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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK PART 39
Justice

Index Number : 601349/2006
FOSTER, RICHARD N.
vs.
KOVNER, BRUCE
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 601349/06
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JAN 18 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/17/12

BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

RICHARD N. FOSTER,

Plaintiff,

- against -

BRUCE KOVNER, ROBERT WILSON, CAXTON HEALTH HOLDINGS, LLC and CAXTON ASSOCIATES, LP,

Defendants.

CAXTON HEALTH HOLDINGS, LLC and CAXTON ASSOCIATES, LP,

Counterclaim-Plaintiffs,

- against -

RICHARD N. FOSTER,

Counterclaim-Defendant.

DECISION/ORDER
Index No. 601349/06
Mot. Seq. No. 002

BARBARA R. KAPNICK, J.:

In this action, plaintiff Richard N. Foster ("Foster") seeks to recover monies allegedly owed to him, including the value of a 10% equity interest in a healthcare-related investment company, pursuant to oral compensation and joint venture agreements. Defendants Bruce Kovner ("Kovner"), Robert Wilson ("Wilson"), Caxton Health Holdings, LLC ("CHH") and Caxton Associates, LP ("Caxton") move for summary judgment pursuant to CPLR 3212 dismissing Foster's claims.

FACTS

The following facts are taken from the parties' statements of material fact pursuant to Commercial Division Rule 19-a, the pleadings, the affidavits and other evidentiary documents submitted in connection with this motion, and are undisputed unless otherwise indicated.

Foster was a Senior Partner and Director at McKinsey & Co., a business consulting firm (Complaint, ¶ 2). He worked there for 31 years, until 2004 (Foster Dep. 4:13-18). Kovner is the founder and Chairman of Caxton (Complaint, ¶ 9). Wilson is the former Vice Chairman of Johnson & Johnson, from which he retired in May 2003 (Wilson Dep. 3:17-5:3).

In 2003, Foster was 62 years old and deciding whether to leave McKinsey, which had a "strongly suggested retirement age of 60" (Foster Dep. 35:14-21). Although he could have stayed, he was interested in pursuing an idea he had been developing to start a healthcare-related hedge fund, private equity fund and venture capital fund (Foster Dep. 29:7-23).

In December 2003, Foster asked Kovner to lunch to discuss his healthcare fund idea, which Kovner thought was a good one

(Foster Dep. 52:19 - 53:6). Foster then suggested that Wilson be brought into the discussions, which he did with Kovner's approval (Foster Dep. 55:14-25). After a series of meetings, they decided that Foster would join Caxton to implement his healthcare concept (Foster Dep. 55:9-56:9).

To this end, Caxton formed CHH in March 2004 (Bernstein Dep. 41:14-16). Caxton executed a Limited Liability Company Agreement (the "LLC Agreement") for CHH dated as of March 15, 2004, in which Caxton was designated the "Initial Member" of CHH. The LLC Agreement also provided for the admission of additional or substituted persons or entities as members, and defined each member's "Percentage Interest" as the "share of the profits and losses of the Company and the Member's right to receive distributions of the Company's assets" (LLC Agreement ¶ 2). The LLC Agreement also required the Members to make capital contributions "of cash (or promissory obligations), property or services to the Company as shall be determined by a Majority in Interest of the Members at the time of each such admission" (*id.*, ¶ 8).

Thereafter, in a letter to Foster dated March 18, 2004 ("the March 18, 2004 Letter"), Caxton memorialized its understanding of

the agreement the parties had reached up to that date. The letter stated, in pertinent part:

> We are extremely pleased with the progress we are making in the Caxton Health Holdings project. While there are numerous, substantive issues remaining to be resolved, we would like to confirm our agreement concerning the following:
>
> 1. At commencement on April 19, 2004, you will assume the position of Chief Executive Officer of Caxton Health Holdings LLC ("CHH").
>
> 2. Robert Wilson will be offered (and, we understand, will assume) the position of CHH's Chairman.
>
> 3. Each of Bruce Kovner (through Caxton Associates LLC or an affiliate), you and [Wilson] will be designated as "Founding Members" of CHH. Among the terms to be negotiated will be the level of ownership to be acquired by each of the Founding Members.
>
> 4. We agree that the full details of your compensation (including terms for continuation, expansion and termination of employment) need to be worked out and will depend on multiple factors. We agree that your initial compensation by CHH will include a base salary of $500,000 per annum and a draw of $500,000. The draw will be netted against any other compensation (other than the base salary) you may earn. The base salary and draw will be payable concurrently on a semi-monthly basis, with the initial aggregate gross (i.e. pretax) payment of $38,461.54 payable on or about April 30, 2004.

Wilson was represented in the negotiations by the law firm of Debevoise & Plimpton LLP ("Debevoise"). On April 2, 2004, Debevoise sent Foster and Wilson a memorandum (the "Debevoise April 2004 Memorandum") purporting to set forth "the current understandings and highlighting issues for additional discussion for the health care funds". Under the heading "Compensation", the Memorandum stated that "[e]ach Founder will receive an annual salary of $1,000,000. Each Founder will also receive a portion of the management fees and carried interest from each of the Health Care Funds".

CHH started operations sometime in April 2004. Foster assumed the duties of President or Chief Operating Officer and Wilson functioned as Chairman (Kovner Dep. 72:20 - 73:3). On April 14, 2004, Foster sent a version of the Debevoise April 2004 Memorandum, edited to include his comments, to his attorneys and to Wilson. At the top of the memorandum, Foster wrote:

> This is a good list of things. What are the two or three most important things we should be on the lookout for? What are the "walk" issues? What are the primary dangers? What are the traps? The lists are useful but we need more insight.

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Thereafter, in his comments, Foster raised various issues, including whether carried interest should be awarded on a sliding scale; the need for "more specifics" on how awards of carried interest might be diluted; and the need to determine how the bonus pool would be defined.

On September 2, 2004, Caxton's Chief Financial Officer, John Forbes, sent an internal memorandum (the "Caxton September 2004 Memorandum") to Caxton's General Counsel (Scott Bernstein, Esq.) and Controller (Karen Cross), posing a series of questions. Forbes asked, *inter alia*, whether Wilson and Foster would be the only individuals to receive actual shares, and what capital they would be "required to put up day one" (*Id*). He also asked "[i]s it the case that [Wilson] and [Foster] each initially own 10% and Caxton owns 80% and the first 10% of the phantom shares dilutes Caxton's ownership and thereafter any dilution is shared pro rata?"

In December 2004, Caxton provided Foster with a proposed draft "Amended and Restated Limited Liability Company Agreement of Caxton Health Holdings LLC" (the "Draft LLC Agreement"). Foster forwarded it to Debevoise on December 16, with a comment that "at long last Caxton has produced a draft of the organization papers for [CHH]." The Draft LLC Agreement was

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accompanied by a memorandum entitled "Caxton Health Holding Vesting", with an indication that it was a "DRAFT - For Discussion Purposes Only" (the "Caxton December 2004 Draft Memorandum"). Under the heading "Version 1", in the Caxton December 2004 Draft Memorandum, the following terms were proposed:

A. Each of RW [Robert Wilson] and RF [Richard Foster] has a 10% equity interest in CHH. The 10% interest entitles the holder immediately to 10% of the net profits and losses of CHH, but will vest over 5 years in equal annual installments of 2% each.

B. If the holder dies, retires, is Permanently Disabled, or is terminated other than for Gross Misconduct [these terms were all defined therein];

> (1) If the event occurs after September 30, the holder gets full vesting credit for the year; if prior to September 30, no vesting credit for the year.
>
> (2) The holder will sell 2% of the CHH equity each year to Caxton Associates, LLC until the holder's vested interest has been fully sold back.

C. If termination occurs as a result of Gross Misconduct, 100% of shares will be immediately sold back at [a] price equal to book value of Vested Holdings.

D. If after termination for any reason the individual goes into a competitive business, 100% is immediately bought back at book value of Vested Holding.

(footnotes omitted).

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The Draft LCC Agreement identified Caxton, Foster and Wilson as "Founding Members" of CHH. Section 7.1 provided that "[t]he Membership Interest of each Founding Member shall initially be: 80% for Caxton and 10% each for each of Foster and Wilson." Section 3.1(a) provided that "[e]ch Founding Member has made a capital contribution as reflected on the books and records of the Company". Section 1.1 defined a "Capital Contribution" as "the amount of capital contributed by such member to the Company".

On February 9, 2005, in response to the Draft LLC Agreement and the Caxton December 2004 Draft Memorandum, Debevoise sent to Caxton's General Counsel a four-page memorandum (the "Debevoise February 2005 Issues List"). The Memorandum summarized "certain key issues to be considered in determining the structure, profit sharing and governance arrangements for Richard Foster and Robert Wilson . . . in connection with [CHH]". The Memorandum raised, on behalf of Wilson and Foster, various questions and comments on issues such as general structure, deferred compensation, capital contributions, clawback obligations, distributions of proceeds, carried interest/incentive allocation, vesting considerations, withdrawal, governance, non-interference provisions, restrictions on transfers, employment arrangements and legal expenses. The

parties never reached an agreement on any of those matters (Foster Dep. 97:12 - 101:11).

In May 2005, Wilson notified Foster that his employment would be terminated (Foster Dep. 322:22 - 323:24). Foster was paid $1 million per year for the time that he worked at CHH (Plaintiff's Counterstatement of Material Facts, Response to Statement No. 12). CHH was not profitable and operated at a loss in each of the years from 2005 to 2009 (Forbes Dep. 97:4-8; 110:6-9; 118:15-21; 123:2-12; 125:5-9). Wilson severed his relationship with CHH at the end of 2007 (Wilson Dep. 214:18 - 215:2) and did not receive any additional payments from CHH in addition to his member guaranteed payments (Forbes Dep. 153:23-154:17).

Foster commenced this action in April 2006. The Complaint alleges that on March 11, 2004, Foster, Kovner, CHH and Caxton entered into a "compensation agreement", consisting, in part, of Kovner's promise that Foster would receive $1 million per year plus a 10% equity interest in CHH in consideration for his work as CEO of CHH (Compl. ¶ 76). As is relevant here, the first cause of action seeks in excess of $40 million for breach of the

compensation agreement and breach of the implied covenant of good faith and fair dealing.

The second cause of action also seeks the value of the alleged 10% equity interest, alleging a breach of an alleged joint venture or partnership agreement entered into on March 11, 2004 by Caxton, Kovner, Wilson and Foster (*id.*, ¶¶ 81-90). The third cause of action alleges that Foster "is entitled to restitution for the unjust enrichment of CHH, Caxton and [ ] Kovner in quantum meruit," and alternatively seeks between $10 and $20 million (and other compensation) for Foster's role in raising $1 billion for Caxton (*id.*, ¶¶ 91-98). The fourth cause of action, against Caxton and Kovner, seeks the value of his 10% equity interest under a theory of promissory estoppel (*id.*, ¶¶ 99-107), and the fifth cause of action demands relief against Caxton, Kovner and Wilson for breach of fiduciary duty in connection with the alleged joint venture/partnership agreement (Compl. ¶¶ 108-112).[1]

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[1] The Complaint originally also asserted causes of action for tortious interference with prospective business advantage and contractual relations. However, those claims were dismissed by Decision and Order of the Hon. Karla Moskowitz dated October 3, 2006 (2006 WL 4804738) and Foster did not appeal the dismissal of those two causes of action.

Defendants moved to dismiss the Complaint for failure to state a claim and under the Statute of Frauds. They also sought dismissal upon documentary evidence, including the March 18, 2004 Letter. Justice Moskowitz, in her Decision and Order of October 3, 2006, dismissed the Complaint in its entirety. With respect to the first cause of action, the Court found that the Complaint sufficiently alleged the existence of an oral agreement for compensation, notwithstanding that some terms were left open for negotiation in the March 18, 2004 Letter. However, the Court concluded that the claim was barred by the Statute of Frauds because Foster alleged in paragraph 35 of the Complaint that the parties expected that CHH "would take at least two to three years to get off the ground", and thus "performance under the terms of the alleged joint venture agreement was to exceed a one-year period".

The Court likewise dismissed the second cause of action sounding in contract as barred by the Statute of Frauds. The Court found that the unjust enrichment and promissory estoppel claims could not survive because they were based on the failed contract claims, and could not be interposed in circumvention of the Statute of Frauds. The breach of fiduciary duty claim was dismissed because the required confidential relationship would

have arisen, if at all, out of the allegations underlying the unsuccessful joint venture claim.

Finally, in connection with the unjust enrichment claim, the Court addressed the individual liability of Kovner and Wilson and held that the Complaint failed to allege that they acted outside the scope of their positions with Caxton or CHH. The Court thus found that piercing the corporate veil could not be justified because Foster did not sufficiently allege either domination of the corporation or the resulting wrongful consequences, and did not allege how they used the corporation for their personal ends.

The Appellate Division, First Department, reversed Justice Moskowitz' Decision in July 2007 (*see Foster v Kovner*, 44 AD3d 23). The Court noted that the Statute of Frauds is generally inapplicable to an agreement to create a joint venture or partnership of indefinite duration, because such relationships are terminable at will and as such performable with a year. The Appellate Division then reinstated the breach of contract claims, agreeing with Justice Moskowitz that an agreement may exist even where the parties acknowledge that they intend to subsequently finalize the details of the agreement, citing *Richbell Info Servs., Inc. v Jupiter Partners*, LP, 309 AD2d 288 (1st Dep't

2003). As a consequence, the unjust enrichment and promissory estoppel claims, which had been dismissed as a result of the failure of the contract claims, were also restored. Likewise, the breach of fiduciary duty cause of action was restored insofar as the joint venture claim had been found viable (44 AD3d at 30).

The First Department concurred with the finding of the Trial Court that the March 18, 2004 Letter did not bar Foster's contract claims as a matter of law. However, the Court specifically stated that defendants had made a "cogent argument" that the parties here had failed to reach agreement on many essential terms, even if the letter alone did not conclusively resolve that issue as required on a motion based on documentary evidence under CPLR 3211(a)(1). Accordingly, the Court went on to state that it could not be said "as a matter of law, that the documentary evidence conclusively establishes the parties merely had an agreement to agree, *although defendants may later succeed on this argument on summary judgment or at trial.*" (emphasis added) (44 Ad3d at 28).

Discovery ensued, and the record was supplemented with the various documents, described above, which reflect the parties' negotiations following the issuance of the March 18, 2004 Letter.

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Additionally, the parties testified at their depositions as to their understandings of those negotiations. As is relevant here, Foster was questioned as to the truth of certain allegations of his Complaint:

Q: ... I'm asking you whether [the following] allegation is true. "The agreement provided that profits and losses of CHH would be shared among the parties", is that true?

A: I don't recall.

Q: You don't know?

A: I don't recall.

Q: You don't recall whether that's true?

A. Correct.

* * *

Q: The second sentence of that paragraph says, "Caxton was to receive 80 percent of the equity interest." Is that true?

A: I don't recall.

Q: The third sentence says, "Mr. Foster and Wilson would each receive a 10 percent equity interest. Is that true?

A: I don't recall.

* * *

Q: Okay. Let's turn back to paragraph 4. Could you please read the first sentence of paragraph 4?

A: Yes. "Messrs. Foster, Wilson, and Kovner, the latter acting on his own personal behalf and on behalf of Caxton Associates, LLC, and/or certain of its affiliates, agreed that Foster and Wilson would be co-equal in the new enterprise, sharing responsibility for all major decisions at CHH."

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Q: Is that true?

A: I believe that it is correct.

Q: Okay. And could you read the second sentence?

A: "They also agreed that Foster and Wilson would be compensated equally . . . ."

* * *

Q: Is that true?

A: I believe that is correct.

Q: Last -- could you read the last sentence?

A: "Mr. Kovner made specific and repeated commitments to Mr. Foster that he would receive payments of a million dollars per year and a 10 percent equity interest in CHH."

Q: Is that statement true?

A: I don't recall.

(Foster Dep. 33:10-35:13).

Foster was also questioned about the issues left open for negotiation by the March 18, 2004 Letter:

Q: ... [T]hat would be at least one of the terms that remained to be negotiated as of that date, the level of ownership to be acquired by each of the three of you, correct?

A: Yes, sir.

Q: So that wasn't resolved as of that date?

A: Correct.

(Foster Dep. 63:4-11).

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Foster later testified that the parties reached a verbal agreement that "Caxton would have 80 percent of the equity, and that [Wilson] and I would each have 10 percent of the equity" (Foster Dep. 90:8-10). He was then asked why, earlier in the deposition, he had testified that he could not recall whether the parties agreed to those fixed equity interests, and whether the profits and losses would be shared. Foster stated that "I thought that you were referring to a specific written agreement, and when I said I didn't recall, it was because I couldn't remember where in the evolution of that specific written agreement . . . these things were" (Foster Dep. 92:13 - 93:3). Foster further stated that his more definite testimony about the terms of the oral agreement was the result of discussions with his attorneys, during which he realized that he had "misinterpreted" the questions (Foster Dep. 93:15-94:6).

With respect to the issue of Foster's equity interest, Kovner testified that he recalled "the number 10 percent being raised and used [b]ut we reached no agreement on that matter . . . [w]e did not agree on the terms on which any equity interest, either in amount or detail, about the way it would vest or be lost" (Kovner Dep. 59:21-60:13). Wilson similarly testified that

he recalled " a lot of discussion about what was called incentive or equity interest, ... and the ranges were 5 percent up to 15 percent. There was a lot of discussion about that, that was all never settled" (Wilson Dep. 95:16-25). He stated that he did not "recall a 10 percent equity interest in CHH. What I do recall is discussions about incentives, about longer term equity. And we discussed different percentages, ranges of percentages that was never settled" (Wilson Dep. 96:24 - 97:5).

DISCUSSION

The motion for summary judgment is granted and the Complaint is dismissed in its entirety. First, Foster has failed to substantiate the core allegation, central to his contract claims, that the parties agreed that he would receive a 10% equity interest in CHH. Viewed in a light most favorable to Foster, the record shows, at best, that the parties discussed that possibility among a variety of options. However, they never reached a final agreement on either the degree of the interest or other related, material terms.

"In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, *i.e.*, whether there was a 'meeting of the minds' regarding the material terms of the

transaction", *Central Fed. Sav. v National Westminster Bank, U.S.A.*, 176 A2d 131, 132 (1st Dept 1991); *see also Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423 (1st Dept 2010), lv den 15 NY3d 704 (2010). "[A]n enforceable contract requires mutual assent to its essential terms and conditions. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" *Edelman v Poster*, 72 AD3d 182, 184 (1st Dept 2010); *see Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 (1989), *cert denied* 498 US 816, (1990). Moreover, under the doctrine of definiteness, "a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to", *Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 (1991); *see Korff v Corbett*, 18 AD3d 248 (1st Dept 2005).

Consequently, "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable", *Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, 52 NY2d 105, 109* (1981). While "[a]n agreement may exist even where parties acknowledge that they intend to subsequently finalize the details of the agreement," *Foster v Kovner*, 44 AD3d at 27-28, an agreement which merely creates the framework for continued

discussions aimed at the execution of a binding contract is insufficient, *Schneider v Jarmain*, 85 AD3d 581, 582 (1st Dept 2011).

Despite Foster's repeated insistence that he was "promised" a 10% equity share in CHH, the record is devoid of any evidence that the parties ever had a meeting of the minds on that term. At deposition, Foster could not recall whether the statements in the Complaint regarding his 10% equity interest, or its allegations that Kovner made "specific and repeated commitments" to that equity share, were true. In contrast, both Kovner and Wilson expressly denied the existence of such a promise.

Foster's belated claim regarding the 10% share, after a conference with counsel, does not create a triable issue of fact. His claim that he "misinterpreted" the original questions is belied by the transcript. He was specifically asked whether particular statements were *true*, not merely whether he could recall whether they appeared in particular draft agreements or in the pleadings. His other responses demonstrate that he understood the distinction, as he testified that a number of the statements regarding the parties' agreement were "correct."

Furthermore, Foster's later testimony regarding the 10% equity interest failed to specify who made the promise, or when it was made. Despite the allegations of the Complaint, he did not attribute the promise to Kovner, or claim that it was made at the March 11, 2004 meeting. Indeed, he conceded that the level of ownership among the parties had not been resolved when he received the March 18, 2004 Letter, and remained to be negotiated as of that date.

The full record now confirms that the equity issue was never subsequently resolved. The documentary evidence of the parties' discussions flatly contradicts Foster's claim that such a promise was made by any party at any time during his tenure at CHH. The paper trail reveals nothing more than protracted, arm's length business negotiations that ultimately failed. In response to the Debevoise April 2004 Memorandum, Foster asked what proposed terms should cause him to "walk" from the negotiations; the Caxton September 2004 Memorandum questioned whether Foster and Wilson would be required to contribute capital on some future "day one", whether they would initially receive 10% of CHH's shares, and how those shares might be diluted; Foster recognized in December 2004 that the Draft LLC Agreement, which proposed the 10% equity interest and a capital contribution, was not a final agreement;

the Draft LLC Agreement was accompanied by the Caxton December 2004 Draft Memorandum, delineated "For Discussion Purposes Only", which proposed one version of a vesting scheme for the equity interests; and the Debevoise February 2005 Issues List raised on Foster's behalf a host of "key issues" still to be considered regarding CHH's operations including its governance, capital structure, compensation arrangements and vesting plan.

Foster suggests that these documents, and a few others, "recognize" that he owned 10% of CHH. However, even a cursory review of their language demonstrates that the most they recognize is that the parties were contemplating that percentage interest as one possible term of some future agreement. None of them suggests that any interest had been finally or irrevocably agreed upon or awarded. Foster also concedes that Wilson never received the 10% equity interest which was to coincide with his own receipt of such an interest.

"It is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed", *Scheck v Francis*, 26 NY2d 466, 469-470 (1970); *Jordan Panel*

Systems, Corp. v Turner Const. Co., 45 AD3d 165, 166 (1st Dept 2007). The parties' intent to await an executed contract may be determined by reference to their course of conduct in negotiating and the documents exchanged during that process, *see Langer v Dadabhoy, 44 AD3d 425* (1st Dept 2007), *lv den* 10 NY3d 712 (2008), and the Court may look to the surrounding circumstances where such intent is not expressly stated, *Dratfield v Gibson Greetings*, 269 AD2d 294 (1st Dept 2000).

Here, the record convincingly establishes that the parties at all times anticipated that their relationship would be governed by a formal writing. Foster acknowledged that the intent was "to convert this very broad, complicated set of verbal agreements in actual written documents" (Foster Dep. 56:16-20), and agreed that "the goal at the end of the day would be to have a final, agreed-upon, signed document that [the] lawyers [had] extensively conscientiously reviewed to protect [Foster's] interests, and that Caxton's lawyers [had] extensively reviewed to protect their interests" (Foster Dep. 266:14-19). Consequently, the negotiations were conducted largely through the exchange of drafts prepared by attorneys. Moreover, the 2004 LCC Agreement, which Foster insists was the only effective contract governing CHH's operations, expressly states in Paragraph 19 that

it "may be amended only upon the written consent of a Majority in Interest of the Members." That Agreement was never amended to grant Foster a 10% equity interest or otherwise make him a Member, and Foster never agreed to the later amended LLC Agreement, which would have awarded him a share subject to a capital contribution and other requirements.

Even assuming, contrary to the evidence, that Foster was promised a 10% equity share in CHH, that term, considered in isolation, is too indefinite to be enforced. The parties considered a variety of vesting, buy-back, forfeiture and other options relating to the equity interests, and Foster concedes that none of them were accepted or implemented. The absence of agreement on the material terms necessary to define the scope and nature of Foster's equity interest renders it illusory, *see, Hecht v Helmsley-Spear, Inc.*, 65 AD3d 951, 951 (1st Dept 2009)("The oral assurances lacking any actual terms as to the amount, form, and timing of payment of any compensation, and including no methodology or custom providing for the determination of the same, failed to manifest a clear intention on the part of the parties to form a binding, definite severance agreement"); *Glanzer v Keilin & Bloom*, 281 AD2d 371, 372 (1st Dept 2001)("the terms used to describe plaintiffs' rights under

the alleged contract -- 'substantial income', 'market rate', 'equity interest' -- [are] too indefinite to permit enforcement").

To the extent Foster's claim of a joint venture or partnership implicates his entitlement to a 10% equity interest, it fails for the reasons discussed above. Furthermore, a joint venture or partnership agreement requires that the parties agree to share not just the profits, but the losses also. *Magnum Real Estate Servs., Inc. v 133-134-135 Assoc., LLC,* 59 AD3d 362 (1st Dept 2009); *Prince v O'Brien, 256 AD2d 208* (1st Dept 1998). At deposition, Foster either maintained that he never discussed the sharing of losses, or expressly disclaimed responsibility for them (Foster Dep. 253:17-23; 109:2-12). His claim that he risked the loss of the value of his services in exchange for a share of the profits is insufficient, as such an arrangement does not constitute sharing in the losses of a partnership or joint venture, *Steinbeck v Gerosa*, 4 NY2d 302, 317 (1958); *Impastato v De Girolamo*, 117 Misc2d 786 (Sup Ct, Kings Co 1983), *affd* 95 AD2d 845 (2d Dept 1983); *Abeles, Inc. v Creekstone Farms Premium Beef, LLC*, 2010 WL 446042 (EDNY 2010); *Artco, Inc. v Kidde, Inc.*, 1993 WL 962596 at *10 (SDNY 1993)("The New York Court of Appeals'

decision in *Steinbeck v Gerosa* stands squarely for the proposition that putting one's efforts and time at risk are not enough to show an agreement to bear losses . . . This, of course, makes sense, because if [plaintiff] were correct that simply expending efforts to set up a venture were sufficient to satisfy the essential element of sharing of losses, the requirement could nearly always be satisfied"). Foster cannot rely on the loss-sharing terms of the LLC Agreement and the Draft LLC Agreement, as he was not a party to the former and the latter never went into effect. As noted in Justice Moskowitz in her October 3, 2006 Decision, the failure of the joint venture claim also requires the dismissal of the claim for breach of fiduciary duty.

Foster's promissory estoppel cause of action must also be dismissed. The elements of such a claim are "(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance", *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-842 (1st Dept 2011). Once again, Foster relies upon the promise of a 10% equity interest in support of this claim. As noted above, such a promise is not only not clear and unambiguous, but non-existent.

The claim for quantum meruit under a theory of unjust enrichment is dismissed as well. "The elements of a claim in quantum meruit are: the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services", *Freedman v Pearlman*, 271 AD2d 301, 304 (1st Dept 2000). However, such recovery is not available unless the services performed were "so distinct from the duties of his employment and of such nature that it would be unreasonable for the employer to assume that they were rendered without expectation of further pay", *id.*, *quoting Robinson v Munn*, 238 NY 40, 43 (1924).

Foster cannot recover for his fundraising efforts on behalf of CHH because they were admittedly within the scope of his duties as CEO (Foster Dep. 150:10 - 152:19) for which he was paid a salary of $1 mllion per year. He also testified that he never had an agreement or understanding that he would be paid a percentage of the funds raised (Foster Dep. 201:21-202:11). Beyond this, the additional compensation sought would be barred by the Statute of Frauds, General Obligations Law 5-701[a][10],

which precludes oral agreements for compensation or finder's fees in connection with "services rendered in . . . negotiating the purchase [or] sale . . . of a business opportunity . . . [including] procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction." *See Meyers Assoc., L.P. v Conolog Corp.*, 61 AD3d 547 (1st Dept 2009)(Statute of Frauds barred quantum merit claim for compensation in connection with procurement of investors for private securities offering).

The record also fails to establish that defendants were unjustly enriched, because it is undisputed that CHH never made a profit but instead sustained substantial losses, *see Delaney v Weston*, 66 AD3d 519 (1st Dept 2009), *lv dism* 14 NY3d 763 (2010). Foster's reliance on his expert's speculative calculation of CHH's alleged enterprise value in its first year is misplaced, because CHH was a new business venture and there was,therefore,no "reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty", *Digital Broadcast Corp. v Ladenburg, Thalmann & Co., Inc.*, 63 AD3d 647, 647-48 (1st Dept 2009), *lv den* 14 NY3d 737 (2010).

Finally, the claims against Kovner and Wilson individually are dismissed, insofar as Foster has not established any tort or

contractual liability under the causes of action pled. Additionally, Foster has not alleged that they acted outside of their corporate capacities with CHH in their dealings with him, and, as set forth by Justice Moskowitz in her Decision, no ground for piercing the corporate veil has been established. Foster's vague claims that they fraudulently induced him to trust them, dragged out the negotiation process, neglected their duties at CHH or ignored some of his requests to speak to them about problems at CHH do not implicate personal liability of any kind.

Accordingly, based on all the papers submitted and the oral argument held on the record on September 9, 2011, defendants' motion for summary judgment is granted.

The Complaint is dismissed with prejudice against all the defendants, and without costs or disbursements.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: January 17, 2012

BARBARA R. KAPNICK, J.S.C.