Interventure 77 Hudson LLC v Halengren
2018 NY Slip Op 30948(U)
May 14, 2018
Supreme Court, New York County
Docket Number: 653913/2013
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
-------------------------------------X
INTERVENTURE 77 HUDSON LLC, *et al.*,

Plaintiffs,

-against-

HOWARD E. HALENGREN, *et al.*,

Defendants.
-------------------------------------X

DECISION AND ORDER
Index No.: 653913/2013

O. PETER SHERWOOD, J.:

This is an action by 28 plaintiffs to recover damages for defendants' alleged fraud and breach of fiduciary duty in connection with the management of a portfolio of commercial real property. Motion sequence numbers 019, 021 and 022 are consolidated for disposition. In motion sequence no. 019, plaintiffs Pinnacle Owner Corp. and Pinnacle Tenant LLC (together, the Pinnacle plaintiffs), Westlake Three Owner Corp., Westlake Three Tenant LLC (together, Westlake Three), Westlake Four Owner Corp. and Westlake Four Tenant LLC (together, Westlake Four) move for summary judgment on the amended complaint with respect to counts I and X (breach of fiduciary duty against defendants Falcon Real Estate Investment Co., LP [Falcon], Howard E. Hallengren [Hallengren], Jack D. Miller [Miller] and David A. Hill [Hill]; count II (aiding and abetting breach of fiduciary duty against defendant International Real Estate Services [IRES], Hallengren, Miller and Hill); count VI (negligence against Hallengren Miller and Hill); and count VIII (tortious interference against Hallengren, Miller, Hill and IRES). In motion sequence no. 021, Hill moves for summary judgment dismissing the amended complaint as against him. In motion sequence no. 022, IRES, which is owned by Hill, joins in Hill's motion, as all of plaintiffs' allegations against IRES relate to actions taken by Hill as president and director of IRES.

For the reasons set forth below, plaintiffs' motion is denied, and the motions of Hill and IRES are granted, except with respect to the breach of fiduciary duty cause of action.

BACKGROUND

I. The Parties

The moving plaintiffs (hereinafter, plaintiffs) are Delaware corporations and limited liability companies formed specifically to hold direct or indirect commercial real estate interests in the United States. The plaintiffs that are limited liability companies are controlled by the sole member of the LLC, which, in turn, is governed by its board of directors. The plaintiffs that are corporations are each governed by a board of directors. (*See* aff of Teresa Tsai, ¶ 3.) During the relevant time period, Andreas Limburg (Limburg) and Kevin Hackett (Hackett) were independent directors of the governing boards of each of the plaintiffs (*see id.*, ¶ 6).

Plaintiffs constitute three pairs of an "Owner" corporation and a "Tenant" LLC. Each Owner is the record owner of a parcel of developed commercial real property which, in turn, is leased by the corresponding Tenant, who, in turn, sublets that property to third-parties (*see* Hill aff, ¶ 17).

Falcon was to provide property management services for plaintiffs' properties during the periods relevant to this action. Hallengren and Miller are co-founders of Falcon. Hallengren was the chief executive officer. Miller was the president. Hill served as the executive vice-president (*see* aff of Justin M. Garbaccio, exhibits 2, 4). Hallengren was a member of each of the governing boards of each moving plaintiff. He, Miller and Hill were also officers of each moving plaintiff (*see* Tsai aff, ¶ 5). Hill was also the president and sole director of defendant IRES, a Texas

corporation located in Dallas that provides real estate brokerage, property management and leasing services. IRES is an affiliate of Falcon (*see* Garbaccio aff, exhibits 5, 6).

In 1991, defendants Miller and Hallengren formed Falcon Real Estate Investment Company, Ltd (Falcon, Ltd.), a Delaware limited liability company (*see* Hill aff, ¶ 3). In 2004, Falcon, Ltd. formed Falcon Real Estate Investment Company, LP (Falcon, LP, and together with Falcon, Ltd., Falcon), a Delaware limited partnership, to provide advisory and management services for real estate investments in the United States for non-U.S. investors (*see id.*, ¶ 4).

II. The Management Agreements

Falcon's engagement as asset manager of the properties was governed by written asset management agreements (the Management Agreements), which provided broad discretionary authority to Falcon and its employees (*see* Garbaccio aff, exhibits 2-16). The Management Agreements expressly provided that Falcon was to act as a fiduciary of the plaintiffs, and that all monies received by Falcon on behalf of plaintiffs were to be held in trust for the benefit of plaintiffs (*see* Management Agreements, Art I, §§ 6, 14; Art IC, § 15). Falcon's compensation for its services was set forth in a comprehensive fee schedule, pursuant to which Falcon was to be paid an asset management fee (equal to a percentage of the total revenue from each property) (the Contractual Management Fee), a leasing fee (equal to a percentage of gross base rent from any new leases) (the Contractual Leasing Fee), and a financing fee (equal to a percentage of the proceeds from any financing transactions with respect to the properties) (together with the Contractual Management Fee and the Contractual Leasing Fee, the Contractual Fees) (*see id.*, Fee Schedule).

Falcon provided its services to plaintiffs principally through Hallengren, Miller and Hill. Plaintiffs contend that Hallengren, Miller and Hill used their positions to engage in self-dealing and to benefit themselves, to plaintiffs' detriment. Plaintiffs assert that Hallengren, Miller and Hill concocted a scheme whereby they caused plaintiffs to pay unauthorized leasing fees, and systematically and regularly extracted additional remuneration in the form of undisclosed kickbacks from vendors they were charged with hiring and overseeing on behalf of plaintiffs. According to plaintiffs, this scheme artificially and unnecessarily increased the fees and commissions plaintiffs were forced to pay, and caused plaintiffs to pay indirectly millions more to Falcon than authorized or intended under the Management Agreements. Plaintiffs further contend that defendants concealed these illicit payments by funneling them through Hill's shell companies, including IRES, and that the record establishes that these funds were all ultimately distributed to Hallengren, Miller and Hill, or to the companies they control.

Defendants assert that, commencing in September 1996, Falcon was engaged by agents of a wealthy foreign national who chose to be represented through agents (the Principal) to provide real estate asset management services for a portfolio of commercial real property located throughout the United States (the Properties)[1]. The Properties were (and some still are) part of a larger global portfolio of properties beneficially owned by and operated for the benefit of the Principal. According to defendants, the Principal oversaw Falcon's acquisition, sale and management of the Properties through a cadre of agents and sophisticated advisors in the United States and abroad. Defendants further contend that the Management Agreements were merely a

[1] In a prior order, the court directed that certain financial information and references to non-parties be kept confidential (*see* NYSCEF Doc. No. 50).

formality entered into for the purpose of meeting the requirements of third-party mortgage lenders who were unaware of the Principal's ownership.

The Properties consisted of large commercial office buildings, condominium developments, industrial warehouses, shopping centers, and single-tenant retail buildings. Defendants assert that, as structured by the Principal's agents, each Property was titled in the name of an "Owner Company" and leased to a "Tenant Company." All of the companies were domiciled in Delaware as corporations, limited liability companies or limited partnerships (*see* amended complaint, ¶¶ 8-22).

III. The Arbitration

On February 10, 2012, 28 the original plaintiffs in this case issued a demand for arbitration (the Arbitration Demand) against Hill, IRES, Falcon and three other respondents: Hallengren, Whitney Investment Advisors (Whitney) and Welsh Real Estate Services (WRES) (*see* aff of James B. Daniels, exhibit B). Miller was not named in the Arbitration Demand.

The claims asserted in the Arbitration Demand arose out of Falcon's role as the real estate asset manager of the Properties. The claimants alleged that the respondents misappropriated the claimants' funds, approved the payment of unauthorized and unearned compensation and fees to the individual respondents and their companies, and engaged in a massive kickback scheme in connection with the hiring of third-party vendors (*see* Arbitration Demand at 8-19).

The Arbitration Demand contained seven enumerated causes of action, including claims against Falcon for: breach of the Management Agreements between Falcon and certain of the plaintiffs (count I); breach of fiduciary duty (count II); fraud (count III); negligent misrepresentation (count IV); conversion (count V); unjust enrichment (count VI); and an

accounting (count VII). Three of these causes of action were also directed at Hill and Hallengren: breach of fiduciary duty, fraud and negligent misrepresentation. The claimants also asserted causes of action against IRES, WRES and Whitney for unjust enrichment.

In the Arbitration Demand, the claimants stated that they were unaware of the respondents' alleged mismanagement and other misconduct "[u]ntil early 2010," after they "became suspicious about a number of transactions in which Falcon had engaged" (Arbitration Demand, ¶¶ 82-84). According to the claimants, a review of various documents, including quarterly reports for all of the Properties for 2007, 2008 and the first three quarters of 2009, and other documents "revealed possible widespread problems with the account managed by Falcon" (*id.,* ¶ 84). Their investigation resulted in their request for Hallengren's resignation as a director, which he provided in April 2010, and their decision to terminate Falcon in July 2010 (*id.*, ¶¶ 6, 84).

It is undisputed that Hill, Hallengren, IRES and WRES never agreed to arbitrate any disputes with the plaintiffs, including the claims asserted in the Arbitration Demand. The only agreements to arbitrate are contained in the written Management Agreements between Falcon and some of the plaintiffs. Accordingly, on March 6, 2012, Hill, Hallengren, IRES and WRES commenced a special proceeding, pursuant to CPLR 7503 (b), to temporarily and permanently stay the arbitration as against them (*Howard E. Hallengren, et al. v Interventure 77 Hudson, LLC, et al.*, index No. 650617/2012) (*see* Daniels aff, exhibit C [petition]).

On September 8, 2012, this court entered an order and decision permanently staying the arbitration with respect to Hill, Hallengren, IRES and WRES (*see* Daniels aff, exhibit D). The court held that the plaintiffs failed to establish any ground to bind those defendants to arbitrate under the arbitration clause in the Management Agreements (*see id.*). On October 18, 2012, the

plaintiffs filed a notice of appeal but never perfected it. The appeal was voluntarily dismissed on December 31, 2013 (*see* Daniels aff, exhibit F).

IV. Procedural History

On November 13, 2013, plaintiffs commenced this action against Hill, Hallengren, Miller, IRES, WRES and Whitney. On January 22, 2014, plaintiffs filed their initial complaint. The facts alleged largely mirror the allegations in the Arbitration Demand. It also expanded the number of causes of action against Hill from three to nine, consisting of: breach of fiduciary duty (count I); aiding and abetting breach of fiduciary duty (count II); fraud and conspiracy to commit fraud (count III); misappropriation (count IV); interference with contract (count V); negligence (count VI); negligent supervision (count VII); tortious interference (count VIII); and unjust enrichment (count IX). Although the Arbitration Demand only asserted a cause of action for unjust enrichment as against IRES, the complaint added this claim and claims for aiding and abetting breach of fiduciary duty, fraud and conspiracy to defraud, misappropriation, interference with contract and tortious interference.

On March 3, 2014, plaintiffs filed an amended complaint to add Falcon as a defendant, but only with respect to the claims of 13 plaintiffs who are not signatories to the written Management Agreements with Falcon (*see* amended complaint, ¶ 24). The added claims were for breach of fiduciary duty (count X) and an accounting (count XI) against Falcon .

Defendants moved to dismiss the amended complaint. By amended decision and order dated October 10, 2014, the court denied the motions, except as to plaintiffs 3150 Briarpark LP and 3010 Briarpark Tenant LP (collectively, the Briarpark plaintiffs) for lack of capacity to sue (*see* decision at 19-20 [Garbaccio aff, exhibit 21]).

Thereafter, on December 10, 2015, the Pinnacle plaintiffs moved to substitute in for the Briarpark plaintiffs. In a decision and order dated April 13, 2016 (the Substitution Order), Justice Anil Singh granted the motion, holding that:

> "Defendants' final contention is that substitution would be futile because any claims by Pinnacle are time-barred; the relation-back doctrine does not apply; and CPLR 204 [b] does not toll the statute of limitations . . . . Here it is hard to discern how the purpose of the statute of limitations would be served if the court were to find that Pinnacle's claims were time-barred based on hyper-technical legal arguments of defendants. It is important to note that defendants will suffer no legal prejudice or surprise if Pinnacle is substituted as a plaintiff, for no new cause of action is asserted. Under such circumstances, defendants' arguments miss the mark"

(Substitution Order at 10 [Garbaccio aff, exhibit 22]).

On September 26, 2014 and October 28, 2014, IRES and Hill filed answers to the amended complaint denying all material claims and interposing various affirmative defenses, including the statute of limitations.

DISCUSSION

I. Hill and IRES Summary Judgment Motions (Motion Seq. Nos. 021 and 022)

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney,* 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs,* 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]), and "should not be granted where there is any doubt as to the existence of a triable issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp*., 200 AD2d 472, 473 [1st Dept 1994]).

In support of his motion for summary judgment, Hill contends that the claims against him must be dismissed because they (1) are barred by the applicable statute of limitations, and/or (2) lack any factual support and fail as a matter of law. IRES joins in the motion.

A. Statute of Limitations Defense

First, Hill argues that plaintiffs' claims are time-barred because the applicable statute of limitations had already run as of November 13, 2013, the date on which this action was commenced. Hill contends that this result is dictated by application of CPLR 202, New York's borrowing statute which provides:

> "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."

"When (1) plaintiff is a non-resident, and (2) the cause of action accrued outside the state, the borrowing statute provides that the New York courts will apply either the statute of the state where the cause of action accrued or the New York statute, whichever is shorter" (1 Weinstein- Korn-

Miller, NY Civ Prac CPLR ¶ 202.00). Thus, when a nonresident sues in a New York court on a cause of action accruing outside New York, CPLR 202 requires that the cause of action be timely under the limitations periods of both New York and the jurisdiction where the claim arose (*see Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 528 [1999]). Moreover, "in 'borrowing' a Statute of Limitations of another State, a New York court will also 'borrow' the other State's rules as to tolling" (*Antone v General Motors Corp., Buick Motor Div.*, 64 NY2d 20, 31 [1984]).

According to the amended complaint, each of the 28 plaintiffs is a Delaware corporation, limited liability corporation or limited partnership. Accordingly, plaintiffs' causes of action accrued in Delaware, plaintiffs' home state (*see Verizon Directories Corp. v Continuum Health Partners, Inc.*, 74 AD3d 416, 416 [1st Dept 2010]). In that case, the court held that, for purposes of the borrowing statute, the plaintiff was "a 'resident' of, and its cause of action accrued in, Delaware, the state of its incorporation" (id.). The court rejected the argument that, "for purposes of the statute, it is a 'resident' of New York, or that its cause of action accrued in this state, by virtue of its authorization to do business and asserted extensive presence here" (*id.* at 417; *see also Bennett v Hannelore Enters., Ltd.*, 296 F Supp 2d 406, 411 [ED NY 2003] ["Under CPLR 202, a cause of action 'accrues' where the injury is suffered as opposed to where the allegedly tortious act occurred"]).

Given that plaintiffs' home state is Delaware, plaintiffs' claims must be timely under the statute of limitations of both New York and Delaware, specifically the shorter Delaware three-year statute of limitations. Nevertheless, plaintiffs contest defendants' statute of limitations argument, contending that (1) the law of the case doctrine precludes it; (2) Delaware's shorter statute of limitations does not apply under the borrowing statue of CPLR 202; and (3) tolling applies under CPLR 204 (b) and/or the doctrine of fraudulent concealment.

1. The Law of the Case Doctrine

Plaintiffs contend that law of the case bars defendants' statute of limitations argument. Where a legal issue was necessarily resolved on the merits in a prior decision, the court's decision on that issue becomes the law of the case, precluding further litigation of that issue (*see Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Holloway v Cha Cha Laundry*, 97 AD2d 385, 386 [1st Dept 1983] ["once an issue is judicially determined, either directly or by implication, it is not to be reconsidered by Judges or courts of co-ordinate jurisdiction in the course of the same litigation"]; *see also Hass & Gottlieb v Sook Hi Lee*, 11 AD3d 230, 231 [1st Dept 2004]).

Plaintiffs argue that this court rejected the same statute of limitations arguments in its decision on motion to substitute the Pinnacle plaintiffs for the Briarpark plaintiffs. Accordingly, the law of the case doctrine requires the court to reject the statute of limitations defense here. This argument lacks merit because the law of the case doctrine does not apply.

"[I]n determining whether law of the case applies, the procedural posture and evidentiary burdens of the litigants must be considered [first]" (*Feinberg v Boros*, 99 AD3d 219, 224 [1st Dept 2012]). In the Substitution Order this court granted plaintiffs' motion to substitute the Pinnacle plaintiffs for the Briarpark plaintiffs. "The determination to substitute or join a party pursuant to CPLR 1018 is within the discretion of the trial court" (*NationsCredit Home Equity Servs. v Anderson,* 16 AD3d 563, 564 [2d Dept 2005]; *see also* Substitution Order at 4 [holding that "a court in its discretion may direct that an assignee be substituted as a party when a cause of action has been assigned"]). The "doctrine [of law of the case] does not apply to discretionary rulings" (*Allstate Ins. Co. v Buziashvili,* 71 AD3d 571, 572 [1st Dept 2010]; *see also Brothers v Bunkoff Gen. Contrs.*, 296 AD2d 764, 765 [3d Dept 2002] [citation omitted] [noting that law of the case applies only where "'a court directly passes upon an issue which is necessarily involved in the

final determination on the merits'" and finding the doctrine inapplicable to a "prior discretionary, conditional preclusion order"]). Additionally, in this case Hill and IRES seek entry of summary judgment pursuant to CPLR 3212. Because the standard of review on a summary judgment motion is more exacting than that for a motion to substitute, the law of the case doctrine does not apply (*see Riddick v City of New York*, 4 AD3d 242, 245 [1st Dept 2004] [law of the case doctrine is inapplicable where, as here, a summary judgment motion follows a motion to dismiss, as the scope of review is distinct]).

2. Whether CPLR 202 Applies

Plaintiffs also contend that the borrowing statute does not apply because plaintiffs' causes of action accrued in New York and plaintiffs are plainly New York, and not Delaware, residents. This argument is baseless. For purposes of CPLR 202, a cause of action accrues at "'the time when, and the place where, the plaintiff first had the right to bring the cause of action'" (Global Fin. Corp., 93 NY2d at 528 [citation omitted]). "When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss" (*id.* at 529). In this action, it is undisputed that plaintiffs assert strictly economic injuries. Accordingly, application of CPLR 202 turns on whether plaintiffs are deemed "resident(s) of the state" of New York, as prescribed by the statute.

CPLR 202 does not include a definition of the term "resident" of New York. However, while "[t]he question of residency becomes more difficult where the plaintiff is an entity or representative" (1 Weinstein-Korn-Miller, NY Civ Prac CPLR § 202.03), published decisions of New York state courts generally hold that the issue is controlled by the entity's state of incorporation (*see e.g. Gordon v Credno,* 102 AD3d 584, 585 [1st Dept 2013] ["the derivative claims plaintiff asserted on behalf of the corporation accrued for purposes of CPLR 202 in

Wyoming, where the corporation was incorporated"]; *Verizon Directories Corp.*, 74 AD3d at 416 ["For purposes of CPLR 202, plaintiff is a 'resident' of, and its cause of action accrued in, Delaware, the state of its incorporation"]). "[A] plaintiff who [seeks] to come within the exception to CPLR 202 for resident plaintiffs has the burden of proving New York residency" [1 Weinstein-Korn-Miller NY Civ Prac CPLR ¶ 202.01). "'The burden of proving residency [is] upon the party seeking to take advantage of the New York statute'" (*Katz v Goodyear Tire & Rubber Co.*, 737 F2d 238, 243 [2d Cir 1984] [citation omitted]).

Here, plaintiffs argue that the principal place of business for every plaintiff is Falcon's headquarters in New York because Falcon "made all decisions and exerted significant control" over plaintiffs from that location, and because the alleged fraudulent scheme was run from this location (*id.* at 13-14). This "residency by agency" theory is unsupported by any authority and is at odds with the purpose of CPLR 202 to confer the benefit of the New York limitations period only where "the economic impact of [the plaintiff's] claimed injury was sustained" in New York (*Nall v Estate of Powell*, 99 AD3d 411, 412 [1st Dept 2012]). More importantly, plaintiffs have failed to demonstrate any significant activities or presence in their own right in New York. None of the Properties were owned or leased by plaintiffs in New York. Thus, plaintiffs could not have felt the economic impact of their alleged injuries in New York.

For purposes of CPLR 202 plaintiffs "reside" in Delaware, their state of incorporation. Indeed, when Hill and other defendants moved to dismiss the amended complaint on forum non conveniens grounds, plaintiffs never argued that they were New York residents, even though a plaintiff's residence is a key factor to be considered on such a motion (*see Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks [USA] Inc.*, 131 AD3d 431, 432 [1st Dept 2015] [citation omitted] ["'Although the residence of a plaintiff is not the sole determining factor on a motion for

dismissal on grounds of forum non conveniens, it has been held to generally be the most significant factor in the equation"']).

Accordingly, under CPLR 202's borrowing statute, Delaware law determines the timeliness of plaintiffs' claims.

3. Whether Tolling Applies Based on Fraudulent Concealment

In Delaware, the "'doctrine of fraudulent concealment tolls the statute of limitations until a plaintiff is put on inquiry notice where an affirmative act of concealment or a misrepresentation was used to put the plaintiff off the trail of inquiry'" (*Hegedus v Ross*, 2012 WL 2884792, *4, 2012 US Dist LEXIS 96699, *11 [D Del 2012] [citation omitted]). Inquiry notice does not require that the plaintiff have "actual knowledge of a wrong" before the statute of limitations period begins to run. Rather, a plaintiff need only have "'an objective awareness of the facts giving rise to the wrong – that is, a plaintiff is put on inquiry notice when he gains possession of facts sufficient to make him suspicious, or that ought to make him suspicious'" (*id.* [citation omitted]).

Plaintiffs assert in the amended complaint that Hill and IRES, as well as the other defendants, concealed their alleged wrongdoing from plaintiffs, thus tolling the statute of limitations. However, it is clear that plaintiffs had inquiry notice of the alleged wrongdoing more than three years before the commencement of this action. Plaintiffs admitted in their Arbitration Demand that they were unaware of defendants' alleged mismanagement and other misconduct "[u]ntil early 2010," after "they became suspicious about a number of transactions in which Falcon had engaged" (Arbitration Demand, ¶¶ 82-82). Plaintiffs' investigation, which included a review of quarterly reports for all of the Properties for 2007, 2008 and the first three quarters of 2009, and other documents, "revealed possible widespread problems with the accounts managed by Falcon"

(Arbitration Demand, ¶ 84). The investigation resulted in Hallengren's resignation as a director in April 2010, and the decision to terminate Falcon as asset manager in July 2010 (Arbitration Demand, ¶¶ 6, 84). Plaintiffs also allege in the amended compliant that, "[i]n or around July 2010, plaintiff Interventure 77 Hudson LLC discovered that Defendants were about to make an improper and unearned payment . . . to a third party and instructed Defendants not to do so, whereupon Defendants took the sum for themselves" (amended complaint, ¶ 70).

These admissions establish that plaintiffs had at least inquiry notice of defendants' alleged misconduct more than three years prior to the commencement of this action. Plaintiffs have not come forward with evidence to rebut the facts establishing their knowledge of their claims more than three years prior to the filing of the complaint.

Therefore, plaintiffs' argument that their claims are tolled by defendants' fraudulent concealment must be rejected.

4. Whether CPLR 204(b) Tolls Statute of Limitations

Plaintiffs also contend that their claims are timely because, pursuant to CPLR 204(b), the statute of limitations was tolled upon the filing of the arbitration on February 10, 2012. CPLR 204(b) provides:

> "(b) Arbitration. Where it shall have been determined that a party is not obligated to submit a claim to arbitration, the time which elapsed between the demand for arbitration and the final determination that there is no obligation to arbitrate is not a part of the time within which an action upon such claim must be commenced. The time within which the action must be commenced shall not be extended by this provision beyond one year after such final determination"

Defendants argue that, because plaintiffs commenced this litigation more than one year after the final determination that Hill was not obliged to arbitrate, tolling under CPLR 204 (b) does not apply (defendants' mem at 19-20). Defendants contend that the final determination occurred on September 18, 2012, when this court permanently stayed the arbitration as to Hill.

The court rejects this argument. Plaintiffs filed this action before there was a final determination in the prior action as to the arbitrability of their claims. As the Court of Appeals held in *Joseph Francese, Inc. v Enlarged City School Dist. of Troy*, 95 NY2d 59, 64-65 [2000]), the period from serving a demand for arbitration until the final determination of nonarbitrability by the Appellate Division tolls statutes of limitation pursuant to CPLR 204(b). Accordingly, the final determination date in this case is not the date of the September 18, 2012 order, but rather, the date of dismissal of the appeal from that order on December 31, 2013 (*see Joseph Francese, Inc.*, 95 NY2d at 64 ["according to the District, the 'final determination' of nonarbitrability, for purposes of CPLR 204(b), was the May 9, 1994 Supreme Court order staying arbitration on that ground. We hold, however, that the final determination was the November 10, 1994 order of the Appellate Division"]). Indeed, contrary to Hill and IRES's argument, the Court of Appeals explicitly analogized CPLR 204(b) and CPLR 205, "the companion tolling provision," to conclude that "final determination" was meant to embrace all appeals (*id.* at 64-65).

Moreover, the proposition that an action "terminates" upon dismissal of the appeal has been upheld in situations similar to the one at bar. For instance, in *Malay v City of Syracuse* (25 NY3d 323 [2015]), the court explained that, in the context of CPLR 205 (a), the savings statute for termination of actions rather than arbitrations, an action is terminated "'when appeals as of right are exhausted' . . . or, when discretionary appellate review is granted, upon 'final determination' of the discretionary appeal" (*id.* at 328 [internal citation omitted]). The logic of Malay applies

equally here, and supports the conclusion that the arbitration was not terminated until it was dismissed on December 31, 2013. Accordingly, plaintiffs' claims were tolled from February 10, 2012, until December 31, 2013.

Hill and IRES further argue that, because the Delaware statute of limitations applies under CPLR 202 and Delaware has no analog to CPLR 204 (b), filing of the arbitration did not toll the statute of limitations. This court disagrees. In *Norex Petroleum Ltd. v Blavatnik* (23 NY3d 665, 678 [2014]), the New York Court of Appeals held that CPLR 205(a) applies, even if a foreign jurisdiction's statute of limitations is "borrowed." In that case, plaintiff filed an initial complaint in New York within Alberta Canada's two-year statute of limitations. The complaint was dismissed without prejudice, and thereafter refiled after the Alberta two-year statute of limitations had run. Applying CPLR 202, defendants argued that, because Alberta did not have a savings statute, plaintiffs' later-filed complaint was untimely. The court rejected the argument, holding that CPLR 205 applied, and effectively tolled the statute of limitations. In so holding, the court explained that New York's saving statute:

> "'is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts'"

(*id.* at 678, quoting *Gaines v City of New York*, 215 NY 533, 539 [1915]). The same logic applies to CPLR 204 (b), which operates to toll the limitations period where an arbitration proceeding is filed before a summons and complaint. Plaintiffs put defendants on notice of their claims by filing a Demand on February 10, 2012, well before the complaint is this action was filed.

Moreover, where, as here, the forum does not have an applicable statute, or the result of a tolling statute would contravene New York policy, resort to New York procedure is necessary (*see Norex Petroleum*, 23 NY3d at 676-677 [borrowing Alberta's two-year statute of limitations, but observing that Alberta did not have a savings statute like CPLR 205 (a), which could apply]; *GML, Inc. v Cinque & Cinque, P.C.*, 9 NY3d 949, 951 [2007] [applying Tennessee's statute of limitations, but holding that Tennessee's tolling provisions did not apply because it would contravene New York policy]). Although defendants contend that Delaware does not have a tolling statute when a party commences arbitration (*see* defendants' mem at 20), New York has a strong policy favoring arbitration of disputes, and barring plaintiffs on statute of limitations grounds from seeking to arbitrate their dispute would contravene this policy (*see Matter of Smith Barney Shearson. v Sacharow*, 91 NY2d 39, 49 [1997]; *Singer v Jeffries & Co.,* 78 NY2d 76, 81-82 [1991]).

Accordingly, the court concludes that the operative date for tolling under CPLR 204(b) is the date of dismissal of plaintiffs' appeal on December 31, 2013. However, as CPLR 204(b) specifically applies to determinations "that a party is not obligated to submit a claim to arbitration," and a subsequent action "upon such claim" (emphasis added), tolling here applies only to the claims that were asserted in the arbitration. Although plaintiffs argue that CPLR 204(b) applies to claims not specifically enumerated in the demand for arbitration since all claims arise out of the "same fundamental facts" (plaintiffs' mem at 16-17), the argument fails in face of the express language of that statute.

Hence, any claims against Hill and IRES that were included in the Arbitration Demand are timely under CPLR 204(b). With respect to Hill, those claims are breach of fiduciary duty (count

I), fraud (count III) and negligence[2] (count VI). With respect to IRES, that claim is unjust enrichment (count IX), the sole claim alleged against it in the Arbitration Demand.

B. Barred Claims Against Hill and IRES

The amended complaint contains seven causes of action against Hill that were not contained in the arbitration demand: aiding and abetting breach of fiduciary duty (count II); conspiracy to commit fraud (count III); misappropriation (count IV); interference with contract (count V); negligent supervision (count VII); tortious interference (count VIII); and unjust enrichment (count IX). The amended complaint contains five causes of action against IRES that were not included in the Arbitration Demand: aiding and abetting breach of fiduciary duty (count II); fraud and conspiracy to commit fraud (count III); misappropriation (count IV); interference with contract (count V); and tortious interference (count VIII). Because, these claims are not tolled by CPLR 204(b), the next question is whether these claims are timely under Delaware law.

Counts I-X of the amended complaint each have a three-year statute of limitations under Delaware law (*see* generally 20 Del Code § 8106 ["no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action"]; *see also Matter of Tyson Foods, Inc. v Consolidated Shareholder Litig.*, 919 A2d 563, 584 [Del Ch 2007] [breach of fiduciary duty (counts I, X)]; *Dubroff v Wren Holdings, LLC*, 2011 WL 5137175, *12, 2011 Del Ch LEXIS 164, *44-45 [2011] [aiding and abetting breach of fiduciary duty (count II)]; *Puig v Seminole Night Club, LLC,* 2011 WL 3275948, *4, 2011 Del Ch LEXIS 109, *12-14 [Del Ch 2011] [fraud and conspiracy to commit fraud (count III)]; *Meer v Aharoni,* 2010 WL 2573767,

[2] Although denominated as "negligent misrepresentation" in the Arbitration Demand, the allegations underlying this cause of action are the same as those set forth in the negligence claim in the amended complaint.

*4, 2010 Del Ch LEXIS 137, *11-12 [Del Ch 2010] [misappropriation (count IV)]; *SmithKline Beecham Pharms. Co. v Merck & Co.*, 766 A2d 442, 450 [Del 2000] [tortious interference with contract (count V)]; *Bank of Delmarva v South Shore Ventures, LLC*, 2014 WL 5390389, *4, 2014 Del Super LEXIS 550, *9-10 [Del Super 2014] [negligence (count VI)]; *Red Bird Egg Farms v Agway Ins. Co.*, 1995 WL 413300, *3, 1995 Del Super LEXIS 283, *7-8 [Del Super 1995] [negligent supervision (count VII)]; *SmithKline Beecham Pharms. Co.*, 766 A2d at 450 [tortious interference with prospective economic advantage (count VIII)]; *Shandler v DLJ Merchant Banking, Inc.*, 2010 WL 2929654, *9, 2010 Del Ch LEXIS 154 [Del Ch 2010] [unjust enrichment (count IX)]).

Plaintiffs concede that inquiry notice began in "early 2010," which, as alleged by plaintiffs, was April 2010 at the latest. Thus, the claims against Hill and IRES that are not included in the Arbitration Demand are barred by the applicable statute of limitations. Hill is entitled to summary judgment dismissing the following claims as against him: aiding and abetting breach of fiduciary duty (count II); conspiracy to commit fraud (count III); misappropriation (count IV); tortious interference with contract (count V); negligent supervision (count VII); tortious interference with prospective economic advantage (count VIII); and unjust enrichment (Count IX). IRES is entitled to summary judgment dismissing the following claims as against it: aiding and abetting breach of fiduciary duty (count II); fraud and conspiracy to commit fraud (count III); misappropriation (count IV); tortious interference with contract (count V); and tortious interference with prospective economic advantage (count VIII).

Although only Hill and IRES moved for summary judgment dismissing claims as time-barred, in light of the forgoing discussion, the court also searches the record pursuant to CPLR 3212(b) and dismisses all claims that were not asserted in the Arbitration Demand - to wit: counts

two, five, seven, and eight in their entirety; counts one, six and nine, as asserted against defendant Miller; count three, to the extent it asserts (a) conspiracy to defraud, and (b) fraud as pleaded against defendants Miller, Whitney Investment Advisors, and Welsh Real Estate Services; and count four, to the extent it is brought against any defendant other than Falcon.

Accordingly, there are three claims remaining against Hill: breach of fiduciary duty, fraud and negligence and one against IRES, for unjust enrichment. With the exception of the claim for breach of fiduciary duty, which is the subject of plaintiffs' motion for summary judgment, defendants contend that these remaining claims – fraud, negligence and unjust enrichment – must be dismissed as duplicative of the claim for breach of fiduciary duty. The court agrees.

It is well established that tort claims must be dismissed when they are duplicative of a pleaded claim for breach of fiduciary duty (*see Stein v McDowell*, 74 AD3d 1323, 1326 [2d Dept 2010]; *Calabro v Fleishell*, 48 AD3d 206, 207 [1st Dept 2008] ["A claim for fraud cannot duplicate a claim for breach of fiduciary duty"]; *Frydman & Co. v Credit Suisse First Boston Corp.*, 272 AD2d 236, 238 [1st Dept 2000] [fraud and negligent misrepresentation]; *PMC Aviation 2012-1 LLC v Jet Midwest Group LLC*, 2016 NY Slip Op 30972[U], *16 [Sup Ct, NY County 2016] ["Plaintiffs cannot state a viable independent cause of action for fraud by merely recasting their claims as . . . fiduciary duty breaches committed with scienter"]).

Likewise, a claim for unjust enrichment should be dismissed where it is based on the same conduct as a breach of fiduciary duty claim (*see Vandashield LTD v Isaccson,* 2015 NY Slip Op 31782[U], *16 [Sup Ct, NY County 2015]; *Hamrick v Guralnick,* 2015 NY Slip Op 31696[U], *8 [Sup Ct, NY County 2015], affd 146 AD3d 606 [1st Dept 2017] [dismissing claim for unjust enrichment as duplicative of plaintiffs' breach of fiduciary duty and fraud claims]).

Here, plaintiffs' claims for fraud, negligence and unjust enrichment each allege the same acts or omissions, and claim the same injuries and damages as plaintiffs' fiduciary duty claims (compare amended complaint, ¶¶ 109-113 [breach of fiduciary duty claim] with *id.*, ¶ 97 [fraud claim]; ¶¶ 129-131 [negligence claim]; ¶ 150 [unjust enrichment claim]). Because these claims are duplicative, they must be dismissed as against all defendants. Hill's motion for summary judgment dismissing the amended complaint is granted, except as to Count I for breach of fiduciary duty. IRES' motion for summary judgment is granted in its entirety.

II. Plaintiffs' Summary Judgment Motion (Motion Seq. No. 019)

In motion sequence number 019, plaintiffs move for summary judgment as to their claims for breach of fiduciary against Falcon, Hallengren, Miller and Hill (counts I and X); aiding and abetting breach of fiduciary duty against IRES, Hallengren, Miller and Hill (count II); negligence against Hallengren, Miller and Hill (count VI); and tortious interference against Hallengren, Miller, Hill and IRES (count VIII).

Plaintiffs' motion regarding the claims of aiding and abetting breach of fiduciary duty and tortious interference are denied because those claims are barred by the statute of limitations and have been dismissed. The motion as to the negligence claim is denied because that claim was dismissed as duplicative of the breach of fiduciary duty claim.

With respect to the claim for breach of fiduciary duty, plaintiffs contend that Falcon, Hallengren, Miller and Hill, who were each fiduciaries, used their positions to enrich themselves to the detriment of plaintiffs. Plaintiffs argue that they are entitled to summary judgment because the undisputed evidence demonstrates that defendants misappropriated at least $7,977,004.10 through (1) payment of an unauthorized fee, allegedly for lease of a commercial building that was

never executed; and (2) secret kickbacks from vendors engaged by Falcon on behalf of plaintiffs. According to plaintiffs, these schemes artificially and unnecessarily increased the fees and commissions plaintiffs were forced to pay, and caused plaintiffs to pay indirectly millions more to Falcon than was authorized or intended under the Management Agreements. Plaintiffs further contend that because defendants were faithless fiduciaries, they must also forfeit $2,702,198.44 in compensation that plaintiffs paid them during the period of disloyalty.

Relying almost entirely on their interpretation of the Management Agreements, plaintiffs' key contention is that defendants received unauthorized payments in connection with their management of the Properties. However, as more fully discussed below, each key fact relied upon is sharply disputed, thereby precluding a grant of summary judgment in plaintiffs' favor. Moreover, defendants assert that all of the payments in dispute were authorized and approved outside of the Management Agreements by the Principal and his agents.

A. Disputed Factual Assertions

1. Plaintiff's Version

Plaintiffs make the following factual assertions in support of their motion for summary judgment.

a. The Asset Management Agreements

Beginning in 2004, Falcon entered into a separate written Management Agreement with each Owner (*see* Tsai aff, exhibit A; Garbaccio aff, exhibits 2, 3). The Management Agreements gave Falcon broad responsibility, authority and discretion to act for plaintiffs, including with respect to the day-to-day management and operation of the Properties. The Management Agreements permitted Falcon to select and engage property managers, leasing agents, and other

vendors on behalf of plaintiffs under Falcon's supervision. Falcon was required to keep detailed books and records, and to appoint officers to act on behalf of plaintiffs (*see* Management Agreements, Art I, §§ 1-14; Article II, §§ 1, 4).

Falcon agreed that it would "undertake its duties in a fiduciary capacity," and that it "would exercise a standard fiduciary duty of care." Falcon also agreed that it would "hold all monies in trust for the benefit of" plaintiffs (*see id.,* Art IV, §§ 6, 15). Each Management Agreement also contained a standard integration clause as follows: "This Agreement contains the entire understanding of the parties to the subject matter hereof and may not be amended or terminated orally" (*id.,* Art IV, § 12). Hill signed the Pinnacle Management Agreement on behalf of Pinnacle Owner Corp. (*see* Garbaccio aff, exhibit 3). Pierre Rolin, the principal of Strategic Real Estate Advisors, Ltd. (StratReal), signed the Management Agreement on behalf of Westlake Three and Westlake Four (*see* Tsai aff, exhibit A; Garbaccio aff, exhibit 2). In the Management Agreements, Falcon agreed to provide its services to plaintiffs (*see* Management Agreements, Art I).

b. The Unauthorized Lease Commissions

On August 28, 2008, Hill informed Limburg by email that Falcon, on behalf of Pinnacle, had "agreed to terms with" Aker Business Services (Aker) for a substantial lease of space in a building owned by Pinnacle. Copying Hallengren and Miller, Hill wrote that the lease was "being sent to Norway for signature" (Tsai aff, exhibit B). Hill noted that "the second half of the lease commission (about $3.5 million) is payable when the Tenant moves in" (*id.*). Limburg asked how much of the commission was "payable now" (*id.*). In response, Hill represented that Pinnacle owed $8.4 million, which included both the amount payable to an outside broker and one half the fee payable to Falcon upon execution (*see id.*).

Plaintiffs contend that, instead of waiting until the lease was executed as required under the Management Agreement, on August 29, 2008, Falcon caused $4,805,537.84 to be paid from Pinnacle's bank account to it and third parties in connection with the unexecuted Aker lease (*see* Tsai aff, exhibit D; Garbaccio aff, exhibits 10-16). Falcon caused Pinnacle to pay what was purported to be the full Contractual Leasing Fee (that would have been due if Aker had executed the lease and had already taken occupancy of the space). According to Hill, that amount was $1,802,373.36, with $1,351,780.02 (75%) distributed to Falcon and $450,953.34 (25%) paid to Whitney (an entity owned by Hill) (*see* Tsai aff, exhibit D).

Plaintiffs further contend that Falcon also caused Pinnacle to pay StratReal and Rolin $2,403,164.48 and $600,000, respectively (*see* Garbaccio aff, exhibits 10, 12-14, 21). However, Falcon did not pay any commission to the outside leasing broker. The amount payable would have been $4,806,328.97 had the lease been executed (compare Tsai aff, exhibit D with Garbaccio aff, exhibit 10). On September 8, 2008, Falcon distributed the $1,351,780.02 it had paid itself, as well as other cash in the Falcon account to Hallengren and Miller (*see* Garbaccio aff, exhibit F at FGL370, exhibit 16 at F2220104). Falcon also distributed $100,000 to IRES, another of Hill's companies, as a distribution (*see id.*, exhibit 17).

According to Hill, Aker notified Falcon in September 2008 that it would not be moving forward with the lease (see Tsai aff, exhibit C). Plaintiff contends that this information was concealed from Limburg. Plaintiffs also contend that, in an internal communication on October 17, 2010, Hallengren admitted that the Aker lease commission was "not earned" (see Garbaccio aff, exhibit 11). According to plaintiffs, defendants have not returned the $1.8 million they paid to themselves for the failed lease. Nor has StratReal or Rolin returned the funds they received

(Tsai aff, ¶¶ 14-15). Instead Hallengren offered to set off the commission against other fees purported to be owed to Falcon by plaintiffs other than Pinnacle (see Garbaccio aff, exhibit 11).

c. The Westlake Kickback Schemes

Under the Management Agreements, Falcon was responsible for selecting and retaining leasing brokers and property managers on behalf of Westlake Three and Westlake Four (*see* Tsai aff, exhibit A; Garbaccio aff, exhibit 2, Art I, §§ 4, 5). Plaintiffs contend that, in addition to the contract fees Falcon received directly under the Management Agreements for these services, Falcon and Hill secretly required the brokers and managers they retained to pay a portion of their fees and commissions to them.

(i). Lease Commissions to Westlake Three and the Conoco Phillips Lease

Falcon engaged Stream Realty Partners-Houston, LP (Stream Realty) to act as a leasing broker for the Westlake Three property. Hill signed the broker agreement with Stream Realty on behalf of Westlake Three Tenant LLC (Westlake Three Tenant) (*see* Garbaccio aff, exhibit 23). The broker agreement required Westlake Three Tenant to pay a commission to Stream Realty equal to 6% of the base rental (*see id.*, § 4.1 [b]). Plaintiffs contend that Hill (through IRES) then secretly entered into a lease commission "sharing" agreement with Stream Realty that required Stream Realty to pay 50% of Stream Realty's lease commissions for lease renewals, and 37.5% for new leases (*see* Garbaccio aff, exhibit 24).

In early 2010, Conoco Phillips agreed to a lease renewal with respect to a portion of the Westlake Three property (*see id.*, exhibits 31, 32). Pursuant to the Management Agreement, Falcon caused Westlake Three to transfer to Falcon's account the Contractual Leasing Fee of 1.5%, which equaled $359,447.22 (*see id.*, exhibit 33 at FGL426, exhibit 32). Westlake Three also paid

Stream Realty for the first half of its 6% commission (*i.e.*, 3% of $718,894.44) (*see* Tsai aff, exhibit 32). IRES then invoiced Stream Realty for $179,723.61 in connection with the Conoco Phillips lease (*see* Garbaccio aff, exhibit 34), and Stream Realty paid IRES that amount as the "Conoco-First Half Payment" (*see id.,* exhibits 30, 35). IRES then paid Falcon $44,930.90 of this amount, and kept the remainder (*see id.,* exhibit 31).

Plaintiffs contend that defendants did not disclose to Limburg that they received payments over and above the Contractual Leasing Fee in connection with the Conoco Phillips Lease renewal. Indeed, Limburg states that he "was not aware that Falcon, [IRES] or any of their officers were entering into supplemental agreements that required leasing agents, brokers, property managers or other vendors hired by Falcon for the Plaintiffs' Properties to pay a portion of their fees back to Falcon, or to third parties such as IRES . . . or any other entities or personnel associated with Falcon" and that he "never authorized any such payments" (*see* Limburg aff, ¶¶ 4-5 [attached to Garbaccio aff as exhibit 25]).

(ii). Lease Commissions to Westlake Four and the BP Lease

Falcon also engaged Stream Realty to act as a leasing broker for the Westlake Four property under the same terms as Westlake Three (*see* Garbaccio aff, exhibit 36, § 4.1 [a]). Hill signed the broker agreement on behalf of Westlake Four (see id. at 11). Plaintiffs contend that Hill (through IRES) also secretly entered into a commission "sharing" agreement with Stream Realty that required Stream Realty to pay IRES 50% of Stream Realty's lease commissions for lease renewals, and 37.5% for new leases (*see id.*, exhibit 37).

On July 18, 2008, Falcon transferred $579,513.80 from the Westlake Four Tenant LLC bank account to its own account, apparently representing the Contractual Leasing Fee for an

anticipated three-year lease renewal by British Petroleum (BP) (*see id.,* exhibit 38; see also exhibit 17 at FGL370). Plaintiffs contend that, similar to the Aker lease, this payment was made prior to the execution of the lease renewal, *i.e.,* there was no lease renewal executed by BP in 2008 that would support the payment to Falcon (*see* Tsai aff, exhibit E).

Plaintiffs contend that Hill also took the IRES/Falcon "kickback" portion of the Stream Realty commission that would have been due to Stream Realty, even though Stream Realty was not yet entitled to a commission (*see* Garbaccio aff, exhibit 38). According to plaintiffs, Hill did not pay Stream Realty any commission (because no lease had been executed), but in July 2008, Falcon and Hill still transferred the "kickback" portion of the unearned commission to IRES from a Westlake Four account, in the amount of $1,159,027.60 (*see id.,* exhibits 39, 41). IRES then paid Falcon $724,392.25 (*see id.,* exhibits 17, 38, 39, 41). Hallengren, Miller and Hill then distributed these funds to themselves on September 8, 2008 (*see id.,* exhibit 17).

In November 2008, defendant WRES, which is owned and operated by Falcon employee Larry Welsh, invoiced Falcon $72,439.22 for "Transaction Coordination" in connection with the disputed BP lease renewal (*see id.,* exhibit 43). Hill subsequently approved a wire transfer of the same amount out of the Westlake Four Tenant LLC bank account to WRES (*see id.,* exhibits 41, 43).

In 2009, BP signed what plaintiffs contend was the original lease renewal with Westlake Four, for more space than Hill had anticipated in 2008 (*id.,* exhibit 46). Plaintiffs contend that Hill then recalculated the Contractual Leasing Fee due to Falcon by using a 2% leasing fee rather than the 1.5% provided for in the Management Agreement (*id.,* exhibit 47), resulting in an alleged leasing fee of $985,934.92 for an overcharge of $246,483.73. Crediting the $579,513.80 that

Falcon had already paid itself in 2008, Miller and Hill transferred an additional $406,421.12 from the Westlake Four account to the Falcon account (*see id.*, exhibit 49).

Plaintiffs contend that Hill also recalculated the kickback portion of Stream Realty's commissions. IRES issued an invoice of $271,273.80 to Falcon for its share of the Stream Realty commissions, and on July 28, 2009, Falcon transferred that amount to IRES from the Westlake Four Tenant bank account (*see id.,* exhibits 38, 47, 50, 51). IRES then paid Falcon $43,791.21 for its share of the kickback (*see id.*).

WRES also invoiced Falcon for an additional $159,696.23 in connection with the renewal of the BP lease based on a percentage of Falcon's Contractual Leasing Fee and the "Outside Broker Commission Sharing" (*see id.,* exhibits 47, 52). Again, rather than pay WRES from its fee, Falcon caused Westlake Four to pay this amount to WRES (*see id.,* exhibit 51).

Plaintiffs contend that defendants did not disclose to Limburg or anyone else that they were receiving payments in connection with the BP lease renewal in addition to the Contractual Leasing Fee (*see* Limburg aff, ¶¶ 4-5).

(iii). Property Management Fee Kickbacks

Plaintiffs contend that Hill also extracted kickback payments from the property managers that he hired for the Westlake Three and Westlake Four Properties. At the end of 2006, Falcon engaged Crescent Property Services, Inc. (Crescent) to manage the Westlake Three and Westlake Four Properties (*see* Garbaccio aff, exhibits 54, 55). Under these agreements, which Hill signed on behalf of both tenant entities, Crescent was to be paid a management fee of 3% of Gross Rents (*see id.*).

Plaintiffs assert that IRES and Crescent also entered into a "Supplemental Management Agreement," pursuant to which Crescent was to "kickback" to IRES one-third of Crescent's fee (or 1% of gross rents) for Westlake Three and Westlake Four (*see id.,* exhibit 56). From the end of 2006 through December 2007, Falcon received Contractual Management Fees totaling $174,166.49 for Westlake Three and $249,613.17 for Westlake Four (for a total of $423,779.66) (*see id.,* exhibits 57, 58). For the same period, Crescent paid IRES $354,208.14 in "supplemental fees" under the Supplemental Management Agreement (*see id.,* exhibit 59. Plaintiffs contend that these fees were not disclosed to the directors of Westlake Three and Four (*see* Limburg aff, ¶¶ 4-5).

In November 2007, Hill, on behalf of Westlake Three Tenant and Westlake Four Tenant, executed a contract with Stream Realty to replace Crescent as property manager (*see* Garbaccio aff, exhibits 60, 61). In that same month, Stream Realty also entered into Supplemental Management Agreements with IRES for Westlake Three and Four, under which Stream Realty was to pay IRES half of its fees (1.5% of the Gross Rents), instead of the 1% IRES was receiving from Crescent (*see id.,* exhibits 62, 63). From 2008 through 2010, Westlake Three and Four paid Contractual Management Fees to Falcon totaling $397,179.62 and $535,857.02, for a total of $933,036.64 (*see id.,* exhibits 64-66). During this same period, Stream Realty paid IRES an additional $974,627.66 in "supplemental" fees for Westlake Three and Four (*see id.,* exhibit 67). As with other payments, plaintiffs contend that defendants did not make full disclosure to the directors of Westlake Three and Four (*see* Limburg aff, ¶¶ 4-5).

2. Defendants' Version

Defendants contend that the portfolio of real estate properties at issue is unique in its structure and management, designed to comply with orthodox religious custom and the perceived

need to maintain total secrecy surrounding the Principal and his beneficial ownership of the Properties. According to defendants, Rolin, an ex-Credit Suisse banker, was an advisor and confidante of the Principal, entrusted with overseeing management of this multi-million dollar portfolio of properties in the United States. Defendants assert that as the Principal's agent and liaison, Rolin authorized and approved the payments at issue outside of the Management Agreements.

Defendants' detailed version of the relevant facts which follows is largely taken from Hill's affidavit (*see* generally Hill aff., NYSCEF Doc. No. 1062). The affidavits of Miller and Hallengren largely corroborate Hill's account (*see* Miller aff, ¶¶ 7-194; Hallengren aff, ¶¶ 16-167).

a. Retention of Falcon

Prior to 1994, a trust was established for the benefit of the Principal (the Trust). The Principal appointed an advisor primarily to help him build a global investment portfolio (the Advisor). One piece of advice was to invest in real estate around the world, including in the United States (*see* Hill aff, ¶ 7).

In 1994, the Advisor began working with Credit Suisse Group, AG (Credit Suisse) in Zurich, Switzerland, to establish the portfolio (*see id.,* ¶ 8). At that time, Rolin and Limburg worked for Credit Suisse in the international real estate and trust departments, and dealt directly with the Advisor (*see id.,* ¶ 8). The Advisor worked with Rolin to acquire and manage real estate for the Principal, and with Limburg as trustee of the Trust to fund the acquisition and corporate management of those assets (*see id.*).

In 1996, a senior Credit Suisse executive requested Falcon's assistance to provide advisory services to the Principal in connection with his desire to acquire real estate investments in the

United States (the U.S. Portfolio), including the assets at issue in this action (*see id.,* ¶ 9). Hallengren and Miller were introduced to the Principal, the Advisor and Rolin in Paris by senior management of Credit Suisse, and began planning the first acquisition in the United States (*see id.*). The Advisor and Rolin were identified as the Principal's agents and investment advisors in connection with the future real estate investments in the United States (*see id.*).

Between 1996 and 1998 properties in the United States were purchased, with Credit Suisse and the Advisor representing the Principal, and Falcon handling acquisition and financing of the Properties (*see id.,* ¶ 10). In 1998, Rolin and Limburg left Credit Suisse to form their own companies – StratReal, which was co-owned by Rolin and the Advisor, with Limburg as a founding director, and Private Client Partners, which was co-owned by Limburg and other former Credit Suisse employees (*see id.,* ¶ 11).

In 1998, the Principal, through Rolin, the Advisor and Limburg, made clear to Falcon that he wanted to significantly expand his portfolio of real estate assets in the United States. After putting together a book of prospective deals, the Principal met with Miller, Rolin and the Advisor. During that meeting, the Principal advised Falcon that the new United States real estate team would consist of StratReal and Falcon (*see id.,* ¶ 13). The Principal further directed Falcon to follow the directives of the Advisor and Rolin in all respects, including any and all decisions related to the selection, acquisition, asset management, financing, leasing and disposition of real estate investments, as well as the approval and payment of all fees related to those investments (*see id.*).

In 1998, the Principal also made clear that Limburg would continue to act as trustee of the Principal's funds, and would be actively involved in the acquisition, asset management and disposition of the investments with the help of the law firm Shearman & Sterling LLP, and its partner, Kevin Hackett Esq. (Hackett) (*see id.,* ¶ 14). Falcon was expressly instructed to follow

Limburg's directions with respect to all financial matters, including the opening of various bank accounts associated with the investments, and the withdrawal or transfer of money to, from and within those accounts (*see id.,* ¶ 15).

b. The Formation and Structure of the U.S. Portfolio

The real estate investments were structured by Limburg and Hackett utilizing multiple layers of foreign and domestic entities to comply with orthodox religious custom and to promote tax efficiency (*see id.,* ¶ 16). As structured by the Principal's agents, each property was purchased in the name of an "Owner Company" and then leased to a "Tenant Company" under a master lease (*see id.,* ¶ 17). United States lenders never knew who the beneficial owner of the Properties was, or of the Principal's involvement in any of these transactions (*see id.,* ¶ 18).

Once acquired by the Owner companies, the Properties were then subleased by the Tenant Companies to third-party tenants explicitly approved by the lenders (*see id.,* ¶ 19). However, the rental payments made by the third-party tenants did not go to the Owner or Tenant Companies but rather, were assigned to the lenders and deposited into lock box accounts controlled exclusively by the lenders (*see id.*). Once the lenders deducted all mortgage related expenses, they would transfer any remaining funds directly to the bank accounts in the name of the Tenant Companies (*see id.*).

Each month, funds held in the Tenant Companies' bank accounts were transferred to accounts in Switzerland controlled by Limburg to pay interest on portfolio loans (*see id.*, ¶ 21). Monies in the Tenant Company accounts were also used to pay all expenses related to the Properties, such as operating expenses (including property management fees), leasing commissions and other ad hoc fee disbursals to StratReal and Rolin (*see id.*).

As the beneficial owner of the Properties was never identified, the lenders took significant steps to protect their collateral and priority, including, inter alia, requiring the Owner Companies to enter into asset management agreements with Falcon, which were assigned to the lenders (*see id.,* ¶ 23).

Defendants contend that, despite the fact that the Management Agreements were entered into between the Owner Companies and Falcon, the Owner Companies never made any payments to Falcon (*see id.,* ¶ 24). Instead, the Tenant Companies, including Pinnacle Tenant, Westlake Three Tenant and Westlake Four Tenant, which were not signatories to the Management Agreements, paid expenses related to the Properties, including all property management acquisition, disposition and leasing fees to Falcon and IRES (*see id.*). Although the Management Agreements addressed the payment of certain fees, other fees, such as acquisition, disposition, leasing, brokerage and property management fees, were not included in the Management Agreements (*see id.,* ¶ 25). All fees, including those paid to StratReal and Rolin, were paid from the Tenant Companies' accounts (*see id.*). These fees (presumably those paid separately from fees paid under the terms of the Management Agreements) were also paid at the discretion of the Principal and his agents through ad hoc oral agreements that were routinely adjusted at their whim (*id.*). As a result, the amounts paid were always subject to change, and were frequently based on what the Principal or his agents decided to pay at any given time (*see id.*).

Defendants contend that the Properties in the U.S. Portfolio were not run by either the Owner or the Tenant Companies, as these entities were merely shell companies which maintained no corporate governance or formalities, and had no "independent" directors (*see id.,* ¶ 27). Rather, control of the U.S. Portfolio was at all times vested in the Advisor, Rolin and Limburg,

with the Principal maintaining ultimate decision making authority (*see id.*). Falcon rarely dealt directly with the Principal, and instead took orders from Rolin and Limburg (*see id.*).

At the Principal's direction, Rolin and Limburg managed, supervised and instructed Falcon in connection with, inter alia, the payment of all expenses related to the U.S. Portfolio, including all asset management and supervisory leasing fees (*see id.,* ¶ 29). The amount of these fees to be paid was routinely determined by Rolin and Limburg, in consultation with the Advisor and the Principal, and communicated to Falcon through oral directives (*see id.*).

c. Fees Sharing by Plaintiffs and Falcon

Defendants contend that, from the outset, Falcon was advised that the asset management fees would be shared with Rolin and the Advisor (*see id.,* ¶ 30). This fee sharing was never memorialized in a written agreement, but rather, was communicated orally by the Principal or his agents to Falcon (*see id.*). Falcon followed the Principal's directives and consistently paid StratReal (and thus Rolin and the Advisor), a portion of the fees earned by Falcon (*see id.*).

According to defendants, throughout the parties' relationship, Rolin and Limburg orally authorized and instructed Falcon to make payments of various fees and bonuses (including acquisition, disposition, financing, refinancing, asset management, leasing, incentive and advance fees) to Falcon, Rolin, StratReal and Limburg, among others, throughout the parties' relationship (*see id.,* ¶ 31). For example, Rolin and Limburg instructed Falcon to pay fees to themselves and StratReal in connection with the Aker lease (*see id.,* ¶ 31).

d. Management of the Properties by Falcon

Defendants assert that Rolin instructed Falcon to handle local property management and leasing activities at all of the Properties in its discretion, as long as: (1) the identity of the Principal

as owner of the Properties was never disclosed to any third party; (2) the Principal and his agents dealt only with Falcon regarding all Property related issues; and (3) the Properties were maintained in pristine condition at all times in the event the Principal ever arrived unexpectedly to personally inspect them (*see id*,. ¶ 34). To achieve these stated objectives, Falcon and IRES co-managed and co-leased various multi-tenant Properties, including Westlake Three and Westlake Four (*see id*.). At Falcon's discretion, and within its good faith professional judgment, local property management and leasing activities could be performed by Falcon, subcontracted to third parties, or any combination thereof (*see id.*, ¶ 35). In the case of the Westlake properties, Falcon authorized Hill to perform these duties through IRES (*see id.*, ¶ 36).

Defendants contend that Falcon and IRES assumed additional management and leasing responsibilities for the Properties that were not set forth in any of the Management Agreements, and were far broader than those typically imposed on an asset manager (*see id.*, ¶ 37). For example, with respect to Westlake Three and Westlake Four, Hill was actively involved in negotiating lease renewals to avoid the lenders triggering a cash trap which would have cut off access to funds held in the Westlake Three and Westlake Four Owner bank accounts (*see id.*, ¶ 39).

Since the Management Agreements did not cover these additional services or how these services would be paid, and as authorized by Rolin and Limburg, co-management and co-leasing arrangements were entered into with the local third-party property managers and leasing agents to compensate Hill and IRES for the extra work performed (*see id.*, ¶ 40).

Defendants assert that, contrary to plaintiffs' contentions, during Falcon's tenure, the amount of all property management and leasing fees were fully disclosed to, approved by, and never hidden or concealed from, Rolin and Limburg, and all payments were reflected in the books

and records of each of the plaintiffs, including Pinnacle, Westlake Three and Westlake Four, and were always available to plaintiffs (*see id.,* ¶ 42).

e. Aker Leasing Fees

Hill asserts that Rolin directed and approved all of the payments from the Pinnacle Tenant account with respect to the Aker lease, with Limburg's knowledge and consent (*see id.*, ¶¶ 56-57). All of these payments were reflected in the quarterly reports provided to Pinnacle (*see id.,* ¶ 58 and exhibit H; *see also* Garbaccio aff, exhibit 10). Hill specifically disputes plaintiffs' contention that the fact that Aker would not be moving forward with the lease was concealed from Limburg, asserting that Limburg was aware that the lease was never signed, as he received monthly and quarterly reports from Falcon which made clear that the lease had not been signed (*see* Hill aff, ¶ 60, exhibits H, I, J and K).

Hill also disputes plaintiffs' contention that defendants have returned none of the $1.8 million they paid to themselves in connection with the failed Aker lease. Hill alleges that, throughout 2009, Falcon communicated regularly with Rolin and Limburg concerning the status of the Aker lease (*see id.,* ¶ 62). During these discussions, neither Rolin nor Limburg ever instructed Falcon to return any of the advanced commission payments (*see id.,* ¶ 63; *see also* Tsai aff, exhibit C). Since Aker ultimately leased only a portion of the space covered by the original 2008 lease, Falcon volunteered to return the advanced funds to the U.S. Portfolio by offsetting the $1,802,373.36 Falcon had received against future leasing, financing and disposition fees (*see id.,* ¶ 64). According to Hill, as of today, Falcon has repaid $1,690,891.30 of the advanced Aker leasing fees through such offsets, with only a balance of $111,482.06 remaining (*see id.*).

f. Westlake Property Management and Leasing Fees

Westlake Three Tenant and Westlake Four Tenant entered into property management agreements with third-party vendors Crescent, from 2006 to 2007, and Stream Realty, from 2007 to 2010 (*see id.,* ¶ 65). In those agreements, both Crescent and Stream Realty were tasked to handle the local day-to-day on-site management issues at the Westlake properties, while Falcon and IRES were responsible for overall accounting, property insurance, real estate taxes, debt payments, and other confidential ownership matters that, per Rolin's instructions, the third-party vendors were prohibited from handling (*see id.*). Crescent and Stream Realty entered into co-management agreements with IRES, pursuant to which they agreed to share their contractual management fee with IRES (*see id.*, ¶ 66). According to defendants, this contractual management fee was at market rate, was separately identified in all management reports, and was approved by Rolin and Limburg (*see id.*).

Defendants dispute plaintiffs' assertions that there was no lease renewal executed by BP in 2008 that would support the payments to Falcon and IRES, and that neither Hill nor Falcon disclosed to Limburg, or anyone else, that Hill and IRES were receiving payments from the property managers in addition to the Contractual Management Fee.

Hill alleges that Westlake Three Tenant and Westlake Four Tenant each also entered into leasing agreements with Stream Realty (*see id.,* ¶ 67). In reality, however, IRES was fully engaged in every aspect of leasing activities for the Westlake Three and Westlake Four properties, because securing the lease renewals at these two properties was critical, as if either Conoco or BP had not renewed their leases at least two years before the lease expiration dates, the lender would spring a cash trap and retain all rent monies (see id., ¶¶ 67-68). Securing the Conoco and BP lease renewals was of critical importance to the Principal, his agents and Falcon (*see id.,* ¶ 68). As a result, IRES

took an extremely active role in the leasing process and was entitled to the payments it earned from the co-leasing agreements it had with Stream Realty (*see id.,* ¶¶ 68-69).

Hill contends that on June 20, 2008, BP exercised its option to renew its existing lease, extending the term to 2013. At the same time, BP gave notice that it wanted to negotiate an expansion of its space in the building (*see id.,* ¶¶ 70-71). In support of this allegation, defendants submit a copy of a lease renewal with BP dated June 26, 2008 (*see id.,* exhibit L), as well as a copy of the "Eighth Amendment to Lease Agreement," executed May 7, 2009, which Hill contends reaffirms that BP had previously exercised its limited renewal option in 2009, and memorialized the terms of the 2009 expansion (*see id.,* ¶ 71; exhibit M, § B).

Hill further asserts that the BP lease renewal was the product of significant work performed by IRES, that Westlake Four was aware of BP's lease renewal, and that a copy of the lease value calculation was provided to Rolin and Limburg, who thereafter approved fees related to BP's lease (*see id.,* ¶ 70; *see also* Garbaccio aff, exhibit 41).

B. Breach of Fiduciary Duty Claim

The crux of plaintiffs' motion is that defendants received certain unauthorized payments, in breach of their fiduciary duty. Defendants respond that the purportedly improper payments alleged in the complaint were approved by Limburg and others.

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by that defendant's misconduct (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Whether plaintiffs are entitled to summary judgment turns on whether defendants have presented sufficient evidence to raise issues of fact that the scope of defendants' fiduciary duties were governed by

understandings with the Principal and his agents, as opposed to the Management Agreements, and that the acts in question did not constitute misconduct under the standards authorized by the Principal and his agents.

The basis of plaintiffs' breach of fiduciary claim is that defendants received unauthorized leasing and property management fees and commissions. Plaintiffs cannot obtain summary judgment against defendants on the theory that they engaged in misconduct by receiving such fees and commissions because defendants have presented evidence, sufficient to raise an issue of fact, that payment of those fees and commissions were authorized, ratified and approved by Rolin and Limburg (*see* generally Hill aff, ¶¶ 25-72; Miller aff, ¶¶ 46-194; Hallengren aff, ¶¶ 58-167).

Under New York law, "[a] principal who condones misconduct on the part of his or her agent may not rely on that misconduct" to obtain summary judgment (*G.K. Alan Assoc., Inc. v Lazzari,* 44 AD3d 95, 100 [2d Dept 2007], affd 10 NY3d 941 [2008]). Indeed, it is widely held that "[t]he ratification or other affirmance by the principal of an authorized act done by an agent . . . releases the agent from liability in damages to the principal for having violated a duty to him" (Restatement [Second] of Agency § 416). Applying these principles, evidence that Rolin and Limburg knew of or sanctioned the alleged improper payments is sufficient to raise issues of fact, defeating summary judgment.

G.K. Alan is directly on point. In that case, Lazzari (the principal) alleged that Alan (its agent) engaged in a scheme to defraud Lazzari's insurers, and thereby breached its fiduciary duties to Lazzari by withholding a portion of the premium savings resulting from the fraud. Challenging this, Alan presented evidence that Lazzari and others were aware of and participated in the insurance fraud scheme, and knew that Alan was receiving a portion of the premium savings as a fee (44 AD3d at 100). Based upon this evidence, the court reversed an order granting summary

judgment in favor of Lazzari, since Alan's allegations of Lazzari's knowledge were "sufficient to raise a triable issue of fact requiring that Lazzari's motion for summary judgment . . . be denied" (*id.*) The Court of Appeals affirmed, holding that the "core question[]" of the extent to which Lazzari "had knowledge of the ongoing insurance fraud or embezzlement – involve[d] factual issues for proper resolution at trial" (10 NY3d at 943).

In this case, there is evidence, some of it undisputed, showing that plaintiffs were aware of, authorized, and approved the payments they now contest. For example, with respect to the Aker lease, plaintiffs contend that the undisputed evidence shows that Hallengren, Miller and Hill knew that the Aker fee was never earned, concealed the failure of the Aker lease negotiations from Limburg, and refused to return the funds received when the misappropriation was discovered. Plaintiffs also cite to Limburg's affidavit, in which he alleges that he would never have authorized the payment of lease commissions for the Aker lease if he had known that the lease had not been signed (*see* Limburg aff, ¶ 4).

However, defendants present evidence that, contrary to plaintiffs' assertions, Rolin and Limburg not only knew of and authorized the fee payments to StratReal, Rolin and Falcon related to the Aker lease, but that Limburg instructed Falcon to pay him a portion of those fees as well (*see* Hill aff, ¶¶ 56-58). According to defendants, the status of the Aker lease execution was never concealed from Limburg (*see id.*, ¶¶ 59-63). Indeed, the evidence submitted by defendants leads to the conclusion that Limburg knew that the Aker lease had not been signed, and was kept abreast of all developments concerning the lease execution (*see id.*, ¶¶ 59-63; exhibit H, I, J and K; Tsai aff, exhibit C; Garbaccio aff, exhibit 10). Defendants contend that Falcon never told Limburg that the Aker lease had been signed, but rather, routinely advised him that execution of the lease remained outstanding (*see id.*, ¶¶ 59-63). Moreover, once it became clear that the Aker lease would

not be executed, Limburg never instructed Falcon to return any of the advanced commissions payments, including the $50,000 payment that Limburg received (*see id.,* ¶ 63; Tsai aff, exhibit C). Instead, Limburg asked Falcon to continue working on the lease with Aker, or, in the alternative, to pursue other potential tenants in Aker's place (*see id.,* ¶ 61). Thus, plaintiffs' assertion that they knew nothing about fee sharing or the status of the Aker lease is sharply disputed by defendants, and requires denial of the motion.

Plaintiffs argue that defendants also breached their fiduciary duties to the Westlake entities. According to plaintiffs, defendants engaged in a "classic kickback scheme" in connection with their duty to select, engage and oversee third party brokers and property managers. Plaintiffs assert that Falcon conditioned its hiring of Stream Realty on Stream Realty's agreement to pay back to defendants a portion of its fees, and that defendants concealed these illicit arrangements by funneling payments to IRES. According to plaintiffs, defendants received two substantial kickbacks from Stream Realty in connection with the BP lease renewal with Westlake Four and the Conoco Phillips lease renewal with Westlake Three. Hallengren, Miller and Hill ultimately received their kickback payments through distributions from Falcon or IRES (*see* plaintiffs' mem at 18-19).

However, the evidence submitted by defendants raises issues of fact as to whether such conduct was authorized by the Principal and his agents. Hill alleges that Rolin and Limburg insisted that Falcon perform additional property management and leasing services not covered by the Management Agreements, in large part to conceal the identity of the Principal and his agents (*see* Hill aff, ¶¶ 65-67). Defendants further assert that, as Rolin and Limburg were aware, Falcon and IRES performed these services and were paid co-management and co-leasing fees to compensate Falcon and IRES for the extra work performed (*see id.,* ¶¶ 70-71). According to

defendants, the amount of these fully earned fees were disclosed to Rolin and Limburg, were reflected in the books and records of plaintiffs, were never hidden or concealed by Falcon or IRES, and were always available to plaintiffs (*see id.*, ¶¶ 70-71).

Plaintiffs further argue that defendants' "purported extra-contractual authorizations are refuted by the Management Agreements and the parol evidence rule" (plaintiffs' mem at 20). Specifically, plaintiffs contend that the Management Agreements made clear (1) that they contained the entire understanding of the parties; (2) that they could not be amended except in writing; and (3) that Falcon's fees could not be increased without prior notice. Plaintiffs argue that, moreover, defendants cannot vary the terms of the Management Agreements through parol evidence, as, regardless of the existence of an integration clause, parol evidence may not be introduced to vary the clear terms of a contract (*see Salzman v Bowyer Prods.*, 42 AD2d 531, 531 [1st Dept 1973]). Plaintiffs contend that the Fee Schedules to the Management Agreements are unambiguous, and thus cannot be changed by any parol evidence that would seek to alter the Fee Schedules (*see* plaintiffs' mem at 20).

These arguments do not meet the stringent standards plaintiffs must satisfy in order to succeed on a Motion for Summary Judgment. The Management Agreements may not address the additional services that Falcon and IRES allegedly performed at the direction of Rolin and Limburg (*see* Hill aff, ¶37 ["Falcon and IRES assumed additional management and leasing responsibilities for the Properties that were not enumerated in the AMAs"]; *see also id.*, ¶ 40 ["Since the AMAs did not cover these additional services or how these services would be paid, and as authorized by Rolin and Limburg, co-management and co-leasing arrangements were entered into with the local third-party property managers and leasing agents to compensate Falcon and IRES for the extra work performed"]). Accordingly, the Management Agreements cannot be

used to obtain summary judgment against defendants on claims arising out of payments Falcon and IRES received for services that may not be covered by the Management Agreements.

Moreover, assuming the Management Agreements did address these services, evidence that the parties orally modified the Management Agreements, and that defendants performed in accordance with those understandings is sufficient to withstand summary judgment (*see Barber v Deutsche Bank Sec., Inc.*, 32 Misc 3d 1239[A], 2011 NY Slip Op 51642[U], *4 [Sup Ct, NY County 2011], affd 103 AD3d 512 [1st Dept 2013] [holding that "no-oral-modification" clauses are waivable by either completed performed or partial performance "unequivocally referable" to modification]; accord *Last Time Beverage Corp. v F&V Distrib. Co, LLC*, 98 AD3d 947, 952 [2d Dept 2012]). Here, Hill, Miller and Hallengren allege that they acted at the direction of Rolin and Limburg, that the Management Agreements addressed only the payment of certain fees, and that other fees, such as the property management fee and leasing commissions, were also paid by Rolin and Limburg through ad hoc oral agreements (*see* Hill aff, ¶ 25; *see also* Miller and Hallengren affidavits). These allegations are sufficient to require denial of the motion.

Accordingly, given the parties' divergent allegations concerning the propriety of the payments at issue, disputed issues of material fact exist sufficient to preclude summary judgment in favor of plaintiffs breach of fiduciary duty claim. Indeed, plaintiffs' own motion demonstrates that there are disputed issues of fact concerning authorization for the payments at issue. Although plaintiffs acknowledge that defendants "have contended that the unauthorized payments and kickbacks were somehow 'approved' . . . including by independent board member, Limburg" (plaintiffs' mem at 20), plaintiffs also contend that summary judgment is mandated because defendants' position is "refuted by Mr. Limburg himself" (*see id.,* citing Limburg aff, ¶¶ 4-5 ["I never would have authorized the payment of lease commissions for the Aker lease, or any other

lease, if I knew that the lease had not been agreed to, approved and signed. . . . I was not aware that Falcon, [IRES] or any of the officers were entering into supplemental agreements that required leasing agents, brokers, property managers or other vendors hired by Falcon for the Plaintiffs' properties to pay a portion of their fees back to Falcon, or to third parties such as IRES. . . . I never authorized such payments in connection with Plaintiffs' properties"]). However, in order to resolve this issue, the court would have to make credibility determinations. Where, as here, credibility determinations are required to decide a summary judgment motion, the motion must be denied (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Creighton v Milbauer,* 191 AD2d 162, 166 [1st Dept 1993]; *see also Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992] [internal quotation marks and citation omitted] [the court "should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility"]).

The court has considered the remaining arguments, and finds them unavailing.

CONCLUSION

Upon the foregoing, plaintiffs' motion for partial summary judgment is denied. The motion for summary judgment of defendant Hill is granted except for count I (breach of fiduciary duty). The motion for summary judgment of IRES is granted and the complaint shall be dismissed as to IRES.

Counts II, (aiding and abetting breach of fiduciary duty), III (fraud and conspiracy to commit fraud), V (interference with contract), VI (negligence), VII (negligent supervision), VIII (tortious interference), and IX (unjust enrichment) are dismissed. Count I (breach of fiduciary duty) is dismissed as against Miller. Count IV (misappropriation) is dismissed as against all defendants except Falcon.

Accordingly, the remaining claims are: count I (breach of fiduciary duty) as plead against Hallengren and Hill; and counts IV (misappropriation), X (breach of fiduciary), and XI (accounting) against Falcon.

Accordingly, it is

ORDERED that the motion of defendant David A. Hill for summary judgment dismissing the amended complaint (motion sequence no. 021) is granted to the extent of granting partial summary judgment dismissing the aiding and abetting breach of fiduciary duty (count II); fraud and conspiracy to commit fraud (count III); misappropriation (count IV); interference with contract (count V); negligence (count VI); negligent supervision (count VII); tortious interference (count VIII); and unjust enrichment (count IX), causes of action as against said defendant and the motion is otherwise denied; and is further

ORDERED that the motion of defendant International Real Estate Services, Inc. for summary judgment dismissing the amended complaint against it (motion sequence no. 022) is granted to in its entirety; and is further

ORDERED that upon a search of the record pursuant to CPLR 3212 (b), the court also dismisses counts two, three, and five, six, seven, eight, and nine in their entirety; counts one as asserted against defendant Jack D. Miller; and count four, to the extent it is asserted against any defendant other that Falcon Real Estate Investment Co., LP n/d/b/a Falcon Real Estate Investment Management, LTD; and it is further

ORDERED that the motion of plaintiffs Pinnacle Owner Corp., Pinnacle Tenant LLC, Westlake Three Owner Corp., Westlake Three Tenant LLC, Westlake Four Owner Corp. and

Westlake Four Tenant LLC for partial summary judgment (motion sequence no. 019) is denied; and it is further

ORDERED that the action shall continue as to the first cause of action (breach of fiduciary duty) relating to the individual defendants (other than Jack D. Miller) and the tenth (breach of fiduciary duty) and eleventh (accounting) causes of action relating to Falcon Real Estate Investment Co., LP n/d/b/a Falcon Real Estate Investment Management, LTD; and it is further

ORDERED that counsel for the parties shall appear for a status conference on Tuesday, June 19, 2018 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: May 14, 2018 **E N T E R:**

O. PETER SHERWOOD J.S.C.