

Loconte Family, LLC v Keyway Pride Ltd., LLC
2024 NY Slip Op 35243(U)
May 17, 2024
Supreme Court, Westchester County
Docket Number: Index No. 62231/2022
Judge: Gretchen Walsh
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION

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LOCONTE FAMILY, LLC, individually and derivatively on
behalf of BABY PHAT HOLDING COMPANY, LLC,

Plaintiffs,

- against -

Index No: 62231/2022
Motion Seq. No. 2
Motion Date: 2/22/2024

KEYWAY PRIDE LIMITED, LLC, KIMORA
LEE SIMMONS-LEISSNER, and TIMOTHY
LEISSNER,

Defendants,

BABY PHAT HOLDING COMPANY, LLC,

Nominal Defendant.

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WALSH, J.

The following e-filed documents, listed in NYSCEF by Document Numbers 42-74, 97-134 and 136-142 were read on this motion by Defendants Keyway Pride Limited, LLC (“Keyway”) and Kimora Lee Simmons-Leissner (“Kimora” or “Simmons”) (together “Defendants”) for an order pursuant to CPLR 3212 granting them summary judgment dismissing Plaintiff Loconte Family, LLC’s (“Plaintiff” or “Loconte” or “LF”) First Amended Complaint with prejudice. Plaintiff opposes Defendants’ motion.

Upon the foregoing papers and for the reasons set forth herein, it is ordered that Defendants’ motion shall be granted in part and denied in part.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff initiated this action by filing its Summons and Complaint on July 7, 2022 individually and derivatively on behalf of Baby Phat Holding Company, LLC (“Company” or “Baby Phat”) against Keyway and the Company as a nominal defendant asserting claims for fraud (individually), breach of fiduciary duties (derivatively on behalf of the Company), and conversion (derivatively on behalf of the Company) relating to: (1) the sale of Plaintiff’s 70% interest in the

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Company to Keyway in November 2017; (2) Keyway's alleged obligations and actions concerning a \$5 million Additional Capital Contribution as defined in the Company's Amended Operating Agreement ("Additional Capital Contribution" or "ACC"); and (3) Plaintiff's subsequent agreement to sell its interests in a separate entity to the Company in October 2021 (NYSCEF Doc. No. 1). On October 13, 2022, Defendant filed its Answer denying Plaintiff's allegations and asserting various affirmative defenses (NYSCEF Doc. No. 7).

Following multiple conferences with the Court, on April 3, 2023, Plaintiff filed its First Amended Complaint ("Complaint" or "Amended Complaint") adding claims for: (4) breach of the Amended Operating Agreement and the implied covenant of good faith and faith dealing against Keyway, individually and derivatively on behalf of the Company; (5) civil conspiracy against Defendants, individually and derivatively on behalf of the Company; (6) breach of the letter agreement against Keyway; and (7) breach of fiduciary duties against Simmons (NYSCEF Doc. No. 24). On May 26, 2023, Defendants Keyway and Simmons filed their Answer (NYSCEF Doc. No. 32) and, on June 16, 2023, Plaintiff filed a motion to enter a default judgment against Timothy Leissner (Mot. Seq. No. 1) (NYSCEF Doc. Nos. 33-38). The Court denied the motion without prejudice and with leave to renew in an Order dated August 2, 2023 because Plaintiff failed to submit evidence of the merits of its claim in support of its motion (NYSCEF Doc. No. 39). Following multiple conferences, on September 27, 2023, the Court issued a Trial Readiness Order requiring the filing of the Note of Issue within 10 days of the Trial Readiness Order (NYSCEF Doc. No. 40). Plaintiff served and filed its Note of Issue on October 6, 2023, and this motion ensued.

ALLEGATIONS OF PLAINTIFF'S FIRST AMENDED COMPLAINT

In its First Amended Complaint ("FAC"), Plaintiff alleges that, despite believing that Keyway and its agents, Kimora and Leissner, were operating in good faith, instead, they were defrauding Plaintiff and taking millions of dollars from the Company (FAC at ¶ 1). Plaintiff states that, in November 2017, "just months before Leissner was federally indicted for his participation in one of the biggest financial scandals in history, Keyway purchased from LF a 70% interest in Baby Phat, a fashion brand that Kimora and her ex-husband Russell Simmons started in the late 1990's. LF retained the other 30% interest in Baby Phat" (*id.* at ¶ 2). Plaintiff asserts that, in connection with its purchase, Keyway was required to invest the \$5 million ACC into the Company, which Keyway was not permitted to remove without Plaintiff's consent (*id.* at ¶ 3). Plaintiff claims that, over the course of the next four years, Defendants and their agents assured Plaintiff that Keyway had made the ACC and the funds remained in the Company's account and were available for its use, but those representations were knowingly false (*id.* at ¶ 5). Plaintiff alleges that, in March 2022, a Keyway representative initially advised Plaintiff that it was unable to make certain required monthly loan payments due in connection with Plaintiff's sale in its interest in the Company, claiming that the Company had no cash on hand to cover the expense and, according to this individual, Leissner could not meet the expense because Leissner had "apparently 'stole' millions of dollars from Baby Phat so that it was impossible for Baby Phat to meet the expense" (*id.* at ¶ 5). It asserts that "Defendants had represented that Baby Phat had over

\$4.5 million of cash on hand, which represented the additional capital investment Keyway was required to make under the purchase agreement” and, therefore, Plaintiff could not believe that “Baby Phat could not cover expenses with this much liquidity shown on its financial statements” (*id.* at ¶ 6).

Plaintiff alleges that “[u]pon learning of this apparent theft, LF contacted Kimora and her agents to obtain more details. When questioned, Keyway and Kimora claimed Leissner (Kimora’s husband) took these actions without Keyway’s or Kimora’s knowledge” (*id.* at ¶ 7).

Plaintiff asserts that although the claim is inconsistent with “Kimora’s duty as the Treasurer of the Company and her responsibility to oversee all of the Company’s accounts, LF had no reason at that time to distrust Kimora and believed she was being truthful” (*id.* at ¶ 8). Plaintiff further alleges that “Kimora repeated the party-line – that Leissner took this action unilaterally – during multiple discussions the parties had on the issue” (*id.*). According to Plaintiff, based on documents produced in this case, Kimora and Keyway’s narrative is false and instead, Defendants concealed material information from LF and “caused Baby Phat to ‘loan’ \$4.2 million on May 25, 2018 and May 10, 2018 to an individual in Austria and an entity that appears to be defunct. This money represented the additional capital that Keyway was required to infuse into Baby Phat and that Defendants represented, for over four (4) years, ‘remained’ in the accounts. In other words, for years Defendants lied to LF and claimed the additional capital Keyway was required to infuse into Baby Phat remained” (*id.*).

Plaintiff claims that the documents produced reveal that “Kimora attempted to use Leissner as a scapegoat, claiming he performed this action unilaterally” but that, “Kimora was well-aware of this improper removal, as internal financial documents that Kimora received make clear that Baby Phat was carrying these ‘loans’ as ‘notes receivable,’ and never had \$4.5 million of cash on hand like Defendants represented to LF. Kimora – whose job title was to literally to oversee the Company’s financials – received these internal financial documents, yet never advised LF of the true status of Baby Phat’s financial position” (*id.* at ¶ 12). Instead, Plaintiff contends, Kimora actively concealed Baby Phat’s cash position and the fact that the ACC by Keyway was removed (*id.*). Plaintiff contends that the documents produced by Keyway prove that “Kimora had a false set of balance sheets that her agents and representatives were providing to LF” and that, “[w]hile the ‘true’ balance sheets demonstrated Baby Phat had little to no cash, Defendants and their agents were providing LF with ‘fake’ balance sheets that purportedly showed Baby Phat had nearly \$4.5 million in cash on hand at any given time” (*id.* at ¶ 13). Plaintiff argues that this fraudulent conduct breached the duties Defendants owed to Plaintiff and is also a breach of the Parties governing agreements (*id.* at ¶ 14).

Plaintiff alleges that Loconte and Baby Phat are New York limited liability companies, Keyway is a California limited liability company that transacted business in New York, and Kimora is an individual resident of New York who acted as Baby Phat’s manager, CEO, President, Secretary and Treasurer and was appointed by Keyway as a member of Baby Phat’s Board of Managers (*id.* at ¶¶ 19-22). It further alleges that Leissner is an individual residing in New York

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City who is the purported husband of Kimora and acted as an agent and representative of Keyway and Baby Phat (*id.* at ¶ 23).

Plaintiff details the history of Baby Phat, asserting that, in or around 1999, Phat Fashions, LLC was owned by Kimora and her husband at the time, Russell Simmons, which launched the “Baby Phat” fashion clothing brand as an offshoot to the “Phat Farm” fashion line (*id.* at ¶ 24). According to Plaintiff, the clothing brand was initially successful due to its relationship with Russell Simmons and his record label Def Jam Recordings and was endorsed by celebrities including those in the hip-hop community (*id.* at ¶ 25). Plaintiff asserts that in 2004, Phat Fashions, LLC was earning over \$500 million in annual sales and was purchased by the Kellwood Company, which Plaintiff asserts was one of the largest clothing producers in the United States for \$140 million (*id.* at ¶ 26). Plaintiff alleges that after the purchase, Kellwood struggled to keep the Phat Farm and Baby Phat fashion lines popular and product sales were reduced (*id.* at ¶ 27). According to Plaintiff, in December 2012, Plaintiff purchased Phat Farm Holding Company, LLC, which owned the rights and intellectual property for, among others, the clothing brands Phat Farm and Baby Phat and, at the time of the purchase, Plaintiff was the sole member of Baby Phat (*id.* at ¶¶ 28-29).

Regarding Keyway’s purchase of Baby Phat, Plaintiff alleges that in early 2017, Leissner approached Plaintiff on behalf of Keyway about the potential of purchasing an interest in the clothing line that Kimora helped to launch (*id.* at ¶ 30). According to Plaintiff, at the time Leissner approached Baby Phat, it had approximately \$20 million in annual sales, was “reestablishing its presence in the United States,” and “was gaining popularity and was heading towards \$50-\$100 million dollars in annual sales” (*id.* at ¶ 31). Plaintiff asserts that it intended to grow Baby Phat’s presence in the United States before transitioning to international channels but that Leissner and Kimora, on behalf of Keyway, instead wanted to immediately focus on global retail channels to grow the business faster (*id.* at ¶¶ 32-33). Plaintiff alleges that Keyway told Plaintiff that it intended to get Baby Phat back to \$600 million in annual sales a year by opening global channels and specifically that Kimora “had access to several potential multi-million deals that would bring Baby Phat (and the ‘Phat Farm’ line) back into several of the largest retail chains in the country” (*id.* at ¶ 33). Plaintiff asserts that, based on these discussions, Plaintiff “began to alter its business plans with the anticipation of Keyway purchasing a majority ownership in Baby Phat” and specifically in that it turned down licensing deals to allow Keyway to refocus Baby Phat and immediately expand its retail presence (*id.* at ¶ 34). Plaintiff alleges that, although Keyway wanted to immediately purchase both the Baby Phat and Phat Farm lines, Plaintiff did not want to relinquish all of its rights immediately and, instead, agreed to sell a majority of its interest in Baby Phat to Keyway with the understanding that it would be willing to revisit the possibility of the sale of Phat Farm Holdings to Keyway in the future (*id.* at ¶ 36).

On November 9, 2017, Keyway, as purchaser, entered into the Purchase Agreement for 70% of Baby Phat’s shares and, simultaneous with the execution of the Purchase Agreement, Plaintiff and Keyway (the sole members of Baby Phat) entered into the Amended Operating Agreement (*id.* at ¶ 37). Plaintiff alleges that the Amended Operating Agreement “delineated the

respective rights and obligations by and between LF and Keyway, and identified LF as a 30% member and Keyway as the remaining 70% member” and that Section 6.1 provides that the Company shall have a Board of Managers consisting of five people with Keyway having the authority to appoint four managers (initially consisting of Kimora and non-party Matthew Norby) and Plaintiff having the authority to appoint one Manager (*id.* at ¶¶ 38-39). Plaintiff states that the Board Members appointed by Keyway and Plaintiff were specifically required to exercise their duties in good faith and, in support, Plaintiff cites to Section 6.5 of the Amended Operating Agreement (*id.* at ¶ 40). According to Plaintiff, the Amended Operating Agreement also vested the Board of Managers with the ability to appoint officers of the Company including a CEO, President, one or more Executive Vice Presidents or Vice Presidents, a Secretary and a Treasurer/CFO and Kimora was appointed the President, CEO, Treasurer and Secretary of Baby Phat at all relevant times (*id.* at ¶¶ 41-42). Plaintiff asserts that Kimora’s positions came with specific duties and responsibilities, including, as an example, Section 7.2(a) of the Amended Operating Agreement which provides that the CEO’s duties included “general supervision, direction, and control of the business and affairs of the Company” (*id.* at ¶ 43).

Plaintiff states that, as President, Kimora was also required to assume and perform all duties of the CEO in her absence or disability (*id.* at ¶ 44). Plaintiff goes on to assert that the Treasurer was “required to ‘keep or cause to be kept the books of account of the Company in a thorough and proper manner, and will render statements of the financial affairs of the Company in such form and as often as required by this agreement, the Board, or the Chief Executive Officer’” (*id.* at ¶ 45). Plaintiff states that, while Baby Phat is Member Managed and the majority of its members were appointed by Keyway, Section 2.5 entitled “Member Decisions” carves out certain decisions requiring Plaintiff’s consent as a member (*id.* at ¶ 46). Plaintiff also quotes Section 3.1, requiring Keyway to make certain monetary contributions to Baby Phat shortly after becoming a member including immediately making the ACC of \$5,000,000, and Section 3.2(a) providing that Keyway and Plaintiff are not entitled to remove the contributions (*id.* at ¶¶ 47-48).

Regarding Plaintiff’s sale of Phat Farm Holdings to Keyway, on or about October 1, 2021, Plaintiff states that it and Baby Phat entered into a Unit Purchase Agreement (the “Phat Farm Purchase Agreement”) in which Plaintiff agreed to sell its interest in Phat Farm Holdings to Baby Phat, allegedly because Kimora, through Keyway, sought to gain majority control over the entire fashion line that was originally started by her and her ex-husband Simmons (*id.* at ¶ 49). Plaintiff asserts that, prior to entering into the Phat Farm Purchase Agreement, Plaintiff “sought assurances from Defendants that Baby Phat’s financial condition was unchanged, and that the Additional Capital remained within Baby Phat’s coffers” and that, specifically, “throughout September and October 2021, Kimora and her representatives had calls with LF and its representatives concerning the Phat Farm purchase” (*id.* at ¶¶ 50-51). It asserts that, because Plaintiff was merging Phat Farm and Baby Phat and providing Defendants with the ability to run both entities, it “wanted assurances that Defendants were not mismanaging Baby Phat” (*id.* at ¶ 52). Plaintiff alleges that, throughout the parties’ discussions, Defendants “made representations concerning Baby Phat’s financial status, and assured LF that the Additional Capital Contribution remained in Baby Phat’s accounts” (*id.* at ¶ 53). As an example, Plaintiff points to an instance when Kimora and her agent Willard

Jackson (“Jackson”) participated in a conference call on September 16, 2021 with representatives of Plaintiff in which Plaintiff’s representatives purportedly sought assurances from Kimora and Jackson about Baby Phat’s financial status and the ACC where Kimora and Jackson assured Plaintiff’s representatives that Baby Phat had over \$4.5 million in cash on hand as a result of the ACC (*id.* at ¶ 54). Plaintiff alleges that the parties participated in another conference call on September 17, 2021, in which Kimora and Jackson again represented to Plaintiff and its representatives that Baby Phat was “in a strong financial position and was being appropriately managed” (*id.* at ¶ 55). Plaintiff asserts that, based on these representations, Plaintiff “agreed to sell its interest in Phat Farm to Keyway pursuant to the terms of the Phat Farm Purchase Agreement” (*id.* at ¶ 56).

Plaintiff alleges that “[p]ursuant to the Phat Farm Purchase Agreement, Keyway (as majority member of Baby Phat) agreed to become a co-guarantor of a certain loan by and between LF, as borrower, and ConnectOne Bank, as lender (the ‘CNOB Loan’)” and that under the Phat Farm Purchase Agreement, Plaintiff “was to receive all available cash flow from Phat Farm until the entire purchase price under the Phat Farm Purchase Agreement was satisfied” (*id.* at ¶ 57). Plaintiff states that, in connection with the Phat Farm Purchase Agreement, on October 8, 2021, “Baby Phat entered the First Amendment to the Amended and Restated Operating Agreement of Baby Phat Holding Company, LLC (‘First Amendment’) . . . memorializ[ing] the requirements for the purchase price to LF under the Phat Farm Purchase Agreement, and further provid[ing] that . . . Keyway was to become a co-guarantor of the CNOB Loan on or before January 1, 2022” (*id.* at ¶ 58). According to Plaintiff, on October 8, 2021, pursuant to the Phat Farm Purchase Agreement, “Kimora, as a member of Keyway, agreed that Baby Phat would make the monthly CNOB Loan payments in a letter agreement (the ‘Letter Agreement’)” (*id.* at ¶ 59). Therefore, Plaintiff alleges that it “agreed to sell its rights in Phat Farm in exchange for, among other things: (i) Phat Farm paying the purchase price out of the available cash flow; (ii) Keyway becoming a co-guarantor on the CNOB Loan; and (iii) Baby Phat making the CNOB Loan payments through the 2027 maturity date” (*id.* at ¶ 60).

Regarding Baby Phat’s operations and the “apparent theft” of \$5 million, Plaintiff asserts that, after it sold a majority interest in Baby Phat to Keyway, the Company’s operations changed in that Keyway retained majority control over the business operations and finances (*id.* at ¶ 61). It alleges that, over the next several years, “Keyway’s representatives consistently advised LF that Baby Phat had secured multi-million contracts and that Baby Phat was in track to achieve the success it had in the past” specifically through obtaining contracts with Macy’s, Dollar General and Walmart that would result in substantial sales (*id.* at ¶ 62). Plaintiff further alleges that “since selling a majority interest in Baby Phat, LF has not received any distributions whatsoever” and, therefore, the income Plaintiff was receiving when it owned 100% of the Company has “ceased entirely” (*id.* at ¶ 63). Plaintiff alleges that Keyway’s assurance that Baby Phat “had millions of dollars of cash on hand” due to the Additional Contribution Keyway was supposed to have made in 2018 was supported by financial documents that Keyway was regularly providing to Plaintiff (*id.* at ¶ 64). Plaintiff further asserts that “since entering into the Purchase Agreement, LF . . . consistently requested updated financials for Baby Phat” and “[i]n response, Keyway -- through

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Kimora and Leissner -- would assure LF that the additional capital was funded and that it remained in Baby Phat's accounts" (*id.* at ¶ 65). Plaintiff alleges an instance in June 2020 in which Leissner provided Plaintiff with "certain 'financial documents' and indicated in email correspondence that Keyway's 'additional \$5 million capital is still held as before, no changes there,'" and provided what was purported to be Baby Phat's balance sheet and profit and loss statement, reflecting the ACC (*id.* at ¶ 66).

Plaintiff alleges that those assurances, representations and financial documents provided to Plaintiff were false and inaccurate (*id.* at ¶¶ 67-68). It asserts that Keyway and Kimora have now admitted that the \$5 million ACC was removed from Baby Phat without LF's knowledge at some point between entering the Amended Operating Agreement and March 2022, and that Defendants intentionally falsified financial documents to "pacify LF's requests to review Baby Phat's accounts during this timeframe" and conceal Defendants' wrongdoing (*id.* at ¶ 69). Plaintiff asserts that, in March 2022, a representative of Keyway claimed that the \$5 million in additional capital purportedly being held by Baby Phat was missing and, in response to Plaintiff's request that Baby Phat confirm that it would be making the March 2022 CNOB Loan Payment as required under the Phat Farm Purchase Agreement and Letter Agreement, Plaintiff was informed that Baby Phat did not have the funds to cover the CNOB Loan payment (*id.* at ¶¶ 71-73). Plaintiff further alleges that after it learned about the missing ACC, Kimora claimed that Leissner, purportedly acting unilaterally, removed the \$5 million and "loaned" the funds to third-parties by way of unsecured notes which Keyway and Kimora claimed are now "due" (*id.* at ¶ 75).

Plaintiff alleges that the notes that were executed in the Company's favor and their terms were never disclosed prior to this action, despite the fact that Kimora, as the CEO, Treasurer and spouse of Leissner, had direct oversight over Baby Phat's accounts and, even assuming that Leissner did solely steal the money as Kimora claimed, she should have noticed the \$5 million in cash was missing and taken immediate action but instead "feigned ignorance" over the missing ACC (*id.* at ¶¶ 76-78). As proof, Plaintiff relies on Keyway's document production supporting that Leissner did not act unilaterally (*id.* at ¶ 79). Plaintiff alleges that although the document production by Keyway was deficient, "it reveals Kimora had intimate knowledge of the removal of the ACC, yet intentionally took steps to conceal that information from LF" (*id.* at ¶ 80). Specifically, Plaintiff asserts that the discovery supports that, on May 25, 2018, just months after entering the Purchase Agreement, Baby Phat "loaned" \$3,000,000 to Dr. Emilio Stock but, based on the promissory note provided, "it does not appear that Baby Phat received any reasonable security for this loan, which was made to an individual in Kitxbuehel, Austria" (*id.* at ¶ 81). Plaintiff also alleges that Keyway produced another promissory note dated May 10, 2018 in which Baby Phat loaned \$1,200,000 to Blaze Ventures, LLC, but does not appear to have provided any reasonable security to Baby Phat for the loan (*id.* at ¶ 82). Plaintiff further alleges that not only did Baby Phat not receive any security for the loans, the loans fell into default on May 10, 2019 without any action being taken to enforce Baby Phat's rights (*id.* at ¶ 83).

In terms of the evidence supporting Kimora's knowledge of the removal of the ACC, Plaintiff relies upon Keyway's financial statements that Kimora would have seen as CEO,

Treasurer and Secretary, including a balance sheet produced by Keyway indicating that, as of December 21, 2020, Baby Phat had only \$29,509 in cash and was carrying “Notes Receivable” in the total amount of \$4,559,775, despite providing a balance sheet to Plaintiff showing that Baby Phat’s finances on that date were materially different (*id.* at ¶¶ 84-87). Plaintiff asserts that on October 30, 2021, Jackson, acting as Kimora’s agent, sent Plaintiff’s representatives an email copying Kimora and her other agent, Brandon Robins, and attaching a copy of the purported balance sheet of Baby Phat from December 31, 2020 noting that “Cash, cash equivalents” held by Baby Phat was \$4,589,283.29, which Plaintiff asserts is materially different from the internal balance sheet that Kimora had in her possession showing that cash on hand was only \$29,509 (*id.* at ¶¶ 88-89). Plaintiff further asserts that the balance sheet provided to Plaintiff on October 30, 2021 did not include any “Notes Receivable” or other line item suggesting Baby Phat had \$4.5 million of uncollected loans and, despite being copied on the email, Kimora did not advise Plaintiff that the balance sheet provided contained false information; instead, she intentionally concealed that she was aware at the time that Baby Phat did not have \$4.5 million in cash as represented in the provided document (*id.* at ¶¶ 90-91). According to Plaintiff, the documents produced by Keyway demonstrate that Kimora was in possession of a Baby Phat Holdings’ balance sheet showing Baby Phat’s financials as of September 30, 2021 and the document, which was first produced on March 6, 2023, reflected that Baby Phat had only \$5,216 cash and was carrying “Notes Receivable” in the amount of \$4,559,775, but that on November 4, 2021, Jackson, copying Kimora, provided Plaintiff’s representatives with another balance sheet that instead showed a financial position on that date reflecting cash on hand of \$4,564,991 and with no mention of any “Notes Receivable” (*id.* at ¶¶ 92-94). Plaintiff alleges that, again despite Kimora being copied on this November 4, 2021 email, she failed to advise Plaintiff that the balance sheet contained false information and intentionally concealed that Baby Phat did not have \$4.5 million in cash as represented in the document provided to Plaintiff (*id.* at ¶ 95).

Plaintiff also relies on Baby Phat’s tax returns produced by Keyway in this litigation, which Plaintiff alleges state that Baby Phat was carrying loans as “Notes Receivable” in 2018 through 2021 which were addressed to Kimora, indicating that Defendants falsified financial documents and lied to Plaintiff about Baby Phat’s financial condition and the ACC (*id.* at ¶¶ 96-99).

Regarding Baby Phat’s failure to make the CNOB Loan payments, Plaintiff alleges that pursuant to Section 3.2 of the Phat Farm Purchase Agreement, Keyway, as majority owner of Baby Phat, “shall become the co-guarantor of the CNOB Loan, and [Baby Phat] shall cooperate with [LF] to complete the necessary documentation with ConnectOne Bank for purposes of adding [Keyway] as a co-guarantor of the CNOB Loan” (i.e., Keyway was required to become a co-guarantor) (*id.* at ¶¶ 100-101). Plaintiff also alleges that “in furtherance of the First Amendment it was agreed that Baby Phat would make all monthly payments due under the CNOB Loan, and would pay the outstanding principal and balance at the CNOB Loan’s maturity” (*id.* at ¶ 102). Plaintiff asserts that, at all relevant times, Keyway, as majority owner of Bank Phat, has controlled its finances and ability to make the required payments but, despite the contractual obligation to do so, Keyway “has failed and refused to become co-guarantor of the CNOB Loan” (*id.* at ¶¶ 103-104). Plaintiff also claims that Baby Phat has consistently failed to make the required monthly

payments, damaging Plaintiff's credit and lender relations and causing the lender to charge late fees and threaten to place the CNOB Loan in default (*id.* at ¶ 105). Plaintiff alleges that Baby Phat has been late on or otherwise missed monthly payments for January 2023, March 2022, May 2022, July 2022, August 2022 and October 2022, and to avoid default, Plaintiff has been forced to make monthly payments on the CNOB Loan out-of-pocket, and then seek reimbursement from Baby Phat (*id.* at ¶¶ 106-107).

Plaintiff asserts that demand would be futile and should be excused as Keyway is the only other member of Baby Phat and owns 70% of the Company, as well as being entitled to appoint a majority of the Board of Managers for the Company (*id.* at ¶¶ 108-109).

The Complaint presents six causes of action.

In its First Cause of Action for fraud against Defendants, Plaintiff alleges that they "engaged in an unlawful scheme to defraud LF of its 70% interest in Baby Phat, and undermine the parties' business relationship" (*id.* at ¶¶ 110-111). Specifically, Plaintiff alleges that they "intentionally misrepresented it maintained the Additional Capital Contribution in Baby Phat's cash reserves for years" and falsified financial records (*id.* at 112). Plaintiff asserts that the discovery demonstrates that Defendants and Kimora in particular, possessed balance sheets that expressly contradicted the false financial documents allegedly provided to Plaintiff and that, despite being aware of the falsity of these documents, Kimora never advised Plaintiff of the true financial state of Baby Phat (*id.* at ¶¶ 113-114). Plaintiff alleges that Defendants used this deception to induce Plaintiff to sell its interest in Phat Pharm based upon assurances that "Baby Phat was in a secured financial position and that the \$5 million of additional capital that was supposed[ly] contributed by Keyway was being held by Baby Phat for use" (*id.* at ¶ 115). It claims that it reasonably understand that Phat Farm would be properly managed and the purchase price under the Phat Farm Purchase Agreement could be paid through the contractually required cash flow (*id.* at ¶ 116). Plaintiff further alleges that "LF reasonably understood based on Baby Phat's represented financial position and the Additional Capital Contribution that Defendants represented was being held by Baby Phat would allow Baby Phat to pay the monthly loan payments for the CNOB Loan, which was a key and critical aspect of the Phat Farm Purchase Agreement" (*id.* at ¶ 117). Plaintiff claims that had it known about Baby Phat's true financial position or that Defendants "stole" \$5 million, it would not have entered into the Phat Farm Purchase Agreement, that it reasonably relied on Defendants' representations concerning Baby Phat's finances and the ACC and that Defendants knew or should have known that the representations surrounding Baby Phat's finances and Keyway's ACC were material, resulting in harm to Plaintiff (*id.* at ¶¶ 118-121).

The Second Cause of Action for breach of fiduciary duty against Keyway, brought derivatively on behalf of Baby Phat, asserts a claim that Keyway owed fiduciary duties to Baby Phat, including to act in good faith, and that it breached those obligations by "among other things, falsifying financial information and/or looting the Company of \$5,000,000 in cash" (*id.* at ¶¶ 122-124). Plaintiff alleges that Keyway's actions are gross, wanton and egregious and were undertaken for Keyway's own personal motives and benefit resulting in harm to Baby Phat (*id.* at ¶¶ 125-126).

The Third Cause of Action for conversion against Keyway, brought derivatively on behalf of Baby Phat, alleges that Keyway unlawfully converted Baby Phat's assets for its own personal benefit amounting to millions of dollars taken intentionally to harm Baby Phat, resulting in substantial damage to Baby Phat (*id.* at ¶¶ 127-130).

The Fourth Cause of Action for breach of the Amended Operating Agreement and the implied covenant of good faith and fair dealing against Keyway alleges that the Operating Agreement, and all of its amendments, is a valid and enforceable agreement under New York law, that Plaintiff has complied with and fulfilled all of its obligations in the Operating Agreement, and that Keyway breached the Amended Operating Agreement causing Plaintiff substantial harm (*id.* at ¶¶ 131-132). Specifically, Plaintiff claims that pursuant to Section 3.1 of the Amended Operating Agreement, Keyway was required to contribute additional capital of \$5 million into Baby Phat within 180 days and Section 3.2(a) of the Amended Operating Agreement provides that Keyway and Plaintiff are not entitled to remove the contributions, which include the ACC (*id.* at ¶¶ 134-135). Plaintiff also alleges that Section 2.5 of the Amended Operating Agreement carves out Member Decisions requiring Plaintiff's consent and that, despite these contractual obligations, documents produced in discovery reveal that in May 2018, Baby Phat loaned a total of \$4.2 million to third parties without Plaintiff's knowledge or consent (*id.* at ¶¶ 136-137). Plaintiff alleges that "Baby Phat – operating primarily through Kimora and her agents – executed promissory notes without even advising LF as is required under the plain terms of the Operating Agreement," and also failed to comply with the First Amendment specifically requiring Keyway to become a co-guarantor on the CNOB Loan in breach of both the express provisions of the Amended Operating Agreement and the First Amendment, as well as the implied covenant of good faith and fair dealing (*id.* at ¶¶ 138-141). Plaintiff further alleges that Keyway was undertaking actions directly contrary to the successful operation of Baby Phat, including by failing to keep the requisite cash reserves so that Baby Phat could meet common operating expenses and debts, frustrating the purpose of the Amended Operating Agreement and resulting in substantial damages (*id.* at ¶ 142).

The Fifth Cause of Action for breach of the Letter Agreement against Keyway asserts that it is a valid and enforceable contract under New York law, that Plaintiff has complied with its terms, and that Keyway (as 70% owner of Baby Phat) has failed to cause Baby Phat to comply with its express terms, by refusing to cause Baby Phat to make the payments required under the Letter Agreement, resulting in Baby Phat being late or missing multiple payments requiring Plaintiff to make payments on Baby Phat's behalf and suffer substantial damages (*id.* at ¶¶ 145-151).

The Sixth Cause of Action for breach of fiduciary duties against Kimora alleges that Section 6.1 of the Amended Operating Agreement provides that the Company shall have a Board of Managers consisting of five people, with Keyway having the authority to appoint four Managers, which initially consisted of Kimora and non-party Matthew Norby, and Plaintiff having the authority to appoint one Manager (*id.* at ¶ 153). Plaintiff alleges that pursuant to Section 6.1, Keyway appointed Kimora to the Board of Managers (*id.* at ¶ 154). Plaintiff asserts that the Amended Operating Agreement "also vested the Board of Managers with the ability to appoint

officers of the Company, including: (a) Chief Executive Officer; (b) President; (c) one or more Executive Vice Presidents or Vice Presidents; (d) Secretary; and (e) Treasurer or Chief Financial Officer” and that Kimora was appointed the President, Chief Executive Officer, Treasurer and Secretary and maintained these positions at all relevant times (*id.* at ¶¶ 155-156). Plaintiff alleges that, in these positions, Kimora owed Plaintiff fiduciary obligations, including to act in good faith (*id.* at ¶ 157). Plaintiff further alleges that Kimora also owed Plaintiff fiduciary obligations as a member of the Board of Managers and points to Section 6.5 of the Amended Operating Agreement (*id.* at ¶¶ 158-159). Plaintiff asserts that Kimora breached these fiduciary duties by falsifying financial information and intentionally concealing from Plaintiff the truth about Baby Phat’s financials and the ACC (*id.* at ¶ 160). Plaintiff claims that Kimora authorized Baby Phat to make purported loans to third parties without receiving reasonable security (*id.* at ¶ 161). Plaintiff alleges that the discovery “confirms that Kimora had knowledge that the Additional Capital Contribution was removed from Baby Phat, but actively concealed that information from LF” and that, when Plaintiff discovered the ACC was missing, Kimora “attempted to use Leissner as a scapegoat by proclaiming he worked ‘unilaterally’ and without her knowledge,” which was “false and misleading, and was intended to undermine LF’s rights as a 30% owner of Baby Phat” and that these actions are “gross, wanton, and egregious, and were undertaken without regard to the duties she owed LF but, instead, for Kimora’s own personal motives and benefit” in breach of Kimora’s fiduciary duties (*id.* at ¶ 162-166).

As relief, Plaintiff requests, as to the First through the Fifth Causes of Action, compensatory damages, consequential damages, incidental damages, punitive damages, interest, attorneys’ fees and costs and other damages in an amount no less than \$10 million, against Keyway and, as to the Sixth Cause of Action, an award of compensatory damages, consequential damages, incidental damages, punitive damages, interest, attorneys’ fees and costs and other damages in an amount no less than \$10 million, against Kimora, along with costs, disbursements and attorneys’ fees incurred in connection with this litigation.

In their Answer, Defendants deny the material allegations of the Complaint and assert seventeen affirmative defenses.

STATEMENTS OF MATERIAL FACTS

According to the parties’ respective Rule 19-A Statements of Undisputed Material Facts and the parties’ respective responses, the following facts are the undisputed facts for the purposes of this motion:

1. Simmons founded Baby Phat in 1999, as part of Phat Fashions, LLC (Defs’ SMF at ¶ 1).¹

¹ The paragraphs referenced herein coincide with Defendants’ Rule 19-a Statement of Material Facts dated December 21, 2023 (NYSCEF Doc. No. 74) (“Defs’ SMF”) and Plaintiff’s Response

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2. Simmons co-owned Phat Fashions, LLC with her ex-husband, Russell Simmons (*id.* at ¶ 2).
3. Simmons and Mr. Simmons sold Phat Fashions, LLC to The Kellwood Company in 2004 for \$140,000,000 (*id.* at ¶ 3).
4. Loconte purchased Phat Fashions, LLC from The Kellwood Company in 2012 (*id.* at ¶ 4).
5. In November 2017, Keyway purchased a 70 percent interest in Baby Phat Holdings Company LLC from Loconte (*id.* at ¶ 5).
6. Simmons is the ultimate beneficial owner of Keyway (*id.* at ¶ 6).
7. The Baby Phat purchase was memorialized by a Common Units Purchase Agreement between Loconte and Keyway, and an Amended and Restated Operating Agreement, both of which were dated as of November 9, 2017 (*id.* at ¶ 9).
8. The Amended Operating Agreement provides that Baby Phat has two members: Keyway and Loconte (*id.* at ¶ 14).
9. The Members delegated “all power and authority to manage the business and affairs of the Company” to a Board of Managers (the “Board”) (*id.* at ¶ 15).
10. The Board was to be comprised of five members, with Keyway having the right to appoint four members and Loconte having the right to appoint the remaining member (*id.* at ¶ 16).
11. Loconte appointed Anthony Loconte as its designated member of the Board (*id.* at ¶ 17).
12. Keyway appointed Simmons and Matthew Nordby as its two designees on the Board (*id.* at ¶ 18).
13. To Simmons’ knowledge, the Board never held a formal meeting (*id.* at ¶ 20).
14. Section 3.1 of the Amended Operating Agreement states that Keyway “shall make, before the 180-day anniversary of the date hereof, one or more additional capital

to Defendants’ Rule 19-a Statement of Material Facts dated February 5, 2024 (NYSCEF Doc. No. 134) (“RSMF”).

contributions in an aggregate amount of \$5,000,000 in the aggregate in cash to [Baby Phat]" (*id.* at ¶ 21).

15. Section 3.2(a)(i) of the Amended Operating Agreement states "no Member may demand or receive a return of his, her, or its Capital Contribution or withdraw from the Company" (*id.* at ¶ 22).
16. Section 2.5 of the Amended Operating Agreement sets out a list of actions Baby Phat could not take without the prior written consent of either "the Members holding more than 80% of all of the outstanding Units," or "the unanimous consent of the Board" (*id.* at ¶ 23).
17. Those actions are:
 - a) Cause [or] permit the consummation of any Liquidation Event, Sale of the Company pursuant to subsection (i) of the definition thereof, or Reincorporation;
 - b) Incur, assume, refinance or guarantee any material indebtedness in an amount over \$250,000 in a single transaction;
 - c) Issue any New Securities other than Excluded Securities, except to the event such issuance of Excluded Securities will result in LF holding less than 20% of the outstanding Units;
 - d) Pay a salary to any employee in an amount over \$100,000 annually;
 - e) Make any Distributions pursuant to Section 5.2 of this Agreement;
 - f) Review and approve the annual budgets of the Company;
 - g) Enter into any transaction with any Manager, Member, or any of their respective Affiliates, other than in an arm's-length transaction on commercially reasonable terms, as determined by the Board in good faith;
 - h) Make any amendment to this Agreement or waive any provision hereof if such amendment or waiver would adversely and disproportionately affect LF as compared to other Members; and
 - i) Except for the Additional Capital Contribution, require any additional Capital Contribution of any Member (*id.* at ¶ 24).
18. Under the Operating Agreement, Keyway was required to contribute \$5 million to Baby Phat, which was defined in the Amended Operating Agreement as the "Additional Capital Contribution" (*id.* at ¶ 25).
19. On January 25, 2018, Keyway caused \$5 million to be deposited into Baby Phat's bank account (*id.* at ¶ 26).
20. In May 2018, "loans" in the total amount of \$4.2 million from Baby Phat were made in two transactions (*id.* at ¶ 29).

21. \$3 million was transferred to an Austrian lawyer, Dr. Emilio Stock (*id.* at ¶ 30).
22. \$1.2 million was transferred to Blaze Ventures, a film company (*id.* at ¶ 31).
23. On February 6, 2019, Leissner sent Lefkowitz and Anthony Loconte Baby Phat's 2018 financial statements, including a balance sheet (*id.* at ¶ 36).
24. The balance sheet contains a single line item labeled "Cash equivalent and s/t investments," totaling \$5,366,955.33 (*id.* at ¶ 37).
25. Simmons was not copied on the email (*id.* at ¶ 39).
26. On June 2, 2020, Mr. Lefkowitz asked Leissner for an updated balance sheet and income statement of Baby Phat, including "what has been spent out of the \$5M investment and where the money is being held" (*id.* at ¶ 40).
27. Leissner responded "Yes will do" (*id.* at ¶ 41).
28. Simmons was not copied on these emails (*id.* at ¶ 42).
29. On June 3, 2020, Leissner sent another email to Lefkowitz and Santino Loconte stating "[o]ur additional \$5 million capital is still held as before, no changes there" (*id.* at ¶ 43).
30. Simmons was not copied on this email (*id.* at ¶ 44).
31. On June 16, 2020, Leissner emailed Baby Phat's updated balance sheet and projections to Lefkowitz and Santino Loconte (*id.* at ¶ 45).
32. The balance sheet contains a single line item labelled, "Cash equivalent/st notes" totaling \$4,368,191.28 (*id.* at ¶ 46).
33. Simmons was not copied on this email (*id.* at ¶ 48).
34. On March 10, 2021, Leissner sent Lefkowitz, Santino and Anthony Loconte Baby Phat's "year-end" financials for 2020 (*id.* at ¶ 49).
35. The balance sheet contains a single line item labelled, "Cash/S-T Liquidity" and "Cash, cash equivalent" totaling \$4,368,191.28 (*id.* at ¶ 50).
36. Simmons was not copied on this email (*id.* at ¶ 52).

37. Willard Jackson started working as a consultant for Baby Phat in the summer of 2021 (*id.* at ¶ 53).
38. On September 15, 2021, Jackson approached Loconte about the potential purchase of Phat Farm by Baby Phat (*id.* at ¶ 54).
39. Representatives from Baby Phat and Loconte had phone calls about the possible Phat Farm transaction on September 15, 16 and 17, 2021 (*id.* at ¶ 55).
40. The Phat Farm transaction closed on October 8, 2021. In connection with the Phat Farm transaction, the parties executed three documents: the Unit Purchase Agreement, the First Amendment to the Amended and Restated Operating Agreement of Baby Phat Holding Company, LLC and the Letter Agreement (*id.* at ¶ 60).
41. The Unit Purchase Agreement states that the purchase price for Phat Farm was \$3,095,577.39, to be paid from the net cash flow of Phat Farm until the payments reached the purchase price (*id.* at ¶ 61).
42. In addition, the Unit Purchase Agreement states that:
- [W]ithin three (3) months of the execution of this Agreement, the Buyer's majority member [Keyway] shall become the co-guarantor of the CNOB Loan, and Buyer shall cooperate with Seller to complete the necessary documentation with ConnectOne Bank for purposes of aiding Buyer's majority owner as co-guarantor of the CNOB Loan (*id.* at ¶ 62).
43. The Amended Operating Agreement further provides Keyway:
- [S]hall become a co-guarantor of the CNOB Loan [] by January 1, 2022, and Keyway Member shall cooperate with LoConte Family LLC to complete and execute the necessary documentation with ConnectOne Bank with respect to the CNOB Loan for purposes of adding Keyway Member as a co-guarantor of the CNOB Loan (*id.* at ¶ 63).
44. The Amended Operating Agreement re-states the payment terms of the purchase price as stated in the Unit Purchase Agreement (*id.* at ¶ 64).
45. The Letter Agreement provides that if Loconte or its affiliate acquired the CNOB Loan from ConnectOne Bank, then Baby Phat would make the payments on the CNOB Loan to the "New Lender"

Keyway Member hereby agrees and acknowledges that LoConte Member or its affiliate (the "New Lender") may acquire the CNOB Loan from ConnectOne

Bank, at which time, the Company shall pay interest only to New Lender on the remaining balance due on the CNOB Loan with a balloon payment of outstanding principal and other remaining charges due at the maturity of the CNOB Loan. The maturity date of the CNOB Loan is August 1, 2027 (*id.* at ¶ 65).

46. Simmons has personally loaned Baby Phat more than \$1.3 million to cover its operating cost needs (*id.* at ¶ 67).²
47. Neither Loconte nor any of its affiliates acquired the CNOB Loan (*id.* at ¶ 69).
48. Anthony Loconte testified that he believed Leissner was negotiating on behalf of Simmons (RPSMF at ¶ 3).³
49. Sona Banker is an “independent outside firm acting as a CFO/CPA, accountant, bookkeeper” that provided services to Baby Phat (*id.* at ¶ 7).
50. At or around the time the Amended Operating Agreement and Purchase Agreement were signed, Simmons, as “Chairwoman and CEO” of Baby Phat prepared a “Summary of Engagement” for Matthew Nordby to become a Member of the Board for Baby Phat (*id.* at ¶ 10).
51. That Summary of Engagement was effective November 1, 2017 (*id.* at ¶ 11).
52. Pursuant to Section 3.1 of the Amended Operating Agreement – entitled Capital Contribution – Keyway was obligated to make an additional capital contribution of \$5,000,000 to Baby Phat within 180 days of executing the Amended Operating Agreement (*id.* at ¶ 12).
53. In connection with the capital contributions, Section 3.2(a) of the Amended Operating Agreement expressly provides that Keyway and LF are not entitled to remove the contributions:

² Although Plaintiff denies this fact, no evidence is cited refuting this fact and, as such, it is deemed admitted.

³ The paragraphs referenced herein coincide with Plaintiff’s Rule 19-a Counter-Statement of Material Facts dated February 5, 2024 (NYSCEF Doc. No. 134) and Defendants’ Response to Plaintiffs’ Rule 19-a Counter-Statement of Material Facts dated February 15, 2024 (NYSCEF Doc. No. 142) (“RPSMF”).

- (a) Return of Capital. Except as otherwise provided in this Agreement, no Member (i) may demand or receive a return of his, her, or its Capital Contribution or withdraw from the Company or (ii) will have any priority over the other Members as to return of his, her, or its Capital Contributions. Under circumstances requiring a return of any Capital Contribution, no Member will have the right to receive property other than cash, except as may be specifically provided in this Agreement (*id.* at ¶ 13).
54. The Amended Operating Agreement delineated the respective rights and obligations by and between LF and Keyway, and identified LF as a 30% member and Keyway as the remaining 70% member (*id.* at ¶ 14).
55. For instance, Section 6.1 of the Amended Operating Agreement provides that the Company shall have a Board of Managers, which will consist of five (5) people. Keyway had the authority to appoint four (4) Managers – which initially consisted of Kimora and non-party Matthew Norby—and LF had the authority to appoint one (1) Manager (*id.* at ¶ 15).
56. Moreover, the Board Members appointed by Keyway and LF were specifically required to exercise their duties in good faith, and Section 6.5 of the Amended Operating Agreement provides:
- FIDUCIARY DUTIES OF THE MANAGERS.** A member of the Board will perform the duties of a member of the Board, including duties as a member of any committee of the Board upon which the member may serve, in good faith, in a manner such member believes to be in the best interest of the Company and its equity holders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances (*id.* at ¶ 16).
57. The Amended Operating Agreement also vested the Board of Managers with the ability to appoint officers of the Company, including: (a) Chief Executive Officer; (b) President; (c) one or more Executive Vice Presidents or Vice Presidents; (d) Secretary; and (e) Treasurer or Chief Financial Officer (*id.* at ¶ 17).
58. Pursuant to the Amended Operating Agreement, Kimora was appointed the President, Chief Executive Officer, Treasurer and Secretary (*id.* at ¶ 18).
59. Kimora has maintained those positions since 2017 (*id.* at ¶ 19).
60. Section 7.2(a) of the Amended Operating Agreement provides that the Chief Executive Officer's duties include, without limitation, "general supervision, direction, and control of the business and affairs of the Company" (*id.* at ¶ 21).

61. Similarly, as the President, Kimora was required to “assume and perform all duties of the Chief Executive Officer” in her absence or disability (*id.* at ¶ 22).
62. As Treasurer, Simmons was required to “keep or cause to be kept the books of account of the Company in a thorough and proper manner, and will render statements of the financial affairs of the Complaint in such form and as often as required by this agreement, the Board, or the Chief Executive Officer” (*id.* at ¶ 23).
63. Additionally, Section 7.2(e) also provided “[t]he Chief Financial Officer or Treasurer, subject to the other of the Board, will have the custody of all funds and securities of the corporation” (*id.* at ¶ 24).
64. Although Baby Phat is Manager Managed, and the majority of the Managers were appointed by Keyway, Section 2.5 entitled “Member Decisions” specifically carved out certain decisions that required LF’s consent as a member of Baby Phat, and provides:

2.5 MEMBER DECISIONS. Notwithstanding anything else to the contrary contained herein, the Company shall not take any of the following actions without the prior written consent of either (i) the Members holding more than 80% of all of the outstanding Units (voting together on a single class) or (b) the unanimous consent of the Board:

- (a) Cause or permit the consummation of any Liquidation Event, Sale of the Company pursuant to subsection (i) of the definition thereof, or Reincorporation;
- (b) incur, assume, refinance or guarantee any material indebtedness in an amount of over \$250,000 in a single transaction;
- (c) issue any New Securities other than Excluded Securities, except to the event such issuance of Excluded Securities will result in LF holding less than 20% of the outstanding Unites;
- (d) pay a salary to any employee in an amount over \$100,000 annually,
- (e) Make any Distributions pursuant to Section 5.2 of this Agreement;
- (f) Review and approve the annual budgets of the Company;
- (g) Enter into any transaction with any Manager, Member or any of their respective Affiliates, other than in an arm’s-length transaction on commercially reasonable terms, as determined by the Board in good faith;
- (h) make any amendment to this Agreement or waive any provision hereof if such amendment or waiver would adversely and disproportionately affect LF as compared to other Members; and
- (i) except for the Additional Capital Contribution, require any additional Capital Contribution of any Member (*id.* at ¶ 25).

65. On April 4, 2019, Simmons received Baby Phat's financial statements from January 2018 through February 2019 (*id.* at ¶ 27).
66. The balance sheet Simmons received showed \$5,000,000 in Baby Phat's bank account as of January 2018, which was depleted throughout the year such that only \$1,075.90 remained in the bank account as of February 2019 (*id.* at ¶ 28).
67. Robins forwarded the email attached as Picinich Aff. Ex. 14 to Simmons (*id.* at ¶ 29).
68. The email attached as Picinich Aff. Ex. 14 shows a purported loan to Blaze Ventures (*id.* at ¶ 31).
69. On February 24, 2021, Simmons, along with Leissner, received "preliminary 2020 financial statements" from Lauren Robinson ("Robinson") (*id.* at ¶ 32).
70. The balance sheet Simmons received on February 24, 2021 indicated that Baby Phat had only \$29,508.79 of cash in its "Checking/Savings." (*id.* at ¶ 33).
71. In the summer of 2021, Willard Jackson was hired by Baby Phat (*id.* at ¶ 34).
72. Around that time, LF and Defendants began discussing the sale of Phat Farm, the masculine clothing brand line related to Baby Phat (*id.* at ¶ 35).
73. On September 17, 2021 (one of the three days that the Loconte representatives and Defendants had conversations about the Phat Farm transaction), Simmons emailed her accountant, Robinson (*id.* at ¶ 38).
74. Robinson responded to Simmons by advising Simmons that Baby Phat only had \$422.30 in its accounts and that the ACC was removed in 2018 and asked Simmons to ask LF for the statements LF believed showed \$4.5 million in Baby Phat's accounts (*id.* at ¶¶ 39-40).
75. Simmons trusted that Robinson was accurate when she advised her on September 17, 2021 that Baby Phat only had \$422.30 in its bank account (*id.* at ¶ 41).
76. On September 18, 2021, Santino Loconte sent the following email:
- I had mis-spoke, and the 5mm was simply a capital investment and not tied to any marketing. My mistake. However, LF is supposed to be made aware of, and also approve, the annual budget. We previously requested this from Tim, but had never received it. If we could get an update here and square it away, that would be great (*id.* at ¶ 43).

77. As of September 20, 2021, Simmons knew Baby Phat only had \$422.30 in its bank account (*id.* at ¶ 44).
78. Jackson did not request the financial information sought by LF from Robinson until October 22, 2021 (*id.* at ¶ 52).
79. The Phat Farm transaction was consummated on October 8, 2021 (*id.* at ¶ 54).
80. Specifically, on October 27, 2021, Robinson forwarded copies of the “12/31/20 and YTD 9/30/21 financial statements for Baby Phat” to Jackson with Simmons and others copied on the email (*id.* at ¶ 57).
81. These documents were requested by Jackson so that he can provide them to LF, which LF requested on October 1, 2021 (*id.* at ¶ 58).
82. Upon receipt of the financial statements, Jackson forwarded the documents to Leissner and copied Simmons stating, “Let’s discuss” (*id.* at ¶ 59).
83. According to Jackson, Simmons expressly directed him to forward the financial statements to Leissner before sending it to LF (*id.* at ¶ 60).
84. The next day, on October 28, 2021, Leissner, in response to Jackson and in an email to Jackson, provided Jackson with financial statements from 2020 and wrote:
- This is what I gave them for FY2020 already. The only major difference is the COGS/shipping costs to the one that you have now received. So we should use the same format. Also as mentioned, I combined the cash and S/T investments on the asset side together. We should do that for 2020 and 2021. And we need to think hard about how to present the equity/shareholder loan portion (*id.* at ¶ 61).
85. Simmons was copied on the October 28, 2021 email (*id.* at ¶ 62).
86. The financial statements provided by Leissner were materially different than the 2020 financial statements provided by Robinson (*id.* at ¶¶ 63-66).
87. At her deposition Robinson, the long-term accountant for Simmons, Keyway and Baby Phat, stated that it is improper to combine cash and notes on a balance sheet (*id.* at ¶ 67).

88. On October 29, 2021, Jackson provided LF with 2020 financial statements that showed Baby Phat had “Current Assets, Cash, cash equivalent” of “\$4,589,283.39” (*id.* at ¶ 68).
89. Simmons was copied on that October 29, 2021 email (*id.* at ¶ 69).
90. That same day, Jackson asked Robinson for the financial statements she previously provided to him in excel format, which Robinson provided on November 1, 2021 (*id.* at ¶ 72).
91. On November 2, 2021, Jackson forwarded the financial statements in excel format that he received from Robinson to his assistant (and cousin) Elizabeth Burnett (*id.* at ¶ 73).
92. On November 2, 2021, Burnett responded to Jackson and sent Jackson a pdf of the September 2021 Baby Phat balance sheet and statement of operations, which was identified as “Copy_of_December_31_September_30_Excel_Copy_for_Client_WJ_Edits.pdf” (*id.* at ¶ 74).
93. In her email to Jackson, Burnett stated “see edits attached” (*id.* at ¶ 75).
94. Robinson stated at her deposition that the document provided by Burnett to Jackson was altered (*id.* at ¶ 76).
95. The financial statement had a balance sheet that showed Baby Phat had “Cash, cash equivalent” of “4,564,991” (*id.* at ¶ 77).
96. In reality, and as confirmed by the September 2021 balance sheet prepared by Robinson and provided to Jackson, as of September 30, 2021, Baby Phat only had cash of \$5,216 (*id.* at ¶ 78).
97. The financial statements Jackson provided LF with for year-to-date September show \$4,564,991 in “cash” (*id.* at ¶ 79).
98. Simmons was copied on that email (*id.* at ¶ 80).
99. In Jackson’s November 4, 2021 email, he did not advise Plaintiff of the amount of cash Baby Phat had in its Bank of America account at that time (*id.* at ¶ 81).
100. In addition to misstating the cash in Baby Phat, the altered financial statements provided to LF contain a disclaimer purportedly from Robinson & Company, which

indicates that the financial documents “adhere to Statement on Standards for Accounting and Review Services (SSARS) NO. 21....” (*id.* at ¶ 82).

101. Despite that disclaimer, Robinson & Company did not prepare the financial statements Jackson provided to LF (*id.* at ¶ 83).
102. At her deposition, Robinson stated that the financial statements provided did not adhere to typical accountant standards, were inaccurate as they are “not presenting accurate numbers,” and were “misleading” because they did not “accurately reflect the assets of Baby Phat” (*id.* at ¶ 84).

DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

A. Defendants’ Contentions in Support of Their Motion for Summary Judgment

In support of their motion, Defendants submit: (1) a Rule 19-A Statement; (2) an affirmation of Joseph A. Matteo, Esq., dated December 21, 2023 (“Matteo Aff.”),⁴ together with accompanying exhibits including an affirmation⁵ of Kimora Lee Simmons-Leissner dated December 21, 2023 (“Kimora Aff.”); and (3) a memorandum of law dated December 21, 2023 (“Defs’ Mem.”).

In her affirmation, Kimora states that she is the President and CEO of Baby Phat (Kimora Aff. at ¶¶ 1-2). She affirms that Midas Commodities Agents Delaware LLC (“Midas”) was the sole member of Keyway when Keyway was formed in November 2017 and that Greg Robinson was the manager of Midas when it was the sole member of Keyway (*id.* at ¶¶ 3-4). She states that Midas’ name changed to “Z One LLC” on March 4, 2019 and that it is the sole member of Keyway (*id.* at ¶¶ 4-5). Kimora represents that she is the beneficial owner of Z One LLC as well as being the “ultimate indirect beneficial owner of Keyway” (*id.* at ¶¶ 7-8). Kimora claims that “Keyway is not, nor has it ever been, a managing member of Baby Phat” and that the Board of Managers of Baby Phat has never held a formal meeting (*id.* at ¶¶ 9-10). She states that, although she was “appointed as a member of the Board of Managers of Baby Phat in November 2017, I did not become aware of this until years later” (*id.* at ¶ 11). She claims that when Leissner “presented the Baby Phat purchase to me around the holidays in 2021, he did not provide me with copies of the Unit Purchase Agreement and Operating Agreement attached as Exhibits 2 and 3” to the Matteo Affirmation and that she did not review them “until years later” (*id.* at ¶ 12).

⁴ The purpose of counsel’s affirmation is to submit relevant exhibits (*see* Matteo Aff. at ¶¶ 1-3 and Exs. 1-29).

⁵ Although counsel labels it as an affidavit, it is not sworn to before a notary public and, instead, Kimora affirms to the truth of the statements contained in her affidavit making it technically an affirmation.

According to Kimora, she “did not receive, prepare, nor did [she] know about, the email and attachments sent on February 6, 2019 by Tim Leissner to Adam Lefkowitz and Santino Loconte attached as Exhibit 14” to the Matteo Affirmation and also did not receive or know about the June 2, 2020 email sent by Tim Leissner to Adam Lefkowitz and Santino Loconte, attached as Exhibit 15 to the Matteo Affirmation (*id.* at ¶¶ 13-14). She also claims that she did not receive or know about the email sent on June 3, 2020 by Tim Leissner to Adam Lefkowitz and Santino Loconte attached as Exhibit 16 to the Matteo Affirmation (*id.* at ¶ 15). She represents that she did not receive, prepare, or know about the email and attachments sent on June 16, 2020 by Tim Leissner to Adam Lefkowitz and Santino Loconte attached as Exhibit 17 to the Matteo Affirmation or those sent on March 10, 2021 by Tim Leissner to Adam Lefkowitz, Santino Loconte, and Anthony Loconte attached as Exhibit 18 to the Matteo Affirmation (*id.* at ¶¶ 16-17).

Kimora asserts that neither she nor Keyway “received proceeds of the ‘loans’ supposedly evidenced by the documents attached as Exhibits 10 and 11” to the Matteo Affirmation and that she “did not make any statements about the ‘Additional Capital Contribution’ as defined in Section 3.1 of the Operating Agreement on any phone calls with Adam Lefkowitz, Santino Loconte, or Anthony Loconte” (*id.* at ¶¶ 18-19). She affirms that she did not authorize Leissner to make those “loans” and has tried to recover the proceeds of the “loans” to no avail (*id.* at ¶¶ 19-20). Kimora claims that Leissner caused the “loans” to be made and gave the proceeds of one of the “loans” to his parents to buy a home in Austria (*id.* at ¶ 22). Finally, Kimora asserts that “Loconte never asked Keyway to become a co-guarantor of the ConnectOne Bank loan referenced in Exs. 24-26 of the Affirmation” (*id.* at ¶ 23).

In their memorandum of law, Defendants argue that Plaintiff’s “causes of action against Simmons and Keyway are based on the false premise that Simmons and Keyway, of which Simmons is the indirect beneficial owner, purportedly stole \$4.2 million from Baby Phat, the limited liability company in which both Keyway and Loconte are members,” but that Simmons did not authorize, benefit or know about the transfer of funds and it was instead her now-estranged ex-husband Leissner that caused Baby Phat to “loan” the funds to third parties and then conceal the loans from Loconte, Simmons and Keyway (Defs’ Mem. at 1). Defendants argue that: (1) the Court should dismiss Plaintiff’s cause of action for fraud against Simmons and Keyway because neither made any of the alleged misrepresentations; (2) the Court should dismiss Plaintiff’s cause of action for breach of fiduciary duty against Keyway because Keyway is a non-managing member of Baby Phat and therefore does not owe any fiduciary duties to its fellow members as a matter of law and did not “loot” Baby Phat but rather Leissner “surreptitiously ‘loaned’” Baby Phat’s assets for the benefit of his parents and third parties without Keyway receiving any financial benefit; (3) the Court should dismiss Plaintiff’s cause of action for conversion against Keyway because Keyway never received the proceeds of the “loans” and because this cause of action is duplicative of Plaintiff’s cause of action against Keyway for breach of Baby Phat’s Operating Agreement; (4) the Court should dismiss Plaintiff’s cause of action against Keyway for breach of Baby Phat’s Amended Operating Agreement and for breach of the implied covenant of good faith and fair dealing because Plaintiff “alleges that Keyway breached the Amended Operating Agreement by purportedly removing its own capital contribution without Loconte’s consent and by refusing to

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become a co-guarantor of Loconte's loan from ConnectOne Bank" when Keyway had no role in making the "loans," did not remove any capital from Baby Phat and never refused to become a co-guarantor of Loconte's loan; (5) the Court should dismiss Plaintiff's cause of action against Keyway for breach of a separate letter agreement that Keyway executed in connection with the amendment of the Baby Phat Operating Agreement in which Keyway "acknowledged that, if Loconte or its affiliate purchased the ConnectOne loan from the bank, then Baby Phat would make future payments to either Loconte or the affiliate that acquired the loan," but that neither Plaintiff nor its affiliate ever purchased the loan from ConnectOne Bank and the letter agreement is therefore irrelevant; and (6) the Court should dismiss Plaintiff's cause of action for breach of fiduciary duty against Simmons because "Simmons neither caused Baby Phat to 'loan' Baby Phat's money to third parties nor altered Baby Phat's financial statements to conceal those 'loans,' which are the two bases of Loconte's fiduciary duty claim against her" (*id.* at 1-3).

In further support of the dismissal of the First Cause of Action for fraud, Defendants argue that Plaintiff bases its fraud claim on "three misstatements on which Loconte's principals allegedly relied in deciding to sell Baby Phat to Phat Farm" (*id.* at 10). Defendants claim these misstatements are, first, that "Simmons and Willard Jackson told Loconte's principals on September 16, 2021 that the Additional Capital Contribution remained in Baby Phat" (*id.* at 10-11). Second, that Keyway "provided financial statements to Loconte that misrepresented Baby Phat's financial position by concealing the 'loans' from the Additional Capital Contribution" (*id.* at 11). Third, that "Leissner misrepresented in a June 2020 email that Baby Phat continued to hold the Additional Capital Contribution" (*id.*).

Regarding the first alleged misrepresentation, Defendants assert that neither Simmons nor Jackson told Plaintiff's principals at any time, including on September 16, 2021, that Baby Phat continued to hold the ACC and that none of Plaintiff's principals recall having any discussions with Simmons and Jackson regarding the ACC (*id.*). With respect to the second alleged misrepresentation, Defendants argue that Leissner provided the financial statements to Loconte on his own and not on behalf of Keyway as Plaintiff contends (*id.*). They state that "Leissner was not a member, manager, director, officer or employee of Keyway, and in any case Keyway had no role in managing Baby Phat's affairs; that role was delegated to Baby Phat's Board of Directors, of which Keyway was not a member" and that "Simmons did not prepare, review or receive any of these statements, and did not know that Leissner had sent them . . . Nor is there any evidence that any other person associated with Keyway was aware of Leissner's communications with Loconte about the financial statements at the time that Leissner sent them" (*id.*). Regarding the third misrepresentation, Defendants argue that the June 2020 emails upon which Plaintiff relies were between its principals and Leissner, without Simmons being copied on the emails or aware they were sent (*id.*). Plaintiff also argues that, because neither Simmons nor Keyway made a material misrepresentation of fact, Plaintiff cannot establish the other required elements of fraud (*id.* at 12 n 3).

Second, Defendants argue that the Court should dismiss Plaintiff's Second Cause of Action for breach of fiduciary duty against Keyway based on allegations that Keyway falsified Baby

Phat's financial information and looted the ACC (*id.* at 12). Defendants contend that Keyway did not owe Baby Phat or Loconte any fiduciary duties as a non-managing member of Baby Phat that played no role in the management of that entity (*id.* at 12). They also assert that even if Keyway did owe Baby Phat or Loconte any fiduciary duties, it could not have falsified financial statements or "loot[ed]" the ACC because Simmons did not know that the purported loans had been made and neither Simmons nor Keyway received the proceeds of those purported loans (*id.* at 12-13). Defendants also assert that Plaintiff's cause of action for breach of fiduciary duty against Keyway is "at least partially duplicative of its cause of action for breach of the Operating Agreement against Keyway" because it "is based, at least in part, on the purported 'looting' of the Additional Capital Contribution," which is also the basis of Plaintiff's cause of action for breach of the Amended Operating Agreement (*id.* at 13).

Third, Defendants argue that the Court should dismiss Plaintiff's Third Cause of Action for conversion against Keyway based on allegations that Keyway converted the ACC for its own personal benefit because Keyway did not receive any proceeds of the ACC, which it contends were sent to third parties, and it is also duplicative of its Fourth Cause of Action for breach of the Amended Operating Agreement (*id.* at 13-14).

Fourth, Defendants argue that the Court should dismiss Plaintiff's Fourth Cause of Action for breach of the Amended Operating Agreement based on alleged breaches of Sections 3.1, 3.2(a) and 2.5 of the Amended Operating Agreement and the implied covenant of good faith and fair dealing based on Keyway's allegedly (1) removing \$4.2 million of the ACC from Baby Phat without Loconte's consent; and (2) "fail[ing] and refus[ing] to become a co-guarantor of the CNOB Loan" (*id.* at 15). They argue that Section 3.1 required Keyway to contribute the ACC to Baby Phat within 180 days of the execution of the Operating Agreement, which it did, that Section 3.2(a) provides that members cannot demand or receive a return of their contributions to Baby, which Keyway did not do, and that Section 2.5 sets forth actions that Baby Phat cannot take without Loconte's permission, which are not relevant here and that Keyway did not cause Baby Phat to take (*id.*). Defendants contend that Keyway has not breached the Amended Operating Agreement with respect to becoming a co-guarantor of the CNOB Loan in that the First Amendment to the Amended Operating Agreement requires Keyway to cooperate with Plaintiff to complete and execute the necessary documents with ConnectOne Bank with respect to the CNOB Loan to add Keyway as a co-guarantor of the CNOB Loan, but that Loconte never asked Keyway to become a co-guarantor of the CNOB Loan nor did Loconte ever present Keyway with any such documents and, therefore, Keyway never failed to cooperate with Loconte (*id.* at 15-16). Defendants argue that Baby Phat has made all payments on the CNOB Loan since the Phat Farm transaction closed and, therefore, Plaintiff has suffered no damages (*id.* at 16). Defendants finally argue that the aspect of Plaintiff's Fourth Cause of Action for breach of the implied covenant of good faith and fair dealing should also be dismissed as duplicative of the other aspect of its Fourth Cause of Action which asserts a breach of contract claim (*id.*).

Fifth, Defendants argue that the Court should dismiss Plaintiff's Fifth Cause of Action for breach of the Letter Agreement against Keyway by allegedly failing to cause Baby Phat to make

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the required payments on the CNOB Loan (*id.*). They contend that the Letter Agreement only provides that “*if* Loconte or its affiliate (defined collectively as the ‘New Lender’) purchase the CNOB Loan from ConnectOne Bank, *then* Baby Phat will make payments to the New Lender” and here neither Loconte nor any affiliate of Loconte purchased the CNOB Loan from ConnectOne Bank and, moreover, “Keyway has caused Baby Phat to make *every* payment due on the CNOB Loan to ConnectOne Bank” (*id.* at 17).

Sixth, Defendants argue that the Court should dismiss Plaintiff’s Sixth Cause of Action for breach of fiduciary duty against Simmons because they claim Simmons never authorized Baby Phat to make “loans” to Dr. Stock or Blaze Ventures from the ACC and that she was not aware in 2018 that \$4.2 million of that amount had been “loaned” to third parties (*id.*). They also repeat their argument that Simmons did not falsify any financial information provided to Loconte and that it was Leissner that altered Baby Phat’s financials before providing them to Loconte but that Simmons was unaware of Leissner’s acts and never received copies of the altered financial statements (*id.* at 17-18).

B. Plaintiff’s Contentions in Opposition to Defendants’ Motion for Summary Judgment

In opposition to Defendants’ motion, Plaintiff submits: (1) Plaintiff’s Response to Defendants’ Statement of Material Facts and Plaintiff’s Counter-Statement of Material Facts dated February 5, 2024; (2) an affirmation of Arnold P. Picinich, Esq. dated February 5, 2024 (“Picinich Aff.”),⁶ together with attached exhibits; and (3) a memorandum of law dated February 5, 2024 (“Plf’s Opp. Mem.”).

In its memorandum of law, Plaintiff argues that it was first advised on March 7, 2022 that the \$4.5 million ACC that Keyway was required to contribute to Baby Phat when it purchased its 70% interest in the Company in 2017 was missing (Plf’s Opp. Mem. at 1). It contends that despite not disputing that Loconte was provided with financial statements indicating that Baby Phat had \$4.5 million in cash in its accounts and selling a 100% interest in Phat Farm Holdings, Defendants contend that they did not know that Simmons’ husband Leissner was falsifying financial statements and had removed the ACC from Baby Phat in 2018 (*id.*). It asserts that Simmons and her employees claim to be unaware as to the operations of Baby Phat but that the evidence and testimony do not support this claim (*id.* at 1-3).

Following a summary of Plaintiff’s Response to Defendants’ Statement of Material Facts, Plaintiff first argues that Defendants ignore evidence and testimony in seeking summary judgment dismissing Plaintiff’s Sixth Cause of Action for breach of fiduciary duties against Simmons (*id.* at 11). Plaintiff asserts that, at all relevant times, Simmons was the CEO, President, Treasurer and Secretary of Baby Phat, as well as being the managing member of Baby Phat’s Board of Managers

⁶ The purpose of counsel’s affirmation is to submit relevant exhibits (*see* Picinich Aff. at ¶¶ 1-36 and Exs. 1-35).

and, therefore, based on these positions, Simmons owed fiduciary duties to LF and Baby Phat under both the express terms of the Amended Operating Agreement and New York law (*id.*). Plaintiff contends that Simmons “ignores the evidence that demonstrates she knew about the missing ACC, yet concealed that information from LF” and that “as of June 4, 2019, Simmons knew: (i) the ACC was removed from the Company’s bank account; (ii) that Baby Phat made ‘loans’ to third-parties; and (iii) the ‘loans’ were in default” but “took no action to inquire about the issues, protect LF, or even advise LF of the situation” (*id.* at 11-12). Plaintiff also argues that “in 2021 and during negotiations regarding LF’s sale of 100% interest in Phat Farm, the parties exchanged several communications wherein LF inquired about the ACC that it understood remained in Baby Phat’s bank account,” specifically citing a September 17, 2021 email exchange between Simmons and Robinson in which Robinson advised Simmons that Baby Phat had only \$422.30 in its accounts rather than the \$4.5 million as LF believed but Simmons ignored Robinson’s request that she ask LF to send statements indicating that Baby Phat had an account containing \$4.5 million dollars (*id.* at 12). Plaintiff also argues that Simmons did not advise LF of the true cash balance in Baby Phat when she received a letter of intent for the Phat Farm transaction containing an “‘Existing Cash On-Hand’ term that expressly stated that the ‘remaining [ACC] investment of \$4,589,283.49’ that was in Baby Phat’s accounts would be spent in a manner agreed upon by the parties after the Phat Farm transaction closed” (*id.* [citations omitted]).

Plaintiff contends that Simmons does not address these facts or provide authority indicating that they are immaterial, but rather claims that she cannot be liable for a breach of fiduciary duty because she did not personally falsify financial information or authorize the purported loans made with the ACC (*id.* at 13). According to Plaintiff, there are disputed facts, first, because “testimony and evidence indicate that Simmons in fact *did* participate in the falsifying of financial information that was provided to LF” (*id.*). As support, Plaintiff cites to Baby Phat’s financial statements received from Robinson in response to requests from Jackson, on behalf of Simmons, showing “‘cash’ of \$29,509 as of December 2020 and \$5,216 as of September 2021” but claims that Jackson was instructed by Simmons not to send the financials directly to LF and instead “required Leissner get involved and ‘review’ all of the financials before LF received them” (*id.*). Plaintiff argues that “Jackson, with Simmons’ knowledge, worked with Leissner to provide LF with altered financial statements for 2020” and “directed his assistant (and cousin) to alter the year-to-date 2021 financials, which were then provided to LF,” resulting in LF receiving 2020 and 2021 balance sheets indicating that Baby Phat has \$4.5 million of cash on hand which Simmons knew was false and for which Jackson admitted was “misleading” at his deposition (*id.*). Plaintiff argues that Jackson’s testimony that his actions were taken at Simmons’s direction and the fact that he copied her on all correspondence raises at least an issue of fact that she participated in falsifying financial information (*id.* at 14).

Plaintiff also argues that Kimora’s claim that she was not aware that purported loans were made, one of which was made to a company owned by her brother, or that the ACC was a required obligation under the Operating Agreement, are disputed facts (*id.*). Plaintiff contends that “[a]s the Treasurer, Simmons was the individual responsible for overseeing (and handling) Baby Phat’s finances, and testified that she was ‘not aware’ that Leissner ‘had any role’ in Baby Phat, which

contradicts her claim now that Leissner unilaterally authorized these ‘loans’ and transferred millions of dollars out of the accounts she was supposed to be overseeing without her knowledge” (*id.*). Plaintiff contends that the “claim that Simmons was ‘not aware’ of the ACC obligation (or that Keyway purchased the 70% interest at all) is highly disputed as it is contradicted by Simmons’ own signature on the Operating Agreement, comments to the public that she ‘hunted down’ LF in 2017 to purchase Baby Phat, and documents and correspondence she produced all indicating that she was aware of and consummated the Baby Phat transaction” (*id.*). Plaintiff also takes issue with Simmons’ credibility generally based on purported contradictions between her positions and her own affidavit or the testimony of others (*id.* at 14-15).

Second, Plaintiff argues that “blaming” Leissner does not “absolve” Defendants of fraud (*id.* at 15). Plaintiff contends that “Defendants proclaim that Count One (Fraud) must be dismissed because ‘neither Simmons nor Keyway made any of these alleged misstatements,’ suggesting that the intentional concealment of information can never constitute fraud, and Leissner’s admitted misrepresentations should be ignored” and that these arguments are factually and legally incorrect (*id.* [citations omitted]). Plaintiff again points out that Simmons held “every executive role within Baby Phat (including being the managing member of Baby Phat’s Board) and, thus, owed fiduciary duties,” including an obligation to disclose material facts, which she failed to do (i.e., she had an obligation to disclose that the ACC was no longer being held) (*id.* at 16). Plaintiff further claims that it is disputed that she was involved in altering the financial statements provided to LF in October 2021 and, therefore, Simmons is not entitled to summary judgment (*id.*). Plaintiff claims that the other facts purportedly cited by Defendants to suggest that there is no factual dispute are incorrect or overstated (*id.*). It claims there is an issue of fact “as to whether Simmons was on calls in September 2021 regarding the ACC” (*id.*). Plaintiff also argues that Defendants’ “position that Leissner was not sending falsified financials on behalf of Keyway or Simmons is illogical and completely ignores that Simmons effectively delegated Leissner to control both Keyway and Baby Phat” because Leissner “held himself out as operating on Simmons’ and Keyway’s behalf, was authorized to transfer money out of Keyway’s bank accounts, and was delegated – by Simmons – to handle all financial aspects of the Baby Phat business (despite that being her role as Treasurer and Board Manager)” (*id.* at 17). Plaintiff contends that “[t]o suggest that Leissner was a representative and agent of Keyway when dealing with the company’s accountants and negotiating Keyway’s 70% purchase of Baby Phat, but no longer an agent when communicating with LF and providing false financials is preposterous and, nevertheless, presents an issue of fact that precludes summary judgment” (*id.*).

Third, Plaintiff argues that Keyway disregarded several obligations in breach of the Amended Operating Agreement (*id.*). Plaintiff contends that “contrary to what Defendants would have this Court believe, both the express and implied provisions of Sections 3.1 and 3.2 provide that the ACC should not be removed from Baby Phat except in accordance with the parties’ agreement” (*id.* at 18). Plaintiff contends that “indisputably never occurred, and the money was withdrawn from Baby Phat’s coffers in May 2018 with[out] LF’s knowledge” and, therefore, “[t]o suggest that there is no express or implied breach of those provisions because Keyway did not ‘demand’ the return of that ACC would render the bulk of the consideration Keyway was to

contribute to the transaction meaningless” (*id.*). Plaintiff also argues that “for Defendants to suggest Keyway did not ‘cause’ Baby Phat to remove the ACC is disputed as Leissner was authorized to act on Keyway’s behalf” is incorrect as “Defendants disclaim any liability for the removal of the ACC by blaming Leissner, but also proclaim Leissner had no authority in Keyway (or Baby Phat for that matter) to initiate that removal (despite having access to, and authority over, the bank accounts)” and “[b]oth cannot be true, and neither are supported by ‘undisputed’ facts” (*id.* at 18). Plaintiff argues summary judgment must be denied based on these purported facts along with the fact that ACC was removed without the approval required in Section 2.5 of the Amended Operating Agreement (*id.*). Plaintiff next argues that Keyway cannot avoid liability due to its failure to become co-guarantor of the CNOB Loan because, despite admitting it has never become co-guarantor of the CNOB Loan, it claims to have done so because “‘LF did not ask’ Keyway to become the co-guarantor” and requesting compliance is not required and is a disputed fact (*id.*). Plaintiff argues that Keyway was contractually obligated to take this action, which it has admitted it has not done, as part of the consideration for the Phat Farm transaction (*id.* at 18-19). Plaintiff asserts that Keyway’s argument that the breach of the implied covenant of good faith and fair dealing must be dismissed as duplicative fails because the “allegations concern[ing] Keyway’s disregard of LF, the removal of the ACC, and operating Baby Phat to the exclusion of LF for years . . . not only violates express provisions in the Operating Agreement (as detailed above), but they also completely undermine the consideration LF was supposed to receive under the various transactions, such as the use of the ACC to bolster Baby Phat” (*id.* at 19).

Fourth, Plaintiff argues that it has alleged a valid claim for its Third Cause of Action for conversion because “it is highly disputed whether Keyway indirectly (or directly) received any of the proceeds” as it is disputed whether the third parties purportedly receiving the loans received the funds and, even if Leissner had unilaterally made the purported loans, there is a question of fact as to whether he was acting on Keyway’s behalf (*id.* at 20-21). Plaintiff also argues that the conversion claim is not duplicative of the breach of contract claim as the conversion claim is a derivative claim brought on behalf of Baby Phat (*id.* at 21).

Fifth, Plaintiff contends that, in seeking summary judgment, “Defendants argue that (i) Keyway did not ‘loot’ the ACC or falsify financial statements; (ii) Plaintiff’s cause of action is ‘duplicative’ (in part) of its cause of action for breach of the Operating Agreement; and (iii) Keyway did not owe Baby Phat or LF any fiduciary duties,” but that these arguments fail because: (1) it is disputed whether Keyway and Leissner, as its representative, removed the ACC in contravention of its obligations; (2) the claim is not duplicative because it is being asserted on behalf of a different (non-contracting party) such as Keyway which did not owe contractual duties to Baby Phat under the Operating Agreement; and (3) Simmons was the managing Board Member and designated as the “LF Representative” and, as the “ultimate beneficial owner of Keyway and [who] had authority to act on its behalf – was controlling management, which is sufficient to impose fiduciary duties” (*id.* at 21-22).

C. Defendants' Contentions in Further Support of Their Motion

In further support of their motion, Defendants submit: (1) Defendants' Response to Plaintiff's Counter-Statement of Material Fact dated February 15, 2024; (2) an affirmation of Julia R. Livingston, Esq. dated February 15, 2024 ("Livingston Aff."),⁷ together with attached exhibits; and (3) a reply memorandum of law dated February 15, 2025 ("Defs' Reply Mem.").

In their reply memorandum, Defendants first reiterate their argument that Plaintiff's fraud claim fails because Defendants made no material misstatements (Defs' Reply Mem. at 1). They assert that the undisputed evidence demonstrates that neither Simmons nor Keyway made any of the three misrepresentations allegedly made prior to the consummation of the Phat Farm transaction and that, instead, Plaintiff "attempts to change its theory, now claiming that Simmons purportedly knew but failed to disclose that Baby Phat no longer had most of the Additional Capital Contribution" but that Plaintiff cannot defeat summary judgment based on new theories of liability not alleged in the operative complaint (*id.* at 1-2). Defendants argue that even if Simmons knew about the purported loans and had a duty to disclose, any omission would have to be material (*id.* at 2). Here, Defendants argue, the "Additional Capital Contribution had nothing to do with the Phat Farm transaction; the purchase price for Phat Farm indisputably was to be paid from Phat Farm's own future net cash flow—not from funds that Baby Phat had on hand [and] . . . [i]ndeed, the Unit Purchase Agreement tellingly does not include any representations or warranties regarding Baby Phat's financial condition or the Additional Capital Contribution" thereby demonstrating that Plaintiff "understood that Baby Phat's financial condition was irrelevant to the Phat Farm transaction" (*id.*). With respect to Plaintiff's argument that there are disputed issues of fact regarding whether Simmons participated in altering the financial statements received by Plaintiff in October 2021, Defendants argue that Plaintiff cannot demonstrate that Simmons personally made changes to the document or sent it to Plaintiff and these events occurred after the Phat Farm's transaction closed, thus barring any claimed reliance on purportedly altered financials (*id.* at 2-3). Defendants argue that "Loconte's attempt to create disputed issues of fact with respect to the purported misrepresentations on which it previously based its fraud claim confirm that the Court should grant Defendants' Motion" and, in support, Defendants rely on disputes between the parties as to which individuals were on calls regarding the ACC in September 2021 and argue that Plaintiff has submitted no "competent evidence" to defeat summary judgment (*id.* at 3). Defendants argue that "the fact that Leissner sent purportedly 'falsified financials' to Loconte in the years prior to the Phat Farm transaction cannot form the basis of a fraud claim against Simmons or Keyway" because Leissner held no positions at Keyway, it was not a manager of Baby Phat and Simmons never received or reviewed the financial statements or knew they were sent (*id.* at 3-4). They further contend that Leissner's action cannot be imputed to Keyway or Simmons because he "sent the altered financial statements to cover up his own theft of the Additional Capital Contribution—an action that harmed Keyway and Simmons' interests" (*id.* at 4).

⁷ The purpose of counsel's affirmation is to submit relevant exhibits (*see* Livingston Aff. at ¶¶ 1-363 and Exs. 1-4).

Second, Defendants reiterate that the Court should dismiss Plaintiff's Second Cause of Action for breach of fiduciary duty against Keyway because Plaintiff cannot dispute that non-managing members of limited liability companies do not owe fiduciary duties to either the limited liability company or that company's members and Plaintiff "admits that Keyway was not a member of Baby Phat's board of managers, which had the exclusive 'power and authority to manage' Baby Phat's affairs" (*id.* at 4-5). Defendants argue that this is different from a situation where "all management responsibilities were automatically vested in the members because the company did not specify a manager in its articles of incorporation" and that it does not matter that "Simmons, who beneficially owns Keyway, was a member of Baby Phat's board of managers" because Keyway is a separate and distinct entity from Simmons (*id.* at 5). Defendants argue that the undisputed facts demonstrate that Keyway did not breach any purported fiduciary duties owed to Plaintiff because Keyway did not take the ACC (*id.*). They assert that it is disputed as to whether Leissner acted on Keyway's behalf when he purportedly removed \$4.2 million from Baby Phat and that Plaintiff "points to no evidence that Leissner was acting as Keyway's agent when he consummated the 'loans' from Baby Phat's account, and, in any event, Leissner's actions cannot be imputed to Keyway because he had abandoned Keyway's interests by looting the Additional Capital Contribution and giving it to what Loconte concedes were 'third-parties'" (*id.*). Defendants also contend that Plaintiff "does not dispute that its cause of action against Keyway for breach of fiduciary duty is based on the same alleged facts as its cause of action against Keyway for breach of the Operating Agreement" and, therefore, the Court should dismiss Plaintiff's Cause of Action for breach of fiduciary duty as duplicative (*id.* at 5-6).

Third, Defendants argue that Plaintiff's conversion claim fails because it is undisputed that neither Keyway nor Simmons removed the ACC (*id.* at 6). They reiterate that the Court "should dismiss Loconte's cause of action for conversion against Keyway because Loconte cannot prove that Keyway exercised dominion over the portion of the Additional Capital Contribution that Leissner stole, and Loconte's conversion claim is duplicative of its cause of action for breach of the Operating Agreement" (*id.*). Regarding Plaintiff's argument that there is a disputed issue of fact as to whether Keyway received proceeds from the ACC, Defendants contend that Plaintiff "admits that \$4.2 of the Additional Capital Contribution was transferred to Emilio Stock and Blaze Ventures, who Loconte concedes are 'third-parties,'" but also argues that it is unclear whether Stock and Blaze Ventures received the funds, which argument Defendants claim is speculative and conclusory and thus insufficient to overcome a motion for summary judgment (*id.*). In further support of the dismissal of this claim, Defendants argue that Leissner was not acting on Keyway's behalf and Keyway did not receive the funds after they were transferred so it could not have exercised dominion and control (*id.* at 7). Defendants also argue that Plaintiff's conversion claim should be dismissed as duplicative of its breach of the Amended Operating Agreement claim as "courts can and should dismiss derivative claims where they are duplicative of direct claims" (*id.* at 7-8).

Fourth, Defendants argue that the Court should dismiss Plaintiff's Fourth Cause of Action for breach of the Amended Operating Agreement against Keyway (*id.* at 8). Specifically, in response to Plaintiff's assertion that "Keyway breached Sections 3.1, 3.2 and 2.5 of the Amended

Operating Agreement and the implied covenant of good faith and fair dealing by allegedly removing \$4.2 million of the Additional Capital Contribution without Loconte's consent and purportedly failing to become a co-guarantor on the CNOB Loan," Defendants first contend that the undisputed facts confirm that Keyway did not breach Section 3.1 of the Amended Operating Agreement because it merely required Keyway to make the ACC, which it did (*id.*). With respect to Section 3.2, Defendants argue that Plaintiff admits that this section only provides that "no Member may demand or receive a return of his, her or its Capital Contribution," but fails to offer evidence that Keyway demanded that Baby Phat return the ACC or that Keyway received it and admits that it was transferred to third parties (*id.* at 8-9). Defendants assert that the undisputed facts "likewise confirm that Keyway did not breach Section 2.5 of the Operating Agreement, which Loconte admits prohibits **Baby Phat** from engaging in certain transactions without Loconte's approval" because, while Plaintiff argues that Leissner was acting on behalf of Keyway when he caused Baby Phat to make the purported loans of the ACC, the authority to manage Baby Phat was vested solely in its Board of Managers which did not include Keyway (*id.* at 9). Defendants next argue that Plaintiff's Opposition "demonstrates that Keyway did not breach the Operating Agreement with respect to becoming a co-guarantor of the CNOB Loan" because Keyway was only asked to cooperate with Plaintiff to execute the necessary documents to become a co-guarantor and Plaintiff never asked Keyway to sign any documents to become a co-guarantor after the Amended Operating Agreement was executed (*id.* at 9-10). Moreover, Defendants assert, Baby Phat has made every payment owed on the CNOB Loan since the Phat Farm transaction closed and, therefore, Plaintiff has suffered no damages (*id.* at 10).

Defendants also argue that the Court "should reject Loconte's contention that Keyway has breached the Amended Operating Agreement by claiming indemnification for its fees and expenses in connection with defending itself in this action" because the Amended Operating Agreement expressly permits Keyway to receive indemnification for its fees and expenses in connection with its defense in this action and because Plaintiff does not assert this claim in the Amended Complaint (*id.*). Defendants contend that "Loconte does not—and cannot—point to any independent basis for its cause of action for breach of the implied covenant of good faith and fair dealing, and in fact concedes that this claim is based on the same alleged acts as its claim for breach of the Operating Agreement" and, therefore, it is duplicative and should be dismissed (*id.* at 11).

Fifth, Defendants contend that Plaintiff concedes that Defendants did not breach the Letter Agreement because it does not address Defendants' argument that there was no breach as "(i) that agreement provides that if Loconte or its affiliate purchased the CNOB Loan from ConnectOne Bank, then Baby Phat would make the loan payments to the purchaser, and (ii) neither Loconte nor any of its affiliates ever purchased the CNOB Loan from ConnectOne Bank" (*id.* at 11). Defendants contend that Plaintiff in fact admits that neither it nor any of its affiliates purchased the CNOB Loan (*id.* at 11-12).

Sixth, Defendants argue that the Court should dismiss Loconte's Sixth Cause of Action for breach of fiduciary duty against Simmons because the basis for this claim is the same as the basis for the fraud claim and Plaintiff provides no evidence that Defendants made material

misrepresentations regarding the ACC before the Phat Farm transaction closed (*id.* at 12). Defendants argue that the “only representation cited in the Amended Complaint other than the September 2021 phone calls and the financial statements provided after the Phat Farm deal closed is the June 2020 email Leissner sent to Loconte stating that the Additional Capital Contribution was ‘held as before, no change there,’” but Simmons was not copied on the email or aware that Leissner had sent it (*id.*). Defendants contend that Plaintiff cannot argue that the “fraud and fiduciary duty claims against Simmons are based on Simmons’ failure to disclose the fact that Baby Phat no longer held the majority of the Additional Capital Contribution,” but Plaintiff cannot assert this new theory which it did not plead in its Amended Complaint (*id.*).

STANDARD OF REVIEW

The legal standards to be applied on a motion for summary judgment are well settled. The proponent of a motion for summary judgment “bears the initial burden of demonstrating its *prima facie* entitlement to the requested relief” (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 50 [2d Dept 2011]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]).

Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Reyes*, 83 AD3d 47; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions; rather the party must “affirmatively demonstrate the merit of its claim or defense” (*Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2015]; *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]).

“It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)” (*Vega, supra*, 18 NY3d at 504). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695 [2d Dept 2015]; *William J. Jenack Estate Appraisers & Auctioneers, Inc., supra*). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8 [1960]; *Collado, supra*). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion “if there is any doubt as to the existence of a triable issue” (*Herrin v Airborne Freight Corp.*, 301 AD2d 500, 501 [2d Dept 2003]; *see also Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

DISCUSSION

A. Plaintiff's Sixth Cause of Action for Breach of Fiduciary Duties Against Simmons

“The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct” (*Matter of Caton*, 206 AD3d 993, 994 [2d Dept 2022], quoting *Celauro v 4C Foods Corp.*, 187 AD3d 836, 837 [2d Dept 2020]). “In New York, a fiduciary relationship arises, ‘where one [person] is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relations’” (*Suthers v Amgen*, 441 F Supp 2d 478, 487 [SD NY 2006], quoting *Flickinger v Harlod C. Brown & Co.*, 947 F2d 595, 599 [2d Cir 1991]). “New York courts have not hesitated to find fiduciary duty claims deficient when a plaintiff has not pled or proved facts demonstrating a fiduciary duty or ‘any relationship approaching privity’” (*id.*, quoting *Columbia Mem. Hosp. v Barley*, 16 AD3d 748, 749 [3d Dept 2005]).

Here, through the Simmons’ Affidavit, Defendants present prima evidence that Simmons did not know about the altered financial statements provided to LF or make any statements about the ACC to LF. However, in opposition, Plaintiff has provided evidence that at all relevant times Simmons was the CEO, President, Treasurer and Secretary of Baby Phat as well as being a manager of Baby Phat’s Board of Managers (NYSCEF Doc. No. 47 [Amended Operating Agreement] at §§ 6.1, 7.1). Therefore, as a manager of a manager-managed LLC, she had a duty to perform her duties in good faith (New York Limited Liability Company Law [“LLCL”] § 409 [“A manager shall perform his or her duties as a manager, including his or her duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances”]). Furthermore, as a manager Simmons also owed a “duty of full disclosure” (*Chan v Havemeyer Holdings LLC*, 223 AD3d 403, 403 [1st Dept 2024]; *Salm v Feldstein*, 20 AD3d 469, 470 [2d Dept 2005] [“As the managing member of the company and as a co-member with the plaintiff, the defendant owed the plaintiff a fiduciary duty to make full disclosure of all material facts”]; *Beatrice Investments, LLC v 511 9th LLC*, 177 AD3d 551, 552 [1st Dept 2019] [“Given that the individual defendant is alleged to have engaged in the misconduct personally and was a fiduciary of the respective defendant manager entities, the causes of action for breach of fiduciary duty against him will lie under both New York and Delaware law”]; see also *Pebble Cove Homeowners’ Assn, Inc. v Shoratlantic Dev. Co., Inc.*, 191 AD2d 544 [2d Dept 1993]).

The Amended Operating Agreement also specifically provides that:

6.5 FIDUCIARY DUTIES OF THE MANAGERS. A member of the Board will perform the duties of a member of the Board, including duties as a member of any committee of the Board upon which the member may serve, in good faith, in a manner such member believes to be in the best interests of the Company and its equity holders and with such care, including reasonable inquiry, as an ordinarily

prudent person in a like position would use under similar circumstances (NYSCEF Doc. No. 47 at § 6.5).

Plaintiff has offered evidence sufficient to raise a question of fact as to whether Simmons knew about the missing ACC but concealed this information from Plaintiff despite her fiduciary duties. Plaintiff provides evidence that, as of June 4, 2019, Simmons knew the ACC was removed from the Company's bank account, that Baby Phat made purported loans to third parties, and that the loans were in default (RSMF at ¶¶ 27-32).⁸ Plaintiff offers evidence that on April 4, 2019, Simmons received Baby Phat's financial statements from January 2018 through February 2019 showing that Baby Phat had \$5,000,000 in its bank account as of January 2018 which was depleted throughout the year such that only \$1,075.90 remained as of February 2019 (*id.* at ¶¶ 27-28; NYSCEF Doc. No. 110). Specifically, on June 4, 2019, Simmons' assistant provided Simmons with an email indicating that Baby Phat made two loans in the total amount of \$4,290,427.10 and that these loans were in default (*id.* at ¶ 29, NYSCEF Doc. No. 111).

Plaintiff further raises a question of fact as to whether Simmons was involved in preparing the financial statements or, at a minimum, that Simmons knowingly provided incorrect financial statements to LF. Plaintiff offers testimony that, in response to multiple requests by LF, in October 2021, Jackson, on behalf of Simmons, requested that Robinson provide Baby Phat's balance sheets to LF and that Jackson, with Simmons' knowledge, worked with Leissner to provide LF with altered financial statements for 2020 showing that Baby Phat had \$4.5 million of cash on hand rather than the \$29,509 reflected on the actual financial statement for December 2020 and the \$5,216 as of September 2021 (*id.* at ¶¶ 49-80). Simmons was copied on both of the emails forwarding the financial statements internally, as well as the email to LF forwarding the purportedly altered financial statements to LF (*id.* at ¶¶ 55-69).

Moreover, as Treasurer, Simmons was responsible for overseeing Baby Phat's accounting and financial affairs (Amended Operating Agreement [NYSCEF Doc. No. 47] [**(e) Duties of Chief Financial Officer or Treasurer.** The Chief Financial Officer or Treasurer will keep or cause to be kept the books of account of the Company in a thorough and proper manner, and will render statements of the financial affairs of the Company in such form and as often as required by this Agreement, the Board or the Chief Executive Officer"]). As such, given her responsibilities as Treasurer, Simmons' claim that she was ignorant as to Baby Phat's financial condition is a triable issue of fact.⁹ Further, Plaintiff offers evidence that despite her knowledge of the true

⁸ Where citations are to the parties' Statements of Material Facts, the Court is referring to the evidence cited in those paragraphs.

⁹ Here, it will be up to the trier of fact to determine if Simmons should be absolved of all liability based on her alleged lack of knowledge as to the transactions at issue. If the trier of fact concludes that Simmons was acting in the capacities ascribed to her in the Amended Operating Agreement, Simmons will not be able to shield herself from liability based on her alleged lack of knowledge because it was her fiduciary duty as CEO, President, Treasurer and Secretary to be kept abreast of

financial situation of Baby Phat, Simmons was on at least one conference call with Plaintiff relating to the sale of Phat Farm in September 2021 during which there is at least a question of fact as to whether the ACC was discussed (RSMF [NYSECF Doc. No. 134] at ¶¶ 36, 55-59).

Plaintiff has also raised questions of fact as to Simmons' credibility. At the summary judgment stage, the Court may not generally weigh issues of credibility (*see, e.g. Knepka v Tallman*, 278 AD2d 811, 811 [4th Dept 2000] ["Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint . . . Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present credibility issues for trial"]; *Krupp v Aetna Life & Cas. Co.*, 103 AD2d 252, 262 [2d Dept 1984] ["in reaching a decision, the court may not ordinarily weigh the credibility of the affiants unless untruths are clearly apparent"]; *Koen v Carl Co.*, 70 AD2d 695, 695 [3d Dept 1979] ["Credibility of persons having exclusive knowledge of facts should not be determined by affidavits submitted on summary judgment motions, but rather at trial by the trier of facts"]). Plaintiff offers evidence that key positions taken by Simmons are contradicted by her own affidavit and testimony from other individuals. For example, Simmons stated in her affidavit that she did not know that Leissner was forwarding the financial statements to LF (NYSCEF Doc. No. 52 at ¶¶ 13-17), but Jackson testified that Simmons directed him to send the financial statements to Leissner for review as he handled the financials (NYSCEF Doc. No. 104 at 93, 142). Simmons also stated in her affidavit that the ACC was loaned in part by Leissner to his parents to buy a home in Austria (NYSCEF Doc. No. 52 at ¶ 22), but Jackson testified that the ACC was "stolen" by Leissner (NYSCEF Doc. No. 104 at 48). Simmons further stated that she first learned about the purchase of Baby Phat "around the holidays" in 2021 (NYSECF Doc. No. 52 at ¶ 12) but in her deposition she testified that she learned of the purchase in the holidays of 2017 (NYSCEF Doc. No. 109 at 77-78). Therefore, Plaintiffs have presented sufficient evidence in support of their allegations and Simmons' credibility is an issue reserved for the trier of fact.

Based on the foregoing, the branch of Defendants' motion to dismiss the Sixth Cause of Action shall be denied.

B. Plaintiff's First Cause of Action for Fraud Against Defendants

In an action to recover for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which rendered the representation false and was known to be false by the defendant, made for the purpose of inducing the other party to rely upon it (scienter), justifiable reliance of the other party on the misrepresentation or material omission, and injury (*Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817 [2016]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]; *Ross v Louise Wise Services, Inc.*, 8 NY3d 478 [2007]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]). Furthermore, where a cause of action is based in fraud, "the circumstances constituting the wrong shall be stated in detail" (see CPLR

Baby Phat's financial condition, including any withdrawals from its bank account for unsecured loans to third parties.

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3016[b]; *see also* *Lanzi v Brooks*, 43 NY2d 778, 780 [1977] [“(CPLR 3016[b]) requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of”]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 178]). “A fraud claim requires ‘proof by clear and convincing evidence’ as to each element of the claim” (*Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt. Co.*, 149 AD3d 146, 149 [1st Dept 2017], *lv denied* 30 NY3d 903 [2017], *citing* *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 350 [1999]).

The elements of fraudulent concealment are the same as the elements required for fraudulent misrepresentation with one addition – it must be shown that “the defendant had a duty to disclose material information and that it failed to do so” (*P.T. Bank Central Asia v ABN AMRO Bank, N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). As with fraudulent misrepresentation, fraudulent concealment must be established by clear and convincing evidence (*Banque Arabe et Internationale D’Investissement v Maryland Natl. Bank*, 57 F3d 146 [2d Cir 1995]). The general rule is that “[i]n the absence of a contractual relationship or a confidential or fiduciary relationship, a party may not recover for fraudulent concealment of fact, since absent such a relationship, there is no duty to disclose” (*900 Unlimited, Inc. v MCI Telecom. Corp.*, 215 AD2d 227, 227 [1st Dept 1995]). Thus, “[t]he mere nondisclosure of a material fact, unaccompanied by some deceptive act, does not constitute fraud absent a confidential or fiduciary relationship” (*Sanford/Kissena Owners Corp. v Daral Props., LLC*, 84 AD3d 1210, 1211 [2d Dept 2011], *quoting* *First Keystone Consultants, Inc. v DDR Constr. Servs.*, 74 AD3d 1135, 1138 [2d Dept 2010]).¹⁰

¹⁰ While new causes of action and theories of liability will generally not be considered if asserted for the first time in response to a motion for summary judgment, raising a new assertion in opposition to summary judgment is permissible when it raises no new theory of law or new factual assertion and does not prejudice the moving party (*Kelleir v Supreme Indus. Park, LLC*, 293 AD2d 513 [2d Dept 2002]; *Warden v Orlandi*, 4 AD3d 239 [1st Dept 2004]; 6B Carmody-Wait 2d § 39:112 [“A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars. Thus, plaintiffs may not avoid summary dismissal of the complaint because of the existence of an arguably meritorious cause of action different from those pleaded. However, raising a new assertion in opposition to summary judgment is permissible when it raises no new theory of law or new factual assertion and does not prejudice the moving party”]). Here, Plaintiff’s assertion that Defendants committed fraud is based upon: (1) their knowledge of the fraudulent financial statements that were being provided to Loconte reflecting that the ACC remained in Baby Phat’s account and their failure to disclose to Loconte the fraudulent nature of these financial statements despite their fiduciary obligation to do so; (2) their agent Leissner’s provision of these fraudulent financial statements; and (3) their own fraudulent statements during conference calls in September 2021 that the ACC remained in Baby Phat. Thus, these allegations and theories are clearly spelled out in the Amended Complaint and it is not a new theory of law or new factual assertion and does not prejudice Defendants.

Here, Defendants have made a prima facie showing of their entitlement to summary judgment. Plaintiff relies on three purported misrepresentations: (1) that Simmons and Jackson assured LF's representatives that the ACC remained in Baby Phat and it was in a secured financial position (Amended Complaint at ¶¶ 54-56); (2) that Keyway provided financial statements to Loconte that misrepresented Baby Phat's financial position by reflecting that the \$5 million ACC was still being held by Baby Phat without change and failing to reflect the purported loans from the ACC (*id.* at ¶¶ 64, 67) and (3) that Leissner misrepresented in a June 2020 email that Baby Phat continued to hold the ACC (*id.* at ¶¶ 65-66, 110-21).

Defendants, however, assert that neither Simmons nor Jackson told LF's principals on September 16, 2021, or on any other date, that Baby Phat continued to hold the ACC. As evidence, Defendants point to three conference calls between Baby Phat and LF about the potential Phat Farm transaction and offer evidence that Simmons participated in only one of those calls, on September 16, 2021, during which she did not make any statements about the ACC, and that she did not learn of the ACC until September or October of 2021 (Matteo Aff. Ex. 20 [NYSCEF Doc. No. 64] [email correspondence between Santino Loconte and Jackson arranging conference calls on September 16, 17, and 21, 2021 regarding the transaction]; Ex. 5 [NYSCEF Doc. No. 49] [Simmons Dep. Tr.] at 27 [Kimora testifying that she had "[a] conversation" with the Loconte family leading up to the transaction]; *id.* at 27 [Kimora testifying that she learned about the ACC around September or October of 2021]; Ex. 8 [NYSCEF Doc. No. 52] [Kimora Aff.] at ¶ 19). Similarly, Defendants provide evidence that, while Jackson participated in all three purported conference calls, he did not make any statements about the ACC on any of those calls because he did not learn about the capital investment into Baby Phat until November or December of 2021 (Matteo Aff. Ex. 19 [NYSCEF Doc. No. 63] [Jackson Dep. Tr.] at 39). Defendants further provide evidence that none of LF's principals recalled having any discussions with Simmons or Jackson regarding the ACC (Matteo Aff. Ex. 21 [NYSCEF Doc. No. 65] [Anthony Loconte Dep. Tr.] at 70-71 [recalling speaking with Kimora once before signing the Baby Phat deal and once when they signed the deal but does not recall discussing anything other than Kimora being excited for the deal], 83-84; Ex. 22 [NYSCEF Doc. No. 66] [Adam Lefkowitz Dep. Tr.] at 79; Ex. 23 [NYSCEF Doc. No. 67] [Santino LaConte Dep. Tr.] at 70)].¹¹ Based on the foregoing, Defendants have established prima facie their entitlement to summary judgment dismissing Plaintiff's fraud claim.

¹¹ The Court does not credit Defendants' argument that even if Plaintiff was misled (which Defendants vigorously dispute) by the false financials of Baby Phat (or Defendants' failure to alert Plaintiff as to the removal of the ACC) prior to the Phat Farm transaction, those misrepresentations or fraudulent omissions cannot be used as the predicate for Plaintiff's fraud claim because Baby Phat finances (including the availability of the ACC) were irrelevant (i.e., not material) to the Phat Farm transaction based on: (1) no representations being made as to Baby Phat's finances in the transaction documents; and (2) Plaintiff was being for the sale solely from Phat Farm's income. It is well settled that the materiality of a fact is not subject to summary disposition (*Dobroski v Bank of Am., N.A.*, 65 AD3d 882 [1st Dept 2009], *lv dismissed* 14 NY3d 785 [2010]; *Brunetti v Musallam*, 11 AD3d 280 [1st Dept 2004]; *see also Parmar v Hermitage Ins. Co.*, 21 AD3d 538, 540 [2d Dept 2005] ["The issue of materiality is generally a question of fact for the jury"]). Here,

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However, in opposition, as set forth above, Plaintiff offers evidence that Simmons held every executive role within Baby Phat (i.e., President, CEO, Treasurer/CFO and Secretary as well as member of Baby Phat's Board of Managers [Amended Operating Agreement at §§ 6.1 and 7.1]) and, therefore, she owed fiduciary duties to Plaintiff. Given these positions, Simmons was under an obligation to disclose material facts, such as the true financial status of Baby Phat, which she failed to do. Thus, Simmons' argument that she did not tell LF that the ACC was being held in September 2021 and, therefore, could not have committed fraud ignores that she had a duty to disclose Baby Phat's true financial condition when she learned of that fact, which arguably occurred by April 2019 or no later than June 2019 (NYSCEF Doc. Nos. 110, 111).¹² Additionally, although Simmons focuses on the June 2020 emails sent by Leissner to argue that he was acting without her authorization and that he alone provided the financial statements to LF, as discussed above, it is a question of fact as to whether Simmons was involved in altering financials provided to LF in October 2021 and whether Leissner was acting as her agent in providing those financial records. Moreover, it is a question of fact as to whether Simmons was on calls in September 2021 regarding the ACC and what was discussed on those calls (SMF at ¶¶ 35-38, NYSCEF Doc. No. 104 at 34-36).

And because Keyway has fiduciary obligations to Loconte (discussed *infra*), the same evidence supports that there are triable issues of fact surrounding Plaintiff's claim of fraud as against Keyway based on its failure to alert Loconte as to the withdrawal of the ACC. Furthermore, there is also a question of fact over whether Leissner was sending the falsified financials on behalf of Keyway and Simmons as their agent since Simmons essentially delegated the responsibility concerning Baby Phat's finances to Leissner as her agent. Contrary to Defendants' contentions, regardless of whether it is undisputed that Leissner was never a member, manager, director, officer or employee of Keyway (Defs' SMF at ¶ 8), the status of a person as an agent does not hinge on a formal title. Furthermore, even if an individual denies that a purported agent has the actual authority to bind a principal, a principal may be liable for the acts of their agent if the agent is acting with apparent authority. "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority" (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]). A third

a jury may well determine that given the symbiotic nature of the relationship between the men's (Phat Farm) and women's (Baby Phat) lines of clothing, that Plaintiff justifiably relied on the material fact of the ACC being in Baby Phat's account in agreeing to enter into the Phat Farm transaction believing that money could be used to bolster Baby Phat's (and thus arguably Phat Farm's) businesses.

¹² Again, it will be up to the trier of fact to decide if Simmons can avoid liability based on a claim that she did not sign or know about the Amended Operating Agreement and First Amendment and, therefore, cannot be responsible for the failure to comply with its requirements (i.e., to maintain the \$5 million ACC in Baby Phat's account and Keyway had to become co-guarantor on the CNOB loan).

party cannot rely on the alleged agent's own action and statements, since apparent authority cannot be based upon the agent's acts (*see Emigrant Mtge. Co., Inc. v Public Admr. of Kings County*, 207 AD3d 437 [2d Dept 2022]; *Sherrod v Mount Sinai St. Luke's*, 204 AD3d 1053 [2d Dept 2022]; *Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc.*, 197 AD3d 1274, 1278 [2d Dept 2021]). "One who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority" (*Ford v Unity Hosp.*, 32 NY2d 464, 472 [1973]; *see also ER Holdings, LLC v 122 W.P.R. Corp.*, 65 AD3d 1275 [2009]). In dealing with an agent, a person is entitled to rely on conduct of the agent's principal which gives "rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal" (*Malefakis v Jazrawi*, 209 AD3d 727, 728 [2d Dept 2022]), although "only to the extent that such reliance is reasonable" (*Hallock*, 64 NY2d at 231).

Plaintiff provides evidence that Leissner was authorized to transact business on behalf of Keyway and Baby Phat, that he held himself out as authorized to work on Simmons's behalf, that Defendants acknowledged Leissner's authority to act on their behalf, and that Leissner was transacting business for Simmons through her various entities regularly (RPSMF at ¶ 4; NYSCEF Doc. No. 98 at 39-42, 48, 88-89 [Anthony Loconte deposition testimony that Leissner was representing Simmons in September 2021 during the discussions relating to the transaction]; NYSCEF Doc. No. 99 [email chain between, among others, Leissner and Robins copying Simmons and stating that it was forwarding the "fully executed LOI"]; NYSCEF Doc. No. 104 [Jackson deposition testimony that Leissner was the "unofficial CEO" of Baby Phat]; NYSCEF Doc. No. 105 [email chain with Leissner stating the \$5 million to fund Baby Phat was "approved"]). This evidence is sufficient to raise a question of fact as to whether Leissner was acting as Simmons' and Keyway's agent such that they could be held liable for Leissner's conversion,¹³ fraudulent misrepresentations and/or omissions concerning the ACC.

Based on the foregoing, the branch of Defendants' motion seeking to dismiss the First Cause of Action shall be denied.

C. Plaintiff's Second Cause of Action for Breach of Fiduciary Duties Against Keyway Brought Derivatively on Behalf of Baby Phat

Plaintiff alleges that Keyway breached its fiduciary duties to Baby Phat by "falsifying financial information and/or looting the Company of \$5,000,000 in cash" (Complaint at ¶ 124). Defendants, however, argue that, as a non-managing member of Baby Phat, a limited liability company, Keyway cannot as a matter of law owe fiduciary duties to Baby Phat or LF (Defs' Mem. at 12). According to Defendants, this claim must be dismissed because Keyway was not a member of Baby Phat's Board of Managers which had the exclusive "power and authority to manage" Baby

¹³ Defendants' argument that they cannot be responsible for conversion because they did not benefit from the removed ACC is of no moment since there are disputed questions of fact over this issue, particularly since Kimora's brother was the recipient of over \$1 million of the funds.

Phat's affairs (Amended Operating Agreement at Section 6.1(c) ["Except as specifically set forth in this Agreement, the Members hereby delegate all power and authority to manage the business and affairs of the Company to the Board. The Board will delegate the management of the day-to-day operation of the business of the Company to such officers as the Board determines appropriate, provided that the business and affairs of the Company will be managed and all powers will be exercised under the ultimate direction of the Board."]; RSMF at ¶¶ 14-18). However, it is well settled that "members of an LLC may stand in a fiduciary relationship to each other and the LLC" (*Jones v Voskreshenskaya*, 125 AD3d 532, 533 [1st Dept 2015]; see also *Piller v Princeton Realty Assoc. LLC*, 173 AD3d 1298, 1303 [3d Dept 2019] ["Pursuant to Limited Liability Company Law § 409, members of a limited liability company owe one another a fiduciary duty to act in good faith and with the degree of care of an ordinarily prudent person under similar circumstances"]). Although it is true that generally speaking, "[a] member who is not a manager does not owe a duty to the LLC or its members, except to the extent he or it participates in the management of the LLC" (1 N.Y. Prac., New York Limited Liab Companies and Partnerships § 1:8),¹⁴ courts have found that controlling members owe a fiduciary duty to the other members (*21st Century Diamond, LLC v Allfield Trading, LLC*, 88 AD3d 558 [1st Dept 2011]; *McGuire v Huntress*, 83 AD3d 1418 [4th Dept 2011], *lv denied* 17 NY3d 712 [2011]; *Widewaters Herkimer Co., LLC v Aiello*, 28 AD3d 1107 [4th Dept 2008]; *Madison Hudson Assoc. LLC v Neumann*, 44 AD3d 473 [1st Dept 2007]; *O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281 [1st Dept 2007]; *Aranki v Goldman & Assoc., LLP*, 34 AD3d 510 [2d Dept 2006]; *Bamford v Penfold, L.P.*, 2020 WL 96742 [Del Ch Ct 2020] [individual who controlled managing member had fiduciary duties]; *Kelly v Baum*, 2010 WL 629850 at * 10 [Del Ch Ct 2010] ["unless the LLC agreement in a manager-managed LLC explicitly expands, restricts, or eliminates traditional fiduciary duties, managers owe those duties to the LLC and its members and controlling members owe those duties to minority members"]; *Matter of Atlas Energy Resources, LLC*, 2010 WL 4273122 at *6 [Del Ch Ct 2010] ["in the absence of explicit provisions in a limited liability company agreement to the contrary, the traditional

¹⁴ See also 4D N.Y. Prac., Com. Litig. in New York State Courts § 104:21 (5th ed.) ("A manager of an LLC owes a fiduciary duty to the LLC and its members . . . Equal members of an LLC may stand in a fiduciary relationship to each other and the LLC, but a member who is not a manager does not owe a fiduciary duty to the LLC or its members, except to the extent that such member participates in the management of the LLC, or such fiduciary duty is set forth in the LLC operating agreement"); *Kalikow v Shalik*, 43 Misc 3d 817, 825 (Sup Ct, Nassau County 2014) ("It is noted that section 409[a] of New York's Limited Liability Company Law sets forth, inter alia, the duties of a limited liability company manager, as follows, 'A manager shall perform his or her duties as a manager, including his or her duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances'. Noticeably absent from the Limited Liability Company Law, which expressly imposes a duty of good faith upon managers of an LLC, is any concomitant duty on a non-managing member"); *Lester v Capo*, 2016 NY Slip Op 30214(U) at *18 (Sup Ct, New York County 2016) ("Managing members of LLCs owe fiduciary duties to the company and its non-managing members. . . As Plaintiffs concede, New York, like many other jurisdictions, does not impose similar duties on non-managers").

fiduciary duties owed by corporate directors and controlling shareholders apply in the limited liability company context”]; *Hodnett v Medalist Partners Opportunity Master Fund II-A, L.P.*, 2022 WL 4072935 [SDNY 2022]; *Denim N.A. Holdings, LLC v Swift Textiles, LLC*, 816 F Supp 2d 1308, 1325-26 [MD Ga 2011] [“Here, though, the Operating Agreement permitted Swift to appoint four managers—and replace the managers it appointed—without Plaintiff’s approval. Moreover, under the Operating Agreement, no manager is permitted to take any action unless the action has been approved by at least a majority of the managers. Therefore, Swift’s ability to appoint four managers gave it de facto control of the DNA board of managers. That control creates a genuine fact dispute as to whether Swift was a managing member of DNA and therefore owed fiduciary duties to Holdings”). Here, Keyway holds a 70% majority interest in Baby Phat and has the power to appoint four out of the five members on the board of managers and Keyway’s sole owner (Simmons) was a managing member of the Board of Managers (Amended Operating Agreement at ¶ 6.1[a][i]). Because the Board of Managers’ acts by majority vote (Amended Operating Agreement at § 6.3[b]), Keyway’s appointments constituted a majority of the Board of Managers and thus, in effect, Keyway dictated all acts by the Board of Managers. Accordingly, because Keyway was not only the majority member of Baby Phat but also effectively controlled the Board of Managers, Keyway owes a fiduciary duty to the minority member (Loconte). Indeed, to hold otherwise would be to put form over substance, which this Court declines to do.

Furthermore, for all the reasons set forth herein concerning the evidence establishing that triable issues of fact exist as to Keyway’s fraud and conversion, this same evidence supports that there exist triable issues of fact over Keyway’s breach of fiduciary duty.

Based on the foregoing, the branch of Defendants’ motion seeking dismissal of the Second Cause of Action shall be denied.

D. Plaintiff’s Fourth Cause of Action for Breach of the Amended Operating Agreement and Implied Covenant of Good Faith and Fair Dealing Against Keyway

Plaintiff’s Fourth Cause of Action alleges that Keyway: (1) breached Sections 3.1, 3.2(a) and 2.5 of the Amended Operating Agreement by allegedly removing \$4.2 million of the ACC from Baby Phat without Plaintiff’s consent; (2) breached the First Amendment to the Amended Operating Agreement requiring Keyway to become a co-guarantor on the CNOB Loan; and (3) breached the implied covenant of good faith and fair dealing based on Keyway’s alleged conduct in actively working to deprive LF of the benefits of its rights in Baby Phat (Complaint at ¶¶ 131-144).

“The essential elements of a breach of contract cause of action are ‘the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages’” (*Blank v Petrosyants*, 203 AD3d 685, 687-688 [2d Dept 2022], quoting *Liberty Equity Restoration Corp. v Maeng-Soon Yun*, 160 AD3d 623, 626 [2d Dept 2018]).

New York courts recognize that within every contract is an implied covenant of good faith and fair dealing (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Dalton v Educ. Testing Serv.*, 87 NY2d 384 [1995]; *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62 [1978]; *Aventine Inv. Mgt., Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513 [2d Dept 1999]; *Components Direct, Inc. v European Am. Bank & Trust Co.*, 175 AD2d 227 [2d Dept 1991]; *La Barte v Seneca Resources Corp.*, 285 AD2d 974 [4th Dept 2001]; *Tapps of Nassau Supermarkets, Inc. v Linden Blvd., L.P.*, 269 AD2d 306 [1st Dept 2000]). The covenant is breached when a party acts in a manner that deprives the other party of the right to receive benefits under their agreement (*511 W. 232nd Owners Corp.*, 98 NY2d 144; *Aventine Inv. Mgt., Inc.*, 265 AD2d 513). The implied covenant of good faith and fair dealing between parties to a contract “embraces a pledge that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract’” (*511 W. 232nd Owners Corp.*, 98 NY2d at 153, quoting *Dalton*, 87 NY2d at 389). Thus, courts view it as encompassing “promises which a reasonable person in the position of the promisee would be justified in understanding were included” (*511 W. 232nd Owners Corp.*, 98 NY2d at 153). Therefore, “the duties of good faith and fair dealing do not imply obligations ‘inconsistent with other terms of the contractual relationship’” (*511 W. 232nd Owners Corp.*, 98 NY2d at 153, quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]; *Capital Z Fin. Serv. Fund II, L.P. v Health Net, Inc.*, 43 AD3d 100 [1st Dept 2007] [breach of implied covenant of good faith and fair dealing cannot be used to circumvent the parties’ express agreement or to create a free-floating duty unattached to the underlying legal document]). The covenant is breached when a party acts in a manner that deprives the other party of the right to receive benefits under their agreement (*511 West 232nd Owners Corp.*, 98 NY2d 144; *Aventine Inv. Mgt., Inc.*, 265 AD2d 513).

In order to establish a breach of the implied covenant, a plaintiff must allege facts that tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff (*Aventine Inv. Mgt.*, 265 AD2d 513; see also *Jaffe v Paramount Communications, Inc.*, 222 AD2d 17 [1st Dept 1996]; *Dvoskin v Prinz*, 205 AD2d 661 [2d Dept 1994]). It is well settled that “[a] breach of the implied covenant of good faith and fair dealing . . . claim may not be used as a substitute for a nonviable claim of breach of contract” (*Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 [1st Dept 2000]; *Prestige Foods, Inc. v Whale Sec. Co.*, 243 AD2d 281 [1st Dept 1997]; *Trade & Indus. Corp. (USA) v Euro Brokers Inv. Corp.*, 222 AD2d 364, 367-68 [1st Dept 1995]). A breach of the implied covenant of good faith claim can survive a motion to dismiss “only if it is based on allegations different than those underlying the accompanying breach of contract claim” (*Siradas v Chase Lincoln First Bank, N.A.*, 1999 WL 787658 at * 6 [SD NY 1999]). Thus, “breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is ‘intrinsically tied to the damages allegedly resulting from a breach of the contract’” (*Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004], quoting *Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]). Stated somewhat differently, a breach of the implied covenant may not be maintained where the breach of the implied covenant is merely an element of the damages alleged in a breach of contract claim (*Casalino Interior Demolition Corp. v Custom Design Data, Inc.*, 235 AD2d 514 [2d Dept 1997], *lv dismissed* 89 NY2d 1085 [1997]).

The Court does not credit Plaintiff's argument that it has a viable claim for breach of the implied covenant of good faith and fair dealing because its allegations with respect to the breach of the implied covenant relate to conduct on the part of Defendants beyond the express provisions of the Operating Agreement, including undertaking actions directly contrary to the successful operation of Baby Phat, such as failing to keep requisite cash reserves so that Baby Phat could meet operating expenses and operating Baby Phat to the exclusion of LF for years (Complaint at ¶¶ 141-143). The Court has no intention of imposing obligations not explicitly provided in the parties' Operating Agreement. Nevertheless, these acts may form the basis for Plaintiff's other claims for fraud, breach of fiduciary duty and conversion. Here, Plaintiff's claim for breach of the implied covenant of good faith and fair dealing is predicated on the exact same allegations as its breach of contract claim and the damages are intrinsically tied to the damages sought in its breach of contract claim. Accordingly, the Court shall grant this branch of Defendants' motion and dismiss so much of the Fourth Cause of Action that is based on a breach of the implied covenant of good faith and fair dealing as duplicative of Plaintiff's breach of contract claim (*see Refreshment Mgt. Serv. Corp. v Complete Off. Supply Warehouse Corp.*, 89 AD3d 913 [2d Dept 2011]; *Deer Park Enter., LLC v Ail Sys., Inc.*, 57 AD3d 711 [2d Dept 2008]; *R.I. Island House, LLC v North Town Phase II Houses, Inc.*, 51 AD3d 890 [2d Dept 2008]; *Pier 50 Studios L.P. v Chelsea Piers, L.P.*, 27 AD3d 217 [1st Dept 2006]; *Empire State Bldg. Assoc. v Trump*, 247 AD2d 214 [1st Dept 1998], *lv dismissed in part, denied in part* 92 NY2d 885 [1998]; *Canstar*, 212 AD2d 452; *Hall v EarthLink Network, Inc.*, 396 F3d 500 [2d Cir 2005]; *Computech Intl., Inc., v Compaq Computer Corp.*, 2002 WL 31398933 [SD NY 2002]).

Turning to Plaintiff's breach of contract claim, Plaintiff contends that Section 3.1 of the Amended Operating Agreement provides that Keyway was required to contribute additional capital of \$5 million into Baby Phat within 180 days. It asserts that Section 3.2(a) provides that Keyway and LF were not entitled to remove the contributions, including the ACC:

(a) Return of Capital. Except as otherwise provided in this Agreement, no Member (i) may demand or receive a return of his, her, or its Capital Contribution or withdraw from the Company or (ii) will have any priority over the other Members as to return of his, her, or its Capital Contributions. Under circumstances requiring a return of any Capital Contribution, no Member will have the right to receive property other than cash, except as may be specifically provided in this Agreement. (NYSCEF Doc. No. 47 at ¶ 3.2[a])

Plaintiff further asserts that Section 2.5 of the Amended Operating Agreement specifically carved out certain decisions that required LF's consent:

2.5 MEMBER DECISIONS. Notwithstanding anything else to the contrary contained herein, the Company shall not take any of the following actions without the prior written consent of either (i) the Members holding more than 80% of all of the outstanding Units (voting together on a single class) or (b) the unanimous consent of the Board:

- (a) cause or permit the consummation of any Liquidation Event, Sale of the Company pursuant to subsection (i) of the definition thereof, or Reincorporation;
- (b) incur, assume, refinance or guarantee any material indebtedness in an amount of over \$250,000 in a single transaction;
- (c) issue any New Securities other than Excluded Securities, except to the event such issuance of Excluded Securities will result in LF holding less than 20% of the outstanding Unites;
- (d) pay a salary to any employee in an amount over \$100,000 annually;
- (e) Make any Distributions pursuant to Section 5.2 of this Agreement;
- (f) Review and approve the annual budgets of the Company;
- (g) Enter into any transaction with any Manager, Member or any of their respective Affiliates, other than in an arm's-length transaction on commercially reasonable terms, as determined by the Board in good faith;
- (h) make any amendment to this Agreement or waive any provision hereof if such amendment or waiver would adversely and disproportionately affect LF as compared to other Members; and
- (i) except for the Additional Capital Contribution, require any additional Capital Contribution of any Member (NYSCEF Doc. No. 47 at ¶ 2.5)

As set forth above, Defendants offer evidence establishing a prima facie case that Keyway did not breach Sections 3.1, 3.2(a) and 2.5 of the Operating Agreement. The parties do not dispute that Keyway made the ACC as required by Section 3.1 (RSMF at ¶¶ 25-26). Defendants assert that Section 3.2(a) provides only that members cannot demand or receive a return of their contributions and that Plaintiff has not provided evidence that Keyway demanded that Baby Phat return the ACC or that Keyway received it, and points to evidence that \$4.2 million of the ACC was transferred to third parties and Keyway never received the proceeds of these purported loans (RSMF at ¶ 29-33, NYSCEF Doc. No. 52 at ¶ 18). Regarding Section 2.5, Defendants provide evidence that Keyway did not cause Baby Phat to take any of the actions enumerated requiring LF's consent with respect to the ACC, but rather that it was Leissner who caused Baby Phat to make the purported loans (*id.*).

In opposition, Plaintiff has offered evidence sufficient to raise a question of fact as to whether Keyway breached these provisions. The parties do not dispute that the \$4.2 million was withdrawn from Baby Phat's account in May 2018 and Plaintiff has offered evidence that the withdrawal was unauthorized (NYSCEF Doc. No. 52 at ¶ 20; RSMF at ¶¶ 29-32). Moreover, as discussed above, there is a question of fact as to whether Leissner was acting as Keyway's agent in the removal of the ACC (*id.*). With respect to Section 2.5, Plaintiff has offered evidence that the ACC was removed without LF's approval in breach of that provision (*id.*).

Defendants also offer evidence establishing prima facie that Keyway did not breach the Amended Operating Agreement through failing to become a co-guarantor of the CNOB Loan. Section 2 of the First Amendment to the Amended Operating Agreement provides:

Amendment to Section 3.2. Section 3.2(d) is hereby added to the Operating Agreement, and provides as follows:

CNOB Loan. In connection with that certain Unit Purchase Agreement dated as of October 13 2021, between the Company and LoConte Family LLC (the “UPA”), the Company's majority Member, Keyway Pride Limited LLC (“Keyway Member”), shall become a co-guarantor of the CNOB Loan (as defined in the UPA) by January 1, 2022, and Keyway Member shall cooperate with LoConte Family LLC (“LoConte Member”) to complete and execute the necessary documentation with ConnectOne Bank with respect to the CNOB Loan for purposes of adding Keyway Member as a co-guarantor of the CNOB Loan.” (NYSCEF Doc. No. 69 [First Amendment to the Operating Agreement] at § 2).

Defendants provide evidence that LF never asked Keyway to become a co-guarantor, nor did it present Keyway with any documents to that effect and, therefore, Keyway did not fail to cooperate with LF in breach of this provision (RSMF at ¶ 68, NYSCEF Doc. No. 52 at ¶ 23).

In opposition, Plaintiff points out that Keyway admits that it has never become a co-guarantor of the CNOB Loan and that requesting compliance with this provision is not required pursuant to the First Amendment to the Operating Agreement. Plaintiff also provides evidence that it is disputed as to whether, even if not required under the terms of the Operating Agreement, LF ever requested Defendants to comply with this provision (NYSCEF Doc. No. 115 [Lefkowitz Dep. Tr.] at 89-91 [testifying that there were conversations “that Keyway was supposed to become a co-guarantor, and they were not cooperating with the process of carrying that out” and didn’t comply]).¹⁵

¹⁵ Plaintiff also offers evidence that Defendants have breached the Amended Operating Agreement in additional ways which it uncovered over the course of discovery and requests that the Court “amend the pleadings pursuant to CPLR 3025(c) to conform to the evidence that LF intends to present at trial regarding the various breaches of the Operating Agreement” (Plf’s Opp. Mem. at 19). Specifically, Plaintiff offers evidence that “Keyway has breached the Operating Agreement in a variety of other manners,” including that on February 7, 2018, Simmons, on behalf of both Keyway and Baby Phat signed an indemnity agreement on behalf of both Keyway and Baby Phat whereby “Simmons, unilaterally agreed that Baby Phat would indemnify Keyway” (RSMF at ¶ 86). Plaintiff also offers evidence that “Keyway (and Simmons, acting on behalf of Keyway and Baby Phat), also unilaterally: (i) authorized salary of over \$100,000 annually to various people and entities; and (2) has entered into a ‘consulting’ agreement with Simmons’ wholly-owned entity, KLS Holdings, LLC” and that these actions “are expressly prohibited by Section 2.5(g), which requires LF’s consent” (Plf’s Opp. Mem. at 19; RSMF at ¶¶ 88-89). Because the Court has determined that there is evidence creating a triable issue of fact as to Keyway’s breaches, there is no need to address these new breaches asserted by Plaintiff in opposition to Defendants’ motion. Thus, although the Court is not willing to conform the pleadings to the proof submitted by Plaintiff in opposition to the motion, the Court will nevertheless, at the conference scheduled herein,

Based on the foregoing, in opposition to Defendants' prima facie showing, Plaintiff has presented evidence supporting that there exist triable issues of fact as to the portion of Plaintiff's Fourth Cause of Action alleging Keyway's breach of the Amended Operating Agreement and the First Amendment to the Operating Agreement. As such, the branch of Defendants' motion that seeks to dismiss the portion of Plaintiff's Fourth Cause of Action that asserts a breach of the implied covenant of good faith and fair dealing shall be granted, and the branch of Defendants' motion to dismiss the portion of the Fourth Cause of Action that asserts a claim for breach of contract shall be denied.

E. Plaintiff's Third Cause of Action for Conversion Against Keyway Brought Derivatively on Behalf of Baby Phat

A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006] ["Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights"]). A cause of action to recover damages for conversion requires a showing that the defendants exercised unauthorized dominion over the plaintiff's property to the exclusion of the plaintiff's rights (*El-Khoury v Karasik*, 265 AD2d 372 [2d Dept 1999]). "[A] cause of action for conversion may be stated by allegations of a corporate officer's misappropriation of corporate funds" (3P-733, *LLC v Tawan Davis*, 187 AD3d 626, 629 [1st Dept 2020]).

Here, Defendants have submitted evidence showing prima facie that Keyway cannot be liable for conversion because neither Simmons nor Keyway exercised dominion over the ACC monies nor did they receive any of the proceeds of those transfers which were sent to third parties and, therefore, Keyway did not exercise dominion or control over those funds (RSMF at ¶¶ 29-33 [summarizing evidence supporting their contentions that Leissner caused Baby Phat to purportedly loan \$4.2 million in two transactions, one for \$3 million to Dr. Stock and one as a transfer of \$1.2 million to Blaze Ventures]). Specifically, Defendants have provided evidence that Leissner transferred \$3 million from Baby Phat to an Austrian lawyer, Dr. Emilio Stock, to purchase a house for his parents and Plaintiff has admitted that \$3 million was transferred to Stock (RSMF at ¶ 30; NYSCEF Doc. No. 55 [promissory note in the amount of \$3 million with Stock as the borrower and Baby Phat as the lender]; NYSCEF Doc. No. 56 [email between Stock and Simmons agent copying Simmons and stating "Tim was the one who facilitated this loan from Baby Phat"]; NYSCEF Doc. No. 57 [May 2018 Bank of America Statement for Baby Phat reflecting wire transfers out of Baby Phat, including one in the amount of \$2 million to Stock on 5/25/2018]). Defendants have also provided evidence that Leissner transferred \$1.2 million to Blaze Ventures,

address any application Plaintiff may have to seek leave to amend the Complaint to add these additional breaches.

a film company owned and operated by Simmons' brother and Defendants have admitted that the \$1.2 million was transferred to Blaze Ventures (RSMF at ¶ 31; NYSCEF Doc. No. 109 [Simmons Dep. Tr.] at 150 [testifying that Blaze Ventures is a film company "for" her brother]; NYSCEF Doc. No. 54 [promissory note in the amount of \$1.2 million with Blaze Ventures LLC as the borrower and Baby Phat as the lender]; NYSCEF Doc. No. 57 [May 2018 Bank of America Statement for Baby Phat reflecting wire transfers out of Baby Phat, including one in the amount of \$1.1 million to Blaze Ventures on 5/22/2018]). Simmons has provided an affidavit in which she represents that neither she nor Keyway received the proceeds of the purported loans evidenced by the promissory notes, that she has tried to recover the proceeds of the purported loans but has not been able to do so and that she did not authorize Leissner to make those purported loans (NYSCEF Doc. No. 52 at ¶¶ 18-20)).

However, in opposition, Plaintiff provides evidence that there are disputed questions of fact as to whether Leissner was acting as Keyway's agent in the transactions, whether Keyway directly or indirectly received any of the proceeds, and whether Leissner used the funds in an unauthorized manner. "Money, if specifically identifiable, may be the subject of a conversion action" [and] "[c]onversion occurs when funds designated for a particular purpose are used for an unauthorized purpose" (*Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017] [citations omitted]). "It is not even necessary that a converter take physical possession of the property [;] '[a]ny wrongful exercise of dominion by one other than the owner is a conversion'" (*Ahles v Aztec Enter., Inc.*, 120 AD2d 903, 904 [3d Dept 1986], *lv denied* 68 NY2d 611 [1986] [citations omitted]; 14 N.Y. Prac., New York Law of Torts § 2:12). Moreover, "lawful possession may become a conversion when the defendant goes beyond the authority of the purpose for his or her possession" (14 N.Y. Prac., New York Law of Torts § 2:12; *see also Rosalinda v Kent Co., Inc.*, 86 AD2d 587 [1st Dept 1982]; *Hallman v Horowitz*, 160 Misc 2d 225 [Dist Ct, Nassau County 1994]).

As discussed above, whether Leissner was acting as Keyway's agent when making the purported loans (and, therefore, exercising dominion and control over the funds) is a triable issue of fact. Moreover, Plaintiff has provided evidence that Leissner purportedly loaned the funds to third parties in an authorized use of the funds which would constitute conversion. Plaintiff has provided evidence that \$3 million of the funds were used to purchase a home in Austria for Leissner's parents ([RSMF at ¶ 48]; NYSCEF Doc. No. 111 [email from Robins to Simmons dated June 4, 2019 listing a purported loan made to Dr. Emilio Stock due to Baby Phat with the total amount due as of April 30, 2019 being \$3,137,822.57]; NYSCEF Doc. No. 139 [certified translation from German to English of NYSCEF Doc. No. 121 which is an email discussing the contract for the purchase of a home in Austria between Leissner and his father Bernd Leissner that Leissner forwarded to Jackson on September 22, 2021]; NYSCEF Doc. No. 140 [certified translation from German to English of NYSCEF Doc. No. 122 which is an email between Emilio Stock and Leissner concerning commissioned work being performed that Leissner forwarded to Jackson]). And, as set forth above, Plaintiff also provides evidence that \$1.2 million of the funds

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were transferred to Blaze Ventures, a film company “for” Simmons’ brother, Vernon Whitlock (RSMF at ¶ 31; NYSCEF Doc. No. 109 [Simmons Dep. Tr.] at 150; NYSCEF Doc. No. 111 [email from Robins to Simmons dated June 4, 2019 listing a purported loan made to Blaze Ventures due to Baby Phat with the total amount due as of April 30, 2019 being \$1,152,604.53]).

Finally, Defendants contend that Plaintiff’s claim for conversion should be dismissed as duplicative of its breach of contract claim because “Loconte bases its cause of action for conversion solely on the supposed misappropriation of the Additional Capital Contribution” and those “same allegations also form the basis of Loconte’s cause of action for breach of the Operating Agreement” (Defs’ Mem. at 14).

“While a cause of action alleging conversion cannot be predicated upon a mere breach of contract, the contracting party may also be held liable in tort where the conduct which constitutes a breach of contract also constitutes a breach of a duty distinct from, or independent of, the breach of contract” (*Connecticut N.Y. Light. Co. v Manos Bus. Mgt. Co., Inc.*, 171 AD3d 698, 699 [2d Dept 2019]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995] [“[A] defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations”]; *Sommer v Fed. Signal Corp.*, 79 NY2d 540 [1992]; *Brown v Kristal Auto Mall Corp.*, 149 AD3d 1025, 1025 [2d Dept 2017] [“[A] claim to recover damages for conversion cannot be predicated on a mere breach of contract”]; 14 N.Y. Prac., New York Law of Torts § 2:12).

Here, Plaintiff’s conversion claim relies upon facts and allegations beyond a breach of the Operating Agreement because Plaintiff is alleging tortious conduct (i.e., conversion)¹⁶ and this claim is asserted derivatively on behalf of Baby Phat rather than Plaintiff’s direct cause of action for breach of contract against Keyway. The damages Baby Phat may recover based on its loss of use of these funds may well be different from the losses Plaintiff may recover based on its loss of the benefit of its bargain. Because this is tortious conduct separate and apart from Plaintiff’s claims for breach of contract based on the alleged removal of the ACC from Baby Phat and the failure of Keyway to become a co-guarantor of the CNOB Loan in breach of the Amended Operating Agreement, it is not duplicative of the breach of contract claim (*see, e.g., Weiner v King*, 43 Misc 3d 1303[A], 2014 NY Slip Op 50455[U] [Sup Ct, NY County 2014]; *Wildenstein v 5H & Co, Inc.*, 97 AD3d 488 [1st Dept 2012] [apartment owner’s allegations that architect took personal property to extort money he claimed she owed to him and the contractor she hired to perform renovations to her apartment stated a wrong separate and distinct from her breach of contract claim against architect and contractor and, therefore, her conversion claim alleged an independent tort and was not duplicative of owner’s breach of contract claim]).

¹⁶ Indeed, the evidence supporting Defendants’ attempt to cover up this misappropriation is additional tortious conduct that takes these acts outside of a simple breach of contract claim.

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Based on the foregoing, the branch of Defendants' motion to dismiss the Third Cause of Action shall be denied.

F. Plaintiff's Fifth Cause of Action for Breach of the Letter Agreement Against Keyway

As Plaintiff withdraws Count Five of its Amended Complaint asserting a claim for breach of the letter agreement against Keyway (Plf's Opp. Mem. at 22 n 5), the branch of Defendants' motion to dismiss the Fifth Cause of Action shall be granted.

CONCLUSION

Accordingly, for the reasons stated and based upon the papers aforesaid, it is hereby

ORDERED that the motion by Defendants for summary judgment is granted in part and denied in part; and it is further

ORDERED that the Fourth Cause of Action (to the extent it asserts a claim for breach of the implied covenant of good faith and fair dealing) and Fifth Cause of Action are dismissed; and it is further

ORDERED that in all other respects, Defendants' motion is denied; and it is further

ORDERED that counsel shall appear for a conference via Teams on May 20, 2024 at 11:00 a.m., the purpose of which is to set the trial date in this action.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
May 17, 2024

ENTER:



Hon. Gretchen Walsh
Justice of the Supreme Court

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TO:

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