution to the LLC. Subject to statutory limitations, if a creditor extends credit to an LLC in reliance on a member's obligation to make a contribution to the LLC or to return a distribution in violation of the LLC Act, then the creditor may enforce the obligation to the extent of the creditor's reasonable reliance."

(*Id*. at 252.) Fatal to defendants' first and second counterclaims is the failure to plead reasonable reliance. Although this is a motion for summary judgment, because no facts establishing reliance "have ever been alleged or proved, [defendants have] failed to demonstrate the existence of a triable issue of fact." (*Alvord & Swift v Stewart M. Muller Constr. Co*., 46 NY2d 276, 279 [1978].)

Counterclaims Arising Out of Trevor Jones Advance

Defendants allege claims for breach of fiduciary duty (stolen funds), tortious interference with contract, civil theft (Fla Stat § 772.11), conversion, and money had and received based on Hopkins deposit of the Trevor Jones Advance -the check for $103,976.92 The Lanier Law Firm, PLLC sent to Fund via Hopkins in June 2015. Hopkins asserts that these claims are also derivative, and as this

court previously held, derivative claims cannot be brought on behalf of cancelled LLCs.

Defendants argue that in June 2015, Management and Fund were winding up and Fund distributed its unliquidated assets to its members. Defendants assert that the distributed assets, including the Trevor Jones Advance, belonged to the members, specifically the Series A member, and thus, these claims are direct. However, defendants fail to offer evidence that the Trevor Jones Advance was Series A's asset, and not the Fund's asset, when Hopkins deposited the check.

Further, when Judge Scarpulla denied dismissal of the civil theft cause of action, she accepted as true, as she must on a 3211 motion to dismiss, the allegation that the Trevor Jones Advance belonged to Sunrise. This is a summary judgment motion where defendants have to raise an issue of fact, and they have failed to do so.

Libel Per Se and Breach of Fiduciary Duty (competing business endeavor)

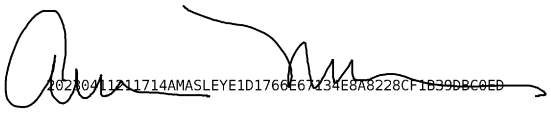
Defendants have withdrawn these claims. (NYSCEF 259, Memo in Opp at n 1.)

Accordingly, it is

ORDERED that motion of defendants Kenneth Ackerman and Sunrise Consulting LLC for summary judgment dismissing the amended complaint is granted, in part, in so far as plaintiff's breach of fiduciary duty claim based on excluding him from day-to-day operations is dismissed, as well as plaintiff's requested relief for a constructive trust, an injunction, disgorgement, and attorneys' fees; and it is further

ORDERED that the cross-motion of plaintiff Robert Hopkins for leave to renew his motion to amend the complaint (motion seq. no. 003), which Justice Scarpulla denied, in part, in so far as Hopkins was not permitted to amend his breach of contract claim is denied; and it is further

ORDERED that plaintiff's motion for summary judgment dismissing defendants' counterclaims is granted, and the counterclaims are dismissed, with the exception of the third and ninth counterclaims which were withdrawn by defendants.



4/11/2023
DATE

ANDREA MASLEY, J.S.C.

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