

**Itzkowitz v Ginsburg**

2023 NY Slip Op 34513(U)

December 4, 2023

Supreme Court, Kings County

Docket Number: Index No. 509504/16

Judge: Larry Martin

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At an IAS Term, Part Comm-10 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4<sup>th</sup> day of December, 2023.

P R E S E N T:

HON. LARRY D. MARTIN,  
Justice.

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MORDECHAI ITZKOWITZ; REMMI, INC., individually and derivatively on behalf of REMMI SERVICES, LLC; YISRAEL GRAFSTEIN; YCD, 1760, LLC; NATHAN UNGAR; BAMBA GAMBA, CORP.; ELI SEGEL; BALR ENTERPRISES, LLC; ALL BORO TRANSIT, LLC; ASHER FRIED; AFFW FLEET GINSBURG LLC; RSAAC FLEET, LLC; JEFFREY EDELMAN, individually and derivatively on behalf of RJ CAPITAL, LLC; AMARPREET SINGH, individually and derivatively on behalf of SAHAILI PARTNERS, LLC; SHMUEL LAUFER, individually and derivatively on behalf of SAM EXPRESS LLC; RIVKA HECHT, derivatively on behalf of RH GREEN, LLC; ISCHA HECHT a/k/a "YISHAI HECHT", individually and derivatively on behalf of GREENISH, LLC; ISCHA HECHT, derivatively on behalf of DADS GREEN, LLC; ISCHA HECHT derivatively on behalf of NP GREEN, LLC; CHAIM NEGER, individually and derivatively on behalf of GREEN MEDALLION ONE, LLC,

Plaintiff,

- against -

Index No. 509504/16

ALAN J. GINSBURG a/k/a "A.J."; MEGA FUNDING, LLC; GREEN APPLE CABS, LLC a/k/a "GREEN APPLE CAB COMPANY"; GLS TRANS, INC.; YITZCHOK MATTIS SWERDLOFF a/k/a "MATT" a/k/a "RIVERDALE"; DALE & CRUE, LLC; RYDER PARTNERS, LLC and JUDAH LANGER a/k/a "YEHUDA",

Defendants.

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ALAN J. GINSBURG; MEGA FUNDING, LLC; GREEN  
APPLE CABS, LLC; GLS TRANS, INC.,

Third-Party Plaintiffs,

-against-

ESTHER SEGEL; FAIGY FRIED and FRIEDOM FLEET  
VENTURES, LLC,

Third-Party Defendants.  
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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations)\_\_\_\_\_

337-338, 340-393 394-395, 397-452

Opposing Affidavits (Affirmations)\_\_\_\_\_

457-506 509-524

Reply Affidavits (Affirmations)\_\_\_\_\_

531-533

Upon the foregoing papers in this action regarding plaintiffs' investments in New York City Taxi & Limousine Commission (TLC) Green Taxicab Permits (Green Taxi Permits), defendants Alan J. Ginsburg (Ginsburg), Mega Funding, LLC (Mega), Green Apple Cab Company (Green Apple) and GLS Transit Inc. (GLS) (collectively, the Ginsburg Defendants) move (in motion sequence [mot. seq.] 15) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the amended complaint (NYSCEF Doc No. 337).

Plaintiffs Mordechai Itzkowitz (Itzkowitz), Remmi, Inc., individually and derivatively on behalf of Remmi Services, LLC (collectively, Remmi), Eli Segel (Segel), Balr Enterprises, LLC, All Boro Transit, LLC, Asher Fried (Fried), AFFW Fleet Ginsburg LLC, RSAAC Fleet, LLC, Jeffrey Edelman (Edelman), individually and derivatively on

behalf of RJ Capital, LLC; Amarpreet Singh (Singh), individually and derivatively on behalf of Sahaili Partners, LLC; Chaim Neger (Neger), individually and derivatively on behalf of Green Medallion One, LLC (collectively, Plaintiffs) and Third-Party Defendants Esther Segel (Segel), Faigy Fried (Faigy) and Freedom Fleet Ventures, LLC (collectively, Third-Party Defendants) move (in mot. seq. 16), pursuant to CPLR 3212, for partial summary judgment: (1) against Ginsburg for unjust enrichment; (2) against Mega for rescission of their respective Operating Agreements; and (3) dismissing the counterclaims and third-party claims asserted against them (NYSCEF Doc No. 394).

### **Background**

On June 6, 2016, Plaintiffs commenced this action by filing a summons and an unverified complaint. Defendants responded by filing pre-answer dismissal motions. Plaintiffs cross-moved for leave to amend the complaint. By a June 12, 2017, decision and order, the court (Ash, J.) dismissed Plaintiffs' unjust enrichment claims asserted against Mega, Green Apple and GLS and granted them leave to amend the complaint (NYSCEF Doc No. 124). On appeal, the June 12, 2017 decision and order was modified by also dismissing Plaintiffs' breach of contract claims asserted against Ginsburg (*see Itzkowitz et al v Ginsburg et al*, 186 AD3d 579, 581 [2020] [holding that "Ginsburg was not a party to the (Operating Agreements), and 'when an agent acts on behalf of a disclosed principal, the agent will not be personally liable for a breach of the contract unless there is clear and explicit evidence of the agent's intention to be bound'"]; *see also* NYSCEF Doc No. 282).

On June 20, 2017, plaintiffs filed the amended *unverified* complaint (NYSCEF Doc No. 127). The amended complaint alleges that the TLC initiated “the Boro Taxi program (also known as the Street Hail Livery program), which licensed green Taxis to serve areas of New York not commonly served by yellow medallion cabs, and to generate business opportunities for small businesses” (*id.* at ¶ 63). The amended complaint alleges that Ginsburg worked in concert with the other defendants from 2013 through 2016 to fraudulently induce Plaintiffs to invest in the program, purchase Green Taxi Permits and green taxicabs:

“Ginsburg formulated a fraudulent scheme to defraud investors (the ‘Enterprise’), under the rubric of purchasing [the Permits]. He began implementing the scheme in late 2013, and the Enterprise collapsed in approximately April 2016.

“Ginsburg and [Yitzchok Mattis] Swerdloff purchased the right to acquire Permits from initial Permit holders who had acquired their Permits from the TLC.

“Ginsburg and Swerdloff solicited investors, including the Plaintiffs herein, and persuaded them to purchase the [Green Taxi] Permits from Ginsburg” (*id.* at ¶¶ 63-66).

Plaintiffs purchased multiple Green Taxi Permits after the Ginsburg Defendants allegedly misled them into believing that they would earn profits and obtain tax benefits by selling them and renting out taxicabs (*id.* at ¶¶ 69-70). The amended complaint asserts 54 causes of action against the Ginsburg Defendants and seeks over \$8 million in damages for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), fraud, breach of an oral contract, rescission of the Operating Agreements and unjust enrichment.

On July 14, 2017, defendants Yitzchok Mattis Swerdloff (Swerdloff) and Dale & Crue, LLC (Dale) answered the amended complaint and asserted affirmative defenses (NYSCEF Doc No. 137). On July 31, 2017, the Ginsburg Defendants answered the amended complaint, asserted affirmative defenses and asserted counterclaims and third-party claims for: (1) an accounting; (2) access to the books and records of the LLCs; (3) breach of fiduciary duty against the LLCs; (4) contribution and indemnification; (5) tortious interference with prospective business relations asserted against Plaintiff Neger; (6) slander; and (7) an award of attorneys' fees (NYSCEF Doc No. 133).

By a December 10, 2019 stipulation, the claims asserted by Yisroel Grafstein (Grafstein), YCD 1760, LLC, Rivka Hecht (R. Hecht), derivatively on behalf of RH Green, LLC, Ischa Hecht a/k/a "Yishai Hecht" (I. Hecht), individually and derivatively on behalf of Greenish, LLC, on behalf of Dads Green, LLC, and on behalf of NP Green, LLC, Nathan Ungar (Ungar), and Bamba Gamba, Corp. were discontinued (the thirteenth, eighteenth through twenty-first and twenty-second causes of action), as were the counterclaims against them (NYSCEF Doc No. 276). By a May 4, 2021 stipulation, the claims asserted by Shmuel Laufer (Laufer) and Sam Express, LLC were discontinued (the fifty-first through the fifty-fourth causes of action), as were the counterclaims against them (NYSCEF Doc No. 305).

After issue was joined, discovery ensued. On June 7, 2021, the remaining Plaintiffs filed a note of issue and certificate of readiness indicating that discovery was complete (NYSCEF Doc No. 308).

### *The Ginsburg Defendants' Summary Judgment Motion*

On December 17, 2021, the Ginsburg Defendants moved for summary judgment dismissing the amended complaint (NYSCEF Doc No. 337). The Ginsburg Defendants submit an affirmation from Ginsburg who affirms that this action arises “from plaintiffs’ failed investment in ‘Green Cab’ permits, which, like the rest of the global taxi industry, was severely affected by the rise of Uber and other ride-sharing companies” and asserts that “the simple fact is that [Plaintiffs] speculated on a potential investment which did not pan out” (NYSCEF Doc No. 361 at ¶¶ 2 and 3).

Ginsburg denies that he had any malicious intent regarding Plaintiffs’ investment in Green Taxi Permits and affirms that the program was specifically sanctioned by the TLC:

“While Plaintiffs accuse me of concocting a fraudulent enterprise designed to take their money and ensnare them in a wide-ranging fraud, nothing could be further from the truth.

“When I first learned of the [Green Taxi Permits] program from Eli [Rosenbloom], I asked Mindy [of FR Conversions] to contact her resources at the TLC to make sure each aspect of the investment would be proper and possible. Attached as Exhibit 2 to this affirmation are numerous emails between me and Mindy and Mindy and the TLC, investigating the various critical aspects of the potential investment *which conclusively prove I never had any fraudulent or nefarious intent regarding Green Cabs*” (*id.* at ¶¶ 9-10 [emphasis added]).

Ginsburg claims that the TLC “encouraged” and “set up” the program, which he describes as follows:

“Therefore, the *TLC, working with multiple Taxi bases, set up a program* in which the permits could be purchased by eligible individuals and then leased to investors who would then purchase, hack and convert the necessary vehicles to operate

the Green Cabs. With the permit lease, the lessor/investor was then eligible to obtain the tax credits and use the grants to purchase and convert his vehicles. Eventually, *after the investors became eligible to own the permits (after one year of owning a TLC licensed vehicle), the permit holders could transfer the permits to the vehicle owner/investors.*

“It cannot be repeated enough, the TLC was aware of this structure and directly encouraged it . . . The *TLC created forms and procedures for the transfer and assignment of grants, directly advised Mindy on the process and was aware of the permit-leasing arrangements. . . None of this was developed or created by me or Mindy and the entire permit leasing structure pre-dated my involvement in the program*” (*id.* at ¶¶ 15-16 [emphasis added]).

Ginsburg asserts that Plaintiffs’ claims regarding his fraudulent representations are undermined by the “SHL Wheel Sales Agreement,” which laid out the terms of Plaintiffs’ investments in the Green Taxi Permits, including the one-year waiting period to own Green Taxi Permits, was drafted by the Taxi bases with the TLC’s knowledge and approval and pre-dated Ginsburg’s personal involvement (*id.* at ¶¶ 17-19). Ginsburg notes that “the SHL Agreement states that the permit will only be transferred once the purchaser (i.e., plaintiffs) is eligible under the TLC’s rules and guidelines” and “that once eligible, the transfer to the plaintiffs would not be automatic and it was the “Seller” (i.e., the permit holder) **and not me** who would use his ‘best efforts’ to ‘facilitate[e]’ the transfer, ‘as per the rules promulgated by the’ TLC” (*id.* at ¶ 17). Ginsburg affirms that “every single remaining plaintiff received a signed SHL Agreement from the permit sellers to them[,]” which specifically laid out the structure of the investment (*id.* at ¶ 19).

Ginsburg affirms that in December 2013 he reached out to Plaintiff Fried, a sophisticated investor, who “took the bull by the horns and conducted his own diligence” after Ginsburg advised him of the potential Green Taxi Permit investment (*id.* at ¶¶ 23-26). Ginsburg affirms that Fried negotiated his own contract with the operator of the taxi base, and Fried and his wife, Faigy, subsequently formed LLCs for their venture in January 2014 and executed Operating Agreements for their respective LLCs (*id.* at ¶¶ 27-28). Ginsburg affirms that *it was Fried* who came up with the idea to approach other potential investors:

“Fried approached me with the idea that there may be a larger opportunity to use our contacts in the industry to help procure permits for more investors. The basic idea was to procure the permits, charge a markup on the price we were paying and retain a small portion of the LLC owning the permits to reap a percentage benefit of the upside from any increase in the permits’ value” (*id.* at ¶ 29).

Ginsburg explains that he and Fried together created an Excel spreadsheet “listing the basic assumed income and expenses of the venture” which was labelled “Taxi Assumptions” (*id.* at ¶ 30). Ginsburg asserts that “[a]s an initial investor and developer of the entire investment, Fried’s accusations against me are particularly ludicrous” (*id.* at ¶ 33). Ginsburg affirms that “[o]nce Fried invested, he began soliciting numerous additional investors, taking a share of their LLCs and otherwise managing their cars” with Defendant Langer (*id.* at ¶ 36).

Ginsburg describes the investor Plaintiffs, some of whom were solicited by Fried,<sup>1</sup>

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<sup>1</sup> Ginsburg affirms that “[a]s was our practice, *after Fried would solicit an investor*, the investor would wire me the funds, I would procure the permits and then share the profits with Fried” (*id.* at ¶ 40 [emphasis added]).

and affirms that it was his “practice” to send all potential investors written disclaimers so that they would not rely on his oral representations about the Taxi Permit program, and instead, would conduct their own due diligence (*id.* at ¶¶ 41-42, 50, 58-59, 66, 73 and 75).

Ginsburg affirms that he has only three ancillary businesses, Matrix, an insurance business, Green Apple, a management company, and GLS, the holder of a base license, none of which were even operational until after Plaintiffs invested in Green Taxi Permits (*id.* at ¶¶ 84-92). Ginsburg affirms that “I never worked on the day-to-day management of the vehicles” and the Operating Agreements of each of the LLCs specifically provides that Mega, the contractually defined “Broker” of the transaction, had no responsibility for the operation or management of the LLCs (*id.* at ¶¶ 95 and 98-99).

Ginsburg affirms that all causes of action asserted in the amended complaint by Plaintiffs Neger and his LLC, Green Medallion One, LLC,<sup>2</sup> against the Ginsburg Defendants are subject to dismissal based on a June 17, 2015 release that Neger executed. Ginsburg specifically affirms that:

“Sometime in mid-April 2015, Neger purchased ten permits and eventually sold five of them. Immediately, Neger began questioning the entire investment and refused to sign the Operating Agreement. During that time period between April and June, we discussed all of Neger’s many gripes, including perceived inaccuracies in the spreadsheet and the risks inherent with the post-one-year transfer of the permits. Neger also discussed his issues and the structure of the deal, including the terms of the Operating Agreement, the uncertainties of the ‘assumptions’ and the terms of the SHL Agreement with

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<sup>2</sup> Neger asserts the thirty-first through thirty-fourth causes of action in the amended complaint for fraud, breach of the Operating Agreement, rescission of the Operating Agreement and unjust enrichment, respectively (*see* NYSCEF Doc No. 127 at ¶¶ 335-356).

numerous other investors including Weisz, Mindy and various other actual Green Cab investors.

“After discussing all of these issues openly and directly, I met with Neger on June 17, 2015, and he signed a general release of me and my entities. A copy of the release is attached hereto as Exhibit 29.

“On or about July 24, 2015, while allegedly represented by his own counsel, Neger signed the Operating Agreement for Green Medallion One, LLC attached hereto as Exhibit 30.

“Recognizing that the release bars his claims, Neger limits his fraud claims to misrepresentations made from June 17, 2015 (the release execution date) and July 24, 2015.

“This accusation is an outright lie, every item Neger claims he was misled about was discussed in detail prior to his entering into the Release and he was never misled. Indeed, in his post-Release correspondence about all the alleged misrepresentations (i.e. the ‘assumptions’ and the permit transfers), *Neger acknowledges that these were continuations of discussions that pre-dated the release. . . .*” (*id.* at ¶¶ 74-78 [emphasis added]; *see* Neger Release, NYSCEF Doc No. 390).

The Ginsburg Defendants also submit a memorandum of law arguing that the claims asserted by the remaining individual Plaintiffs and their LLCs fail for the same reasons (NYSCEF Doc No. 339 at 1). They argue that the RICO claims asserted against them in the amended complaint (the first through fourth causes of action) should be dismissed because “Plaintiffs cannot meet their burden for any element of RICO as a matter of law” since “each Plaintiff did not even learn of the investment from the Ginsburg Defendants, and the alleged ‘enterprise’ post-dates [Plaintiffs’] investment[s] . . .” (*id.*). Specifically, the Ginsburg Defendants assert that:

“[they] did not lure a single Plaintiff into this investment. Specifically, Fried and Ginsburg worked on developing the investment, and Fried assisted in creating the structure, thus he was not lured into the investment. The remaining Plaintiffs each admit to learning of the investment, and obtaining diligence materials, from third parties outside the control or influence of the Ginsburg Defendants.

“Second, at the time the Plaintiffs invested, there was no scheme or group of interrelated businesses. Each Plaintiff admittedly had the ability to hire or find their own ancillary vendors (i.e., to manage cars, hack them into taxis, provide insurance etc.), and many of the Plaintiffs used third-party vendors” (*id.* at 4).

The Ginsburg Defendants argue that none of the remaining Plaintiffs have standing to assert a RICO claim because they cannot prove that they were the intended target of the RICO enterprise and that they sustain foreseeable injury from an alleged scheme (*id.* at 5).

The Ginsburg Defendants further contend that the record does not reflect that they committed at least two predicate acts of racketeering (*id.* at 5-6). They also assert that “Plaintiffs certainly did not justifiably rely on the[ir] alleged wire fraud, which apparently consists of emails about taxes sent *after* Plaintiffs learned of the investment and conducted **their own diligence**” (*id.* at 7-8 [italics added]). They also argue that there was no “enterprise” to support a RICO claim because “the evidentiary record establishes that there was no distinct group of individuals working together to perpetrate a fraudulent enterprise” (*id.* at 8). Defendants assert that “[t]here can be no ‘open-ended continuity’ of criminal activity because the [Amended] Complaint relies on two phone calls Itzkowitz made to Ginsburg (and not Ginsburg reaching out to Itzkowitz) and some vague e-mails, none of

which amount to criminal activity” (*id.* at 9). The Ginsburg Defendants also argue that the RICO claims are duplicative of their fraud and contract claims (*id.* at 11).

Regarding the fraud claims (the fifth, ninth, fourteenth, twenty-third, twenty-seventh, thirty-first, thirty-fifth, thirty-ninth, forty-third and forty-seventh causes of action), the Ginsburg Defendants argue that they “fail because there is no genuine issue of fact that the Ginsburg Defendants did not make any misrepresentations to the Plaintiffs” (*id.* at 13). They assert that “not a single Plaintiff at their deposition could provide any facts to support a fraud claim, and in fact admitted that they were solicited by individuals other than Ginsburg” (*id.*). The Ginsburg Defendants claim that their “alleged misrepresentations center around their vague promises that the projected business would be profitable and the later transfer of permits would be easy” and that their “statements of hope or plans for the future are not fraud” (*id.* at 14).

They further argue that there was no justifiable reliance since “Plaintiffs admitted at their depositions that, when deciding to invest, they relied on information provided to them by third parties and information that was publicly available” (*id.* at 15). They also point out that the Operating Agreements contain disclosures and explicit disclaimers warning Plaintiffs about the risks and negating any justifiable reliance (*id.* at 15-18).

The Ginsburg Defendants contend that Plaintiffs’ breach of contract claims (the sixth, tenth, fifteenth, twenty-fourth, twenty-eighth, thirty-second, thirty-sixth, fortieth, forty-fourth and forty-eighth causes of action), based on an alleged *oral* agreement by Ginsburg – to “automatically” sell and transfer the Green Taxi Permits in exchange for

payment after one year and that he would manage Plaintiffs' investment – pre-dates the execution of the Operating Agreements, and thus, are barred by the merger and integration clauses in the Operating Agreements (*id.* at 19). The Ginsburg Defendants also claim that such an oral agreement is unenforceable under the Statute of Frauds since it could not be performed within one year (*id.*).

The Ginsburg Defendants contend that Plaintiffs' claims to rescind their respective Operating Agreements (the seventh, eleventh, sixteenth, twenty-fifth, twenty-ninth, thirty-third, thirty-seventh, forty-first, forty-fifth and forty-ninth causes of action) must fail because there is no evidence of a material breach of the Operating Agreements to warrant such equitable relief (*id.* at 20).

#### ***Plaintiffs' and Third-Party Defendants' Opposition***

Plaintiffs and Third-Party Defendants oppose the Ginsburg Defendants' summary judgment motion with a two-page affirmation from Fried, who denies that he suggested recruiting investors for the Green Taxicab Permits and affirms that “[Ginsburg] told me that I was purchasing Permits that would automatically transfer to my chosen entities after one year” (NYSCEF Doc No. 458 at ¶¶ 3 and 9). They also submit exhibits, including deposition transcripts, emails and bank statements (*see* NYSCEF Doc No. 459).

Plaintiffs and Third-Party Defendants submit an opposing memorandum of law (NYSCEF Doc No. 456). They assert that the Ginsburg Defendants' moving papers support the denial of their motion because Ginsburg denies making oral representations that were identified in Plaintiffs' interrogatory responses and at Edelman's deposition (*id.*

at 1-2). They claim that these “disputed” facts regarding Ginsburg’s oral representations require denial of the Ginsburg Defendants’ summary judgment motion regarding Plaintiffs’ fraud and RICO claims.

Regarding RICO, they argue that “[t]he legal sufficiency of the RICO claims has previously been decided in this case, and the facts are plainly in dispute” (*id.* at 3). They assert that “Ginsburg’s verbal commitment to Individual Plaintiffs (e.g. Itzkowitz, Singh, Edelman, Neger) that he would supervise management of the taxicabs evidences his scheme to defraud” and “[d]espite his prior verbal assurances, Ginsburg declared he was only a broker (relying on language in the Operating Agreement . . .)” (*id.* at 9). Thus, Plaintiffs asserts that they relied on Ginsburg’s “verbal commitment” to “supervise management” of their investments in the Permits as a predicate for their RICO and fraud claims, despite the express disclaimer in the Operating Agreements stating otherwise.

Plaintiffs argue that their breach of contract claims are based on “Ginsburg’s failure to transfer ownership of the Permits to Plaintiff LLC, despite the agreement to do so . . .” and assert that these oral contracts are distinct from the Operating Agreements, “and thus the merger clause of the later Operating Agreements does not bear upon these contracts” (*id.* at 19). They also seemingly argue that the Statute of Frauds does not preclude their breach of contract claims because the Operating Agreements should be read together with subsequent emails:

“Here, Ginsburg provided operating agreements to Plaintiffs prior to the purchase of Permits (subsequently signed by the parties to the sale) that state the core terms of the sale (e.g. the beneficiary of the sale of the Permits – Plaintiff LLCs, the

consideration for the Permits referred to as the investment – the sale of Permits by Mega Funding with payment by Individual Plaintiffs) *and emails between the parties* confirming payment amounts and containing copies of Permit documents. Ginsburg does not even deny the transaction, but rather questions what the sales entailed (which were addressed in the operating agreements)” (*id.* at 20 [emphasis added]).

They argue that “the Ginsburg Defendants, b[ased on] Ginsburg’s unconscionable conduct, are estopped from reliance upon the Statute of Frauds . . .” (*id.* at 21). Alternatively, they assert that “to the extent that the Statutes of Frauds bars any claims in this action, it is limited to the breach of contract claims, and does not extend to other claims . . .” (*id.*).

Lastly, Plaintiffs assert that their equitable claims for rescission of their respective Operating Agreements and for unjust enrichment should be upheld because they “received pieces of paper, titled ‘Permit,’ owned by others, that did not . . . actualize into actual ownership of the Permits” (*id.* at 22).

***Plaintiffs’ and Third-Party Defendants’  
Partial Summary Judgment Motion***

On December 17, 2021, Plaintiffs and Third-Party Defendants collectively moved for partial summary judgment: (1) on their claims against Ginsburg for unjust enrichment (the eighth, twelfth, seventeenth, twenty-sixth, thirtieth, thirty-fourth, thirty-eighth, forty-second and forty-sixth causes of action); (2) on their claims against Mega for rescission of the Operating Agreements (the seventh, eleventh, sixteenth, twenty-fifth, twenty-ninth, thirty-third, thirty-seventh, forty-first, forty-fifth and forty-ninth causes of action); and (3) dismissing all counterclaims and third-party claims asserted against them.

Plaintiffs submit a memorandum of law arguing, for the first time, that the Operating Agreements should be rescinded due to a mutual mistake regarding transfer of the Permits. Specifically, they argue that “[a]ccepting Ginsburg at his word for purposes of this motion, Ginsburg and Mega . . . made innocent misstatements [about the automatic transfer of Permits after one year], and there was a mutual mistake of fact that led to an unintentional misrepresentation of a material fact that induced the agreement” (NYSCEF Doc No. 396 at 15). They explain that “[d]espite significant efforts, *Plaintiffs were unable to procure . . . ownership*” of the Permits, which warrants rescission because that was the purpose of the Operating Agreements (*id.* at 15-16 [emphasis added]). In short, Plaintiffs argue that “based upon Ginsburg and Mega Funding’s misrepresentation of fact (whether intentional or by mistake) regarding ownership of the Permits, a critical part of the [Operating] agreement, Plaintiffs are entitled to rescind their agreements and receive their money back” (*id.* at 16).

Plaintiffs also seek summary judgment on their unjust enrichment claims asserted against Ginsburg on the ground that he “purportedly through his wholly owned company Mega . . . ‘sold’ hundreds of Permits, for which they were paid vast sums of money but procured none of the Permits” and “Ginsburg sold an illusion to his victims” (*id.* at 5-6). Plaintiffs also argue that “Ginsburg received the benefits of Mega[’s] arrangement with the Plaintiffs, not only with the cash that he kept without depositing it in Mega[’s] account, but also with the wires sent to . . . Mega . . . *which he used for personal use*” (*id.* at 9 [emphasis added]). Plaintiffs contend that “a cursory examination of Mega[’s] [Signature bank]

accounts suggest that Mega . . . used nearly \$1,000,000.00 directly for Ginsburg's benefit, including over \$500,000.00 on items related to construction, home improvement, and landscaping alone" (*id.*; Mega Signature bank at NYSCEF Doc Nos. 428-429).

Plaintiffs argue in their memorandum of law<sup>3</sup> that the Ginsburg Defendants' first counterclaim for an accounting should be summarily dismissed as "frivolous" because "management functions of Plaintiff LLCs were performed by Defendants Ryder, GLS, and GAC through Defendant Langer" (*id.* at 17). They explain that "[b]ecause Defendants GLS and GAC were tasked with maintaining the accounts for the taxicabs for the Plaintiffs and Third-Party Defendants, their claim for an accounting is tantamount to an accountant requesting an accounting of his client's funds" (*id.* at 18). They note that Ginsburg appeared as the individual representative at the depositions of Defendants GLS and GAC. (NYSCEF Doc No. 419 at 33).

Plaintiffs argue that the second counterclaim for access to the Plaintiff LLCs' books and records has been rendered moot because those documents were produced during discovery (NYSCEF Doc No. 396 at 19). Plaintiffs contend that the third counterclaim for breach of fiduciary duty is subject to dismissal because "the Defendants' fiduciary rights either never attached or were revoked by their own failures and breaches" (*id.* at 20). Regarding the fourth counterclaim for contribution and/or indemnification, Plaintiffs argue that there is no factual basis for such a claim and this case does not involve a tort (*id.* at

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<sup>3</sup> Plaintiffs failed to submit an affidavit in support of this branch of its partial summary judgment motion, as required under CPLR 3212(b).

21). They argue that the fifth counterclaim against Plaintiff Neger for tortious interference with prospective business relations fails to allege “any specific details about the potential transaction” (*id.* at 22-23). Plaintiffs contend that the sixth counterclaim for slander similarly fails to provide any detailed factual allegations (*id.* at 23).

### Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

### ***The RICO Claims***

The first through fourth causes of action in the amended complaint assert RICO claims against the Ginsburg Defendants. To establish a RICO claim under 18 U.S.C. §

1962 (c), “a plaintiff must show that he [or she] was injured by defendants’ (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity” (*Azrielli v Cohen Law Offices*, 21 F3d 512, 520 [2d Cir. 1994]). RICO defines “pattern of racketeering activity” as requiring “at least two acts of racketeering activity” committed within a 10-year period (18 U.S.C. § 1961 [5]; *see also Azrielli*, 21 F3d at 520). To establish a pattern of racketeering activity, a plaintiff must make a showing that the predicate acts of racketeering activity by a defendant are “related, and that they amount to or pose a threat of continued criminal activity” (*H.J., Inc. v Northwestern Bell Tel. Co.*, 492 US 229, 239 [1989]). The continuity necessary to prove a pattern can be either “open-ended continuity,” (i.e., past criminal conduct coupled with a threat of future criminal conduct) or “closed-ended continuity” (i.e., criminal conduct “extended over a substantial period of time”) (*GICC Capital Corp. v Technology Finance Group, Inc.*, 67 F3d 463, 467 [2d Cir 1995]).

Plaintiffs’ RICO claims asserted in the first through fourth causes of action in the amended complaint are admittedly based on Ginsburg’s “verbal commitment” to “supervise management” of Plaintiffs’ investments in the Permits, which allegedly “lured” Plaintiffs into investing in Ginsburg’s alleged scheme. Because reliance upon such “verbal commitments” by Ginsburg is negated by the express terms of the parties’ Operating Agreements, which clearly and unambiguously identified Mega as a “Broker” with no responsibility to supervise management of Plaintiffs’ investment, Plaintiffs have failed to identify any criminal conduct to form the predicate of a RICO claim.

### *The Fraud Claims*

“The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages” (*Introna v Huntington Learning Centers, Inc.*, 78 AD3d 896, 898 [2010]). Importantly, the Second Department has repeatedly held that that “[w]here, as here, there is a ‘meaningful’ conflict between an express provision in a written contract and a prior alleged oral representation, the conflict negates a claim of a reasonable reliance upon the oral representation” (see *Urstadt Biddle Properties, Inc. v Excelsior Realty Corp.*, 65 AD3d 1135, 1137 [2009] [quoting *Stone v Schulz*, 231 AD2d 707, 707-708 [1996]).

Plaintiffs’ fraud claims asserted against the Ginsburg Defendants essentially assert that Ginsburg orally and in emails misrepresented that he would provide “management services” for the investors’ taxicabs and that the Green Taxi Permit transfers would be “automatic” after one year (see NYSCEF Doc No. 343 at ¶¶ 69 (e), 78 and 80). However, Plaintiffs’ respective Operating Agreements for their LLCs identifies Mega as the “Broker(s)” and contain the following paragraph:

“It is understood and acknowledged that *the Brokers shall have no responsibility for the management and operation of the Company and its business, that any investment made in the Company was and will not be done in reliance on any statement or omissions by the Brokers, and that any party that invests in the company, including any Member that makes a capital contribution to the Company, has had the opportunity to exercise all due diligence and is relying on its own analysis and investigation.* . . . Finally, it is further understood and acknowledged that any distributions the Brokers shall receive

from the Company are in the nature of brokerage fees, and are not in consideration for any role by the Brokers in the management or operation of the Company and its business” (NYSCEF Doc Nos. 366 at ¶ 7, 370 at ¶ 7, 377 at ¶ 8, 381 at ¶ 8, 385 at ¶ 8 and 391 at ¶ 8 [emphasis added]).

Plaintiffs’ fraud claims are subject to summary dismissal because the Operating Agreements admittedly executed by Plaintiffs contain explicit disclaimers that Mega, the Broker, “shall have no responsibility” for management and that the investor Plaintiffs should not rely on statements by the Broker (through Ginsburg, its agent) because the investors are expected to do their own due diligence. This provision in the Operating Agreements completely negate Plaintiffs’ reliance on Ginsburg’s oral representations, as a matter of law.

Plaintiffs could not have justifiably relied on any representations by Ginsburg on behalf of Mega, the Broker, regarding management of Plaintiffs’ investment, given the explicit disclaimer in the Operating Agreements admittedly executed by Plaintiffs. Consequently, the fraud claims asserted by the remaining Plaintiffs in the fifth, ninth, fourteenth, twenty-third, twenty-seventh, thirty-first, thirty-fifth, thirty-ninth, forty-third and forty-seventh causes of action in the amended complaint are dismissed.

### ***Breach of Oral Contract***

Plaintiffs’ claims for breach of an alleged oral agreement regarding management of the taxicabs and the automatic transfer of the Permits to Plaintiffs after one year are similarly subject to dismissal. “Where there is a conflict between an express provision in

a written contract and an alleged oral agreement, the oral agreement is unenforceable” (*Shah v Micro Connections, Inc.*, 286 AD2d 433, 433 [2001]).

Here, the amended complaint asserts causes of action for breach of Ginsburg’s alleged oral representations that he would supervise management of Plaintiffs’ taxicabs, despite the undisputed fact that the individual investor Plaintiffs each executed Operating Agreements which state otherwise. Consequently, Plaintiffs’ breach of contract claims asserted in the sixth, tenth, fifteenth, twenty-fourth, twenty-eighth, thirty-second, thirty-sixth, fortieth, forty-fourth and forty-eighth causes of action are dismissed.

### ***Rescission of the Operating Agreements***

“As a general rule, rescission of a contract is permitted ‘for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but . . . only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract’” (*RR Chester, LLC v Arlington Bldg. Corp.*, 22 AD3d 652, 654 [2005] [quoting *Callanan v Powers*, 199 NY 268, 284 (1910)]; see also *Singh v City of New York*, 189 AD3d 1697, 1700 [2020], *aff’d*, 40 NY3d 138 [2023] [in Taxicab medallion purchasers’ putative class action against the City and the TLC, the Appellate Division, Second Department, held that purchasers’ claim for rescission should have been dismissed because “(a)s a general rule, rescission of a contract is permitted for such breach as substantially defeats its purpose”]).

Plaintiffs have failed to satisfy their burden of identifying any material breach of the Operating Agreements by Mega to warrant rescission of the Operating Agreements.

Plaintiffs do not dispute that they received documentation prior to executing the Operating Agreements in which they were advised about the TLC's particular administrative process pursuant to which qualified investors could obtain ownership of the Permits after one year. Just because Plaintiffs failed to obtain ultimate ownership of the Permits through the TLC's procedure, for whatever reason, does not warrant rescission of the Operating Agreements.

Furthermore, Plaintiffs have failed to establish that the Operating Agreement should be rescinded based on a *mutual* mistake. Contrary to Plaintiffs' unsupported assertion, they were advised in writing that Mega was not providing them with ownership of the Permits, which were not automatically transferable until investors satisfied certain TLC requirements and arranged for the transfer after the one-year waiting period.

### *Unjust Enrichment*

“The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered” (*GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 570 [2015] [internal quotation marks omitted]). “It is well settled that the essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered” (*Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007] [quotation marks omitted]).

Here, the Operating Agreements each contain a provision specifically providing that Mega is the Broker for the procurement of Permits and any funds received by Mega is in “the nature of brokerage fees”:

“Finally, it is further understood and acknowledged that *any distributions the Brokers shall receive from the Company are in the nature of brokerage fees*, and are not in consideration for any role by the Brokers in the management or operation of the Company and its business” (NYSCEF Doc Nos. 366 at ¶ 7, 370 at ¶ 7, 377 at ¶ 8, 381 at ¶ 8, 385 at ¶ 8 and 391 at ¶ 8 [emphasis added]).

While Plaintiffs were inexplicably unable to procure full ownership of the Permits after the one-year waiting period, they admit that Mega brokered their initial investment in the Permits.

There are, however, triable issues of material fact as to whether or not Ginsburg retained brokerage fees that Plaintiffs paid to Mega and impermissibly used such funds for his own personal expenses. Consequently, due to these factual issues raised by Plaintiffs and the Mega Signature bank records, none of the moving parties are entitled to summary judgment regarding the unjust enrichment claims asserted against Ginsburg in the amended complaint (the eighth, twelfth, seventeenth, twenty-sixth, thirtieth, thirty-eighth, forty-second and forty-sixth causes of action), with the exception of the thirty-fourth cause of action asserted by Neger (*infra*).

### ***Plaintiff Neger's Claims***

“As a general rule, a general release which is part of a negotiated settlement bars causes of action alleging fraud based upon misrepresentations predating it” (*Engel v*

*Deutsche Bank Nat. Tr. Co.*, 116 AD3d 915, 916 [2014]). “However, a release may be set aside on any of the traditional bases for setting aside agreements, e.g., fraud and duress” (*id.*). “Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release ‘shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release’” (*Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]). “[A] party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release” (*id.*).

Plaintiff Neger admittedly executed a general Release on June 17, 2015, broadly releasing Mega and the other Ginsburg Defendants from:

“all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which against the RELEASEE, the RELEASOR, RELEASOR’S successors and assigns, Judah Langer, Green Apple Cabs, LLC and AJ Ginsburg ever had, now have or hereafter can, shall or may have, for, upon, or by any reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this **RELEASE**” (NYSCEF Doc No. 390).

Neger cannot now claim that Ginsburg fraudulently misled him regarding his investment in Green Taxi Permits based on post-Release discussions regarding the same investment.

Indeed, Neger explicitly admitted during his deposition that his claims against the Ginsburg Defendants are based on communications with Ginsburg that post-date the

Release, although such discussions were a continuation of their pre-Release discussions (*see* NYSCEF Doc No. 353). Because Plaintiffs, in opposition to the Ginsburg Defendants' summary judgment motion, failed to satisfy their burden of establishing that Neger was either fraudulently induced to execute the Release or that he did so under duress, all of his causes of action asserted against the Ginsburg Defendants are subject to dismissal based on the terms of the Release that he admittedly executed after having arms-length settlement negotiations with Ginsburg.

This court has considered the parties remaining contentions and finds them unavailing, including those regarding the insufficiency of the Ginsburg Defendants' counterclaims. Accordingly, it is hereby

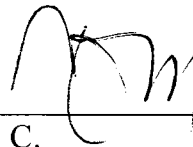
**ORDERED** that the Ginsburg Defendants' summary judgment motion (mot. seq. 15) is granted to the extent that: (1) the first, second, third and fourth causes of action in the amended complaint for alleged RICO violations are dismissed; (2) the fraud claims asserted by Plaintiffs in the fifth, ninth, fourteenth, twenty-third, twenty-seventh, thirty-first, thirty-fifth, thirty-ninth, forty-third and forty-seventh causes of action in the amended complaint are dismissed; (3) the breach of oral contract claims asserted by Plaintiffs in the sixth, tenth, fifteenth, twenty-fourth, twenty-eighth, thirty-second, thirty-sixth, fortieth, forty-fourth and forty-eighth causes of action in the amended complaint are dismissed; (4) the claims to rescind the Operating Agreements asserted in the seventh, eleventh, sixteenth, twenty-fifth, twenty-ninth, thirty-third, thirty-seventh, forty-first, forty-fifth and forty-ninth causes of action are dismissed; and (5) Plaintiff Neger's thirty-first, thirty-second,

thirty-third and thirty-fourth causes of action asserted against the Ginsburg Defendants are dismissed based on the June 17, 2015 Release; the Ginsburg Defendants' summary judgment motion is otherwise denied regarding Plaintiffs' unjust enrichment claims asserted against individual Defendant Ginsburg in the eighth, twelfth, seventeenth, twenty-sixth, thirtieth, thirty-eighth, forty-second and forty-sixth causes of action; and it is further

**ORDERED** that Plaintiffs' partial summary judgment cross motion (mot. seq. 16) is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LARRY MARTIN  
JUSTICE OF THE SUPREME COURT