SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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GERALD KATZOFF and GFB RESTAURANT CORP.,

Plaintiffs,

- v -

BSP AGENCY, LLC, PROVIDENCE DEBT FUND III L.P., BENEFIT STREET PARTNERS SMA LM L.P., BENEFIT STREET PARTNERS SMA-C L.P., PROVIDENCE DEBT FUND III MASTER (NON-US) FUND L.P., and BENEFIT STREET PARTNERS SMA-C SPV L.P.

Defendants.

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INDEX NO. 655823/2020

MOTION DATE 01/31/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 97, 98, 99, 100, 101, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for AMEND CAPTION/PLEADINGS.

This action involves the claims of plaintiffs Gerald Katzoff and GFB Restaurant Corp. (GFB) alleging wrongful conduct including the fraudulent inducement of loans and guarantees by defendants BSP Agency, LLC, Providence Debt Fund III, L.P., Benefit Street Partners SMA LM L.P., Benefit Street Partners SMA-C L.P., Providence Debt Fund III Master (Non-US) Fund L.P., and Benefit Street Partners SMA-C SPV L.P. (collectively, BSP) to improperly seize ownership and control of the Il Mulino brand of restaurants. Now present before the court is plaintiffs' motion pursuant to CPLR 3025 (b) for leave to amend their complaint and add as defendants Brian Galligan, Millennium I.M. Consulting, LLC, Millennium I.M. Holdings, LLC, The BDG Family Partnership, Galligan Hospitality Group, Inc., Millennium Hospitality Group, L.L.C. (collectively, the Galligan defendants). BSP opposes the motion.

BACKGROUND

In its determination of BSP's prior motion to dismiss, the court described pertinent background from the original complaint, which facts the court accepted as true for the purposes of that motion (NYSCEF # 42 – Dec 22, 2021 Decision and Order). Restated as now relevant: the business relationship between Katzoff and Galligan began in 2002, when Katzoff provided the financial capital for the acquisition of the original Il Mulino restaurant located at 86 West 3rd Street, New York, NY (the Original Restaurant). Also in 2002, Millennium IM Consulting LLC,

owned by Galligan, and plaintiff GFB, that owns the Original Restaurant, entered into a consulting agreement regarding the operation of the Original Restaurant. That consulting agreement requires Galligan, *inter alia*, to consult with Katzoff, as representative of GFB, with respect to the management and supervision of the Original Restaurant and expressly prohibits Galligan from "hav[ing] any direct or indirect interest in or render[ing] any services for a first class high-end Italian restaurant in competition with the [Original] Restaurant and with a similar price point, within five (5) miles of the [Original] Restaurant" (NYSCEF # 100, § 7 [c]).

Around 2004, Katzoff and Galligan formed nonparty K.G. IM, LLC (KGIM) to serve as manager of nonparty Il Mulino USA, LLC, which would be the holding company for additional Il Mulino entities. Under KGIM's operating agreement, Katzoff and Galligan are members and co-managers who each owe contractual and fiduciary duties to Il Mulino and to each other. Il Mulino eventually expanded from a single location into a fine dining restaurant group with 16 locations. In this expansion, Katzoff found joint venture partners to open new Il Mulino restaurants in Tribeca, Gramercy, and Boca. Katzoff and Galligan entered into the JBIM operating agreement for the restaurants in Tribeca and Gramercy, and the JBIM II operating agreement for the restaurant in Boca. Under those operating agreements, Katzoff and Galligan owe contractual and fiduciary obligations to each other to co-manage the companies formed under the agreements and the restaurants.

Then, on June 15, 2015, BSP induced Il Mulino USA, KGIM, and another entity, IM LLC-III LLC (collectively, the Borrowers), to enter into a credit agreement with BSP to finance the expansion of their restaurants. Katzoff personally guaranteed the loans. Plaintiffs allege that BSP "falsely committed to loan Il Mulino $30 million that would first pay off Il Mulino's existing debt of approximately $21 million [and then] loan Il Mulino an additional $9 million for expansion" (NYSCEF # 1, ¶ 57). Despite this commitment, BSP, allegedly in a misleading way, papered the credit agreement as an initial term loan of $21 million and additional loans of up to $9 million. The Borrowers eventually defaulted.

Litigation followed. In July of 2020, Katzoff filed bankruptcy petitions on behalf of fifteen Il Mulino entities, whereby BSP later acquired certain assets for around $20 million in a bankruptcy sale. Also in July of 2020, BSP filed a related action against Katzoff to enforce the personal guarantee (*BSP Agency, LLC. v Katzoff*, Sup Ct, NY County, Chan, J., Index No. 653472/2020 – the Guaranty Action). In the Guaranty Action, this court has already granted BSP's motion for summary judgment in lieu of complaint as to liability and recently ordered the parties to proceed with the process for a special referee to determine damages.

Meanwhile, plaintiffs commenced this action on October 29, 2020. In the original complaint, plaintiffs alleged that defendants engaged in a "loan-to-own scheme" to improperly seize ownership and control of the Il Mulino restaurant group (NYSCEF # 1, ¶ 1). Plaintiffs also asserted that BSP tortiously interfered with Galligan's contractual and fiduciary obligations to Katzoff and GFB by, among other things, prohibiting Galligan from working for Il Mulino entities that were not

borrowers or guarantors under the BSP loans. Altogether, the complaint alleged causes of action for lender liability on behalf of Katzoff individually (first cause of action), tortious interference with contracts on behalf of Katzoff and GFB (second cause of action), tortious interference with prospective business relations on behalf of Katzoff (third cause of action), and fraudulent inducement on behalf of Katzoff (fourth cause of action) (NYSCEF # 1, ¶'s 191-210).

In the motion to dismiss decision, the court dismissed all cause of actions with the exception of the count for tortious interference with contracts. The court found sufficient allegations of valid contracts between Galligan and Katzoff (via operating agreements) and between Galligan and GSB (via the consulting agreement), that BSP knew about the contracts, that BSP intentionally interfered with, and procured the breach of, the contracts, and that this interference damaged plaintiffs. BSP has since answered the complaint and the parties have been conducting discovery.

Then, by notice of motion filed on October 7, 2022, plaintiffs filed the present motion, which, as laid out below, includes six causes of action based variously on breach of, and tortious interference with, contract as well as breach, and aiding and abetting breach, of fiduciary duty (NYSCEF # 87).

DISCUSSION

CPLR 3025 (b) provides that leave to amend "shall be freely given upon such terms as may be just." The First Department has explained that amendments can be denied "only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law" (*CIFG Assur. North Am. Inc. v J.P. Morgan Securities LLC*, 146 AD3d 60, 64-65 [1st Dept 2016]). "A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]. . . Prejudice to warrant denial of leave to amend requires some indication that the [defendants have] been hindered in the preparation of [their] case or [have] been prevented from taking some measure in support of [their] position"(*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal citation and quotation marks omitted]).

Alleged Prejudice and Delay: Parties' Arguments

Plaintiffs assert that BSP will not be prejudiced by the amendment "because this action is still in the early stages of discovery" (NYSCEF # 92 at 9). Plaintiffs state: "document discovery is far from completed . . . [and] no depositions have been taken yet. In fact, the depositions of the parties are not even scheduled yet" (NYSCEF # 92 – MOL at 6). Plaintiffs assert that following the court's motion to dismiss decision, BSP "refused to engage in discovery in good faith" (*id.* at 1). Plaintiffs identify that they served 87 document demands on BSP on March 23, 2022, and that BSP categorically refused to produce any documents in response to 89% of the requests (*id.* at 4). BSP did make its first set of document productions on June 13, 2022: "a sum total of only 295 documents" (*id.*). Ultimately, plaintiffs

moved to compel production, and, on January 11, 2023, the court granted the motion in part as to five categories of requests (NYSCEF # 117).

In opposition, BSP argues that granting plaintiffs' motion would prejudice BSP. It asserts that this case has "nothing to do with righting a legally cognizable wrong. Rather, from the beginning, this Court has been used by Plaintiff Katzoff as a method of harassing Mr. Katzoff's perceived enemies while attempting to prove that he is a victim of an elaborate conspiracy and not just a failed restauranter" (NYSCEF # 97 – Opp at 1). BSP continues that plaintiffs have no justification for the timing of the proposed amended complaint, contending that, in addition to the motion to dismiss, the parties have "engaged in and completed document discovery; exchanged countless letters regarding discovery disputes; and fully briefed a Motion to Compel" (*id.* at 7). BSP argues that the prejudice demonstrated here is analogous to that in *Panasia Estate v Broche* "where plaintiff sought to add facts related to breach of contract claim, which were in plaintiffs' possession for two years, because the theory of the case changed and 'defendants are left with starting this litigation from scratch even though it has 'revealed' its theories of defenses…that have now prompted plaintiff to change its mind and assert additional claims' " (NYSCEF # 97 at 7 describing 2011 WL 13151668 [Sup Ct, NY County 2011]).

BSP avers that plaintiffs offer no reasonable excuse for their delay in putting forward the proposed amended complaint. BSP points out that plaintiffs have long had the relevant agreements in their possession and they "have known since 2020 precisely what services, if any, Mr. Galligan or [his affiliated entities], have provided or have not provided to Plaintiffs" (NYSCEF # 97 at 8). BSP speculates: "They likely" chose not to sue the Galligan defendants "because they understood that Mr. Galligan would be a critical witness and they did not want to alienate him. Now, immediately upon learning that Mr. Galligan would testify truthfully (which happens to be in BSP's favor) regardless of their gamesmanship, Plaintiffs are trying to pivot. That they cannot do" (*id.*).

In reply, plaintiffs deny that discovery has been completed and also reject BSP's claim of prejudice where it would not be "hindered in the preparation of its case" (NYSCEF # 115 – Reply at 1, quoting *Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 23 [1981] ["Prejudice, of course, is not found in the mere exposure of the defendant to greater liability"]). As to the timing of this motion, plaintiffs assert that comes before the filing of the note of issue so there is no "extended delay" as courts use that term so "no 'reasonable excuse' is required" (NYSCEF # 115 at 1-2). Plaintiffs assert that if an excuse is required, however, they have demonstrated one because "(i) BSP tried to shift blame to Galligan, who also bears responsibility for his misconduct; and (ii) through discovery, Plaintiffs learned that BSP promised Galligan an 'employment contract' and 'equity' in a 'new co' " (*id.* at 4-5). As for BSP's reliance on *Panasia*, plaintiffs distinguish that situation in that the court denied leave to amend where the plaintiff sought leave "for a third time" (*id.* at 4).

Alleged Prejudice and Delay: Analysis

The court rejects BSP's argument that leave to amend should be denied on account of alleged prejudice or lack of a reasonable excuse for delay. First, BSP has insufficiently identified prejudice. It is clearly not the case that the parties have "completed document discovery" (NYSCEF # 97 at 7). As BSP acknowledged, plaintiff's motion to compel was pending when BSP briefed this motion and has since resulted in BSP being ordered to produce additional documents (NYSCEF # 117). Nor have party-depositions taken place and the note of issue has not been filed. In *Pecora v Pecora*, upon which BSP relies, the First Department denied leave to amend where, also, the note of issue had not been filed, but there the ten year delay from the time plaintiffs knew of the potential claim, and seven years from the commencement of their action, tangibly prejudiced defendants because relevant documents of a non-party had been destroyed pursuant to a seven-year retention policy thereby hindering defendants from establishing defenses to the new claims (204 AD3d 611, 612 [1st Dept 2022]). Here, BSP identifies no analogous prejudice from plaintiffs' amendment two years after their commencement of this case. BSP's reliance on *Panasia* is also unavailing. There, the court denied leave to amend where the plaintiff sought leave "for a third time" and the parties had already engaged in summary judgment dispositive motion practice wherein they assembled, laid bare, and revealed their proof, which has not happened in this case (2011 WL 13151668).

Nor is the timing of this motion a basis for denial (*see e.g. Johnson v Montefiore Med. Ctr.*, 203 AD3d 462 [1st Dept 2022] ["delay alone is not a sufficient ground for denying leave to amend"]). It is also notable that the preliminary conference was only held on March 7, 2022, only seven months prior to the initiation of the present motion. The cases BSP cites are distinguishable (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 21 [1st Dept 2003] [denying leave to amend where defendants would be "significantly prejudiced" and the motion was "made more than six years after the commencement of the action"]; *Oil Heat Inst.*, 4 AD3d 290 [summary judgment motion pending and prejudice established in that the plaintiff "enlisted the aid of" third-party defendants before seeking to add them as direct-defendants, even though they had "requested that they present a 'forceful and appropriate joint prosecution and defense effort' "]; *Hanford v Plaza Packaging Corp.*, 284 AD2d 179, 180 [1st Dept 2001] [rejecting leave to amend where, at "the eleventh hour, [and] . . . [o]nly when defendants moved for summary judgment in this proceeding did she seek to amend the complaint"]; *Tribeca Space Managers, Inc. v Tribeca Mews Ltd.*, 200 AD3d 626 [1st Dept 2021] [no abuse in discretion in rejecting motion to amend complaint "more than four years after the action was commenced, more than three years after the note of issue was filed, and more than eight months after the first trial ended in a mistrial"]).

Because the court finds there is no applicable prejudice or undo delay, the court next considers whether the proposed amendments are palpably improper or insufficient as a matter of law.

Proposed Counts 1-4, Contract-Based Claims: Parties' Arguments

The proposed amended complaint pleads the following contract-based causes of action: (1) Tortious Interference With Contracts Against BSP on Behalf of Katzoff and GFB; (2) Breach of the GFB Consulting Agreement Against Galligan and the Galligan Alter Egos on Behalf of GFB; (3) Breach of the IM II Operating Agreement Against Galligan and the Galligan Alter Egos on Behalf of Katzoff; and (4) Breach of the JBIM Operating Agreement Against Galligan and the Galligan Alter Egos on Behalf of Katzoff (NYSCEF # 87, ¶'s 175-198).

Plaintiffs contend that leave to amend should be granted as plaintiffs' claims "are based on the same occurrences . . . and the original complaint put defendants on notice of those occurrences" (NYSCEF # 92 at 7, quoting *O'Halloran v Metro. Transp. Auth.*, 154 AD3d 83, 87 [1st Dept 2017]). Plaintiffs assert that the proposed claims meet the standards for amendment, adding that "certain additional allegations concerning BSP's false promises to Galligan "are based on evidence obtained through discovery. . . . Given that leave to amend is 'freely given,' Plaintiffs should be allowed to amplify their claims against BSP and Galligan with this newly discovered evidence" (NYSCEF # 92 at 9). And given the court has already upheld plaintiffs' tortious interference with contract claim based on Galligan's contracts with plaintiffs, then they have also "necessarily stated a claim that Galligan breached his contractual obligations" (*id.* at 10 [emphasis omitted]). That claim "is identical in the Amended Complaint, except that it adds the IM II Operating Agreement as a contract that BSP interfered with and removes the Operating Agreements of JBIM II and KGIM," plaintiffs explain (*id.*).

In opposition, BSP posits that the new complaint "stripped to its core . . . is about three contracts," being the GFB Consulting Agreement, the JBIM Operating Agreement, and the IM-II Operating Agreement (NYSCEF # 97 at 4). As to the GFB agreement, BSP contends: "Plaintiff does not allege facts that would constitute a breach by Mr. Galligan thereof. The GFB Consulting Agreement is between GFB and Millennium (not Mr. Galligan), and therefore only limits the acts [of] Millennium" (NYSCEF # 97 at 10). Plaintiffs' alter ego allegation is insufficient to bridge this gap, BSP maintains, and insufficiently pled in any event (*id.* at 10-11). BSP further raises the insufficiency of plaintiffs' allegations premised on the JBIM Operating Agreement, which BSP posits does not require Galligan to provide services to any of plaintiffs' restaurants or prohibit Galligan from providing services to any other restaurant (*id.* at 12). Finally, BSP states that the proposed amended complaint "fails to satisfactorily allege that BSP had knowledge of the contracts at issue, instead conclusively stating" BSP's knowledge without supporting facts (*id.*).

On count 2, BSP denies that the Galligan defendants breached the GFB Consulting Agreement because that contract "expressly permits the acts Plaintiffs complain about" (*id* at 13). BSP also raises pleading defects relating to GFB's performance of its own obligations, damages, and the alter-ego theory (*id.* at 13-14). For counts 3 and 4, BSP similarly contests the adequacy of plaintiffs' damages and alter-ego allegations. And for count 4, BSP, similar to count 2, avers that the JBIM

Operating Agreement "expressly permits" Galligan to compete while not requiring him to manage any restaurant (*id.* at 15-16).

In reply, plaintiffs contend: "BSP tries to re-litigate the Court's denial of its motion to dismiss Plaintiffs' claim for tortious interference – which BSP never appealed. . . . That decision is law of the case, which BSP cannot re-litigate in opposing leave to amend" (NYSCEF # 115 at 5 [emphasis omitted]). As to BSP's claim that it lacked knowledge of the agreements with which it allegedly tortiously interfered, plaintiffs state that the proposed amended complaint "sufficiently alleges that BSP had knowledge of the contracts, including when it performed extensive due diligence into every facet of Il Mulino's business" (*id.* at 5, n 5). Plaintiffs also proffer documents to evidence BSP's knowledge in 2015 of the IM II Operating Agreement (*id.* citing NYSCEF # 109 – Kwon Aff Ex 3).

Plaintiffs argue that they have adequately pled that Galligan "exercises complete domination and control over" the other Galligan defendants and caused them "to facilitate his disloyal conduct and breaches" in addition to alleging that the Galligan defendants "do not exercise corporate formalities, comingle funds, do not distinguish between their debts and obligations, and operate as a single economic entity" (NYSCEF # 115 at 5-7 quoting the proposed amended complaint, ¶'s 29-34). Plaintiffs point to "BSP's investment committee memo . . . [and] organizational chart of Il Mulino" and a Google search of "Millennium IM Consulting LLC" as evidence that the LLC "is simply a corporate shell through which Galligan agreed to manage – and not compete with – GFB" (NYSCEF # 115 at 7, citing NYSCEF #'s 111 – Kwon Aff Ex 5; 112 – Kwon Aff Ex 6).

As for the sufficiency of the pleadings against Galligan, plaintiffs reiterate their objection to those arguments on the basis of the law of the case doctrine, and then dispute BSP's interpretation of the GFB Consulting Agreement (NYSCEF # 115 at 7-8). Specifically, while that agreement does authorize Galligan "to engage in/or have an interest in any business of any kind" including "ownership and/or management of other restaurants," plaintiffs also identify a provision limiting such authorization as may be "specifically precluded by this Agreement," noting further that the agreement specifically precludes Galligan from competing with the Original Restaurant within a five mile radius (*id.* at 8 quoting NYSCEF # 100, §'s 7 [a], [b], and [c]). Plaintiffs also parse BSP's opposition and conclude that it does not dispute, and therefore concedes, the sufficiency of plaintiffs' allegation that Galligan in his individual capacity breached the IM-II Operating Agreement's prohibition on operating restaurants within five miles of the Original Restaurant (NYSCEF # 115 at 9-10). And despite BSP's assertion that plaintiffs have insufficiently pled damages, plaintiffs maintain that the court precedent does not require a showing of damages, "only that damages . . . might be reasonably inferred" (*id.* at 9).

Responding to BSP's argument that plaintiffs did not plead GFB's performance of its obligations to pay Galligan, plaintiffs argue that they did pay him, that BSP knew they paid him, and that if the failure to allege as much is fatal—which they think it is not—then they request leave to add such allegation to

the proposed amended complaint (NYSCEF # 115 at 8). Plaintiffs also suggest that this very argument of BSP treats Millennium Consulting as Galligan's alter ego "because the GFB Consulting Agreement technically requires payment to Millennium Consulting" (*id.* at 8, n 6).

Proposed Counts 1-4, Contract-Based Claims: Analysis

A plaintiff seeking to recover for tortious interference with contract "must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). To state a cause of action for breach of contract under New York Law, a party must show (1) the existence of a contract, (2) the party performed in accordance with the contract, (3) the counter party breached its contractual obligations, and (4) the breach resulted in damages (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022]).

This court grants plaintiffs' motion to amend as to the first four causes of action. As for the JBIM operating agreement and the GFB consulting agreement, the court has already upheld the identical tortious interference claim, which decision is law of the case as against BSP (*see e.g. Loewentheil v White Knight, Ltd.*, 71 AD3d 581 [1st Dept 2010]). The court declines BSP's invitation to exercise its discretion to revisit its prior determination (*see e.g. Wells Fargo Bank, N.A. v Zurich Am. Ins. Co.*, 59 AD3d 333, 335 [1st Dept 2009]).

BSP has also failed to demonstrate that plaintiffs' claims involving the IM II operating agreement are insufficient as a matter of law. BSP's argument that plaintiffs fail to adequately allege damages is unavailing; under the law of the case, the damages allegedly stemming from this operating agreement connect with the damages this court has already found sufficient for tortious interference in its prior decision (NYSCEF # 42 at 6). The second, third, and fourth causes of action similarly pass muster on this motion as against the Galligan defendants as the court's determination of the existence of a tortious interference with contract claim necessarily involves an underlying breach of contract.

BSP's arguments respecting veil-piercing are unavailing. An alter ego theory of liability to pierce the corporate veil generally "requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005] [rejecting motion to dismiss claim based on veil-piercing and listing various "indicia of a situation warranting veil-piercing" such as absence of corporate formalities, inadequate capitalization, use of funds for personal purposes, and more]). "New York law disfavors disregard of the corporate form" (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept 2012]). Generally, "a fact-laden claim to pierce the corporate veil is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss" (*Cortlandt St. Recovery Corp. v*

Bonderman, 31 NY3d 30, 47 [2018]). Wrongdoing for veil piercing "does not necessarily require allegations of actual fraud. While fraud certainly satisfies the wrongdoing requirement, other claims of inequity or malfeasance will also suffice" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]).

As it is undisputed that certain claims require veil-piercing to reach all of the Galligan defendants, [1] plaintiffs have alleged just sufficient facts of Galligan's domination of sole-member business entities to sustain the claims at this juncture (*see* NYSCEF # 87, ¶'s 29-34; *see also Cobalt Partners, L.P.*, 97 AD3d at 41 ["To use domination and control to cause another entity to breach a contractual obligation for personal gain is certainly misuse of the corporate form to commit a wrong"]). To the extent this alter ego claim would be insufficient were it merely a breach of contract without any hint of wrongdoing, plaintiffs have still pled just sufficient facts (*see Brandsway Hosp., LLC. v Delshah Capital LLC*, 216 AD3d 486, 487 [1st Dept 2023] ["a breach of contract claim, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil"] [quotation marks omitted]). This finding is strengthened by BSP having argued that plaintiffs have not pled that they performed under the GFB consulting agreement by paying Galligan, by which argument BSP treats Millennium Consulting as Galligan's alter ego because, as plaintiffs observe, "the GFB Consulting Agreement technically requires payment to Millennium Consulting" (*id.* at 8, n 6 citing NYSCEF # 97 at 13).

Proposed Counts 5 and 6, Fiduciary Duties: Parties' Arguments

The proposed amended complaint also pleads causes of action for (5) Breach of Fiduciary Duty Against Galligan and the Galligan Alter Egos on Behalf of Katzoff and GFB; and (6) Aiding and Abetting Breach of Fiduciary Duty Against BSP on Behalf of Katzoff and GFB (NYSCEF # 87, ¶'s 198-212). Plaintiffs point to the new allegations that Galligan competed with plaintiffs' restaurants and BSP substantially assisted the breach by hiring and paying Galligan a salary and prohibiting him from working for plaintiffs (NYSCEF # 92 at 11).

BSP disputes that Galligan owes a fiduciary duty to plaintiffs. "[N]either friendship, nor a contractual managerial relationship necessarily create a fiduciary duty" (NYSCEF # 97 at 18). Nor do the other proposed defendants owe fiduciary duties, according to BSP (*id.* at 18-19). BSP rejects the adequacy of the pleadings on damages (*id.* at 19-20). And count 5, BSP asserts, is duplicative of the alleged contractual breach claims (*id.* at 20-21). Because count 5 should be dismissed, BSP contends that the related aiding and abetting breach of fiduciary duty claim stated

[1] For example, Galligan signed the IM II operating agreement (i) on behalf of Millenium and (ii) in his personal capacity, but the latter solely as to Section 9.1 (c). That section includes Galligan's representation that he owned "100% of the interests of Millennium I.M. Holdings, LLC" and apparently is not relevant for the presently alleged claims. Therefore, the IM II agreement, and its prohibition against Galligan from "render[ing] any services for . . . a high end Italian restaurant located within five miles of" the Original Restaurant, apparently is actionable only as a direct breach against Millennium I.M. (the general signatory) without piercing the corporate veil (NYSCEF # 101, § 14.1; *see also* NYSCEF # 100 – GFB consulting agreement § 7 [c]).

in count 6 should also fail (*id.* at 21). BSP adds that count 6 is moreover lacking in that it only makes insufficient, conclusory allegations as to BSP's participation (*id.* at 21-22).

In reply, plaintiffs contend that Galligan owes Katzoff a fiduciary duty by virtue of their longtime business partnership, and that this is more than merely a friendship or a contractual managerial relationship (NYSCEF # 115 at 10). Because the faithless servant doctrine is implicated, plaintiffs add that, even if damages could not be proven, disgorgement of past compensation is a viable remedy (*id.* at 11). Because of disgorgement, the fiduciary duty claim is also not duplicative, plaintiffs maintain (*id.*). And plaintiffs point to various specific allegations they have pled that support an aiding and abetting claim against BSP (*id.* at 12-13).

Proposed Counts 5 and 6, Fiduciary Duties: Analysis

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699–700 [1st Dept 2011]). "[A] fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. . . . A fiduciary relationship is necessarily fact-specific and is also grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 592-93 [2012] [quotation marks omitted]).

Giving the proposed amended complaint a liberal construction, the court finds that BSP has failed to overcome the heavy presumption in favor of the validity of amended pleadings. First, BSP has failed to show that the claim that Galligan owed a fiduciary duty is insufficient as a matter of law. Galligan's appointment as Managing Member of JBIM alongside Katzoff (NYSCEF # 99 at 4) supports a finding of a fiduciary relationship as "[t]he members of an LLC may stand in a fiduciary relationship to each other and the LLC" (*Jones v Voskresenskaya*, 125 AD3d 532, 533 [1st Dept 2015]). Nor has BSP demonstrated as a matter of law that the Galligan defendants' asserted breaches of contract—to advise under the GFB consulting agreement and not to render services within five-miles of the Original Restaurant under both the GFB consulting agreement and the IM II operating agreement—cannot constitute actionable misconduct for breach of fiduciary duty.

Nor is plaintiffs' fiduciary duty claim insufficient as a matter of law on account of the damages element. BSP asserts that "Plaintiffs offer no insight into any damages they might have suffered as a result of Mr. Galligan's alleged breaches" (NYSCEF # 97 at 20). This court has already sustained damages connected to Galligan's alleged breaches of contract, however, and BSP has not given this court reason to think that such damages should be insufficient for a fiduciary duty claim. That the asserted misconduct for the breach of fiduciary duty

mirrors the asserted breaches of contract does not render the former subject to dismissal as duplicative to the extent disgorgement may be an available remedy.

The court also sustains the claim for aiding and abetting a breach of fiduciary duty, which "requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). In addition to the first and third elements having been met for the present purposes above, plaintiffs have also adequately asserted BSP's knowledge of the various agreements involved (NYSCEF # 115 at 5, n 5), the inner workings of Katzoff and Galligan's business arrangements through BSP's agent Jang, who apparently also had a director title with Il Mulino (NYSCEF # 87, ¶ 75), and BSP's participation in inducing the breach (*see e.g. id.*, ¶ 156 [asserting that BSP's representative "told Katzoff that BSP would not allow Galligan to work for the Original Restaurant while also working for BSP"]).

Costs and Attorneys' Fees

BSP asserts that "if the court grants plaintiffs' motion for leave to amend the complaint (it should not), the court should award defendants costs and reasonable attorneys' fees for responding to the proposed amended complaint" (NYSCEF # 97 at 22 [capitalization changed]). The court determines not to order such award.

CONCLUSION

In light of the foregoing, it is hereby

ORDERED that plaintiffs Gerald Katzoff and GFB Restaurant Corp.'s motion to amend their complaint is granted and the proposed amended complaint (NYSCEF # 87) shall be deemed served on BSP (defined below) upon service of a copy of this Decision and Order with notice of entry; and it is further

ORDERED that the BSP defendants (defined above) shall answer within twenty (20) days from the date of service; and it is further

ORDERED that defendants Brian Galligan, Millennium I.M. Consulting, LLC, Millennium I.M. Holdings, LLC, The BDG Family Partnership, Galligan Hospitality Group, Inc., Millennium Hospitality Group, L.L.C. (collectively, the Galligan defendants) shall answer or otherwise move following the time limits set by the CPLR following service per the CPLR.

10/13/2023
DATE

MARGARET CHAN, J.S.C.

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