SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHAHABUDDEEN A. ALLY **PART 16M**
Justice

REVKA LLC, in its own capacity and as a member of PRINCIPESSA SOHO LLC and in the right of and on behalf of PRINCIPESSA SOHO LLC, Plaintiff, -against- COBI LEVY and ACT 2 HOSPITALITY RG GROUP, LLC, Defendants.	**INDEX NO.** 655547/2023 **MOTION DATE** 3/14/2024 3/27/2024 **MOTION SEQ. NOS.** 006 & 007
COBI LEVY and ACT 2 HOSPITALITY RG GROUP, LLC, Counter-Plaintiffs, -against- REVKA LLC, Counter-Defendant.	**DECISION & ORDER**
COBI LEVY and ACT 2 HOSPITALITY RG GROUP, LLC, Third-Party Plaintiffs, -against- SALIM ASSA and PR LLC, Third-Party Defendants.	

The following e-filed documents, listed by NYSCEF document number, were read on this motion (Seq. No. 6) to/for **AMEND CAPTION/PLEADINGS**: 127-138, 143-149, 152

The following e-filed documents, listed by NYSCEF document number, were read on this motion (Seq. No. 7) to/for **DISMISS**: 109-115, 151, 153-155

Now before the Court for decision are two motions, Motion Sequences 6 and 7.

In Motion Sequence 7, plaintiff/counter-defendant REVKA LLC ("Revka") and third-party defendants SALIM ASSA ("Assa") and PR LLC ("PR"; and, together with Assa, "Third-Party Defendants"; and, together with Revka, the "Assa Parties") seek an order, pursuant to CPLR Rule 3211(a)(1), (5), and (7), dismissing the Counterclaims and Third-Party Complaint of defendants/counter-plaintiffs/third-party plaintiffs COBI LEVY ("Levy") and ACT 2 HOSPITALITY RG GROUP, LLC ("Act 2 Group"; and, together with Levy, the "Levy Parties"). (NYSCEF Doc. 109) The Levy Parties oppose the motion. (*Id.* Docs. 151-54)

In Motion Sequence 6, nonparty Act2 Hospitality RG LLC ("Act2") seeks an order, pursuant to CPLR §§ 1012 and 1013, permitting it to intervene in this action, and, in the same motion, the Levy Parties seek an order, pursuant to CPLR Rule 3025, granting them leave to file an amended pleading and to amend the caption accordingly. (*Id.* Doc. 127) The Assa Parties oppose the motion. (*Id.* Doc. 149)

The motions are consolidated herein for purposes of disposition. For the reasons discussed below, the Assa Parties' motion to dismiss is **GRANTED**, and the Levy Parties' and Act2's motion to intervene and amend is **GRANTED IN PART**.

I. THE ASSA PARTIES' MOTION TO DISMISS

A. Background

1. *Assa's and Levy's Business Relationship, the Purchase Agreement, and Revka*

Levy, a resident of New York County, operates and co-owns, either directly or indirectly, approximately a half-dozen restaurants in New York City. (Am. Answer, Countercls., and Third-Party Compl., dated Dec. 26, 2023 ("Levy Compl.") (NYSCEF Doc. 91), ¶ 1) Act 2 Group is a Florida limited liability company owned and managed by Levy. (*Id.* ¶ 2) Assa owns and controls, either directly or indirectly, PR and Revka. (*Id.* ¶ 5) PR and Revka are both New York limited liability companies. (*Id.* ¶¶ 3-4)

In 2013, Levy, along with six of his friends, founded a restaurant in downtown Manhattan named Little Prince. (*Id.* ¶ 8) Principessa Soho LLC ("Soho"), a New York limited liability company, owns Little Prince. (*Id.* ¶ 10) Levy and his friends were each granted a membership interest in Soho. (*Id.*) Levy was made Little Prince's manager and has overseen every aspect of its

operations, including having originally named and designed the restaurant and created its menus. (*Id.* ¶ 9)

In 2015, after Levy had been managing Little Prince successfully for two years, Levy met Assa. (*Id.* ¶ 12) Assa was co-owner of a midtown Manhattan restaurant named Butter, which was then suffering financially. (*Id.* ¶ 15) Assa, who has never managed a restaurant, offered Levy the opportunity to take over Butter's management. (*Id.*) Levy accepted, and under his management Butter became profitable. (*Id.* ¶ 16)

Based on Levy's turnaround of Butter, Assa approached Levy about investing in restaurants that Levy himself owned and operated. (*Id.* ¶ 17) Subsequently, in 2018, Assa and Levy started a new restaurant named Lola Taverna near Little Prince in downtown Manhattan. (*Id.* ¶ 18) Concurrently, Assa expressed his interest to Levy in purchasing an ownership interest in Little Prince. (*Id.* ¶ 19)

In September 2018, Assa and Levy reached a deal for Assa to take a stake in Little Prince. (*See id.* ¶¶ 20-27) The deal was structured so that one of Little Prince's original investors, Jeffrey Chodorow, would cash out his 38% interest in Soho and Assa would come in as a new investor. (*Id.* ¶ 20) Chodorow sought to cash out not only his interest in Soho but also his interest in another restaurant named Babu Ji. (*Id.* ¶ 21) Levy agreed to purchase both interests from Chodorow, agreeing to pay $250,000 for Chodorow's stake in Soho and $372,000 for his stake in Babu Ji. (*Id.* ¶ 22) Assa, in turn, agreed to purchase those interests from Levy. (*Id.* ¶¶ 23-24) As to the 38% interest in Soho, however, Assa agreed to pay only $201,000, rather than the $250,000 that Levy had paid. (*Id.* ¶ 24)

The deal was formalized in a written Purchase Agreement and Warranties executed on or about September 27, 2018, between PR and Levy (the "Purchase Agreement"). (*Id.* ¶ 26; Affirm. in Supp. of Mot. to Dismiss the Countercls. & Third-Party Compl., dated Feb. 16, 2024 ("Migliaccio Affirm.") (NYSCEF Doc. 110), Ex. D (NYSCEF Doc. 114)) As to the purchase price, the Purchase Agreement provided:

> In consideration of and in exchange for the sale, assignment, transfer and conveyance of the 100% Member Interest in accordance with the terms and conditions herein, [PR] agrees to pay [Levy] $201,000.00 for the interests in the Principessa restaurant [*i.e.*, Little Prince] and $365,000.00 for the interests in the Babu Ji restaurant, for a total Purchase Price in the amount of $566,000.0 as follows:

> **a.** $365,000.00 paid to [Levy] on the date of execution herewith; and,
>
> **b.** $201,000.00 (less a $100,000 Buyer's Credit from [Levy] to [PR]) paid to [Levy] within six (6) months of the execution herewith.

(Migliaccio Affirm., Ex. D, ¶ 2) Assa and Levy intended to combine the 38% interest in Soho purchased from Chodorow with Levy's own 13% interest, resulting in a combined 51% interest in Soho that would then be transferred to a company managed by Assa and co-owned by Levy and PR. (Levy Compl. ¶ 27) This intent is reflected in paragraph 3 of the Purchase Agreement, which provides:

> **(a)** It is understood and agreed, that regardless of the structure or entities ultimately utilized for ownership of the Acquisition Interests, that the percentage sharing between [PR] and [Levy] in the ownership shall be as follows:
>
> . . . .
>
> **(2)** For the net 50.16% member interest acquired in the [Little Prince] restaurant, 80% [PR] and 20% [Levy].

(*Id.* ¶ 3(a)(2)) The company through which Levy and PR would control the combined 51% interest in Soho is Revka. (Levy Compl. ¶ 27) Under their plans, Levy would, and in fact did, remain Soho's manager. (*Id.*)

The amount owed to Levy for Chodorow's 38% interest in Soho has allegedly never been paid in full. (*Id.* ¶¶ 28-29) Nevertheless, Revka was formed and has been operated by Assa, acting as its manager, as if it had acquired the full 51% interest in Soho contemplated under the Purchase Agreement. (*Id.* ¶ 30). Assa has allegedly used the "fiction" that Revka is now a member of Soho to pursue a vendetta against Levy through concocted grievances and demands for information. (*Id.* ¶ 31)

2. *The Claims In This Action*

Revka filed its Complaint in this action on November 3, 2023. (Compl., dated Nov. 3, 2023 (NYSCEF Doc. 2)) The Complaint alleges eight causes of action, on behalf of itself as well as derivatively on behalf of Soho, sounding in breach of contract, breach of fiduciary duty, conversion, unjust enrichment, and injunctive relief. (*See id.* ¶¶ 20-62) Revka's claims stem from Levy having allegedly caused Soho to make distributions to himself and Act 2 Group but not to Revka, even though Revka is allegedly a member of Soho and Levy and Act 2 Group are not. (*See id.* ¶¶ 20-62) Revka also claims that Levy caused Soho to make improper payments to another member of Soho.

(*Id.* ¶ 14) In addition to damages, Revka seeks an order removing Levy as Soho's manager, replacing him with Revka, and requiring Levy to cooperate in transitioning control of Soho's business to Revka. (*See id.* ¶ 62)

The Levy Parties filed their Answer to the Complaint on December 4, 2023. (Answer, dated Dec. 4, 2023 (NYSCEF Doc. 65). The Answer asserted seven affirmative defenses to Revka's claims. (*See id.* at 6-7)

On December 26, 2023, the Levy Parties filed an Amended Answer, Counterclaims, and Third-Party Complaint. (Levy Compl.) The Levy Parties' Counterclaims and Third-Party Complaint allege four causes of action:

1. The first cause of action, alleged against each of the Assa Parties based on the facts recited above, seeks a declaration that the 38% interest in Soho for which Levy paid $250,000 belongs to Levy or Act 2 Group and not to any of the Assa Parties. (Compl. ¶¶ 33-34)
2. The second cause of action, also alleged against each of the Assa Parties, sounds in fraud. (*See id.* ¶¶ 35-42) The Levy Parties' theory is that the Assa Parties implemented a scheme to encourage Levy to purchase Chodorow's 38% interest in Soho with the intent to then take that interest from Levy without paying for it. (*Id.* ¶ 37) They allegedly structured the Purchase Agreement so that PR had six months to make the payment and could then implement a "fake it until you make it" strategy of pretending to be the owner of Little Prince without actually being the owner. (*Id.* ¶ 38) The Assa Parties allegedly concealed this scheme from the Levy Parties. (*Id.* ¶ 39) As a remedy, the Levy Parties seek recission of that much of the Purchase Agreement that concerns the purchase of the 38% interest in Soho, as well as punitive damages. (*See id.* ¶ 42; *id.* wherefore ¶ iii)
3. The third cause of action, alleged only against PR and Revka, is for breach of the Purchase Agreement for failure to pay the $201,000 owed for the 38% interest in Soho. (*Id.* ¶¶ 43-46) Revka, the Levy Parties allege, was assigned the Purchase Agreement by PR. (*Id.* ¶ 46) The third cause of action is expressly alleged in the alternative to the second cause of action for fraud. (*Id.* ¶ 44)

4. The fourth case of action, also alleged against each of the Assa Parties, seeks a declaration that Soho must indemnify the Levy Parties for their expenses, including attorneys' fees, pursuant to § 5.5.2 of Soho's operating agreement, which section provides that Soho "shall indemnify each Manager or Member for any act performed by the Manager or Member with respect to [Soho] matters, except for fraud, bad faith, gross negligence, or an intentional breach of th[e] Agreement." (*Id.* ¶¶ 47-49)

B. Legal Standard

The Assa Parties move to dismiss the Levy Parties' Counterclaims and Third-Party Complaint pursuant to CPLR Rule 3211(a)(1), (5), and (7).

Under New York's "well-established liberal pleading standards," in deciding a motion to dismiss pursuant to CPLR Rule 3211, a court must "assume all facts asserted in the complaint to be true and draw all reasonable inferences from those assertions." *34-06 73, LLC v. Seneca Ins. Co.*, 39 N.Y.3d 44, 51 (2022) (collecting cases). After giving the plaintiff the benefit of all reasonable inferences, a court must "determine only whether the alleged facts fit within any cognizable legal theory." *Sassi v. Mobile Life Support Servs., Inc.*, 37 N.Y.3d 236, 239 (2021) (internal quotation marks and citation omitted). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *Carlson v. Am. Int'l Grp., Inc.*, 30 N.Y.3d 288, 298 (2017) (internal quotation marks and citation omitted).

CPLR Rule 3211(a)(1) provides that a court may dismiss a proceeding based upon "documentary evidence." Dismissal is warranted under Rule 3211(a)(1) only where "the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law." *Carlson*, 30 N.Y.3d at 298 (internal quotation marks omitted). Evidence qualifies as documentary evidence within the meaning of Rule 3211(a)(1) only if it is "unambiguous," "essentially undeniable," and of "undisputed authenticity." *VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC*, 171 A.D.3d 189, 193 (1st Dep't 2019) (citation omitted). Qualifying evidence includes "documents reflecting out of court transactions such as 'mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable.'" *Unlimited Assets, Inc. v. PennyMac Corp.*, 75 Misc. 3d 1238(A), at *2 (N.Y. Sup. Ct. Bronx Cty. Aug. 8, 2022) (quoting *Magee-Boyle v. Reliastar Life Ins. Co. of N.Y.*, 173 A.D.3d 1157, 1159 (2d Dep't 2019)).

CPLR Rule 3211(a)(5) provides that a court may dismiss a pleading where "the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statue of frauds."

CPLR Rule 3211(a)(7) provides that a court may dismiss a pleading for failure to state a cause of action. On a motion to dismiss brought pursuant to Rule 3211(a)(7), a court "must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 570-71 (2005) (internal quotation marks and citation omitted). When considering such a motion, however, a court need not accept as true "conclusory allegations of fact or law not supported by allegations of specific fact." *Wilson v. Tully*, 43 A.D.2d 229, 234 (1st Dep't 1998). "In assessing the legal sufficiency of a claim, the Court may consider those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference . . . and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference." *Dragonetti Bros. Landscaping Nursey & Florist, Inc. v. Verizon N.Y., Inc.*, 71 Misc. 3d 1214(A), at *2 (N.Y. Sup. Ct. N.Y. Cty. Apr. 28, 2021) (internal quotation marks and citation omitted), *aff'd*, 208 A.D.3d 1125 (1st Dep't 2022).

C. Discussion

1. *A Prior Release Bars the First, Second, and Third Causes of Action in the Counterclaims and Third-Party Complaint*

The Assa Parties' primary argument for dismissal of the Levy Parties' Counterclaims and Third-Party Complaint is that the first, second, third causes of action are barred by a release. On July 16, 2021, Levy, Act 2, Assa, and a number of their companies not involved in the instant action executed a Confidential Settlement Agreement and Release (the "Settlement Agreement") resolving two prior lawsuits: (1) *Prinkipas, LLC et al. v. Salim Assa et al.*, Index No. 625394/2021 (N.Y. Sup. Ct. N.Y. Cnty.); and (2) *210 Prinkipas LLC v. Cobi Levy et al.*, Index No. 654298/2021 (N.Y. Sup. Ct. N.Y. Cnty.). (Migliaccio Affirm., Ex. C (NYSCEF Doc. 113)) The Settlement Agreement was effective on the last date that it was signed, which is July 16, 2021. (*Id.* ¶ 34; *see also id.* at pp. 7-8)

The Assa Parties submit a copy of the Settlement Agreement in support of the motion. (*See generally id.*) The Levy Parties dispute neither the fact that they entered into the Settlement Agreement nor that the copy of the agreement submitted is authentic. The Settlement Agreement is documentary evidence that the Court may consider in deciding the motion pursuant to CPLR Rule 3211(a)(1). *See Landmark Ventures, Inc. v. Insightec, Ltd.*, 179 A.D.3d 493, 495 (1st Dep't 2020) (considering a settlement agreement in deciding a motion under CPLR Rule 3211(a)(1)); *Jackson v. Gross*, 150 A.D.3d 710, 711 (2d Dep't 2017) (same).

Paragraph 14 of the Settlement Agreement, a general release provision, provides, in relevant part:

> Prinkipas, Levy and [Act 2 Hospitality RG Group, LLC] and their respective affiliates, successors and assigns, officers, managers, members, representatives, agents, employees, and principals (the "Levy Releasors") hereby discharge, release and covenant not to sue Assa, Partners, 210 LLC and their respective affiliates, successors and assigns, officers, managers, representatives, agents, employees, and principals (the "Assa Releasees") for any claims, demands, damages, debts, liabilities, obligations, costs, accounts, liens, causes of action, covenants, judgments and executions of every kind and nature whatsoever, in law, equity or otherwise, whether now known or unknown, suspected or unsuspected, which the Levy Releasors ever had, owned or held, or now have, own or hold, against any of the Assa Releasees, from the beginning of time through the Effective Date of this Agreement.

(Migliaccio Affirm, Ex. C ¶ 14) By its own terms, the Settlement Agreement is to be interpreted according to New York law. (*Id.* ¶ 23)

Under New York law, "a general release is governed by principles of contract law." *Mangini v. McClurg*, 24 N.Y.2d 556, 562 (1969); *Smith v. City of N.Y.*, --- N.Y.S.3d ---, 2025 WL 676692, at *2 (1st Dep't Mar. 4, 2025); *In re Jacker*, 105 A.D.3d 1048, 1048 (2d Dep't 2013); *Good v. Drew Bldg. Supply, Inc.*, 266 A.D.2d 925, 925 (4th Dep't 1999); *Stone v. Nat'l Bank & Trust Co.*, 188 A.D.2d 865, 867 (3d Dep't 1992). "Where the language of a release is clear, effect must be given to the intent of the parties as indicated by the language employed." *Schaefer v. Liberty Nat'l Bank & Trust Co.*, 18 N.Y.2d 314, 317 (1966). "Like any contract, a release must be read as a whole to determine its purpose and intent, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous." *Smith*, 2025 WL 676692, at *2 (internal quotation marks and citation omitted). "'A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning

which there is no reasonable basis for a difference of opinion.'" *Id.* (alterations in original) (quoting *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002)). "Strong policy considerations favor the enforcement of settlement agreements," *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 383 (1993); thus, "[g]eneral language in a release will be construed against the person releasing claims and the burden is on that individual to establish that the language is in fact more limited," *Bain v. Gary, Williams, Parenti, Watson & Gary, P.L.*, 636 F. Supp. 3d 124, 139 (D.D.C. 2022) (applying New York law).

"Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release. In fact, a release may encompass unknown claims, including unknown fraud claims." *LMM Capital Partners, LLC v. Mill Point Capital, LLC*, 224 A.D.3d 504, 506 (1st Dep't 2024) (internal quotation marks and citations omitted); *Smith*, 2025 WL 676692, at *2 (internal quotation marks and citations omitted).

i. The Term "Affiliates" Includes PR and Revka

Here, on its face, paragraph 14 of the Settlement Agreement is an extremely broad general release, encompassing all claims of any nature that Levy, Act 2 Group, and their "affiliates" may have against Assa and his "affiliates" arising prior to July 16, 2021. The core of the parties' dispute over the applicability of this provision to the Levy Parties' claims herein is the meaning and scope of the term "affiliate." The Assa Parties contend that the term, as used in the release provision, unambiguously conveys the parties' intent to release any claims, known or unknown, against not only Assa but against PR and Revka as well. They rely on a decision of the Delaware Chancery Court, applying New York law, in *Geier v. Mozido, LLC*, No. 10931-VCS, 2016 WL 5462437 (Del. Ch. Sept. 29, 2016). The Levy Parties argue, however, that within the Settlement Agreement's context of resolving an unrelated dispute and its use of the term "affiliates" in other provisions, the term "affiliates" does not refer to PR or Revka. They also contend that certain extrinsic evidence confirms the parties' intent not to release the claims asserted herein, and they dispute the applicability of *Geier*.

Contrary to the Levy Parties' contentions, *Geier* is apposite, persuasive authority. The plaintiff in *Geier*, Phillip H. Geier ("Geier"), settled via general release a separate, earlier action against, among others, Mozido LLC ("Mozido") related to a default on a promissory note. 2016 WL 5462437, at *2. The general release was not signed by Geier himself but was instead signed by

another individual on behalf of a limited liability company (the "Geier Group") and a trust (the "Geier Trust") that Geier controlled. *Id.* at *2. The general release expressly provided, however, that the "affiliates, subsidiaries, and parents" of the Geier Group and the Geier Trust released any claims that they "ever had, now have or hereafter can have" against the releasees in that action. *Id.* at *6. The *Geier* action was subsequently commenced against Mozido seeking damages related to incentive options that Geier had allegedly been promised in exchange for his service on Mozido's board of directors but that had never been delivered. *Id.* at *1. Mozido moved to dismiss the *Geier* action based on the general release settling the prior action, arguing that the ordinary meaning of the term "affiliate" included Geier individually. *Id.* at *6. Geier argued that the term was ambiguous and urged the Chancery Court to allow discovery regarding the parties' intent. *Id.*

The Chancery Court agreed with Mozido, holding that "the only reasonable interpretation of the term 'affiliate' is that it includes Geier individually as an affiliate of the Geier Trust and the Geier Group." *Id.* That holding was based on a plain reading of the general release and the ordinary meaning of "affiliate":

> Contract provisions should be interpreted consistently with the general purpose of the contract. Since one can discern on the face of the General Release that its purpose is to effect a broad release of claims, intended to cover any preexisting claims the releasors may have against the releasees, it is appropriate to interpret the term "affiliate," as used in the General Release, broadly as well. In determining the meaning of "affiliate," standard dictionary definitions are instructive, including: "an affiliated person or organization," "being close in connection, allied, associated, or attached as a member or branch," or "[s]omeone who controls, is controlled by, or under common control with an issuer of a security."

Id. (footnotes omitted). Because Geier's own complaint indicated that he controlled both the Geier Group and the Geier Trust, the Chancery Court concluded that Geier was their "affiliate" within the ordinary meaning of the term. *Id.*

Geier is directly on point with the arguments and allegations now under consideration. Like the general release at issue in *Geier*, the plain language of paragraph 14 of the Settlement Agreement clearly reflects the parties' intent to effect a broad release of claims. The term "affiliate," furthermore, is used in essentially the same manner in paragraph 14 as it is in the general release at issue in *Geier*. The plain language of paragraph 14 does not reflect any intent by the parties that the term "affiliate" bear any meaning other than its ordinary meaning, which, as

recognized and discussed in *Geier*, includes a person who or an organization that exercises control over another person or organization. Finally, like the plaintiff in *Geier*, the Levy Parties do not dispute the issue of control, instead expressly alleging in the Counterclaims and Third-Party Complaint that Assa "controls and owns" PR and Revka and that Levy "own[s] and manage[s]" Act 2 Group. (Levy Compl. ¶¶ 2, 5)

The Levy Parties' attempts to distinguish *Geier* are unavailing. They argue that the Chancery Court's interpretation of the general release in *Geier* was "colored" by the fact that the case "involved 'sophisticated' parties, in command of diverse trusts and companies, lending each other millions of dollars, and fighting over equity stakes likewise valued in the millions." (Mem. of Law in Opp. to Revka LLC, PR LLC and Salim Assa's Mot. to Dismiss Countercls. and Third-Party Compl., dated Mar. 13, 2024 ("Levy Dismissal Opp.") (NYSCEF Doc. 151), at 8) Although not expressly stated, this argument implies that neither Levy nor Assa are sophisticated parties. The Court disagrees. To the contrary, as the pleadings and other filings in this case make clear, both Levy and Assa are sophisticated businessmen who run numerous successful businesses in Manhattan through multiple separate companies. (Levy Compl. ¶ 1 ("Levy . . . operates and co-owns . . . approximately a half-dozen successful restaurants in New York City."); *see also id.* ¶¶ 8-32) That the comparative sums of money that their businesses are worth or that they themselves possess or manage may be less than those involved in *Geier* does not render them unsophisticated for purposes of applying the relevant contract principles. Levy and Assa simply are not the unsophisticated everyman that the law sometimes seeks to protect by narrowly construing contract terms.

The Levy Parties' other opposition arguments are similarly meritless. They contend, first, that the use of the term "affiliates" in paragraphs 11 and 12 of the Settlement Agreement necessarily results in a meaning that unambiguously excludes PR and Revka as Assa's affiliates. Specifically, paragraphs 11 and 12 concern who certain of the parties may use as counsel and accountants, providing:

> **11.** Levy consents that Richard Migliaccio, Esq. and/or Robert Kaplan, Esq. will be legal counsel for Prinkipas, 210 LLC, Holding, and their affiliates; and if Levy at any time decides to use different legal counsel, he will provide Partners written notice of the change and the name of the new counsel he intends to use and Partners must consent to that use of new counsel, which consent will not be unreasonably withheld.

> 12. Levy consents that Partners shall have the authority to select accountants for any matters involving Prinkipas, 210 LLC, Holding and their affiliates—those accountants are currently Sakkal & Augylius, 3399 Shore Parkway, Brooklyn, New York 11235—unless Levy objects that they accountant[s] should be changed because of a financial issue, some wrongdoing by the accountants, or a legal dispute, including a potential conflict of interest that may arise. In that event, Levy will provide Partners written notice of the change and the name of the new accountants he intends to use and Partners must consent to that use of new accountants, which consent will not be unreasonably withheld.

(Migliaccio Affirm., Ex. C ¶¶ 11-12) According to the Levy Parties, if the Assa Parties' "interpretation of the term 'affiliate' were correct," paragraphs 11 and 12 "would restrict who may be retained as legal counsel or as accountants for any company that Assa owns or controls." (Levy Dismissal Opp. at 6) The plain language of these paragraphs, however, only restricts whom Prinkipas, LLC, 210 Prinkipas LLC, Holding[1] and *their* affiliates may retain as counsel or accountants. Unlike in paragraph 14, Assa is not named in paragraphs 11 and 12. Paragraphs 11 and 12 do not reflect, therefore, an intent to restrict whom Assa and *his* affiliates may retain as counsel or accountants. By contrast, by specifically including Assa, paragraph 14 plainly reflects a broader intended scope for the release, applying to any organization that Assa owns or controls, such as PR and Revka. Paragraphs 11 and 12 do not require that the term "affiliate" be interpreted as the Levy Parties contend when those paragraphs are read with reference to the whole of the Settlement Agreement.

Next, contrary to the Levy Parties' suggestion, the mere fact that the Settlement Agreement resolves a separate action does not create inherent ambiguity as to the parties' intent that the release apply to claims unrelated to the settled action. Litigants are always free to give up the right to pursue potential claims against an opposing party that have little or nothing to do with a pending lawsuit as consideration for settling that lawsuit—to, in other words, sweeten the pot with a broad waiver. If the Levy Parties "intended to reserve any further claims against" the Assa Parties, they could have and "should have added words of reservation" to the release. *Schaefer*, 18 N.Y.2d at 317.

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[1] In what appears to be an oversight, the Settlement Agreement does not provide the full company name for Holding. It does, however, state that Holding is solely owned by 210 Prinkipas LLC and defines Holding as "a company that is the owner of the registered trademark 'Lola Taverna.'" (Migliaccio Affirm., Ex. C at p. 1)

The single case that the Levy Parties cite to argue that the Court should find the term "affiliates" ambiguous, *CREF 546 West 44th Street, LLC v. Hudson Meridian Construction Group, LLC*, 69 Misc. 3d 747 (N.Y. Sup. Ct. N.Y. Cnty. 2020), is distinguishable. There, the question was whether CREF 545 West 44th Street, LLC's parent, Patrinely Group, LLC, was an "affiliate" within the meaning of an indemnity provision in a contract. *See id.* at 767-68. The court concluded that it was ambiguous whether the term held that meaning, in light of an indemnity provision in a related contract that specifically named Patrinely Group, LLC as an indemnitee while the indemnity provision in the contract under consideration did not, as well as the stricter standard of interpretation applicable to indemnity provisions under New York law, such that a claim for contractual indemnity should be dismissed "[u]nless the contract's language and purpose are 'clear and unambiguous' and 'evince an unmistakable intent to indemnify.'" *Id.* at 768 (quoting *Suazo v. Maple Ridge Assoc., L.L.C.*, 85 A.D.3d 459, 460-61 (1st Dep't 2011)). The instant case does not involve a separate, related agreement containing a potentially conflicting and ambiguity-creating use of the term "affiliate," and the applicable interpretive standard favors, rather than disfavors, a broad reading where, as here, the plain language of the release evinces an intent to effect a broad release of claims.

To the extent that the Levy Parties argue that the Settlement Agreement does not transfer any stake in Soho to PR or Revka and does not make the Purchase Agreement valid where it may otherwise be void, the Levy Parties miss the point. Certainly, the Settlement Agreement does neither of those things—and the Assa Parties do not even appear to argue that it does. But if paragraph 14 of the Settlement Agreement encompasses the Levy Parties' claims against the Assa Parties, its effect is precisely to bar the Levy Parties from affirmatively asserting those claims against the Assa Parties for monetary or other forms of relief. That does not mean, however, that the Levy Parties waived their ability to assert as affirmative defenses to the claims alleged in the Complaint that the Assa Parties failed to satisfy their obligations under the Purchase Agreement or otherwise defrauded the Levy Parties.

Based on the foregoing, the Court follows *Geier* and holds that the term "affiliates," as used in paragraph 14 of the Settlement Agreement, includes the Levy Parties as well as each of the Assa Parties.

ii. The Levy Parties' Claims Accrued Before July 16, 2021

To be released under paragraph 14 of the Settlement Agreement, the Levy Parties' claims in the first, second, and third causes of action must have accrued prior to July 16, 2021, when the Settlement Agreement became effective. Based on the allegations in the Counterclaims and Third-Party Complaint, each of these causes of actions did accrue prior to that date and, as a result, must be dismissed.

The Levy Parties dispute only that the second cause of action for fraud accrued after July 16, 2021. They argue that "Assa's fraudulent misrepresentations were continuous and persisted well past the 2021 settlement agreement. . . . Thus, the fraud claim accrued . . . again after the 2021 settlement agreement." (Levy Dismissal Opp. at 9) As examples of these communications, the Levy Parties refer to certain extrinsic evidence consisting of emails from August 2021. (*Id.*) The Levy Parties cite nothing, however, that would allow the Court to consider, on a pre-answer motion to dismiss, extrinsic evidence to determine whether a fraud claim is supported by ongoing misrepresentations.

But even if the Court were to consider the referenced emails, they do not appear to reflect material misrepresentations by Assa. The Levy Parties fail to offer any explanation, let alone a convincing one, as to how any statements made in the emails, either by counsel or by Assa himself, are materially false or misleading or in any way related to the Assa Parties' alleged obligations under the Purchase Agreement. Indeed, to the extent that the emails purportedly represent admissions that Assa, PR, and/or Revka still owe Levy compensation for the disputed interest in Soho, they would seem, on their face, to refute rather than support the Levy Parties' theory of fraud here. Nor, moreover, do the Levy Parties attempt to explain how they reasonably relied on any of the allegedly false statements in these emails to their detriment. In short, consideration of the emails would not establish a post–Settlement Agreement accrual date and thereby save the fraud claim.

2. *The Levy Parties Fail to State a Claim For Fraud*

Assuming, *arguendo*, that the Levy Parties' second cause of action for fraud is not barred by paragraph 14 of the Settlement Agreement, that cause of action must still be dismissed as duplicative of the third cause of action for breach of contract and because the allegations fail to satisfy the pleading requirements of CPLR Rule 3016(b).

i. The Fraud Claim Is Duplicative of the Breach-of-Contract Claim

The Levy Parties' fraud claim is essentially that the Assa Parties never intended to pay the amount agreed in the Purchase Agreement for the 38% interest in Soho that Levy had purchased from Chodorow. This is nothing more than a restated breach-of-contract claim. It must, therefore, be dismissed as duplicative of the third cause of action for breach of contract. *Essential Home Remodeling v. Rossin*, --- N.Y.S.3d ---, 2025 WL 756829, at * 1 (1st Dep't Mar. 11, 2025) ("[A] breach of contract claim cannot be converted into one for fraud merely by alleging that defendant did not intend to fulfill the contract."); *Brown v. Wolf Grp. Integrated Commc'ns, Ltd.*, 23 A.D.3d 239, 240 (1st Dep't 2005) ("[P]laintiff has alleged no more than that defendants did not intend to honor their contract, which is insufficient to state a claim for fraud."); *Bencivenga & Co. v. Phyfe*, 210 A.D.2d 22, 22 (1st Dep't 1994).

That the Levy Parties seek recission of the Purchase Agreement as the remedy for the fraud claim does not make that claim distinct from the breach-of-contract claim and save it from dismissal. As the Assa Parties correctly point out, the First Department has rejected such an argument. *Empire Outlet Builders LLC v. Constr. Res. Corp. of N.Y.*, 170 A.D.3d 582, 583 (1st Dep't 2019) ("Plaintiff contends that the fraud claim is not duplicative of the contract claim because it seeks rescission of part of the Subcontractor Agreement as an alternate remedy on the fraud claim. However, the equitable remedy of rescission is not available where there is an adequate legal remedy, and plaintiff does not explain why damages—a legal remedy—would be insufficient."). Nowhere in the Counterclaims and Third-Party Complaint do the Levy Parties allege that monetary compensation for the Assa Parties' alleged breach of the Purchase Agreement would be inadequate and why.

ii. The Fraud Claim Fails to Satisfy CPLR Rule 3016(b)

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). "A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)." *Id.*

Here, the Levy Parties fail to state their fraud claim with the particularity required by CPLR Rule 3016(b). The Counterclaims and Third-Party Complaint "fail[] to identify any specific and material misrepresentation of fact" by the Assa Parties and "offer[] only general and

conclusory allegations" of a "scheme" to effectively not fulfill the Purchase Agreement. *Barlow v. Skroupa*, 221 A.D.3d 482, 483 (1st Dep't 2023). Such allegations are insufficient to maintain a fraud claim. *See id.*

3. *The Fourth Cause of Action for Indemnification Must Be Dismissed*

In the fourth cause of action alleged in the Counterclaims and Third-Party Complaint, the Levy Parties seek indemnification for their attorneys' fees pursuant to § 5.5.2 of Soho's operating agreement. (Levy Compl. ¶¶ 47-49) According to the Levy Parties' own allegations, § 5.5.2 provides that Soho "shall indemnify each Manager or Member for any act performed by the Manager or Member with respect to [Soho] matters, except for fraud, bad faith, gross negligence, or an intentional breach of th[e] Agreement." (*Id.* ¶ 48) The Assa Parties seek to dismiss the fourth cause of action on two grounds: (1) the counterclaim cannot properly be asserted against Soho because Revka is suing derivatively on Soho's behalf; and (2) § 5.5.2 of Soho's operating agreement does not provide for indemnification for attorneys' fees. On at least one of these grounds, the Assa Parties are correct as a matter of law, and the fourth cause of action must be dismissed in its entirety.

Initially, although the Levy Parties assert the fourth cause of action against each of the Assa Parties, only *Soho* is expressly obligated to provide the relief of indemnification under § 5.5.2 of its operating agreement. Typically, this alone would require dismissal of the fourth cause of action. Because Revka is suing derivatively on behalf of Soho, however, an additional level of analysis is necessary.

It is a well-established principle of New York law that a "counterclaim may not be asserted against a plaintiff in a capacity different from that in which he or she appears in the action." *Corcoran v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 143 A.D.2d 309, 311 (1st Dep't 1988) (citing *Ehrlich v. Am. Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 259 (1970)); *Michelman-Cancelliere Iron Works, Inc. v. Kiska Const. Corp.-USA*, 18 A.D.3d 722, 723 (2d Dep't 2005) ("'[A] claim and counterclaim must be by and against the same party in the same capacity.'" (alteration in original) (quoting *Ruzicka v. Rager*, 305 N.Y. 191 (1953))); *Conant v. Schnall*, 33 A.D.2d 326, 328 (3d Dep't 1970) ("It is the general rule that a defendant may counterclaim against the plaintiff only in the capacity in which he is sued because of the possibility of prejudice to the person represented."); David D. Siegel, *New York Practice* § 225 (6th ed. 2024) ("If a party has several capacities, a

counterclaim involving that party may be used only in respect of the capacity in which she appears in the action."). New York courts have applied this general principle to, among other things, dismiss counterclaims against a plaintiff in his or her individual capacity when the plaintiff has sued only derivatively on behalf of a company. *E.g.*, *Bull Hill, LLC v. HFZ Member RB Portfolio LLC*, No. 654561/2022, 2024 WL 4202664, at *2 (N.Y. Sup. Ct. N.Y. Cnty. Sept. 16, 2024); *Choi v. Cho*, No. 600686/2014, 2014 WL 12755011, at *5 (N.Y. Sup. Ct. Nassau Cnty. July 28, 2014); *see also Conant*, 33 A.D.2d at 328 ("For example, a shareholder bringing a derivative action is not subject to counterclaims against him individually.").

There is an exception to this principle, however, recognized in the very case on which the Assa Parties rely. In *Conant*, after stating that "a shareholder bringing a derivative action is not subject to counterclaims against him individually," the Third Circuit acknowledged that this "limitation . . . breaks down when the representative is also the real party in interest." 33 A.D.2d at 328. In such a case, the plaintiff's two capacities—individual and representative—effectively merge into one. *Id.* Thus, the sole heir of an estate who sued only as administrator of the estate could nevertheless face counterclaims asserted against him individually, and, similarly, a plaintiff who is the sole shareholder, officer, and director of a corporation who sued on behalf of the corporation could face counterclaims asserted against him individually. *See id.* (citations omitted); *Simon v. Francinvest, S.A.*, No. 162867/2014, 2023 WL 4401155, at *9 (N.Y. Sup. Ct. N.Y. Cnty. July 7, 2023).

Here, Revka purports to own 51% of the membership interests in Soho, typically granting Revka control over Soho. Except for those portions quoted in the Counterclaims and Third-Party Complaint, however, Soho's operating agreement has not been placed before the Court on this motion, so the Court cannot determine what powers are granted to a majority owner thereunder. Additionally, the Levy Parties dispute that Revka ever acquired an ownership interest in Soho, let alone a controlling one. The Court cannot, as a result, determine as a matter of law, on this motion pursuant to CPLR Rule 3211(a)(7), that Revka is or is not in such control of Soho that Revka's individual and representative capacities merge, making Revka subject to the fourth cause of action seeking relief that only Soho can provide. *See Simon*, 2023 WL 4401155, at *9 ("[T]he court cannot determine as a matter of law that it was improper for Kessler to counterclaim against Pascal individually, particularly because JJS is a closely held corporation and its interests are tied

closely with Pascal's own interests."); *Mount Pleasant Cemetery Ass'n v. Burke*, No. 40793-10, 2011 WL 5631291 (N.Y. Sup. Ct. Suffolk Cnty. Oct. 12, 2011) ("Clearly, the counterclaims alleged against Scerri in his official capacity as an officer of the not-for-profit plaintiff are supportable and survive a motion to dismiss under CPLR §3211(a)(6).").

Yet the fourth cause of action must still be dismissed in its entirety on a separate ground. As the Assa Parties correctly argue, § 5.5.2 of Soho's operating agreement does not provide for indemnification for attorneys' fees. In New York, "and indeed, in the rest of the country, the long-standing 'American rule' precludes the prevailing party from recouping legal fees from the losing party 'except where authorized by statute, agreement or court rule.'" *Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 A.D.3d 203, 204 (1st Dep't 2010) (quoting *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 597 (2004)). Indeed, New York courts "ha[ve] been distinctly inhospitable" to claims for attorney's fees through indemnification provisions in contract. *Id.* at 205. Consequently, "a contract assuming th[e] obligation [to pay a party's attorney's fees] must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491 (1989). Because such a duty is contrary to the American rule, a "court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise." *Id.* at 492. "The *Hooper* standard requires more than merely an arguable inference of what the parties must have meant; the intention to authorize an award of fees to the prevailing party in such circumstances must be virtually inescapable." *Gotham Partners*, 76 A.D.3d at 209; *see also id.* at 207 ("[T]he provision must *unequivocally* be meant to cover claims between the contracting parties rather than third-party claims.").

The conclusion that § 5.2.2 of Soho's operating agreement is meant to award attorney's fees to the winning side in a dispute between members or between the manager and members of Soho is not "unmistakably clear," "virtually inescapable," and "unequivocal," as required by *Hooper* and *Gotham Partners*. The provision, as alleged, provides for indemnification for any act "with respect to [Soho] matters, except for fraud, bad faith, gross negligence, or an intentional breach" of the operating agreement. (Levy Compl. ¶ 48) It is unclear precisely what the phrase "with respect to [Soho] matters" means, but it could conceivably cover any action that a manager or member takes on behalf of Soho or Little Prince (which Soho owns and operates) that results

in a third-party suit against the manager or member. The provision's list of exceptions to coverage does not provide any clarity to the degree required under *Hooper* and *Gotham Partners*. But even if it was unmistakably clear that § 5.2.2 is meant to apply to intra-member or -manager disputes rather than third-party disputes, the provision does not expressly mention expenses of any kind, let alone attorney's fees specifically. Such a provision cannot satisfy the exacting *Hooper* standard. *See Learning Experience Sys., LLC v. Collins*, No. 20-CV-2504 (MKB), 2023 WL 5835034, at *30 (E.D.N.Y. Sept. 8, 2023) (applying New York law) (dismissing a counterclaim for indemnification for all attorney's fees and costs where "[t]he indemnification provision at issue before the Court is broad and covers 'all liabilities accrued' with no explicit indication that the parties are unequivocally indemnifying each other for attorney's fees claims"); *Sage Sys., Inc. v. Liss*, 39 N.Y.3d 27, 32 (2022) ("Here, the indemnification provision makes no explicit mention that partners may recoup attorney's fees in an action on the contract.").

II. THE LEVY PARTIES' AND ACT2'S MOTION TO INTERVENE AND AMEND

It is well-settled that "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499 (1st Dep't 2010). Here, the Levy Parties' proposed Second Amended Answer with Counterclaims does not attempt to correct any of the deficiencies identified herein; instead, it seeks only to add an additional party, Act2, and "sort out the distinction between the New York company [Act2] and the Florida company [Act 2 Group]." (Mem. of Law in Supp. of Mot. for Leave to Amend Pleading, for Leave to Intervene, and to Amend Caption, dated Feb. 26, 2024 (NYSCEF Doc. 128), at 9; Affirmation of Ihsan Dogramaci, dated Feb. 26, 2024 (NYSCEF Doc. 132), Exs. 5 & 6 (NYSCEF Docs. 137-38)) To the extent that the Levy Parties propose to make such amendments to the Counterclaims and to the Third-Party Complaint while also converting the latter to cross-claims, the proposed Second Amended Answer with Counterclaims is thus palpably insufficient, and the motion is denied. However, in light of the apparent confusion as to which is the proper entity sued (Act 2 Hospitality Group, LLC or Act2 Hospitality RG Group, LLC), the Assa Parties' failure to seek to amend the Complaint to clarify, and the permissive standard applicable to motions to amend, the Levy Parties may serve an answer, *and only an answer*, that conforms to the proposed amendments.

CPLR § 1012(a)(3) provides for any person's intervention as of right "when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." CPLR § 1013 provides for any person's intervention by permission of the court "when the person's claim or defense and the main action have a common question of law or fact."

> However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance, and that intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings.

Berkoski v. Bd. of Trs. of Inc. Vill of Southampton, 67 A.D.3d 840, 843 (2d Dep't 2009) (internal quotation marks and citations omitted). Because the Assa Parties' claims, if sustained, could affect the interests of nonparty/proposed intervenor Act2 in a real and substantial way, Act2 should be permitted to intervene in this action as an additional defendant under either CPLR §§ 1012(a)(3) or 1013.

Accordingly, it is hereby:

ORDERED that the Assa Parties' motion (Seq. No. 7), pursuant to CPLR Rule 3211(a)(1), (5), and (7), to dismiss the Levy Parties' Counterclaims and Third-Party Complaint is **GRANTED**; and it is further

ORDERED that the Levy Parties' Counterclaims and Third-Party Complaint is **DISMISSED** in its entirety; and it is further

ORDERED that the Levy Parties' and Act2's motion (Seq. No. 6), pursuant to CPLR §§ 1012 and 1013, to intervene and, pursuant to CPLR Rule 3025, for leave to amend is **GRANTED IN PART and DENIED IN PART in accordance herewith**; and it is further

ORDERED that the Levy Parties and Act2 shall file a Second Amended Answer (sans Counterclaims) conforming to the proposed pleading at NYSCEF Docs. 137 & 138 within twenty (20) days of the entry of this Decision and Order; and it is further

ORDERED that the Levy Parties shall serve a copy of this Decision and Order upon the Assa Parties and upon the Clerk of the General Clerk's Office with notice of entry within twenty (20) days thereof; and it is further

ORDERED that service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (Revised August 15, 2019);[2] and it is further

ORDERED that any requested relief not expressly addressed herein has been considered and is denied; and it is further

ORDERED that the Clerk shall mark Motion Sequence Nos. 6 and 7 decided in all court records.

This constitutes the decision and order of the Court.

March 26, 2025
DATE

SHAHABUDDEEN A. ALLY, A.J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
MOTION (SEQ. 6):		GRANTED		DENIED	X	GRANTED IN PART	OTHER
MOTION (SEQ. 7):	X	GRANTED		DENIED		GRANTED IN PART	OTHER
CHECK IF APPROPRIATE:		SETTLE ORDER				SUBMIT ORDER	STAY CASE
		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[2] The protocols are available at https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/Efil-protocol.pdf.