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

PRESENT: HON. PAUL WOOTEN Justice PART 7

WILLIAM H. YUEN,

Plaintiff,

- against-

MARK C. BRANIGAN and PANGEA CAPITAL MANAGEMENT, LLC (f/k/a PANGEA CAPITAL MANAGEMENT LP),

Defendants.

INDEX NO. 150420/13

MOTION SEQ. NO. 001

MARK C. BRANIGAN and PANGEA CAPITAL MANAGEMENT, LLC (f/k/a PANGEA CAPITAL MANAGEMENT LP),

Third-Party Plaintiffs,

- against-

JOHN R. LAKIAN,

Third-Party Defendant.

INDEX NO. 590313/13

The following papers, were read on this motion _____.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ■ No

Motion Sequence 001 and 002 are hereby consolidated for purposes of disposition.

William H. Yuen (plaintiff or Yuen) brings this action against Mark C. Branigan (Branigan) and Pangea Capital Management, LLC, (Pangea) a hedge fund partnership managed and controlled by Branigan (collectively, defendants), based upon defendants' allegedly fraudulent misrepresentation, fraudulent inducement, breach of contract, breach of fiduciary duties, unjust enrichment and malicious prosecution of Yuen, Pangea's former head of trading, stemming from the acrimonious dissolution of the Pangea partnership and the work affiliation between plaintiff and Branigan. Plaintiff's claims, are, in essence, that Pangea

breached a compensation agreement and partnership agreement between plaintiff and Pangea, and that Branigan committed fraud to induce him to join Pangea, and instituted a malicious prosecution of plaintiff. Plaintiff did not name John R. Lakian (Lakian), Branigan's partner, in the action. Branigan brought Lakian into this litigation by filing a third-party complaint against him which asserts claims for contribution and indemnification, based on Lakian's alleged testimony to the grand jury that indicted Yuen, and further asserting that Lakian breached his fiduciary duties to Branigan and Pangea by (1) failing to supervise Yuen's activities as a trader in 2009 when Branigan was unable to do so; and (2) funding Yuen's litigation against Branigan and Pangea.

In motion sequence number 001, plaintiff moves, pursuant to CPLR 3211(a)(1) and (a)(7), for an order dismissing defendants' counterclaims. Defendants cross-move, pursuant to CPLR 3211(a)(7), or, in the alternative, pursuant to CPLR 3212, for an order dismissing the first amended verified complaint, and authorizing the unsealing of criminal records utilized in the prosecution and indictment of Yuen that forms the basis for Yuen's malicious prosecution cause of action.

In motion sequence number 002, third–party defendant Lakian moves, pursuant to CPLR 3211(a)(7), for dismissal of the second, third, fifth and sixth causes of action of the third-party complaint. Lakian also moves, pursuant to CPLR 3211(c), for summary judgment on the first, second and fourth counts of the third-party complaint.

For the reasons set forth below, the motions are granted in part and denied in part.

BACKGROUND

The following facts are drawn from the first amended complaint, the answer, the third-party complaint, and from the documentary evidence that is cited and incorporated by reference in the pleadings.

Pangea, a hedge fund that conducts trades for outside investors based upon daily

recommendations created through a proprietary trading algorithm, was founded by Branigan in February 2008 (amended complaint, ¶¶ 7-8). Pangea is a limited liability company organized under the laws of the state of Delaware (Lakian aff, ¶ 2). Pangea is operated under the terms of its LLC Agreement, which specifies that it is governed and to be interpreted under the laws of the state of Delaware (*id.*, ¶¶ 3-4; *see also* LLC Agreement § 10.09 [attached to Lakian aff as exhibit B])

During the time period relevant to this litigation, Pangea managed the Pangea Opportunity Fund, LP (the Pangea Fund) (counterclaims, ¶ 51). Pangea utilized a trading model in managing the Pangea Fund, which was designed to capitalize on market increases by taking long positions (*id.*, ¶¶ 52-53). By the spring of 2009, Branigan and Lakian had determined that they would need to be able to capitalize on downturns in the market by taking short positions as a way of augmenting the returns generated by the trading model, and that they needed to hire a trader who could assist them both in developing a "short" trading model, as well as trading the existing trading model (*id.*, ¶ 55-56). Branigan, who had met Yuen in 2007 while the two worked at a hedge fund in New York (amended complaint, ¶ 10), mentioned him to Lakian as a possible candidate (counterclaims, ¶ 62). On July 10, 2009, Lakian interviewed Yuen, and negotiations concerning the terms of Yuen's possible employment commenced thereafter (*id.*, ¶ 62).

Plaintiff contends that, in or before July 2009, in order to induce him into joining Pangea, Branigan falsely represented that, as of July 2009, Pangea had over $40,000,000.00 in investor funds under management, and that it possessed a proprietary trading algorithm that would generate advantageous trade recommendations (amended complaint, ¶ 11). Plaintiff contends that he reasonably relied on these representations, and, on July 24 2009, he entered into an oral agreement with Branigan and Pangea that, in addition to his position as head of trading, plaintiff would hold the title of "Partner" of Pangea (meaning member), and in consideration for

his undertaking the position of partner, plaintiff would receive a 10% equity share in Pangea (the Partnership Agreement) (*id.*, ¶ 17). In addition to his partnership interest, plaintiff also negotiated a compensation agreement, pursuant to which he would be compensated for his serving as head of trading, at a minimum of $15,000.00 per month, for a minimum period of three years (the Compensation Agreement), plus an additional sum to be calculated based upon the amount of assets under management (*id.*, ¶ 18).

Lakian memorialized his understanding of the principle terms of Yuen's employment agreement in an email dated July 28, 2009 (counterclaims, ¶ 63). The terms of Yuen's employment, as set forth in Lakian's July 28, 2009 email, were ultimately memorialized in an employment agreement that the parties never signed. The terms of the employment agreement tracked Lakian's email with one change: as originally contemplated, Yuen would be required to acquire his 10% interest in Pangea on or before December 31, 2009. However, the employment agreement that Lakian ultimately negotiated with Yuen provided that Yuen would instead have a right to acquire a 10% interest in Pangea only after completing a year of employment with Pangea without first having been terminated (*id.*, ¶ 64).

During the course of the negotiations, one stumbling block had been Yuen's request for a $30,000.00 loan to cover his overdue alimony payments (*id.*, ¶ 65). Branigan asserts that he agreed to personally loan Yuen $15,000.00 (*id.*, ¶ 69), and that Yuen asked him to characterize the loan as a starting bonus (*id.*). Branigan alleges that he ultimately agreed, and advanced the funds to Yuen on August 5, 2009 (*id*, ¶ 70).

According to plaintiff, Lakian confirmed his understanding of the Partnership Agreement and Compensation Agreement, and thereafter, Lakian and Branigan referred to Yuen as a partner of Pangea (amended complaint, ¶ 19). Plaintiff alleges that Branigan agreed to confirm the Partnership Agreement in a formal partnership agreement, but a formal agreement was never prepared. Instead, Branigan confirmed plaintiffs' ten-percent equity stake in email and

through other written references, and during plaintiff's tenure at Pangea, he was always treated as a partner, and held out to the world as a partner of Pangea (*id.*, ¶¶ 20, 25).

Plaintiff further asserts that, in spite of the fact that the draft Compensation Agreement was never signed, Pangea, Branigan and plaintiff began acting in accordance with the agreement (*id.*, ¶ 22). For instance, Pangea began paying Yuen his minimum monthly compensation payments of $15,000.00 (*id.*, ¶ 23).

After joining Pangea, Yuen commenced work as the head of trading by performing trades on behalf of Pangea, utilizing the daily trading recommendations generated by Pangea's trading algorithm (*id.*, ¶ 24). One of the "selling points" Branigan would stress to plaintiff was Pangea's ownership of a proprietary trading algorithm that would purportedly generate advantageous trade recommendations (*id.*, ¶ 27). This program was located on the secured server of an outside company, QES, LLC (QES) that ran a daily program utilizing the algorithm (*id.*, ¶ 28). Plaintiff asserts that he depended on his assistant, Annesh Sinha, to log on to the QES systems to receive the daily trading recommendations (*id.*, ¶ 29).

To facilitate plaintiff's work out of the office, Pangea purchased a laptop for approximately $600.00. Plaintiff would take the laptop home on most nights and weekends to work on presentations of analysis for Pangea. Plaintiff asserts that the laptop did not contain any of Pangea's proprietary information or intellectual property (*id.*, ¶ 32). In addition, the trading algorithm remained at all times on QES's secured servers, and not in plaintiff's possession. At no point did Pangea or its employees store or physically possess the algorithm on any of its computers (*id.*, ¶ 33).

At some point, the professional relationship between plaintiff and defendants began to deteriorate. Yuen alleges that, after he joined Pangea, he discovered that Branigan had deliberately and substantially inflated the amount of assets under management at Pangea, and that instead of $40,000,000.00, Pangea only had $4,000,000.00 under management (*id.*, ¶¶ 11,

34). In addition, plaintiff realized that Branigan had mischaracterized the quality and capability of the trading algorithm (*id.*, ¶ 35). Plaintiff asserts that, after he brought these facts to Branigan's attention, and recommended several alternative business opportunities, Branigan "enacted a plan to squeeze out" plaintiff from Pangea (*id.*, ¶¶ 36- 37).

In October 2009, one of Pangea's largest investors raised concerns about the possibility of Pangea's holding short overnight oil positions (counterclaims, ¶ 72). By email dated October 13, 2009, Yuen responded to the investor, stating, "I spoke to Mark over the weekend and he told me that you expressed some concerns regarding shorting oil and the risk of ruin. I understand where you are coming from . . . I utilize stop loss orders actively . . . Another trading philosophy I adhere to is not to 'double down' when a position is under water" (*id.*, ¶ 73). Later that day, the investor wrote back, asking for confirmation that Yuen would be closing out his short oil positions each evening (*id.*, ¶ 74). Branigan responded by email also dated October 13, 2009, stating "No net short energy derivatives position will be held by the Pangea Opportunity Fund other than between 5am EST and 5pm EST when have the dedicated attention of our trading team" (*id.*, ¶ 75). Defendants assert that Yuen was copied on this email, and thereby received a copy of Branigan's written directive not to short oil derivatives overnight (*id.*, ¶ 76). Defendants refer to Branigan's instructions as the "Directive" (*id.*).

Branigan became critically ill and was hospitalized on the evening of December 2, 2009. From December 2, 2009 through December 23, 2009, Branigan remained in the hospital and was in intensive care for a significant portion of that time. Upon his return home, Branigan was heavily medicated and was unable to return to work at Pangea's office until early February 2010 (*id.*, ¶ 78). According to Branigan, during this period, Lakian was in charge of Pangea, and responsible for supervising Yuen and Pangea's trading activity (third-party complaint, ¶ 20).

Defendants assert that, during the time period when Branigan was in the hospital and immediately afterwards when he was recovering at home, notwithstanding Branigan's express

instructions not to hold net short energy derivatives positions overnight in the Pangea Fund, and Yuen's own representations that he utilized "stop loss orders actively" and did not "double down" on losing positions, Yuen did, in fact, hold net short energy derivative positions overnight, failed to use stop loss orders, and doubled down on a losing position, all in violation of Branigan's directive, and all of which caused significant damage to Pangea (counterclaims, ¶ 79). In particular, for a number of days in mid-to-late December, Yuen shorted oil derivatives overnight, and "doubled down" on his losing positions, causing the Pangea Fund to lose almost 23% of its value (*id.*, ¶ 80).

In emails sent in early January 2010, Yuen took responsibility for the losses, but stated that "[t]he model and I didn't foresee the multiple geopolitical events that took place during that time," and further represented that procedures had been put into place "to ensure that this doesn't happen again. For example, we would override the model to never short oil overnight" (*id.*, ¶ 81).

Defendants assert that, however, the decision to stay short in oil overnight was not dictated by the trading model, but was caused by Yuen's reckless disregard of Branigan's directive, coupled with subsequent instructions several days later by Lakian for Yuen to stay short in oil and "double down" on his losing positions (*id.*, ¶ 82).

Branigan returned to work in February 2010, and, following a probationary period during which Yuen was given a chance to try to make back some of the losses in the Pangea Fund but instead lost another 11%, Yuen was terminated for cause on June 2, 2010 via email from Branigan (*id.*, ¶ 84; amended complaint, ¶ 43). The email also stated that: (1) plaintiff had no equity in Pangea; (2) no one from Pangea would disparage plaintiff; and (3) the "company line" would be that plaintiff left Pangea to pursue other opportunities. Branigan instructed plaintiff to return any of Pangea's equipment, materials or electronic files by Friday, June 4, 2010, at which time plaintiff would be able to pick up his personal possessions (amended complaint, ¶ 43).

Plaintiff contends that, as a result of his sudden ouster, he was never fully compensated per his agreement with Pangea. Specifically, plaintiff contends that he was deprived of reimbursement for work-related expenses, agreed-to compensation of a minimum of $450,000.00 in monthly payments, and an equitable stake of no less than $1,000,000.00 (*id.*, ¶ 45).

Following his termination from Pangea, plaintiff continued to work with Lakian, in a strategic capacity to help grow Pangea's subsidiary called Capital L, a registered investment advisor (*id.*, ¶ 48). Plaintiff asserts that he and Lakian agreed that he would continue to use the laptop originally purchased for him in his work for Capital L (*id.*, ¶ 50).

Plaintiff contends that, after he made several good faith attempts to resolve the dispute over monies owed to him by defendants, he retained legal counsel to try to resolve this issue. However, instead of negotiating in good faith, Branigan chose to escalate the dispute by falsely accusing plaintiff of a crime (*id.*, ¶ 54). According to plaintiff, Branigan began calling upon personal friends within the New York City police department (the NYPD) to assist him with trumped-up and false accusations that plaintiff had wrongfully retained possession of the laptop (*id.*, ¶ 56). On September 14, 2010, plaintiff was arrested (*id.*, ¶¶ 61-71).

Plaintiff asserts that Branigan gave his friends in the NYPD false information, and that Branigan importuned his friends in the NYPD to threaten and arrest plaintiff without true probable cause, and based purely on Branigan's lies (*id.*, ¶¶ 72-73). According to plaintiff, the specific facts that Branigan lied about, and importuned other Pangea employees to lie about, include: (1) that at a meeting in June 2010, plaintiff threatened to hold the laptop hostage and destroy it if he was not given the compensation owed him; (2) that Pangea had only one computer on which it was capable of trading; (3) that the laptop in plaintiff's possession was that computer; (4) that there was one program, the algorithm, on plaintiff's laptop, to which Pangea owned all of the rights outright; (5) that without the laptop and the algorithm contained therein,

Pangea would not be able to access the QES algorithm or execute any trades, and that Pangea's business was crippled; and (6) that plaintiff had no authority to retain possession of the laptop (*id.*, ¶ 78).

Defendants have a different version of what occurred with respect to the laptop. Defendants contend that, in the months after his departure from Pangea, plaintiff repeatedly threatened litigation against Branigan and Lakian (third-party complaint, ¶ 61). Plaintiff also attempted to use the laptop as bargaining leverage. During a meeting on June 6, 2010 between Lakian and Yuen at the Palace Hotel (the Palace Hotel Meeting), and in an email dated October 7, 2010, Yuen advised Lakian that he was holding the laptop "hostage until his salary and equity demands were met (*id.*, ¶ 53; *see* Branigan Aff, exhibit B]).

Defendants assert that, in the months following the Palace Hotel Meeting, various requests were made by Branigan and others for Yuen to return the laptop. One such request, on June 25, 2010, was from Sinha, who indicated that he urgently needed the laptop in order for Pangea to be able to "run our systems" (third-party complaint, ¶ 56). In September 2010, facing little movement from Yuen regarding the return of the laptop, and his own belief that the laptop was needed in order trade the Pangea Fund, Branigan filed a criminal complaint with the NYPD with the hope of having the laptop returned (*id.*, ¶ 57).

Branigan testified before the grand jury and he asserts, on information and belief, that Lakian did also (third-party complaint, ¶¶ 58, 59, 76, 79). Lakian asserts, however, that he did not testify before the grand jury (Lakian aff, ¶ 18).

Eventually, a grand jury indicted plaintiff for grand larceny (amended complaint, ¶ 85). Plaintiff contends that Branigan committed perjury, giving false testimony to the grand jury, and lying to the district attorney (*id.*, ¶¶ 86- 87). On January 31, 2012, plaintiff won a dismissal of all charges on speedy trial grounds (*id.*, ¶ 88).

After the discontinuance of the criminal action against him, Yuen commenced this

litigation against Pangea and Branigan. Yuen filed his first amended verified complaint on February 27, 2013, asserting causes of action for malicious prosecution (first cause of action), breach of the Partnership Agreement (second cause of action), breach of the Compensation Agreement (third cause of action), fraudulent inducement (fourth cause of action), and an alternative claim for unjust enrichment (fifth cause of action).

On April 11, 2013, Branigan and Pangea answered the complaint and asserted counterclaims for gross negligence (first counterclaim), negligence (second counterclaim), breach of contract based on Yuen's disregard of Branigan's written Directive concerning oil shorting (third counterclaim), breach of contract based on Yuen's failure to repay the $15,000.00 loan given by Branigan (fourth counterclaim) and unjust enrichment (fifth counterclaim).

On April 4, 2013, Branigan and Pangea filed a third-party complaint as against Lakian, asserting claims for contribution and indemnification with respect to the malicious prosecution cause of action in the main action (first and second causes of action). Third-party plaintiffs also assert that Lakian breached his fiduciary duty to Branigan and Pangea by: (1) failing to supervise Yuen's activities as a trader in 2009 when Branigan was unable to do so (third cause of action); and (2) funding Yuen's litigation against Branigan and Pangea (fourth cause of action). Third-party plaintiffs also assert causes of action for gross negligence (fifth cause of action) and negligence (sixth cause of action), each arising out of the alleged failure to properly supervise Yuen's trading activity in December 2009.

STANDARDS OF LAW

"The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 [1st Dept 2003]). Thus, on "a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court "must

accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

In order to prevail on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the movant must demonstrate that the documentary evidence conclusively refutes the plaintiff's claims (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]; *see McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009] [a motion to dismiss pursuant to CPLR 3211(a)(1) "'may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff's factual allegations, *conclusively establishing* a defense as a matter of law'"] [citation omitted, emphasis in original]).

With respect to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court is not called upon to determine the truth of the allegations (*Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 317 [1995]). Rather, the "'criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'" (*Leon*, 84 NY2d at 88 [citation omitted]).

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st

Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

Motion Sequence Number 001

Defendants' Cross-Motion for Dismissal/Summary Judgment

Defendants' motion to dismiss or for summary judgment is denied for the most part, as they have failed to set forth documentary evidence that utterly refutes plaintiff's allegations, and plaintiff has sufficiently pled his claims. In addition, this pre-discovery motion for summary judgment is inappropriate, as there are sharply disputed issues of material fact.

1. ***Malicious Prosecution (First Cause of Action)***

First, defendants argue that the malicious prosecution cause of action is untimely, because it was filed after the applicable one-year statute of limitations (*see* CPLR 215[3]). The court rejects this argument as, pursuant to CPLR 3211(e), a motion to dismiss based upon a statute of limitations defense filed post-answer is procedurally improper (*see Style Master Fashion, Inc. v Wang*, 2011 WL 223354, 2011 NY MISC LEXIS 609, 2011 NY Slip Op 30103[U] [Sup Ct, NY County 2011]).

Next, defendants argue that the complaint fails to sufficiently plead the elements of a malicious prosecution cause of action. The elements of a claim for malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the accused; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice" (*Broughton v State of N.Y.*, 37 NY2d 451, 457, *cert denied sub nom Schonberger v Kellogg*, 423 US 919 [1975]; *see also Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000]; *Maskantz v Hayes*, 39 AD3d 211, 213 [1st Dept 2007]).

The amended complaint alleges that Branigan instituted a baseless criminal investigation against Yuen based on his possession of the Pangea laptop, which resulted in an indictment against Yuen for grand larceny (amended complaint, ¶¶ 85, 93). Defendants contend that the amended complaint fails to satisfy the second, third and fourth elements.

With respect to the second element, favorable termination, defendants fail to establish that the criminal proceeding was not terminated in plaintiff's favor. Here, plaintiff's criminal proceeding was dismissed on speedy trial grounds. Under New York law, a dismissal on speedy trial grounds that is "not inconsistent with plaintiff's innocence" constitutes a favorable termination (*see Smith-Hunter*, 95 NY2d at 198; *see also Rogers v City of Amsterdam*, 303 F3d 155, 160 [2d Cir 2002]). Although defendants contend that "the circumstances indicate that

Yuen was not innocent" (defendants' memorandum at 11), whether or not Yuen was actually innocent is sharply disputed. Accordingly, this Court finds that plaintiff has satisfied the favorable termination element.

With respect to the third and fourth elements, defendants contend that the complaint does not sufficiently plead a lack of probable cause, and fails to sufficiently plead actual malice. This Court disagrees.

Under New York law, an indictment creates a presumption of probable cause (*see Colon v City of New York*, 60 NY2d 78, 82 [1983] ["Once a suspect has been indicted . . . the law holds that the Grand Jury action creates a presumption of probable cause"]). "In the context of a malicious prosecution cause of action, probable cause 'consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty'" (*Passucci v Home Depot, Inc.*, 67 AD3d 1470, 1470 [4th Dept 2009], quoting *Colon*, 60 NY2d at 82). It is well established that "'information provided by an identified citizen accusing another of a crime is legally sufficient to provide the police with probable cause to arrest'" (*Lyman v Town of Amherst*, 74 AD3d 1842, 1843 [4th Dept 2010] [citation omitted]). Actual malice "means that the defendant must have commenced the . . . criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served" (*Nardelli v Stamberg*, 44 NY2d 500, 503 [1978]; *see also Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 132 [1st Dept 1999]).

Here, there are issues of fact as to whether Branigan had probable cause to commence a criminal complaint against plaintiff, and whether he acted out of malice. Plaintiff has submitted evidence that raises issues of fact as to whether Branigan commenced the criminal proceeding against him out of spite and retaliation based on Yuen's refusal to cooperate in Pangea's business practices. Plaintiff has also submitted evidence that Branigan may have provided incomplete or misleading information to his friend at the police department, and

pressured others to falsify their stories.

For instance, in one email entitled "Anger," Branigan tells Lakian that he has decided to go after Yuen's "jugular" and "drop the bomb" on him because Yuen has been talking about him to third parties. Branigan further explains that he is "dealing with the police and the DA" because Yuen has "slandered" him (11/10/2010 email from Branigan to Lakian [Yuen aff, exhibit 1]). In another email, Branigan tells Lakian that he needs him to cooperate because "I can't keep jerking the DA around because I will burn my relationship with the Police Lieutenant that I asked for help originally and I can't afford to do that" (11/9/2010 email from Branigan to Lakian [Yuen aff, exhibit 3]).

Branigan further asserts that while "I have no desire to put anyone in jail either. . . . Bill seems intent on trying to ruin our lives and reputations" (10/30/2010 email from Branigan to Lakian [Yuen aff, exhibit 2]). "We had better be prepared to let the Court System of New York City take care of Bill. It won't cost us a penny and Bill will be paying for his legal representation" (*id.*). These emails clearly raise questions of fact as to whether Branigan commenced the criminal proceeding against plaintiff "due to . . . something other than a desire to see the ends of justice served" (*Nardelli*, 44 NY2d at 503).

There are also issues of fact as to whether the laptop contained any valuable or proprietary software. Yuen contends that Branigan falsely stated to the police that the laptop's absence affected Pangea's ability to trade (Yuen aff, ¶ 19). In support of this contention, Yuen submits computer records that he alleges demonstrate that the sole Pangea employee with access to the trading platform, Mr. Sinha, maintained full access throughout the entire period in question (*see* Yuen aff, exhibit 5). Accordingly, defendants' motion to dismiss the first cause of action for malicious prosecution is denied.

2. *Breach of the Partnership Agreement (Second Cause of Action)*

To state a cause of action for breach of a partnership agreement, the complaint must

sufficiently allege that a partnership agreement existed (*see Cleland v Thirion*, 268 AD2d 842, 843 [3d Dept 2000]). A court should consider several factors including: (1) the parties' intent; (2) whether there was joint control and management of the business; (3) whether the parties shared profits and losses; and (4) whether there was a combination of property, skill or knowledge (*see id.*). The "party pleading the existence of a partnership has the burden of proving its existence (*North Am. Knitting Mills, Inc. v International Women's Apparel, Inc.*, 2000 US Dist LEXIS 13139, *3, 2000 WL 1290608, *1 [SD NY 2000]). Under New York law, an oral partnership agreement that cannot be fully performed within a year is void under the statute of frauds (*see Germain v Nova Mfg. Co.*, 20 Misc 2d 364, 365 [Sup Ct, NY County, Special Term 1959]).

Yuen alleges that Branigan and Pangea breached an oral partnership agreement whereby Yuen would receive a 10% equity share in Pangea (amended complaint, ¶ 17). Defendants argue that this oral agreement is void under the statute of frauds because it was for a term of more than one year. As stated in the complaint, Yuen's agreement with Pangea was for a "minimum period of three years" (*id.*, ¶ 18).

In opposition to the motion, plaintiff asserts that the defendants confuse the Partnership Agreement with the Compensation Agreement. According to plaintiff, the Partnership Agreement was a separate oral agreement between Yuen and defendants, that was to exist for an indefinite period of time. An oral agreement to form a partnership for an indefinite period creates a partnership at will and is not barred by the statue of frauds (*Moses v Savedoff*, 96 AD3d 466, 469 [1st Dept 2012]; *see also Foster v Kovner*, 44 AD3d 23, 27 [1st Dept 2007] ["the statute of frauds is generally inapplicable to an agreement to create a . . . partnership . . . . because absent any definite term of duration, an oral agreement to form a partnership . . . for an indefinite period of time creates a partnership . . . at will"]).

Defendants' motion to dismiss the second cause of action for breach of the Partnership

Agreement is denied, as plaintiff submits evidence that raises issues of fact as to whether a partnership existed for an indefinite period of time in which the parties shared control, profits and losses.

For example, in emails to plaintiff dated September 19, 2009 and September 29, 2009, Branigan refers to plaintiff as "handling trading as my partner for the Pangea fund" and by signing his email to plaintiffs, "Your Partner – Mark" (*see* Yuen aff, exhibit 11). Moreover, in other emails between Branigan and third parties, Branigan refers to Yuen as his "partner" (*see id.*).

Although defendants claim that plaintiff had no vested equity interest in Pangea, but rather, only a future option to purchase an equity interest, emails exchanged between the parties regarding Yuen's compensation explicitly reference his 10% equity share as an existing vested equity interest, and Pangea's principals discuss a reduction of that "equity interest" from 10% to 5% (*see* Yuen aff, exhibit 10 [1/22/10 email from Branigan to Lakian]).

Yuen has also pled sufficient facts to meet the other factors to be considered in determining whether there was a partnership agreement. Joint control and management of Pangea could be inferred through Yuen's appointment as Head of Trading, whereby Yuen was placed in charge of all of Pangea's trading activity, through which he contributed his skill and knowledge to Pangea. Moreover, if it were proved that Yuen did indeed have a 10% equity share in Pangea, that share would indicate that he had an ownership stake in Pangea, and shared in Pangea's profits and losses.

Accordingly, the motion to dismiss the second cause of action is denied.

3. *Breach of the Compensation Agreement (Third Cause of Action)*

Defendants contend that the Compensation Agreement fails to satisfy the statute of frauds because, by its terms, it cannot be completed in one year. General Obligations Law (GOL) § 5-701(a) states that if the agreement is by its terms not to be performed within one

year, it is void unless it is evidenced by a writing.

Here, the Compensation Agreement was not capable of being performed within a year. The amended complaint alleges that Yuen and Branigan negotiated a compensation agreement whereby Yuen "would be compensated for his serving as Head of Trading, at a minimum of fifteen thousand dollars ($15,000) per month for a minimum period of three years" (amended complaint, ¶ 18). The amended complaint further acknowledges that no compensation agreement was signed (*id.*, ¶ 22). Thus, the Compensation Agreement is void under the statute of frauds (*see Massey v Byrne*, 112 AD3d 532 [1st Dept 2013]).

The amended complaint further alleges that, although no agreement was signed, "Pangea, Branigan and Plaintiff immediately began acting in accordance with the agreement," because they "began paying Mr. Yuen his minimum monthly Compensation payments" of $15,000.00 (amended complaint, ¶¶ 22-23). However, under New York law, part performance does not validate an oral employment agreement that is otherwise nullified by the statute of frauds (*see Cunnison v Richardson Greenshields Sec.*, 107 AD2d 50, 54 [1st Dept 1985] ["In New York, the part performance of an oral contract for employment, not to be performed within a year, does not remove the contract from the operation of the statute of frauds"]).

In opposition to the motion, plaintiff contends that GOL § 5-701(b)(3)(d) allows the writing requirement "to be satisfied by memoranda, notes or other documentation basically establishing the agreement's existence" (*Nausch v AON Corp.*, 2 AD3d 101, 102 [1st Dept 2003]), and that in this case, the terms stated in the unsigned Compensation Agreement are confirmed through Yuen's own statements and emails exchanged between the parties (plaintiff's memorandum at 20). The Court disagrees.

GOL § 5-701(b)(3)(d) provides that an otherwise valid agreement is not void for lack of a writing as long as (1) it is a "qualified financial contract" and (2) there is sufficient evidence to indicate that a contract has been made or the parties have previously or subsequently agreed

to be bound by the terms of the "qualified financial contract" from the time they reach agreement on those terms. However, this provision of the GOL does not apply to an employment or compensation agreement.

GOL § 5-701(b)(2) offers the definition of a "qualified financial contract," and provides that it is "an agreement as to which each party thereto is other than a natural person." It further provides that it covers only certain transactions relating to the purchase and sale of securities or commodities. The Compensation Agreement does not fall within this definition because Yuen is not "other than a natural person," and his employment agreement cannot be deemed to be a "qualified financial contract," as it does not relate to securities or commodities.

Accordingly, the third cause of action for breach of the Compensation Agreement must be dismissed.

4. *Fraudulent Inducement (Fourth Cause of Action)*

A fraudulent inducement cause of action requires the plaintiff to plead that the defendant made a "knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv denied* 17 NY3d 782 [2011]; *see also Frank Crystal & Co. v Dillmann*, 84 AD3d 704, 704 [1st Dept 2011]).

In the amended complaint, plaintiff alleges that Branigan falsely represented to him that, as of July 2009, Pangea had over $40,000,000.00 in investor funds under management, and that he relied on this statement in joining Pangea (complaint, ¶¶ 11, 14).

Defendants assert that this cause of action must be dismissed because Yuen could not have relied on Branigan's alleged statement that Pangea had $40,000,000.00 under management, because Yuen knew in July 2009, before he joined Pangea in August, that it had fewer assets under management. In response to an email from Branigan detailing Pangea's assets under management, Yuen emailed Branigan on July 28, 2009: "I though you said that

we had $40mm in AUM [assets under management] already and that the $31mm signaling deal was incremental . . . which is different from the email below" (*see* Branigan aff, exhibit D). Thus, defendants assert, Yuen knew in July 2009 that Pangea had fewer than $40,000,000.00 in assets under management.

However, there are issues of fact as to when Yuen actually started working at Pangea. In opposition to the motion, Yuen asserts that he started working in mid-July 2009, while the details of the formal compensation agreement were still being worked out (Yuen aff, ¶ 36). Thus, he asserts, the date on the email, July 28, 2009, actually demonstrates that he discovered this fact only after he started working at Pangea. Yuen also submits other emails which, he contends, demonstrate that he had started working for Pangea prior to the date of this email (*see* Yuen aff, exhibits 7, 12 [7/18/09 and 7/23/09 emails from Branigan where he urged Yuen to come up with inventive trades to pull the month of July out of the "negative column"]). These emails create issues of fact as to Yuen's actual start date, and thus, whether he relied on Branigan's alleged misrepresentation about the amount of Pangea's assets under management prior to the time he began working at Pangea. Accordingly, defendants' motion to dismiss the fourth cause of action is denied.

5. *Unjust Enrichment*

A cause of action for unjust enrichment requires that the defendant was enriched, at the plaintiff's expense, and it would be inequitable to permit the other party to retain the benefit (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Unjust enrichment is precluded where there is an enforceable contract; it can only be asserted where the plaintiff has failed to allege a valid contract (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

Defendants' motion to dismiss this cause of action is denied. With respect to the Compensation Agreement, as plaintiff does not have a valid breach of contract cause of action

as to this agreement, he is not precluded from proceeding on the quasi-contract theory of unjust enrichment (*see id.*).

With respect to the Partnership Agreement, defendants contend that, to the extent that this agreement is valid, the unjust enrichment claim is precluded. However, a "party is not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue" (*Curtis Props. Corp. v Greif Cos.*, 236 AD2d 237, 239 [1st Dept 1997]). Here, there remains a bona fide dispute as to the existence of the Partnership Agreement.

6. *Request to Unseal Criminal Records*

Defendants' request for an order authorizing the unsealing of criminal records utilized in the prosecution and indictment of plaintiff is granted, as there are issues of fact as to what occurred and who testified in front of the grand jury, and all parties are in agreement that these records are needed as part of discovery in this case.

Plaintiff's Motion to Dismiss Counterclaims

1. *Gross Negligence and Negligence (First and Second Counterclaims)*

In their counterclaim for gross negligence, defendants allege that, as a managing member of Pangea, Branigan had the right to issue the Directive, and that Yuen, as an employee of Pangea, had the duty to follow and implement it (counterclaims, ¶ 86). Defendants further allege that Yuen intentionally and recklessly breached this duty by "overriding the Directive, staying short (including overnight) in oil derivatives, and "doubling down" on his losing positions (*id.*, ¶ 87). In their negligence counterclaim, defendants similarly allege that Yuen breached his duty to defendants by overriding the Directive (*id.*, ¶ 93).

These counterclaims must be dismissed, however, as they are barred by the three-year statute of limitations (*see* CPLR 214[4] and [5]). The statute of limitations for negligence

actions begins to run on the date of the injury (*id.*). Thus, the statute of limitations for defendants' gross negligence and negligence counterclaims began to run on the date of the injury alleged by defendants – December 2009 (*see* counterclaims, ¶ 94 [referring to the "approximately 23% of losses sustained by the Pangea Fund in December 2009"]). Thus, the statute of limitations for their negligence and gross negligence expired in December 2012, months before defendants filed the answer and counterclaims in April 2013. Accordingly, defendants' first and second counterclaims are dismissed as time-barred.

In opposition to the motion, defendants argue that the common law doctrine of continuing injury/continuing wrong tolls the statute of limitations on the negligence and gross negligence claims. Defendants contend that, pursuant to this doctrine, the statute of limitations was tolled until June 2, 2010, when Yuen was terminated.

However, in *Kahn v Kohlberg, Kravis, Roberts & Co.* (970 F2d 1030, 1039] [2d Cir], *cert denied* 506 US 986 [1992]), a case cited by defendants in support of their position, the court specifically stated that "[t]he doctrine [of continuing wrong] applies when the defendant's conduct causes the plaintiff to sustain damages *after the time when the statute of limitations would have expired* if it commenced at the time of defendant's first act" (emphasis added). Defendants here do not claim that they experienced any damages following the expiration of the statute of limitations, and, in fact, specifically allege that "Yuen's breach of duty in overriding the Directive directly and proximately caused the harm sustained by Branigan and Pangea, and in particular the approximately 23% losses sustained in the Pangea Fund in December 2009" (counterclaims, ¶ 94). Accordingly, the doctrine does not apply, and the first and second counterclaims are dismissed.

2. *Breach of Contract (Third and Fourth Counterclaims)*

In their third counterclaim for breach of contract, defendants allege that "[t]o the extent this Court should find that the unsigned [Compensation] Agreement constitutes a valid and

binding agreement among Yuen and Pangea . . . such [Compensation] Agreement expressly provides, in the section entitled "Duties and Position," that Yuen 'shall additionally render such other services and duties as may be assigned to him from time to time by the Company" (counterclaims, ¶ 97). Defendants further allege that the Directive qualified as "other services and duties as may be assigned to [Yuen] from time to time by the Company" (*id.*, ¶ 98), and that by "intentionally overriding the Directive and staying short in oil derivatives overnight, Yuen breached the terms of the [Compensation] Agreement" (*id.*, ¶ 99). However, the third counterclaim must be dismissed, as this Court has already found that the Compensation Agreement is barred by the statute of frauds.

In its fourth counterclaim for breach of contract, defendants allege that Yuen and Branigan entered into an oral agreement, pursuant to which the parties agreed that Branigan would loan Yuen $15,000.00 so that Yuen would be able to meet his overdue alimony payment, and that Yuen breached the oral agreement by refusing to repay Branigan after his employment was terminated (*id.*, ¶¶ 104, 107).

Plaintiff contends that this counterclaim is barred by documentary evidence. This Court disagrees. In support of this argument, plaintiff submits his 1099 for 2009, which shows that plaintiff earned $75,000.00 for working five months of that year (*see* aff of Anne Salisbury, exhibit C). Plaintiff contends that the $15,000.00 loan was never reported because it was never paid. However, in opposition to the motion, defendants submit a July 3, 2009 email from Yuen to Branigan in which Yuen states: "I wanted to ask . . . would you be willing to lend me with interest the $30k personally, against the incentives you talked about if I can make successful introductions, and have Pangea pay for my health insurance for six months" (*see* Branigan aff, exhibit I]). Defendants allege in the counterclaims that Branigan agreed to personally loan Yuen $15,000.00, half of the amount originally requested, and that Yuen asked Branigan to characterize the loan as a starting bonus (counterclaims, ¶ 69).

Thus, plaintiff's documentary evidence fails to "resolve[] all factual issues as a matter of law, and conclusively dispose[] of the plaintiff's claim" (*Fontanetta v John Doe I*, 73 AD3d 78, 83 [2d Dept 2010] [citation omitted]).

Plaintiff also argues that the fourth counterclaim fails to state a claim because the only term alleged is the amount of money loaned to him. The Court rejects this argument. To state a cause of action for breach of contract, a party must plead the existence of a contract, the plaintiff's performance under that contract, the defendant's breach of that contract, and resulting damages (*see JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). Defendants have adequately alleged all of these elements, as the counterclaims state: Branigan and Yuen entered into an oral contract whereby Branigan would loan Yuen $15,000.00 so that Yuen could cover an alimony payment and Yuen would repay the loan; Branigan advanced the $15,000.00 and satisfied all other obligations under the oral agreement; Yuen breached the agreement by failing to repay the $15,000.00; and Branigan suffered damages as a result of the breach in an amount no less than $15,000.00 (counterclaims, ¶¶ 66, 104-108). Accordingly, plaintiff's motion to dismiss the fourth counterclaim is denied.

3. *Unjust Enrichment (Fifth Counterclaim)*

In the fifth counterclaim, defendants allege that Yuen was unjustly enriched by Branigan's loan (counterclaims, ¶ 110). However, this counterclaim must be dismissed as, "an unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract . . . claim" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]).

4. *Request for Punitive Damages*

In order to establish a claim for punitive damages, a party must "allege facts demonstrating that the defendant's conduct was so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply criminal indifference to civil

obligations" (*Zarin v Reid & Priest*, 184 AD2d 385, 388 [1st Dept 1992]; *see also Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011]). It is well settled that the purpose of punitive damages is not to remedy private wrongs, but to vindicate public rights (*see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]; *see also Fabiano v Philip Morris, Inc.*, 54 AD3d 146, 150 [1st Dept 2008] ["the imposition of such damages for private purposes has been held to violate public policy"]).

Defendants' claim for punitive damages is dismissed, as it is clear that in such counterclaim defendants seek only to vindicate a private right, and the only remaining counterclaim is the fourth counterclaim for breach of contract.

Motion Sequence Number 002- Motion to Dismiss Third-Party Complaint

1. ***Breach of Fiduciary Duty, Gross Negligence, Negligence (Third, Fifth and Sixth Causes of Action***

The third, fifth and sixth causes of action asserted in the third-party complaint for breach of fiduciary duty (third-party complaint, ¶ 84), gross negligence (*id.*, ¶¶ 93-94) and negligence (*id.*, ¶ 99) all arise out of the same alleged conduct, which is that Lakian directed Yuen to ignore the Directive.

Under both New York and Delaware law, each of these claims are subject to a three-year statute of limitations period. The third-party complaint alleges that: (1) Lakian's direction to Yuen to ignore the Directive occurred on December 17, 2009 (*see id.* ¶ 27); (2) the damage to Pangea was immediate and significant, reaching a 23% loss by the end of December 2009 (*see id.*, ¶¶ 25, 30, 95, 100); (3) there were daily reports available to management of Pangea showing the damage it was suffering at that time (*see id.*, ¶ 99); and (4) Branigan had actual knowledge not only of the alleged losses, but of their alleged cause by no later than January 5, 2010 (*see id.*, ¶ 32). Because this action was not commenced until April 13, 2013, each of these claims must be dismissed as untimely.

Under Delaware law, a breach of fiduciary duty claim must be filed within three years of the alleged breach of duty (10 Del Code § 1806; *see e.g. Matter of Tyson Foods Consolidated Shareholder Litigation*, 919 A2d 563, 584 [Del Chancery 2007] ["A three-year statute of limitations applies to breaches of fiduciary duty, and the matter is properly raised on a motion to dismiss. The statute of limitations begins to run at the time that the cause of action accrues, which is generally when there has been a harmful act by a defendant. This is true even if the plaintiff is unaware of the cause of action or the harm"]).

New York law also provides for a three-year limitations period where, as here, the only remedy sought for the alleged breach of fiduciary duty is money damages (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 239).

Here, third-party plaintiffs seek money damages only (*see* third-party complaint at 21). As the alleged breach of duty, i.e. the failure to adequately supervise Yuen, occurred on December 17, 2009 and third-party plaintiffs' claims against Lakian were not commenced until April 13, 2013, the third cause of action for breach of fiduciary duty must be dismissed.

Similarly, both Delaware and New York law provide for a three-year limitations period for bringing claims based on negligence (10 Del Code § 8106; *Abdi v NVR, Inc.*, 2007 WL 2363675, 2007 Del Super LEXIS 237,[Del Super 2007], *affd* 945 A2d 1167 [Del 2008]; *Ville de Port, Inc. v Hess Corp.*, 34 Misc 3d 1214[A], 2012 NY Slip Op 50072[U], * 4 [Sup Ct, Kings County 2012]).

The claims for gross negligence and negligence are also barred by the three-year statute of limitations (*see* CPLR 214[4] and [5]). The statute of limitations for negligence actions begins to run on the date of the injury (*see id.*). Since both of the allegedly negligent acts and the damage alleged in the complaint occurred in December 2009, the three-year limitations period under either Delaware or New York law ran well before the third-party complaint was filed on April 11, 2013. Indeed, Branigan concedes that he was made aware of

not only the losses he now attributes to Lakian's alleged misconduct, but of their cause, at two meetings held in his own apartment on January 4 and 5, 2010 (third-party complaint, ¶¶ 32, 34). Accordingly, these claims must be dismissed as well.

In opposition to the motion, third-party plaintiffs assert that Lakian is equitably estopped from asserting a statute of limitations defense, because Branigan was not aware of the basis of the claim until the fall of 2011. The Court rejects this argument, as equitable estoppel is not applicable here.

Equitable estoppel is an "uncommon remedy" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007], and an "extraordinary remedy" (*Pahlad v Brustman*, 33 AD3d 518, 519 [1st Dept 2006], *affd* 8 NY3d 901 [2007]), which precludes a defendant from asserting a statute of limitations defense to an untimely claim when the delay in asserting the claim "was induced by fraud, misrepresentation or deception" (*id.*, quoting *Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]). The doctrine is applied sparingly because statutes of limitations "reflect the legislative judgment that individuals should be protected from stale claims" (*Zumpano v Quinn*, 6 NY3d 666, 673 [2006]). The plaintiff seeking to equitably estop the defendant from asserting the statute of limitations as a defense must demonstrate both that he reasonably relied on the defendant's misrepresentations in not asserting the claim more timely, and that he exercised due diligence in ascertaining the relevant facts and commencing the action (*id.* at 674; *Pahlad*, 33 AD3d at 519-520).

Third-party plaintiffs cannot make that showing here, as the alleged conduct by Lakian that third-party plaintiffs assert warrants giving rise to estoppel was essentially a denial of liability rather than the required affirmative fraud, misrepresentation or deception. The only conduct by Lakian that third-party plaintiffs point to in support of their argument for equitable estoppel are a conversation on January 4, 2010 between Lakian and Branigan, with Yuen present, where Lakian told Branigan that Yuen was at fault for the Pangea fund's losses, and a

January 9, 2010 email from Lakian to similar effect (opposition memorandum at 12, Branigan aff, ¶¶ 20-21 and exhibit A). Third-party plaintiffs have not pointed to any other action or conduct of Lakian that allegedly prevented them from bringing suit on a timely basis.

However, a simple denial of responsibility is not sufficient to warrant application of the equitable estoppel doctrine:

> "It is not enough that plaintiffs allege defendants were aware of the [wrong] and remained silent about it. . . . Conduct like this may be morally questionable in any defendant . . . but it is not fraudulent concealment as a matter of law. A wrongdoer is not legally obliged to make a public confession, or to alert people who may have claims against it, to get the benefit of a statute of limitation" (*Zampano*, 6 NY3d at 674-675; *accord Corsell v Verizon N.Y. Inc.*, 18 NY3d at 789).

Likewise, here, the statement by Lakian that third-party plaintiffs allege give rise to the estoppel is that Yuen was at fault or responsible for the loss (opposition memorandum at 12 ["Lakian and Yuen told Branigan during a meeting on January 4, 2010 that Yuen was at fault for the Pangea Fund's losses"]). This is insufficient for estoppel.

Moreover, in both the third-party complaint, and in his most recent affidavit, Branigan concedes that on January 5, 2010, Yuen told him, at a meeting in Branigan's home, that Lakian had told him to disregard the Directive (Branigan aff, ¶ 22; third-party complaint, ¶ 34). This is the very same act that third-party plaintiffs have alleged forms the basis of their claims for breach of fiduciary duty, gross negligence and negligence. Thus, these claims depend on nothing beyond what Yuen told Branigan on January 5, 2010. New York law is clear that equitable estoppel does not apply when a plaintiff knows of the existence of his or her claim (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-554 [2006]). Accordingly, the third, fifth and sixth causes of action of the third-party complaint must be dismissed.

2. *Contribution and Common-Law Indemnification (First and Second Causes of Action*)

In their first cause of action for contribution and second cause of action for common-law

indemnification, third-party plaintiffs assert that, if they are liable to Yuen for malicious prosecution, then Lakian is liable to them under both contribution and common law indemnification based on Lakian's conduct in testifying before the Grand Jury that indicted Yuen (third-party complaint, ¶¶ 76, 79).

Although Lakian originally moved for summary judgment on the contribution and common-law indemnification causes of action, on the ground that he never testified before the grand jury that indicted Yuen, he now withdraws that branch of the motion, in light of the factual dispute that exists with respect to whether or not he testified before the grand jury. Lakian agrees that it is appropriate to wait until the minutes of the grand jury proceeding are available before asking this Court to rule on those aspects of the motion.

However, Lakian does not withdraw the portion of his motion which seeks dismissal of the cause of action for common-law indemnification for failure to state a claim. Lakian contends that the second cause of action should be dismissed, because it is clear from the allegations of the third-party complaint that Branigan played an active role in the events giving rise to the malicious prosecution claim, and, therefore, is not entitled to indemnification.

Lakian contends that, even if it is assumed that he testified before the grand jury that indicted Yuen, third-party plaintiffs would not have a claim for common-law indemnification against him, as the amended complaint makes clear that Yuen's claims for malicious prosecution are based on Branigan's conduct alone. Lakian argues that, under these circumstances, common-law indemnification cannot be obtained. "[W]here one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent" (*D'Ambrosio v New York*, 55 NY2d 454, 462 [1982]). "Since the predicate of common law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the

doctrine" (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]).

However, this Court finds that third-party plaintiffs have sufficiently stated a cause of action for common-law indemnification. Common-law indemnification allows one who has been "compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]).

Branigan asserts that Lakian should indemnify him if he is found liable to Yuen for malicious prosecution, based on Lakian's testimony before the grand jury concerning Yuen's holding of the laptop hostage as a tactic to coerce Pangea to pay him money (third-party complaint, ¶ 59 ("Upon information and belief it was Lakian's testimony concerning Yuen's attempted 'extortion' at the Palace Hotel Meeting that resulted in criminal charges that were filed against Yuen being raised to felony charges"]). The third-party complaint alleges that Lakian's testimony resulted in the amplification of the charges against Yuen, which led to Yuen's indictment (*id.*).

Lakian's argument that Yuen deliberately asserted the malicious prosecution cause of action against Branigan, and only complained about Branigan's conduct, disregards the fact that Yuen attributes his purported damages to the augmentation of the criminal charges against him to felony charges (*see* amended complaint, ¶ 77). Branigan alleges that that augmentation could not have occurred but for Lakian's testimony, since Lakian was the only one with personal knowledge of Yuen's attempt to hold the laptop "hostage" to obtain money from Pangea that Yuen claim he was owed, by virtue of the Palace Hotel Meeting, and that no other basis for the felony charge against Yuen existed (third-party complaint, ¶¶ 58, 59). Indeed, Branigan claims that Lakian is completely responsible for the harm alleged by Yuen (*see id.*, ¶¶ 58, 59, 78-80).

Moreover, even Lakian admits in his affidavit in support of his motion that he was

involved in the events that led to the felony charges and indictment against Yuen. He states that he met with Yuen at the Palace Hotel on June 16, 2010 (Lakian aff, ¶ 14). He also states that he met an assistant district attorney from the DA's office for about 20 to 25 minutes about the Palace Hotel Meeting and Lakian's advice to Yuen to return the laptop (*id.*, ¶ 17). There is thus a strong basis for Branigan's common-law indemnification claim based on the above admissions by Lakian and the fact that, as alleged in the third-party complaint, Lakian testified before the grand jury that indicted Yuen for larceny.

Lakian further argues that Branigan cannot maintain a common-law indemnification cause of action against him because Branigan participated in the criminal proceeding commenced against Yuen. However, the third-party complaint expressly alleges that Branigan did not participate in the alleged wrong, because it was Lakian's testimony, not Branigan's, that resulted in the felony charges commenced against Yuen (third-party complaint, ¶ 59). This allegation is sufficient to state a cause of action for common-law indemnification. Accordingly, Lakian's motion to dismiss the first and second causes of action of the third-party complaint is denied.

3. ***Breach of Fiduciary Duty (Fourth Cause of Action)***

In their fourth cause of action, third-party plaintiffs assert that Lakian breached his fiduciary duties to them because he is "believed to be funding the Main action against Branigan and Pangea" (third-party complaint ¶ 88), and providing other unspecified "litigation assistance" to Yuen (*id.*, ¶ 89), in contravention of Pangea's interests. Third-party plaintiffs assert that Lakian has been assisting Yuen because: (1) Lakian was not named in the complaint (*id.*, ¶67); (2) Lakian circulated a draft form of Yuen's summons to Pangea's investors (*id.*, ¶ 68); and (3) Yuen filed the complaint at the same time that the claims between Branigan and Lakian in the main action were starting to move through the litigation process (*id.*, ¶ 69).

Lakian has denied funding Yuen's litigation, and providing any form of improper

assistance in derogation of his obligations to Pangea (Lakian aff, ¶ 19).

To state a cause of action for breach of fiduciary duty, a plaintiff must allege that the defendant owed the plaintiff a fiduciary duty and committed misconduct, and that the plaintiff suffered damages as a result (*see Burry v Madison Park Owner*, 84 AD3d 699, 699-700 [1st Dept 2011]; *Beard Research Inc. v Kates*, 8 A3d 573, 601 [Del Ch 2010]), *affd sub nom ASDI, Inc. v Beard Research, Inc.*, 11 A3d 749 [Del 2010]). Under New York and Delaware law, a manager of a limited liability company is a fiduciary and owes duties of loyalty and due care (*see Arfa v Zamir*, 75 AD3d 443, 444 [1st Dept 2010]; *Auriga Capital Corp. v Gatz Props.*, 40 A3d 839, 852 [Del Ch 2010], *affd* 59 A3d 1206 [Del 2012]).

Lakian asserts that this cause of action should be dismissed on summary judgment because he has not funded Yuen's litigation (Lakian aff, ¶ 19). However, the only evidence produced by Lakian in support of this argument is his own statement that he has "not provided Mr. Yuen with any financial support in return for his filing his claims against Mr. Branigan and Pangea. Neither have I agreed to provide Mr. Yuen with any funding for this lawsuit in the future" (Lakian aff, ¶ 19). This is insufficient for summary judgment, as Lakian's outright denials of third-party plaintiffs' allegations only serve to raise a genuine issue of fact requiring a trial on the merits of this claim (*see Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997] [a determination of credibility is the province of the jury]). Accordingly, Lakian's motion for summary judgment on the fourth cause of action for breach of fiduciary duty is denied.

The Court has considered the remaining arguments, and finds them to be without merit.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for dismissal of defendants' counterclaims (Motion Sequence 001) is granted to the limited extent that the first counterclaim for gross negligence, the second counterclaim for negligence, the third counterclaim for breach of contract and the

fifth counterclaim for unjust enrichment are dismissed, as is defendants' request for punitive damages; and it is further,

ORDERED that defendants' cross-motion for dismissal or for summary judgment on the amended complaint (Motion Sequence 001) is granted to the limited extent that the third-cause of action for breach of the Compensation Agreement is dismissed; and it is further,

ORDERED that defendants' cross-motion for an order authorizing the unsealing of criminal records utilized in the prosecution and indictment of plaintiff that forms the basis of his malicious prosecution cause of action (Motion Sequence 001) is granted; and it is further,

ORDERED that third-party defendants' motion for dismissal or for summary judgment on the third-party complaint (Motion Sequence 002) is granted to the limited extent that the third cause of action for breach of fiduciary duty, the fifth cause of action for gross negligence and the sixth cause of action for negligence are dismissed; and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that the parties are directed to appear for a Preliminary Conference on October 28, 2015 at 11:00 a.m. in Part 7, 60 Centre Street, Room 341; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 9/2/15

PAUL WOOTEN *J.S.C.*

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**