

Carnegie Deli, Inc. v Levine
2015 NY Slip Op 31069(U)
January 15, 2015
Supreme Court, New York County
Docket Number: 650912/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CARNEGIE DELI, INC., MARIAN HARPER LEVINE,
ROWAB ENTERPRISES, LTD., CARNEGIE
DELICATESSEN, INC., CARNEGIE DELI PRODUCTS,
INC., 854 CARNEGIE REAL ESTATE CORP., MILMAR
ENTERPRISES, INC., MASDEL ENTERPRISES, LLC,
SARMAR ENTERPRISES, LTD., CARNEGIE LV, INC.,
and CARNEGIE PA, LLC,

Plaintiffs,

- v -

Index No.
650912/2014

**DECISION
and ORDER**

Mot. Seq. 002, 003

SANFORD MARTIN LEVINE, PENKAE
SIRICHAROEN, LENG ENTERPRISES, LLC, and
JODI LEVINE SMITH,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action for conversion, unjust enrichment, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, misappropriation of trade secrets, and unfair competition. This action is based on, *inter alia*, a purported scheme to defraud plaintiffs, Carnegie Deli, Inc., Rowab Enterprises, Ltd., Carnegie Delicatessen, Inc., Carnegie Deli Products, Inc., 854 Carnegie Real Estate Corp., Milmar Enterprises, Inc., Masdel Enterprises, LLC, Sarmar Enterprises, Ltd., Carnegie LV, Inc., Carnegie PA, LLC (collectively, "Carnegie Deli"), and Marian Harper Levine (and together with Carnegie Deli, collectively, "Plaintiffs"), by allegedly diverting assets belonging to Carnegie Deli and its owner, Marian Harper Levine, to defendants Sanford Martin Levine ("Sandy Levine"), Penkae Siricharoen ("Siricharoen"), Leng Enterprises, LLC ("Leng"), and Jodi Levine Smith (collectively, "Defendants").

Defendants Siricharoen and Leng (and together, the "Leng Defendants") now move (Mot. Seq. #002) for an Order, pursuant to CPLR §§ 3211(a)(5), (a)(4) and

(a)(7), BCL § 1312, LLCL § 808, dismissing Plaintiffs' complaint on the basis of lack of capacity, failure to state a cause of action, statute of limitations; and, pursuant to CPLR § 3024, striking scandalous and prejudicial matter unnecessarily inserted into Plaintiffs' complaint.

Defendants Sanford Levine and Jodi Levine Smith (and together, the "Levine Defendants") now move (Mot. Seq. #003) for an Order, pursuant to CPLR §§ 3211(a)(5), (a)(4) and (a)(7), and BCL § 1312, and LLCL § 808, dismissing Plaintiffs' complaint on the basis of the applicable statute of limitations, the pendency of prior proceedings between the parties, failure to state a claim, and lack of capacity.

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(3) the party asserting the cause of action has not legal capacity to sue;

(4) there is another action pending between the same parties for the same cause of action in a court of any state of the United states; the court need not dismiss upon this ground but may make such order as justice requires;

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't, 2003] [internal citations omitted]; CPLR § 3211[a][7]). On a motion to dismiss pursuant to CPLR § 3211(a)(5), the court may grant dismissal of a cause of action which is time-barred by the statute of limitations.

As far as Defendants' motion to dismiss for lack of capacity is concerned, **section 1312(a) of the New York Business Corporations Law ("BCL")** denies an

unauthorized foreign corporation “doing business” in this state capacity to sue here, unless and until such authorization is obtained. (BCL § 1312[a]). This statute regulates foreign corporations “doing business” in this state, and employs a heightened “doing business” standard in order to avoid unconstitutional interference with interstate commerce under the Commerce Clause. (*Airtran N.Y., LLC v. Midwest Air Group, Inc.*, 46 A.D.3d 208, 214 [1st Dep’t 2007]). Under this heightened “doing business” standard, the test is whether the foreign entity’s local business activity is so systematic and regular as to manifest a continuity of activity in this state. (*Id.*; *Nick v. Greenfield*, 299 A.D.2d 172, 173 [1st Dep’t 2002]). This test presents a “higher hurdle” than the “doing business” standard used to determine long-arm jurisdiction under CPLR § 302 (*Airtran*, 46 A.D.3d at 215). Thus, “incidents of business” may be sufficient to subject an unauthorized foreign entity to service of New York process, “and yet insufficient to require it to take out a certificate authorizing it to do business in New York.” (*Colonial Mortg. Co. v. First Fed. S&L Ass’n*, 57 A.D.2d 1046, 1047 [4th Dep’t 1977]; *International Text-Book Co. v. Tone*, 220 N.Y. 313, 318 [1917]). Section 808 of the LLC Law (“LLCL”) similarly denies an unauthorized foreign LLC “doing business” in New York capacity to bring suit here, unless and until the required authorization is obtained. Section 808(a), like its corporate counterpart, BCL § 1312(a), regulates foreign LLC’s “doing business” in this state, and employs a heightened “doing business” standard in order to avoid unconstitutional interference with interstate commerce under the Commerce Clause. (*Airtran N.Y., LLC v. Midwest Air Group, Inc.*, 46 A.D.3d 208, 214 [1st Dep’t 2007]; *Matter of Mobilevision Med. Imaging Servs., LLC v. Sinai Diagnostic & Interventional Radiology, P.C.*, 66 A.D.3d 685 [2d Dep’t 2009]). The burden of proving either statutory barrier to suit rests on the party asserting it. (*Airtran*, 46 A.D.3d at 215).

Here, Defendants fail to meet their heavy burden of demonstrating that the foreign entity plaintiffs, Carnegie Delicatessen, Inc., Carnegie Deli Products, Inc., Milmar Enterprises, Inc., Carnegie PA, Inc., and Masdel Enterprises LLC, are “doing business” in this state so as to deny these plaintiffs capacity to sue here. Defendants do not present any evidence of these Plaintiffs’ local business activity. Defendants’ argument that Plaintiffs “could have” provided affidavits describing the foreign entity plaintiffs’ business activity is insufficient, without more, to meet Defendants’ burden of showing that the foreign entity plaintiffs’ local business activity is “systematic and regular” within the meaning of BCL § 1312(a) and LLC § 808(a)’s heightened “doing business” test. Accordingly, at this time, Defendants do not demonstrate that these foreign entity plaintiffs cannot maintain the instant suit under BCL § 1312(a) and LLC § 808(a). The question of the foreign entity plaintiffs’ capacity to bring suit in New York requires limited discovery on this issue.

Thus, the remainder of the action will be stayed pending discovery limited to the issue of the foreign entity plaintiffs' capacity to maintain the instant action in this forum without authorization.

Turning now to Defendants' motions to dismiss the individual causes of action asserted in Plaintiffs' complaint, a conversion occurs 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 N.Y.3d 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. (*Id.* at 50). In order to sustain a cause of action for conversion, a plaintiff must show "legal ownership or an immediate superior right of possession to a specific identifiable thing." (*Komolov v. Segal*, 101 A.D.3d 639, 640 [1st Dep't 2012] quoting *Messiah's Covenant Community Church v. Weinbaum*, 74 A.D.3d 916, 919, [2d Dep't 2010]). Where the property alleged to have been converted is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner. (*Republic of Haiti v. Duvalier*, 211 A.D.2d 379, 384 [1st Dep't 1995]). The funds of a specific, named bank account are sufficiently identifiable to support a cause of action for conversion. (*Id.*). In addition, a conversion occurs when funds "designated for a particular purpose are used for an unauthorized purpose." (*Lemle v. Lemle*, 92 A.D.3d 494, 497 [1st Dep't 2012]).

Here, Plaintiffs' complaint alleges that Defendants converted Carnegie Deli's property in the form of, "cash receipts," "bank, brokerage and other accounts," "non-cash payments," "products, supplies, and other property of the Carnegie Deli and its food preparation facility in Carlstadt, New Jersey", and "payroll funds". With respect to Sandy Levine, Plaintiffs' complaint alleges that, "[a]fter taking over the lead management role for the Carnegie Deli's business in 1999, Sandy Levine repeatedly diverted the Carnegie Deli's cash receipts in massive amounts for his personal use." Plaintiffs' complaint alleges that "Sandy Levine's theft extended to all areas of the Carnegie Deli's business that received cash payments, including its restaurant service, supply deals with local tour operators, and other endeavors." More specifically, Plaintiffs' complaint alleges that "between approximately 2004 and 2012, Sandy Levine repeatedly raided the bank accounts of Plaintiffs Carnegie LV. Inc. and Carnegie PA, LLC, corporations that manage the Carnegie Deli's business interests in Nevada and Pennsylvania." Plaintiffs' complaint asserts that "Sandy Levine used these companies' bank accounts as his personal piggy bank,

writing checks and withdrawing hundreds of thousands of dollars - transactions that served no legitimate purpose related to the companies' business."

Plaintiffs' complaint also asserts that "[a]fter taking over the lead management role for the Carnegie Deli's business in 1999, Sandy Levine repeatedly stole non-cash income from the business". Plaintiffs' complaint alleges that "Sandy Levine repeatedly stole the proceeds of a business deal through which the Carnegie Deli licensed the sale of 'Carnegie Deli' sandwich bread." Plaintiffs' complaint alleges that "Sandy Levine furthered and concealed this theft by opening, maintaining, and, ultimately, looting bank accounts held in the names of the Carnegie Deli's affiliated companies, and/or by cashing checks received as payment for the sandwich bread sales and pocketing the proceeds". Plaintiffs' complaint further alleges that "from approximately 2008 through 2012, Sandy Levine caused the Carnegie Deli to make salary payments to Penkae Siricharoen, despite the fact that Penkae no longer worked at the restaurant or performed any services related to the business of the Carnegie Deli." Plaintiffs' complaint further alleges that "from approximately 2000 through 2012, Sandy Levine made salary payments to his son-in-law, Chuck Smith, for services that were either never performed or paid for at a rate drastically exceeding their fair market value." Plaintiffs' complaint alleges that "from approximately 2000 through 2012, Sandy Levine made salary payments to other individuals for accounting and other services that were either never performed or paid for at a rate drastically exceeding their fair market value."

Plaintiffs' complaint further asserts that, "[a]fter taking over the lead management role for the Carnegie Deli's business in 1999, Sandy Levine repeatedly stole the Carnegie Deli's property, including food products and restaurant supplies, for himself, his codefendants, and others." Plaintiffs' complaint asserts that "Sandy Levine stole products and supplies from both the Carnegie Deli restaurant in New York City and its sister facility in New Jersey, where the Deli smokes and cures its meats and prepares other food for its customers", and that, "Sandy Levine sent products and supplies that he stole from the Carnegie Deli to locations controlled by his codefendants and others, including the Leng Thai Restaurant in Astoria, Queens, and various restaurants in Bangkok, Thailand. The Carnegie Deli never received payment for these products and supplies." Plaintiffs' complaint further alleges that "Sandy Levine furthered and concealed this theft by falsifying invoices, shipping and receiving paperwork, and other business records." Plaintiffs' complaint also alleges that Sandy Levine "furthered and concealed this theft by diverting stolen funds, and goods and services derived therefrom, to other individuals, including his daughter, Defendant Jodi Levine Smith, and his son-in-law, Charles ("Chuck") Smith." Plaintiffs' complaint states that "[a]mong other examples, Sandy Levine

funneled the proceeds of his theft into real property purchased in the name of Jodi Levine Smith, accounts held under her name, and joint accounts held under both of their names.” Plaintiffs’ complaint asserts that Jodi Levine Smith “repeatedly agreed to accept stolen funds - and goods, property, and services derived therefrom - knowing that they were (or were derived from) the property of the Carnegie Deli and/or its owner, Marian Harper Levine, and with the intent of furthering and concealing Sandy Levine’s theft.”

Plaintiffs’ complaint further asserts that “Sandy Levine furthered and concealed this theft by diverting stolen funds, and goods and services derived therefrom, to Defendant Penkae Siricharoen”, and “by diverting stolen funds to other businesses, including Defendant Leng Enterprises LLC, doing business as Leng Thai Restaurant in Astoria, Queens, and restaurant ventures in Bangkok, Thailand”. In addition, Plaintiffs’ complaint alleges that “Penkae Siricharoen repeatedly agreed to accept funds for this ‘no show’ job, knowing that they were the property of the Carnegie Deli and that she had no legal claim or right to be compensated by the Carnegie Deli.” Plaintiffs’ complaint alleges that “Penkae Siricharoen repeatedly agreed to accept goods stolen from the Carnegie Deli, knowing that they were the property of the Carnegie Deli, and with the intent of furthering and concealing Sandy Levine’s theft.”

Accepting Plaintiffs’ allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs’ complaint adequately plead that Sandy Levine exercised unauthorized control over Carnegie Deli’s property, by, *inter alia*, using corporate funds to pay excessive compensation, (*Lemle v. Lemle*, 92 A.D.3d 494, 497 [1st Dep’t 2012]), diverting corporate funds from identified company bank accounts for personal use, (*id.*), interfering with Carnegie Deli’s ownership of the proceeds of the sandwich deal sales, (*Key Bank v. Grossi*, 227 A.D.2d 841, 843 [3d Dep’t 1996]), and sending Carnegie Deli’s food products and restaurant supplies to “the Leng Thai Restaurant in Astoria, Queens, and various restaurants in Bangkok, Thailand”. Accordingly, accepting Plaintiffs’ allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs’ complaint adequately plead a cause of action for conversion of Carnegie Deli’s property as against Sandy Levine.

With respect to the Leng Defendants, accepting Plaintiffs’ allegations as true and drawing all inferences in favor of the non-moving party, Plaintiffs’ allegations that Siricharoen, “repeatedly agreed to accept funds for this ‘no show’ job, knowing that they were the property of the Carnegie Deli”, and, “repeatedly agreed to accept goods stolen from the Carnegie Deli, knowing that they were the property of the

Carnegie Deli, and with the intent of furthering and concealing Sandy Levine's theft", sufficiently support Plaintiffs' claim for conversion of Carnegie Deli's property as against Siricharoen. (*Cf. United States Fidelity & Guaranty Co. v. Barry*, 236 A.D. 464 [1st Dep't, 1932] [finding conversion of corporate funds where defendants accepted checks from corporation that had no account with defendants and owed defendants nothing; inference that defendants knew or should have known corporate funds were being used to pay personal debt was proper). In addition, accepting Plaintiffs' allegations as true, Plaintiffs' complaint adequately pleads that Leng exercised unauthorized control over Carnegie Deli's property, including food products and restaurant supplies, to the exclusion of Plaintiffs' rights. Accordingly, accepting Plaintiffs' allegations as true and viewing Plaintiffs' complaint in the light most favorable to the non-moving party, the four corners of Plaintiffs' complaint adequately plead a cause of action for conversion of Carnegie Deli's property as against the Leng Defendants, for purposes of surviving a motion to dismiss at this early stage of litigation.

Additionally, viewing Plaintiffs' complaint in the light most favorable to Plaintiffs, Plaintiffs' allegations that "Sandy Levine funneled the proceeds of his theft into real property purchased in the name of Jodi Levine Smith, accounts held under her name, and joint accounts held under both of their names", and that, Jodi Levine Smith "repeatedly agreed to accept stolen funds – and goods, property, and services derived therefrom – knowing that they were (or were derived from) the property of the Carnegie Deli, and with the intent of furthering and concealing Sandy Levine's theft" sufficiently support Plaintiffs' conversion claim as against Jodi Levine Smith, for purposes of surviving a motion to dismiss at this early stage of litigation.

As for Plaintiffs' second cause of action, for conversion of Marian Harper Levine's property, Plaintiffs' complaint alleges that Defendants converted Marian Harper Levine's property in the form of "funds, financial instruments, and other property." Plaintiffs' complaint further alleges that, "[f]rom approximately 2000 through 2012, Sandy Levine repeatedly stole financial instruments belonging to Marian Harper Levine, including bonds and bond coupons, amounting to millions of dollars in illicit gains." Plaintiffs' complaint also asserts that, "between approximately 2000 and 2012, Sandy Levine repeatedly made unauthorized withdrawals from Marian Harper Levine's personal bank accounts." Plaintiffs' complaint alleges that "Sandy Levine furthered and concealed this theft by forging Marian Harper Levine's signature and using Marian Harper Levine's signature stamp for unauthorized purposes." Plaintiffs' complaint also asserts:

Defendant Jodi Levine Smith and her husband Chuck Smith repeatedly agreed to accept stolen funds - and goods, property, and services derived therefrom - knowing that they were (or were derived from) the property of Marian Harper Levine, and with the intent of furthering and concealing Sandy Levine's theft.

Plaintiffs' complaint states that "Sandy Levine furthered and concealed this theft by diverting funds derived from the stolen instruments, and goods and services derived therefrom, to [Siricharoen]", and that, "Penkae Siricharoen repeatedly agreed to accept funds derived from the stolen instruments, and goods and services derived therefrom, knowing that they were (or were derived from) the property of Marian Harper Levine, and with the intent of furthering and concealing Sandy Levine's theft." Plaintiffs' complaint asserts that "[Leng] and its owners and agents, including [Siricharoen], repeatedly agreed to accept funds derived from the stolen instruments, and goods and services derived therefrom, knowing that they were (or were derived from) the property of Marian Harper Levine, and with the intent of furthering and concealing Sandy Levine's theft." Plaintiffs' complaint alleges:

By misappropriating, transferring, receiving, and/or secreting the funds, financial instruments, and other property described above, the Defendants exercised wrongful, unauthorized, and unlawful dominion and control over such funds, financial instruments, and other property. That wrongful, unauthorized, and unlawful dominion and control was done to the exclusion of Marian Harper Levine and was contrary to, in denial of, and inconsistent with Marian Harper Levine's viable ownership interest in the funds, financial instruments, and other property.

Accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately plead that Sandy Levine exercised unauthorized control over specifically identifiable named accounts and financial instruments belonging to Marian Harper Levine, to the exclusion of Marian Harper Levine's rights, and are sufficient to support Plaintiffs' cause of action for conversion of Marian Harper Levine's property as against Sandy Levine. Similarly, viewing Plaintiffs' complaint in the light most favorable to the non-moving party, Plaintiffs' allegations that the Leng Defendants and Jodi Levine Smith purportedly agreed to accept such funds or property derived therefrom

“knowing that they were (or were derived from) the property of Marian Harper Levine”, are sufficient to plead a cause of action for conversion of Marian Harper Levine’s property as against these defendants. Accordingly, accepting Plaintiffs’ allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs’ complaint adequately plead a cause of action for conversion of Marian Harper Levine’s property as against Defendants.

As for Plaintiffs’ third cause of action, for unjust enrichment, to prevail on a claim for unjust enrichment, the “plaintiff must show that the other party was enriched, at plaintiff’s expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.” (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep’t 2011]). The Court of Appeals explains:

In a broad sense, this may be true in many cases, but unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff.

(*Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 [2012]). An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim. (*Id.*). However, a party may state causes of action alternatively, or assert inconsistent theories of recovery, at the pleadings stage. (CPLR § 3014; *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 177 [1st Dep’t 1998]).

Here, Plaintiffs’ complaint alleges that, “Defendants have been enriched by their actions in taking, transferring, receiving, secreting, and failing to return the funds, accounts, financial instruments, and other property of the Plaintiffs, and by diverting them for the Defendants themselves or otherwise for their benefit.” Plaintiffs’ complaint also asserts:

Defendants’ enrichment, as set forth above, was at Plaintiffs’ expense in that the Plaintiffs lost revenue and use of the funds, accounts, financial instruments, and other property described above. Given this, and all of the other facts pled herein, in equity, justice and good conscience,

the Defendants should compensate the Plaintiffs for the amounts by which each of them has been enriched.

Plaintiffs' complaint further alleges that, "[a]s pleaded in this alternative claim, the Plaintiffs have no other remedy at law to recover the funds, financial instruments, and property described above."

Accepting Plaintiffs' allegations as true, Plaintiffs' allegations that Defendants were enriched by "taking, transferring, receiving, secreting, and failing to return the funds, accounts, financial instruments, and other property of the Plaintiffs, and by diverting them for the Defendants themselves or otherwise for their benefit" adequately support Plaintiffs' cause of action for unjust enrichment as against Defendants. Accordingly, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, Plaintiffs' cause of action for unjust enrichment stands.

As for Plaintiffs' fourth cause of action, for breach of fiduciary duty to Carnegie Deli as against Sandy Levine, the elements of a cause of action for breach of fiduciary duty include: (1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages caused by the misconduct. (*Armentano v. Paraco Gas Corp.*, 90 A.D.3d 683, 935 [2d Dep't 2011]). A corporate director or officer is in a fiduciary relationship. (BCL § 717; *Foley v. D'Agostino*, 21 A.D.2d 60, 66 [1st Dep't 1964]). The fiduciary relationship "is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." (*Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 98 [1st Dep't 2006]). A cause of action sounding in breach of fiduciary duty must be pleaded with particularity. (CPLR 3016[b]). When concrete facts "are peculiarly within the knowledge of the party" charged, it would be potentially unjust to dismiss a case at an early stage when a pleading deficiency might be cured later in the proceedings. (*Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 [2008] [citations omitted]).

Plaintiffs' complaint alleges that, "[Sandy Levine] . . . was formerly the business manager for the Carnegie Deli", and that, "[a]fter taking over the lead management role for the Carnegie Deli's business in 1999, Sandy Levine repeatedly diverted the Carnegie Deli's cash receipts in massive amounts for his personal use." Plaintiffs' complaint alleges that, "Sandy Levine repeatedly stole the proceeds of a business deal through which the Carnegie Deli licensed the sale of 'Carnegie Deli' sandwich bread", and that, "Sandy Levine furthered and concealed this theft by

opening, maintaining, and, ultimately, looting bank accounts held in the names of the Carnegie Deli's affiliated companies, and/or by cashing checks received as payment for the sandwich bread sales and pocketing the proceeds." Plaintiffs' complaint further asserts that "Sandy Levine sent products and supplies that he stole from the Carnegie Deli to locations controlled by his codefendants and others, including the Leng Thai Restaurant in Astoria, Queens, and various restaurants in Bangkok, Thailand. The Carnegie Deli never received payment for these products and supplies", and that, "Sandy Levine furthered and concealed this theft by falsifying invoices, shipping and receiving paperwork, and other business records."

Plaintiffs' complaint also alleges, "Sandy Levine was entrusted with responsibility for managing the building 854 Seventh Avenue in Manhattan, which houses the restaurant and numerous apartment units." Plaintiffs' complaint alleges that, "[i]n breach of that trust, Sandy Levine repeatedly and falsely held himself out as the owner of the building and engaged in conduct detrimental to the Carnegie Deli's business interests to derive benefits for himself, his codefendants, and others." Plaintiffs' complaint further asserts that, "Sandy Levine granted a sweetheart lease to his mistress, [Siricharoen], to the detriment of the business he was entrusted to manage." Plaintiffs' complaint alleges that, on February 14, 2011, "Sandy Levine purported to grant Siricharoen a 15-year lease for an apartment in the building, charging a rent two to three times lower than market value", and that, "[t]he terms of the lease were commercially unreasonable and contrary to the property owner's business interests".

In addition, Plaintiffs' complaint asserts:

Sandy Levine breached his fiduciary duties to the Carnegie Deli by engaging in the wrongful activity as described herein, including, but not limited to: the theft of the Carnegie Deli's funds, accounts, and other property, for his benefit and the benefit of his codefendants and others; the payment of bribes; forgery; the conduct of business affairs on behalf of the Carnegie Deli in a manner contrary to the Carnegie Deli's interests; mismanagement and self-dealing in the course of administering the Carnegie Deli's real estate holdings; and misrepresentations, half-truths, and omissions about his handling of the Carnegie Deli's funds, accounts, property, and business interests.

Plaintiffs' complaint also asserts that, "Sandy Levine induced employees' and others' acquiescence to the theft and other misconduct by compensating them through business deals detrimental to the Carnegie Deli." Plaintiffs' complaint alleges that, "Sandy Levine carried out these and other wrongful actions without the Carnegie Deli's knowledge or consent, from approximately 2000 through 2012", and that, "Sandy Levine's breaches of his fiduciary duties to the Carnegie Deli have and will directly and proximately cause the Carnegie Deli to suffer great and irreparable damage and injury."

Accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, Plaintiffs' allegations that Sandy Levine held the "lead management role for the Carnegie Deli's business" adequately plead the existence of a fiduciary relationship between Sandy Levine and Carnegie Deli. Viewing Plaintiffs' complaint in the light most favorable to the non-moving party, the four corners of Plaintiffs' complaint adequately plead misconduct, i.e. Sandy Levine's purported "self-dealing" and alleged "mismanagement" of business affairs and real estate holdings, and damages. Accordingly, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately plead a cause of action for breach of fiduciary duty to Carnegie Deli as against Sandy Levine.

As for Plaintiffs' fifth¹ cause of action, for breach of fiduciary duty to Marian Harper Levine, as against Sandy Levine, "it is axiomatic that transactions between spouses 'involve a fiduciary relationship requiring the utmost of good faith' meriting 'strict surveillance' by courts." (*KS v. ES*, 39 Misc. 3d 1219(A), 1219A [Sup. Ct. N.Y. Cnty. 2013] quoting *Christian v Christian*, 42 NY2d 63, 72, 365 N.E.2d 849, 396 N.Y.S.2d 817 [1977]). In addition, "[f]amily members stand in a fiduciary relationship toward one another in a co-owned business venture." (*Braddock v. Braddock*, 60 A.D.3d 84, 88 [1st Dep't 2009]).

Here, Plaintiffs' complaint alleges that, "[d]uring their marriage, Marian Harper Levine reposed trust and confidence in her husband Sandy Levine and vested him with authority to act on her behalf with respect to certain personal financial affairs." Plaintiffs' complaint asserts that, "Marian Harper Levine entrusted Sandy Levine with her confidential financial information, bank account information,

¹ Plaintiffs' complaint contains two purported "fifth" causes of action. Plaintiffs' first "fifth" cause of action is for breach of fiduciary duties owed to Marian Harper Levine as against Sandy Levine. The second "fifth" cause of action is for aiding and abetting Sandy Levine's breach of fiduciary duties owed to the Carnegie Deli, as against Jodi Levine Smith and the Leng Defendants. The Court refers to Plaintiffs' causes of action as they are numbered in Plaintiffs' complaint.

financial instruments, and other property, and reposed trust and confidence in him to act in her best interests". Plaintiffs' complaint further alleges that, "Sandy Levine repeatedly made unauthorized withdrawals from Marian Harper Levine's personal bank accounts" and that, "Sandy Levine furthered and concealed this theft by forging Marian Harper Levine's signature and using Marian Harper Levine's signature stamp for unauthorized purposes." Plaintiffs' complaint further asserts:

Sandy Levine breached his fiduciary duties to Marian Harper Levine by engaging in the wrongful activity as described herein, including, but not limited to: the theft of funds from her personal accounts; theft of her bonds and bond coupons, forgery; the conduct of her financial affairs in a manner he knew was contrary to her interests; and misrepresentations, half-truths, and omissions about his handling of Marian Harper Levine's funds, financial instruments, and other property.

Accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately plead a fiduciary relationship between Marian Harper Levine and Sandy Levine whereby "Marian Harper Levine entrusted Sandy Levine with her confidential financial information, bank account information, financial instruments, and other property, and reposed trust and confidence in him to act in her best interests", Sandy Levine's misconduct *vis-à-vis* Marian Harper Levine's finances, and pecuniary damages. Accordingly, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately plead a cause of action for breach of fiduciary to Marian Harper Levine as against Sandy Levine.

As for Plaintiffs' second "fifth" and sixth causes of action, for aiding and abetting Sandy Levine's alleged breaches of fiduciary duty to Carnegie Deli and Marian Harper Levine, to state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead: (1) a breach of fiduciary duty; (2) that defendant knowingly induced or participated in the breach; and, (3) damage resulting from the breach. (*Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 101 [1st Dep't 2006]). To state a claim under this theory, a plaintiff must allege that the defendant had actual knowledge of the breach of duty; constructive knowledge will not suffice. (*Brasseur v. Speranza*, 21 A.D.3d 297, 299 [1st Dep't 2005]). For purposes of an aiding-and-abetting breach of fiduciary duty claim, "[a] person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial

assistance' to the primary violator." (*Kaufman v. Cohen*, 307 A.D.2d 113, 126 [1st Dep't 2003]). Such "substantial assistance" occurs when a defendant "affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." (*Id.*). Thus, the "mere inaction" of an alleged aider and abettor, "constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff." (*Id.*).

Here, Plaintiffs' complaint asserts that "[Siricharoen], [Leng], and Jodi Levine Smith aided and abetted Sandy Levine's breaches of fiduciary duties by contributing to, concealing, and encouraging his tortious activity, including but not limited to Sandy Levine's theft of the Carnegie Deli's funds, trade secrets, confidential information, and other property." More specifically, with respect to the Leng Defendants, Plaintiffs' complaint alleges that "Siricharoen repeatedly agreed to accept goods stolen from the Carnegie Deli, knowing that they were the property of the Carnegie Deli, and with the intent of furthering and concealing Sandy Levine's theft." Plaintiffs' complaint further alleges, "[Leng] and its owners and agents, including [Siricharoen], repeatedly agreed to accept goods stolen from the Carnegie Deli, knowing that they were the property of the Carnegie Deli, and with the intent of furthering and concealing Sandy Levine's theft." Plaintiffs' complaint alleges that "The Defendants furthered and concealed this theft by inducing employees and others to acquiesce to - or, in some cases, assist in - the misconduct, including by paying cash bribes and by entering corrupt deals designed to benefit those individuals at the expense of the Carnegie Deli and its business."

Plaintiffs' complaint also asserts that, "[f]rom approximately 2006 through 2012, [the Leng Defendants], Sandy Levine, and others conspired to pursue restaurant ventures in New York City and elsewhere using the Carnegie Deli's name, goodwill, and products without the knowledge or consent of the Carnegie Deli or its owner." Plaintiffs' complaint alleges, "[a]s an example, the Leng Thai Restaurant in Astoria, Queens, served food that purported to be produced by the Carnegie Deli", and that, "[a]s another example, in or after 2007, Defendants Penkae Siricharoen and Sandy Levine opened a restaurant called the 'Carnegie Deli Thailand' in Bangkok, Thailand." Plaintiffs' complaint further asserts that, "[a]t all relevant times, the Defendants knew that the Plaintiffs actively used the 'Carnegie Deli' name in commerce and protected their intellectual property rights through contractual, statutory, and other legal means, including trademark registrations and licensing agreements", and that, "Plaintiffs never authorized the Defendants to use the name or products of the Carnegie Deli."

Accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, Plaintiffs' complaint adequately alleges that the Leng Defendants knowingly induced or participated in Sandy Levine's purported breach of fiduciary duty to Carnegie Deli. Plaintiffs' allegations, including that the Leng Defendants, "repeatedly agreed to accept goods stolen from the Carnegie Deli, knowing that they were the property of the Carnegie Deli, and with the intent of furthering and concealing Sandy Levine's theft", that "the Leng Thai Restaurant in Astoria, Queens, served food that purported to be produced by the Carnegie Deli", and that, "The Defendants furthered and concealed this theft by inducing employees and others to acquiesce to - or, in some cases, assist in - the misconduct, including by paying cash bribes and by entering corrupt deals designed to benefit those individuals at the expense of the Carnegie Deli and its business", sufficiently plead substantial assistance to Sandy Levine, the alleged primary violator. Accordingly, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately plead an aiding-and-abetting fiduciary duty claim as against the Leng Defendants.

However, with respect to Jodie Levine Smith, Plaintiffs' complaint merely alleges that Sandy Levine "furthered and concealed this theft by diverting funds derived from the stolen instruments, and goods and services derived therefrom, to other individuals, including his daughter, Defendant Jodi Levine Smith" and that, "Sandy Levine funneled the proceeds of his theft into real property purchased in the name of Jodi Levine Smith, accounts held under her name, and joint accounts held under both of their names." Plaintiffs' complaint alleges that "Jodi Levine Smith . . . repeatedly agreed to accept stolen funds - and goods, property, and services derived therefrom - knowing that they were (or were derived from) the property of Carnegie Deli, and with the intent of furthering and concealing Sandy Levine's theft." Even accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, Jodi Levine Smith's alleged passive acceptance of funds or property is insufficient to plead actual knowledge or substantial assistance for purposes of an aiding-and-abetting breach of fiduciary duty claim. Furthermore, Plaintiffs' complaint does not allege that Jodi Levine Smith owes a fiduciary duty directly to Carnegie Deli. Accordingly, even accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint fail to plead that Jodie Levine Smith "knowingly" participated in Sandy Levine's purported breach of fiduciary duty to Carnegie Deli. Absent actual knowledge, Plaintiffs' aiding-and-abetting breach of fiduciary duty claim cannot stand as against Jodi Levine Smith.

Likewise, with respect to Plaintiffs' sixth cause of action, for aiding and abetting Sandy Levine's purported breach of fiduciary duty to Marian Harper Levine, as against the Leng Defendants and Jodi Levine Smith, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately state a claim as against the Leng Defendants. However, even accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint are insufficient to support Plaintiffs' cause of action for aiding and abetting breach of fiduciary duty to Marian Harper Levine as against Jodi Levine Smith.

As for Plaintiffs' seventh cause of action, for fraud as against Sandy Levine, in a claim for fraudulent misrepresentation, a plaintiff must allege: (1) a misrepresentation or a material omission of fact; (2) which was false and known to be false by defendant; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance of the other party on the misrepresentation or material omission; and, (5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173 [2011]). A cause of action sounding in fraud must be pleaded with particularity. (CPLR § 3016[b]). However, "that requirement should not be confused with unassailable proof of fraud." (*MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 295 [1st Dep't 2011]). "[T]he purpose of § 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of", (*Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 [2008]), and should not be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting the fraud. (*Lanzi v. Brooks*, 43 N.Y.2d 778, 780 [1977]). Thus, where concrete facts "are peculiarly within the knowledge of the party" charged with the fraud, "it would work a potentially unnecessary injustice to dismiss a case at an early stage" prior to discovery. (*Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 [2008] [citations omitted]).

Here, Plaintiffs' complaint alleges that Sandy Levine "repeatedly made material misrepresentations to the Carnegie Deli, including misrepresentations concerning: the nature of his use of the Carnegie Deli's cash receipts, bank accounts, financial instruments, and other property; the nature of work allegedly performed by various individuals; and other material facts concerning the finances and interests of the Carnegie Deli." Plaintiffs' complaint alleges that "Sandy Levine misrepresented the nature of his use of the Carnegie Deli's funds, accounts, and other property, including by stating in words or substance that his use was for the legitimate business purposes of the Carnegie Deli". Plaintiffs' complaint further alleges that Sandy Levine "falsified the businesses' books and records", "misrepresented the nature of

work allegedly performed by various individuals to justify salary and other payments that were unjustified and contrary to the interests of the Carnegie Deli", "failed to disclose and omitted material facts concerning the conduct described above in his communications with Marian Harper Levine and the Carnegie Deli's employees and agents", "forged Marian Harper Levine's signature and used her signature stamp for unauthorized purposes", and "bribed employees and others to induce their acquiescence to the theft and other misconduct." Plaintiffs' complaint also asserts that Sandy Levine, "repeatedly failed to disclose the actions described above, which were materially injurious to the interests of the Carnegie Deli, in his communications with the Carnegie Deli's owner, employees, and agents", that, "Sandy Levine made the misrepresentations and omissions described above with the intent of continuing his employment with the Carnegie Deli and to further and conceal his theft and other misconduct", and that, "Carnegie Deli relied on Sandy Levine's misrepresentations and omissions in continuing to employ him and entrusting him with the management of the business, its finances, trade secrets, and strategic plans."

Accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint set forth Sandy Levine's alleged misconduct in sufficient detail to clearly inform Sandy Levine with respect to the incidents complained of. Accordingly, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately plead a cause of action for fraud upon Carnegie Deli as against Sandy Levine, for purposes of surviving a motion to dismiss at this early stage of litigation.

As for Plaintiffs' eighth cause of action, for fraud upon Marian Harper Levine, as against Sandy Levine, Plaintiffs' complaint alleges that, "Sandy Levine misrepresented the nature of his use of Marian Harper Levine's accounts, financial instruments, and other property, including by stating in words or substance that his use was for the benefit, and consistent with the interests, of Marian Harper Levine." Plaintiffs' complaint further asserts: "Sandy Levine repeatedly made material misrepresentations to Marian Harper Levine concerning his use of her bank accounts, financial instruments, and other property; and other material facts concerning her finances and interests" and that, "Sandy Levine repeatedly failed to disclose the actions described above, which were materially injurious to Marian Harper Levine's interests, in his communications with her." Plaintiffs' complaint alleges that "Sandy Levine made the misrepresentations and omissions described above with the intent of maintaining Marian Harper Levine's trust and confidence, preserving his access to her funds and property, and furthering and concealing his theft and other misconduct" and that, "Marian Harper Levine relied on Sandy

Levine's misrepresentations and omissions in continuing to entrust him with access to her accounts, financial instruments, confidential information, and other property interests", and was damaged as a result.

Accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint set forth Sandy Levine's alleged misconduct in sufficient detail to clearly inform Sandy Levine with respect to the incidents complained of. Accordingly, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately plead a cause of action for fraud upon Marian Harper Levine as against Sandy Levine, for purposes of surviving a motion to dismiss at this early stage of litigation.

As for Plaintiffs' ninth cause of action, a plaintiff claiming misappropriation of a trade secret must prove: (1) it possessed a trade secret; and, (2) defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means. (*Integrated Cash Management Services, Inc. v. Digital Transactions, Inc.*, 920 F.2d 171, 173 [2d Cir. 1990]). A trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." (*Ashland Management v. Janien*, 82 N.Y.2d 395, 407 [1993] quoting Restatement of Torts § 757). Factors to consider in deciding a trade secret claim include:

- (1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

(*Id.*; Restatement of Torts § 757, comment *b*). Additionally, a trade secret must first of all be secret: whether it is, is generally a question of fact. (*Ashland Management*, 82 N.Y.2d at 407).

Here, Plaintiffs' complaint alleges that, "Carnegie Deli has taken numerous steps to protect the confidentiality of its trade secrets, including its production techniques and business plans. For example, the Carnegie Deli limits access to its production techniques and business plans." Plaintiffs' complaint further alleges that, "[b]ecause of his position with the business and the high level of trust placed in him by the Carnegie Deli, Sandy Levine was one of only a handful of Carnegie Deli employees who had access to the entirety of the restaurant's business plans and production techniques." Plaintiffs' complaint asserts that, "[b]etween 2000 and 2012, Sandy Levine repeatedly misappropriated the trade secrets of the Carnegie Deli – including production methods, recipes, and business plans – and provided that confidential information to [Siricharoen], her relatives, associates, and others." Plaintiffs' complaint further asserts:

Between 2000 and 2012, Sandy Levine brought Penkae Siricharoen, her relatives, associates, and others to the Carlstadt, New Jersey location where certain of the Carnegie Deli's food products are prepared (including a variety of processed meats, pickled foods, and desserts). The purpose of those visits was to convey the Carnegie Deli's food production processes and recipes to individuals not authorized to receive such information.

Plaintiffs' complaint alleges that, as a result, "Defendants have knowingly misappropriated the Carnegie Deli's trade secrets, or aided and abetted such misappropriation, in breach of their confidential relationships and/or fiduciary and other legal duties to the Carnegie Deli, and/or as a result of discovery by improper means."

Accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately plead that Sandy Levine possessed "trade secrets of the Carnegie Deli – including production methods, recipes, and business plans" and that Sandy Levine used such "confidential information" in breach of a duty owed to Carnegie Deli. Accordingly, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately plead a cause of action for misappropriation of trade secrets as against Sandy Levine.

In addition, viewing Plaintiffs' complaint in the light most favorable to the non-moving party, the four corners of Plaintiffs' complaint adequately plead that Siricharoen and Leng possessed proprietary information including, "Carnegie Deli's

production processes and recipes”, and that the Leng Defendants used such “confidential information”, as a result of discovery by improper means, in their own restaurant ventures. Accordingly, accepting Plaintiffs’ allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs’ complaint adequately plead a cause of action for misappropriation of trade secrets as against the Leng Defendants.

As for Plaintiffs’ tenth cause of action, for unfair competition, New York recognizes two theories of common-law unfair competition: palming off and misappropriation. (*ITC Ltd. v. Punchgini, Inc.*, 9 N.Y.3d 467, 476 [2007]). An unfair competition claim involving “palming off” involves the sale of the goods of one manufacturer as those of another. (*Id.*). By contrast, an unfair competition claim involving misappropriation, “usually concerns the taking and use of the plaintiff’s property to compete against the plaintiff’s own use of the same property.” In order to sustain a cause of action for unfair competition involving misappropriation, a plaintiff must plead bad-faith misappropriation of a commercial advantage. (*Ahead Realty LLC v. India House, Inc.*, 92 A.D.3d 424, 425 [1st Dep’t 2012]; *REDF-Organic Recovery, LLC v. Rainbow Disposal Co., Inc.*, 116 A.D.3d 621, 622 [1st Dep’t 2014]). The goodwill attached to a famous name may constitute a property right or commercial advantage for purposes of a claim for unfair competition involving misappropriation. (*ITC Ltd. v. Punchgini, Inc.*, 9 N.Y.3d 467, 476 [2007]).

Plaintiffs’ complaint alleges that “Carnegie Deli and its owner hold the exclusive rights to use of the name ‘Carnegie Deli.’ Those rights arise from both common law and statute, including numerous federally registered trademarks.” Plaintiffs’ complaint further alleges, “From approximately 2006 through 2012, Defendants Penkae Siricharoen, Leng Enterprises LLC, Sandy Levine, and others conspired to pursue restaurant ventures in New York City and elsewhere using the Carnegie Deli’s name, goodwill, and products without the knowledge or consent of the Carnegie Deli or its owner.” More specifically, Plaintiffs’ complaint asserts, “As an example, the Leng Thai Restaurant in Astoria, Queens, served food that purported to be produced by the Carnegie Deli”, and that, “As another example, in or after 2007, Defendants Penkae Siricharoen and Sandy Levine opened a restaurant called the ‘Carnegie Deli Thailand’ in Bangkok, Thailand.” Plaintiffs’ complaint alleges that, “Plaintiffs never authorized the Defendants to use the name or products of the Carnegie Deli.” Plaintiffs’ complaint further alleges, “The Defendants’ actions evidence a conscious plan and scheme to misrepresent their restaurant ventures as being authorized by and/or affiliated with the Carnegie Deli.”

Plaintiffs’ complaint asserts:

The Defendants conspired together to misappropriate the Carnegie Deli's business and goodwill by using the 'Carnegie Deli' name without authorization and falsely implying an affiliation with the Carnegie Deli; willfully breaching or inducing others to breach fiduciary duties owed to the Carnegie Deli; misappropriating the Carnegie Deli's confidential and proprietary information and trade secrets and competitive advantage; physically taking company property; and interfering with the Carnegie Deli's business and employer-employee relationships.

Plaintiffs' complaint alleges, "Such conduct constitutes unfair competition which has directly and proximately caused substantial damage to the Carnegie Deli and its businesses, resulting in the loss of business, employees, goodwill, and current and future revenue, and other damage to their business and reputation."

Accepting Plaintiffs' allegation that "Leng Thai Restaurant in Astoria, Queens, served food that purported to be produced by the Carnegie Deli," as true, the four corners of Plaintiffs' complaint sufficiently plead bad faith misappropriation of a commercial advantage belonging to Carnegie Deli. Additionally, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, Plaintiffs' allegations respecting Sandy Levine's, and the Leng Defendants', purported use of Plaintiffs' trade name to open a restaurant called the "Carnegie Deli Thailand" sufficiently plead a bad faith misappropriation of Carnegie Deli's goodwill, for purposes of surviving a motion to dismiss at this early stage of litigation. Accordingly, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint are sufficient to support Plaintiffs' cause of action for unfair competition as against Sandy Levine and the Leng Defendants.

With respect to Defendants' remaining arguments for dismissal, the Levine Defendants argue that Plaintiffs' complaint should be dismissed on the basis of the pendency of prior proceedings between the parties. CPLR § 3211(a)(4) permits dismissal of an action where, "there is another action pending between the same parties for the same cause of action in a court of any state of the United States; the court need not dismiss upon this ground but may make such order as justice requires." The purpose of this rule is to prevent a party from being harassed or burdened by having to defend a multiplicity of suits. (*Rinzler v Rinzler*, 97 A.D.3d

215, 217 [3d Dep't 2012] [internal citations omitted]). Factors to consider in determining whether two causes of action are the same include: (1) whether both suits arise out of the same actionable wrong or series of wrongs; and, (2) "as a practical matter, whether there is any good reason for two actions rather than one being brought in seeking the remedy." (*Id.*). Here, the Levine Defendants argue that Plaintiffs' complaint should be dismissed based on the pendency of prior proceedings between plaintiff 854 Carnegie Real Estate Corp. and defendants Siricharoen and Sandy Levine. However, insofar as the instant suit seeks different relief and involves several parties that are not named in the prior proceeding, CPLR § 3211(a)(4) does not require dismissal of the instant complaint.

As for the Levine Defendants' argument that Plaintiffs' remaining causes of action as against Sandy Levine should be addressed in the matrimonial action pending between Sandy Levine and Marian Harper Levine, New York Domestic Relations Law ("DRL") § 234 provides in pertinent part:

In any action for divorce, for a separation, for an annulment or to declare the nullity of a void marriage, the court may (1) determine any question as to the title to property arising between the parties, and (2) make such direction, between the parties, concerning the possession of property, as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties. Such direction may be made in the final judgment, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and final judgment.

(DRL § 234). Here, Plaintiffs' complaint does not seek to adjudicate the relationship status of Sandy Levine and Marian Harper Levine. Plaintiffs' complaint does not involve competing claims of title to marital property or the distribution of marital assets pursuant to a divorce decree. In addition, Plaintiffs' complaint involves thirteen additional parties (ten plaintiffs and three defendants) who are not parties to the matrimonial action pending between Marian Harper Levine and Sandy Levine. Accordingly, the Levine Defendants' argument that Plaintiffs' complaint should be dismissed pursuant to DRL § 234 is unavailing.

Finally, with respect to Siricharoen's motion to strike certain allegations from Plaintiffs' complaint as scandalous or prejudicial, CPLR § 3024(b) permits a party to "move to strike any scandalous or prejudicial matter unnecessarily inserted into a

pleading.” In order to prevail on a motion to strike under CPLR § 3024(b), a party must demonstrate that the matter at issue is not merely “scandalous” or “prejudicial”, but also that the matter is “unnecessarily” inserted in the pleadings. In determining a motion to strike pursuant to CPLR §3024(b), the Court looks to “whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action.” (*New York City Health and Hosps. Corp. v. St. Barnabas Comly. Health Plan*, 22 A.D.3d 391, 391 [1st Dep’t 2005]). Here, the Leng Defendants move to strike allegations respecting Siricharoen’s purported “illicit” and “adulterous” relationship with Sandy Levine from Plaintiffs’ complaint as scandalous and prejudicial. The Leng Defendants move to strike such allegations as asserted in paragraphs 1, 33, 103, and 106 of Plaintiffs’ complaint. Although the Leng Defendants meet their burden of demonstrating that the allegations in question are “scandalous” within the meaning of CPLR § 3024(b), insofar as Plaintiffs’ complaint alleges that Sandy Levine engaged in “self-dealing” in connection with Carnegie Deli’s real estate holdings, the Leng Defendants fail to demonstrate that the allegations contained in paragraphs 1, 33, 103, and 106 are not relevant to a cause of action asserted in Plaintiffs’ complaint.

Wherefore, it is hereby

ORDERED that the motion of defendants Siricharoen and Leng (Mot. Seq. #002) is denied in its entirety; and it is further

ORDERED that motion of defendants Sandy Levine and Jodi Levine Smith (Mot. Seq. #003) is granted only to the extent that Plaintiffs’ second “fifth” and sixth causes of action, for aiding and abetting breach of fiduciary duty to Carnegie Deli and Marian Harper Levine, respectively, are dismissed as against defendant Jodi Levine Smith only and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiffs’ remaining causes of action are severed and shall proceed; and is further

ORDERED that all parties are directed to appear for a conference at 71 Thomas Street, Room 205, on March 24, 2015, at 9:30 a.m. to set a discovery

schedule for the limited issues raised above respecting the foreign entity plaintiffs' capacity to bring suit in New York.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: January 15 2015



EILEEN A. RAKOWER, J.S.C.

HON. EILEEN A. RAKOWER