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Re: *Banet, et al. v. Fonds de Régulation et de Contrôle Café Cacao, et al.*
Civil Action No. 3742-CC

Dear Counsel:

The parties in this long-running dispute are locked in a fight over the status of their legal relationship and, unfortunately, there is no amount of chocolate that can ease the pain. Plaintiff Hausmann-Alain Banet asserts that he is a stockholder of defendant, The New York Chocolate and Confections Company ("NY3C"). Plaintiffs Fulton Cogeneration Associates, LP ("FCA") and Lion Capital Management, LLC ("LCM") assert they are creditors of NY3C. NY3C has moved for summary judgment on each of its three counterclaims. Pursuant to the Declaratory Judgment Act (10 Del. C. ch. 65) NY3C's counterclaim seeks declarations that (1) Banet is not a stockholder of NY3C and that LCM has not been a stockholder of NY3C since May 23, 2008 (Count I); and (2) that neither LCM nor FCA is a creditor of NY3C (Counts II and III).

Though the matter before me is on cross motions for summary judgment, the motions are surprisingly incongruous. Defendant NY3C seeks declaratory relief on its counterclaims, yet plaintiffs seek summary judgment on Count I of their Amended Complaint, a matter which I not only stayed pending the outcome of the counterclaims,[1] but which I also denied in a previous summary judgment motion.[2] Thus, I only address the portion of plaintiffs' motion relating to defendant's counterclaims.[3] The remainder of plaintiffs' motion is merely a motion to reargue plaintiffs' first summary judgment motion, which has been denied, and is denied again for the same reasons stated in my February 18, 2009 ruling.

I. FACTUAL BACKGROUND[4]

NY3C is a Delaware corporation that was formed in October 2003 to operate a chocolate plant based in Fulton, New York. Nestle formerly owned and operated the plant. Fonds de Régulation et de Contrôle Café Cacao ("FRC") and LCM purchased the plant and equipment necessary to operate the plant before to NY3C's formation. The FRC is a quasi-governmental agency formed under the laws of the Côte d'Ivoire; LCM is an alternative investment management firm.

Banet incorporated NY3C in Delaware on October 30, 2003, appointing himself sole director and authorizing the company to issue 1,000 shares of common stock. On November 17, 2003 Banet issued all 1,000 shares of stock to LCM, and on the same day LCM transferred 800 of those shares to the FRC (representing 80%). LCM retained the remaining 200 shares (representing 20%).

Eventually a dispute arose over the ownership of NY3C and the composition of its board of directors. In July 2005, the FRC filed an action in this Court seeking a declaration as to the respective equity interests of the FRC and LCM (the

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[1] *Banet v. Fonds de Régulation et de Contrôle Café Cacao*, C.A. No. 3742-CC, July 6, 2009 Order (granting NY3C's motion to amend, staying Count I, and directing parties to brief the legal issues raised in NY3C's counterclaims).

[2] *Banet v. Fonds de Régulation et de Contrôle Café Cacao*, C.A. No. 3742-CC, 2009 WL 529207 (Del. Ch. Feb. 18, 2009) (hereinafter "*FRC II*") (denying Banet's First Summary Judgment Motion).

[3] Unfortunately, this "portion" is highly disproportionate to the number of pages plaintiffs' devoted to rearguing issues already decided by this Court. Of 50 pages, approximately 10 related to defendant's counterclaims.

[4] Because no dispute of material fact exists, I may draw facts from either defendant's or plaintiffs' briefs. For reasons of ease and clarity, the facts stated here are drawn predominately from defendant's opening brief.

"FRC Action").[5] In response, LCM sought, among other things, a declaration that it owned 100% of NY3C. On January 22, 2007, after a three-day trial, I issued a letter opinion holding that the FRC owned 80% of the 1,000 issued and then-outstanding shares of NY3C and that LCM owned the remaining 20%.[6] Most importantly, I found that "[n]othing in the record suggests that either party has transferred its shares since they were validly issued and distributed on November 17, 2003."[7]

On May 23, 2008, LCM's 200 shares of NY3C stock were sold at a sheriff's sale in partial satisfaction of a judgment against LCM.[8] That judgment was entered on September 17, 2007 in the Superior Court of California in favor of NY3C and against both LCM and Banet as a result of the conversion of a tax refund check belonging to NY3C.[9] The judgment is final against both LCM and Banet.[10] NY3C domesticated the judgment on October 4, 2007 in the Delaware Superior Court in and for New Castle County.[11] As a judgment creditor, NY3C attached LCM's stock in NY3C, and then filed a motion to sell LCM's 200 shares. On February 15, 2008, the Superior Court entered an order directing the sale of LCM's shares.[12] After repeated unsuccessful attempts by Banet to prevent the sale, LCM's stock was finally sold. NY3C purchased LCM's 200 shares,[13] and therefore became NY3C's sole stockholder as of May 23, 2008.

Subsequently, by Ordinance dated September 19, 2008, the President of the Côte d'Ivoire formed and empowered the Comité de Gestion de la Filière Café-Cacao (the "CGFCC") to succeed to the authority and powers of the FRC. Thus, the CGFCC has been the sole stockholder of NY3C since September 19, 2008.

Plaintiff Fulton Cogeneration Associates, LP ("FCA") supplied gas, electricity, and steam to the chocolate plant. On July 19, 2005, FCA filed suit against NY3C in the Supreme Court of the State of New York seeking damages arising out of NY3C's alleged failure to honor its obligations to FCA in connection

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[5] *Fonds de Régulation et de Contrôle Café Cacao v. Lion Capital Mgmt., LLC*, C.A. No. 1509-N, 2007 WL315863, at *3 (Del. Ch. Jan. 22, 2007) (hereinafter "*FRC I*").
[6] *Id.* at *8.
[7] *Id.*
[8] Def.'s Opening Br. in Supp. of its Mot. for Summ. J. ("DOB") Ex. 7.
[9] DOB Ex. 8.
[10] LCM did not appeal the judgment, but Banet did and on October 16, 2008 the Supreme Court of California refused his appeal. DOB Ex. 9.
[11] DOB Ex. 10, 11.
[12] DOB Ex. 15.
[13] DOB Ex. 7.

with FCA's provision of steam to the chocolate plant through June 30, 2005 (the "New York Action").[14] FCA alleged that NY3C owed it for steam provided between December 19, 2003 and May 31, 2004 pursuant to an agreement NY3C assumed from Nestle. By its terms, that agreement ended May 31, 2004. After May 31, 2004, FCA continued to provide steam on a month to month basis "under the same rates, terms and conditions as applied under the Nestle Steam Agreement" through June 30, 2005.[15]

In addition to the above amounts sought for services, FCA also brought claims against NY3C to recover (i) reimbursement for under-consumption charges, (ii) damages resulting from FCA's inability to pay its suppliers or employees, and (iii) interest, late charges, attorneys' fees and other damages.[16] In July 2008, the New York Court granted partial summary judgment in favor of FCA reflecting amounts that NY3C owed FCA for steam provided to the plant.[17] All of FCA's other claims were "dismissed – with prejudice" in response to FCA's failure to comply with an Order directing the company to obtain new counsel after its counsel moved to withdraw or suffer dismissal with prejudice of its claims.[18] Rather than appeal the dismissal, Banet consciously decided to give the claims up.[19]

Due to the lengthy and increasingly confused record, NY3C undertook to narrow the matters at hand by amending its answer to include three counterclaims and then seeking summary judgment on those counts. This is my decision on those claims.

II. STANDARD OF REVIEW

The decision to grant declaratory relief lies within the Court's discretion.[20] The Court may exercise its discretion when the benefit of granting relief outweighs the risk of a premature judgment.[21] Specifically, an actual controversy must exist

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[14] *Fulton Cogeneration Assoc., LP v. New York Chocolate & Confections Co.*, Index No. 05-1185 (N.Y. Sup., filed July 19, 2005).
[15] NY Compl. ¶ 22 (DOB Ex. 25).
[16] DOB Ex. 25, at ¶¶ 13-15, 17-20, 23-26, 41, 58, 60, 66, 73.
[17] DOB Ex. 26. The judgment was attached by the County of Oswego Industrial Development Agency ("IDA") and NY3C satisfied the judgment in April 2009. DOB Ex. 27.
[18] DOB Ex. 28 (emphasis removed). Retaining counsel was an ongoing problem for FCA in the New York Action; it obtained and then lost the assistance of three law firms. DOB Ex. 29 at 1-2.
[19] *See* 2008 Banet Dep. Tr. at 253-54 (Dec. 19, 2008), DOB Ex. 1.
[20] *Sprint Nextel Corp. v. iPCS, Inc.*, C.A. No. 3746-VCP, 2008 WL 2737409, at *12 (Del. Ch. July 14, 2008).
[21] *Id.*

which (1) involves the rights or other legal relations of the parties, (2) is asserted against one who has an interest in contesting the claim, (3) is between parties whose interests are real and adverse, and (4) is ripe for adjudication.[22]

Here, the Court will exercise its declaratory judgment jurisdiction and decide the motions for summary judgment before it. The controversy is real and ripe for adjudication. Each plaintiff has asserted the existence of a legal relationship—either as a stockholder or creditor—with defendant, and defendant disputes the claims. Moreover, plaintiff does not dispute the applicability of the Declaratory Judgment Act to this controversy.

Though the cross motions before me are incongruous, I apply the well-settled standards in analyzing the parties' contentions. To prevail, each moving party must show that there is no material fact in dispute and that they are entitled to judgment as a matter of law.[23] In examining the record, I must draw every reasonable inference in favor of the non-moving party,[24] and accept the non-moving party's version of any disputed facts.[25] That the parties have filed cross motions for summary judgment does not alter this standard.[26]

For the reasons outlined below, I grant defendant's motion for summary judgment and deny plaintiffs' motion for summary judgment.

III. ANALYSIS

A. Banet is Not a NY3C Stockholder (Count I)

As an initial matter, and for clarity of the record, no dispute exists that the 200 shares of NY3C stock formerly held by LCM were sold at a sheriff's sale on May 23, 2008 pursuant to a Sale Order of the Superior Court. Thus, LCM has not been a stockholder of NY3C since May 23, 2008.

Banet alleges that, as a result of a May 11, 2006 sale, he is the beneficial owner of LCM's former 200 shares of NY3C stock.[27] Defendant maintains that

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[22] *Id.* at *12-13.
[23] Ch. Ct. R. 56.
[24] *See Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002).
[25] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del.1992).
[26] *See Chambers v. Genesee & Wyoming Inc.*, 2005 WL 2000765, at *5 (Del. Ch. Aug. 11, 2005) ("Because both sides have alleged that there are outstanding issues of fact material to the resolution of the other's motion, Rule 56(h) does not apply by its own terms.")
[27] Pls.' Br. in Opp'n to Def.'s Mot. for Summ. J. and In Supp. of Pls.' Mot. for Summ. J. ("PAB") 47.

Banet is not a stockholder and that his claim is barred by both *res judicata* and judicial estoppel. Although plaintiffs attempt to obfuscate this issue with immaterial facts and thirteenth-hour arguments, defendant has carried its burden and shown that no material factual disputes exist. Defendant is entitled to summary judgment as a matter of law under both *res judicata* and judicial estoppel theories.

Under *res judicata*, a party must demonstrate:

> (1) the court making the prior determination had jurisdiction; (2) the parties in the present action are either the same parties or are in privity with the parties from the prior adjudication; (3) the prior adjudication was final; (4) the causes of action were the same in both cases or the issues decided in the prior action were the same as those raised in the present case; and (5) the issues in the prior action were decided adversely to the party's contention in the instant action.[28]

Banet argues that *res judicata* is inapplicable here solely because the fourth element is not met. He contends that this Court did not need to decide whether LCM sold its 200 shares to him on May 11, 2006 in the FRC Action. Banet mischaracterizes the previous proceeding. The issue in front of the Court then was the same issue now: to determine the equity ownership interests of NY3C. I specifically held that there was no evidence of any stock transfers since November 2003.[29] Moreover, my Final Order provided that, as of January 22, 2007, only LCM and FRC were owners (of 200 and 800 shares, respectively), and "[a]ny previously issued stock certificates which are inconsistent with" the foregoing "are null and void and of no force and effect."[30] Clearly, Banet's current claim contradicts my plain ruling.

Though Banet does not contest the privity element, I address it because he was not a named party in the FRC Action. Privity exists where a person has a "close or significant relationship" with another.[31] As LCM's President, CEO, stockholder, and sole litigation representative, Banet has a "close or significant relationship" with LCM. Thus, Banet's stockholder claim meets all elements of the doctrine and it is barred under *res judicata* as a matter of law.

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[28] *Julian v. Eastern States Const. Serv., Inc.*, C.A. No. 1892-VCP, 2009 WL 1211642, at *5 (Del. Ch. May 5, 2009).
[29] *FRC I*, 2007 WL315863 at *5-6.
[30] *FRC I*, Final Order July 17, 2007, ¶ 5.
[31] *Orloff v. Shulman*, C.A. No. 852-N, 2005 WL 3272355, at *9, n.60 (Del. Ch. Nov. 23, 2005).

Moreover, *res judicata* not only bars all claims that were litigated in the prior proceedings but also all claims that could have been litigated.[32] Even if LCM had transferred its shares to Banet on May 11, 2006, that transfer occurred five months before the FRC trial. Had this transfer truly occurred—rather than, as I suspect, been conjured up as a last-ditch effort to prevent the sheriff's sale[33]—Banet, as LCM's sole representative, had an obligation to disclose that fact to the Court, rather than taking the inconsistent position that LCM was the owner (indeed, LCM would have lost standing to pursue its claims in the FRC Action had it no longer owned the stock). Furthermore, based on Banet's production of two stock certificates dated May 11, 2006, which clearly are "previously issued stock certificates" as referred to in my previous Order, he should have asserted his claim in the previous action.

As a final attempt to excuse his failure to correct the record in the FRC Action, Banet contends he did not mention the stock transfer because it might "make the judge upset"[34] and LCM remained the record holder throughout that action and he merely held the stock in beneficial title. But Banet again contradicts himself. Unfortunately, if the certificates Banet produced in support of his new theory are valid, they show that record ownership transferred from LCM to *him*. If this were true, LCM's ownership claim in the FRC Action was entirely disingenuous.

Banet's claim also fails under the doctrine of judicial estoppel. A litigant may not advance an inconsistent position when the Court was induced to accept the previous position as a basis for its ruling.[35] Allowing a litigant to do so "is the equivalent to committing a fraud on the Court."[36] As stated above, Banet was in privity with LCM, thus the doctrine of judicial estoppel applies.[37] Clearly, I accepted Banet's argument that LCM was the owner of the shares in the FRC Action. He cannot now assert that he is the owner of those shares. Banet is not a stockholder of NY3C as a matter of law. His self-serving argument to the contrary

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[32] *See Julian*, 2009 WL 1211642, at *5.

[33] As defendant notes, Banet's first assertion that he was the owner occurred less than a month *before* the sheriff's sale, and conspicuously *after* my final ruling. *See* Defendant's Reply Brief and Answering Brief ("DRB") 9. The Superior Court shared my same suspicion, and treated Banet's request to cancel the sheriff's sale as a motion for reargument of its sale order, which it denied. *See* DOB Ex. 19.

[34] DOB Ex. 1 at 188.

[35] *Julian*, 2009 WL 1211642 at *6.

[36] *Lynch v. Thompson*, No. C.M. 2488-K, 2009 WL 1900464, at *4 (Del. Ch. June 29, 2009).

[37] 28 Am. Jur.2d *Estoppel* § 74 (2000).

now is completely unbelievable, as well as judicially estopped and barred by *res judicata*.

Nevertheless, Banet also tries to insert a new issue, disguised as a response to defendant's motion, as to whether he is a current director of NY3C.[38] Defendant has not sought a declaration regarding Banet's director status because any question as to the current directors was settled previously. Though there may have been a dispute as to whether Banet was removed from the board in 2005, that question is moot in light of CGFCC's removal of all then current members of NY3C by written consents dated November 20, 2008 and election of new directors.[39] Clearly, Banet is not a director of NY3C.

B. FCA is Not a Creditor of NY3C (Count III)

Delaware courts must measure the preclusive effect of a foreign judgment by the standards of the rendering forum.[40] FCA's claims that it is owed money by NY3C were previously adjudicated in the New York Action. To determine claim preclusion under the doctrine of *res judicata*, both New York and Delaware apply the modern transactional approach, which bars all claims arising out of the same transaction or series of transactions.[41]

Plaintiffs assert that FCA remains a creditor of NY3C after conclusion of their New York Action. In that action, plaintiffs sought payment for services provided by FCA to NY3C before June 30, 2005. Even though the New York

[38] DRB at 3, n.4.

[39] Plaintiffs explicitly acknowledge the written consents in their First Summary Judgment Motion Reply Brief, and implicitly in their opposition to NY3C's Motion to Amend. *See* DRB at 3, n.4. After acknowledging the written consents twice and not disputing their validity, the plaintiffs cannot now do so. *See* PAB 14 (attempting to argue invalidity of written consents due to improper dating). Even if I were to consider plaintiffs' purported dispute, it fails because the written consents to remove and replace NY3C's officers and directors, both dated November 20, 2008, were valid as a matter of law. CGFCC was the sole stockholder of NY3C as of November 20, 2008, therefore under DGCL section 228(c) only one stockholder was required to sign and date the written consent. *See* 10 *Del. C.* § 228(c) ("Every written consent shall bear the date of signature of each stockholder . . . who signs the consent . . . ."). CGFCC signed and dated the written consents. Plaintiffs appear to focus on the number of signatures, not the entity for which the signatures were executed. Thus, plaintiffs misapply Section 228.

[40] *In re Nat'l Auto Credit, Inc.*, C.A. 19028-NC, 2004 WL 1859825, at *2 (Del. Ch. Aug. 3, 2004); *see also, Columbia Cas. Co. v. Playtex FP, Inc.*, Del. Supr., 584 A.2d 1214, 1217 (1991).

[41] *Sandhu v. Mercy Med. Ctr.*, 54 A.D.3d 928 (Sup. Ct., App. Div., 2d Dep't, NY 2008). Plaintiffs erroneously assert that Delaware law applies regarding the application of *res judicata*, but New York law applies because the previous action was a New York action.

Action granted plaintiffs partial summary judgment and dismissed the remainder with prejudice—clearly a final adjudication on the issue—plaintiffs now contend that NY3C owes FCA expenses that FCA was required to pay after the termination of services to NY3C on June 30, 2005. Plaintiffs concede, however, that these alleged debts arise out of "services performed prior to June 30, 2005"[42]—the same services giving rise to the New York Action. Rather than represent new debts, these alleged debts are merely additional damages arising from the cause of action in New York, which should have been brought in the earlier action.[43] As such, they are barred by *res judicata*.

Relying on convenient portions of an ALR article, plaintiffs contend that actions dismissed "with prejudice" do not automatically operate as a judgment on the merits for *res judicata* purposes.[44] Unfortunately for plaintiffs, both the article and many New York courts equate a dismissal "with prejudice" with a dismissal "on the merits,"[45] and I see no reason to depart from such precedent.[46]

Additionally, raising a *res judicata* defense at this time is both appropriate and not prejudicial to plaintiffs. Contrary to plaintiffs' contention, it would have been inappropriate to raise this defense in answer to Count I of the Amended Complaint, which seeks appointment of a receiver, because FCA does not assert these alleged debts in Count I. Moreover, from early in the case plaintiffs have known NY3C's intent to assert claim preclusion. Therefore, plaintiffs are not prejudiced by defendants' asserting this defense at this time.

Finally, plaintiffs argue that NY3C is liable to FCA for a "potential debt" held by the County IDA against FCA.[47] Due to the uncertainty of such a debt it is unripe for adjudication as a matter of law. Therefore, FCA is not a creditor of NY3C for any potential debt held by the County IDA.

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[42] *See supra* note 13 (continued service "under the same rates, terms & conditions under the Nestle Steam Agreement").

[43] Indeed, these claims were brought in the New York Action, and *denied* with prejudice. DOB Ex. 29. To allow plaintiffs to assert them now would eviscerate the doctrine of *res judicata*. It is undisputed that FCA ceased providing any services to NY3C on June 30, 2005. Therefore, no basis exists for FCA to claim that NY3C is indebted to it for services provided after that date.

[44] As defendant points out, plaintiffs misconstrue the article. It begins with a "general proposition, [that] a judgment of dismissal which expressly provides that it is 'with prejudice' operates as res judicata." 149 ALR 553, at Section III.a.

[45] *Id.*; *see also, Yonkers Contracting Co., Inc. v. Port Authority Trans-Hudson Corp.*, 712 N.E.2d 678, 681 (N.Y. 1999).

[46] Nor am I persuaded by plaintiffs' attempt to distinguish a dismissal for "failure to prosecute" from a dismissal "with prejudice" when the final order explicitly states "with prejudice."

[47] PAB 30.

For all these reasons, FCA is not a creditor of NY3C as a matter of law.

C. LCM is Not a Creditor of NY3C (Count II)

As a result of plaintiffs' tireless efforts to complicate matters, LCM's status at first appears murky. Finally, in their reply brief, plaintiffs get around to actually providing a breakdown of the debts purportedly owed to LCM and FCA.[48] FCA and LCM jointly appear to assert debts arising out of the operations of FCA, whereas LCM individually appears to assert alleged debts that arose out of its "causing FCA to supply services to NY3C."[49] A numerical breakdown, however, is not necessary because the undisputed facts show that no creditor relationship exists between LCM and NY3C.

The alleged debts arising from the operations of FCA, whether asserted by FCA or LCM, are barred by *res judicata*. FCA is barred by this theory, as described above, and LCM is likewise barred because it is in privity with FCA. Privity exists where a party's rights derive from the previous litigant's rights.[50] LCM alleges that because FCA had no assets, LCM had to lend it money to pay its expenses.[51] Thus, any claim that LCM may assert for payment based on an alleged obligation arising from FCA's operations is derivative of FCA's claims, and therefore privity exists. LCM is precluded as a matter of law from asserting such debts for the same reasons that FCA is precluded.

As to the alleged debts asserted solely by LCM, plaintiffs' present three theories—contract, unjust enrichment, and quantum meruit[52]—to establish a creditor relationship between LCM and NY3C. Each theory fails.

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[48] Pls.' Reply Br. in Supp. of Pls.' Mot. for Summ. J. ("PRB") 10-11.

[49] *See* PAB 27-28. Only once do plaintiffs mention a direct connection between LCM and NY3C ("NY3C fail[ed] to satisfy its debts and obligations to LCM") but mere mention is insufficient to establish any obligation between those parties. *Id.* at 27.

[50] *37-01 31st Ave Realty Corp. v. Safed*, 20 Misc.3d 762, 766 (Civ. Ct., Queens Cty. 2008) ("a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation.").

[51] 2008 Banet Dep. Tr. at 98, DOB Ex. 1.

[52] LCM also contends it is entitled to reimbursement for providing the start up capital necessary to begin NY3C operations. Though plaintiffs concede they have received approximately $4.1 million in reimbursement, they believe they are entitled to more because the reimbursement funds came from an advancement of approximately $7 million from the FRC (whose purpose was to fund NY3C operations) to NY3C; hence plaintiffs must be owed the full amount transferred. Standing alone this assertion cannot establish a reimbursement liability.

First, it is undisputed that no written contract exists between LCM and NY3C. The best plaintiffs can muster is that "logically" there must have been an agreement because it "would make no sense for FCA to supply gas, electricity and steam to NY3C free of charge or at a loss."[53] Unfortunately, there is no such agreement and logic does not create that which does not exist.[54] Moreover, plaintiffs appear to have confused the parties; FCA was paid (as evidenced by the New York Action judgment) and if LCM was to be paid for services it caused FCA to provide, an agreement between FCA and LCM would be more logical. But any such agreement is irrelevant to NY3C's relationships.

Second, with regard to plaintiffs' unjust enrichment and quantum meruit claims, plaintiffs again appear to have confused the parties. Only the provider has standing to bring an equitable claim for recovery against NY3C. Because FCA—not LCM—provided the services, LCM lacks standing to assert these claims.

For the foregoing reasons, LCM is not, as a matter of law, a creditor of NY3C.

VI. CONCLUSION

For all the above reasons, defendant's motion for summary judgment is GRANTED and plaintiffs' cross motion for summary judgment is DENIED.

Furthermore, because I declare, as a matter of law, that Banet is not a stockholder of NY3C, and that FCA and LCM are not its creditors, plaintiffs lose standing for four of their claims: Count I (appointment of a receiver or custodian), Count II (breach of fiduciary duty brought derivatively by LCM and FCA), Count III (breach of fiduciary duty brought derivatively by Banet), and Count VI (request for stockholders meeting). Banet also loses standing for Count IV (breach of fiduciary duty brought directly by Banet and LCM). Additionally, because Banet clearly has not been a director since November 20, 2008, Counts V (books and records demand) and VII (request to hold a meeting of the board) are moot.

Therefore, I DISMISS Counts I-III, partial Count IV, and Count VI on lack of standing grounds, and Counts V and VII on mootness grounds. Only LCM's

[53] PAB 27 (emphasis supplied).

[54] Plaintiffs do point to one written agreement as evidence that LCM agreed to cause FCA to supply services to NY3C "at cost." Unfortunately this agreement is a guarantee between LCM and a third party vendor, obligating LCM to pay the vendor in the event that FCA does not. NY3C is not a party to the agreement; therefore, it is irrelevant to establish NY3C's rights and obligations. PAB 20 (citing Pl. Ex. J).

direct claim for breach of fiduciary duty as a former minority stockholder of NY3C (partial Count IV) remains.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:dmq