Park v Song
2018 NY Slip Op 32587(U)
October 10, 2018
Supreme Court, New York County
Docket Number: 650186/2017
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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STEPHEN PARK, THOMAS YANG, PAUL LEE and ANDREW CHANG, all individually and on behalf of KORILLA BBQ, LLC

Plaintiffs,

-against-

EDWARD SONG, DAVID IM, KORILLA BBQ, LLC, KORILLA EAST VILLAGE TRUCK, INC., WHITE TIGER NAMED KORILLA, LLC, LET GROUP, LLC, MOKBAR, LLC, MOKBAR II, LLC, AEGIS 233 LLC, ESTHER CHOI, HARDY CHUNG and YOUNG SUN SONG,

Defendants.

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Index No.: 650186/2017

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

Defendants Edward Song (Song), David Im, Korilla BBQ, LLC (the Company),[1] Korilla East Village Truck, Inc. (Korilla East), White Tiger Named Korilla, LLC (White Tiger), LET Group, LLC (LET), Mokbar, LLC (Mokbar), Mokbar II, LLC (collectively with Mokbar, the Mokbar Companies), Aegis 233 LLC, (Aegis), Ester Choi, Hardy Chung, and Young Sun Song (Young Sun), move to dismiss the complaint for failure to state a claim, based on passage of the statute of limitations and due to plaintiffs' discovery violations. They also seek a protective order limiting their discovery

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[1] The Company is merely a nominal defendant and is named only as a necessary party to the derivative claims plaintiffs assert on its behalf (*see Summer v Ruckus 85 Corp.*, 150 AD3d 515 [1st Dept 2017], citing *Tobias v Tobias*, 192 AD2d 438, 440 [1st Dept 1993] ["a corporation is ordinarily an indispensable party in a derivative suit"]). In the ordering language at the end of this decision, the court amends the caption to clearly reflect the Company's status as a nominal defendant. For the sake of clarity, the amended caption also omits the defendants against whom all claims are dismissed (Choi, Young Sun, and the Mokbar Companies).

obligations. The four *pro se*[2] plaintiffs in this action – Stephen Park, Thomas Yang, Paul Lee, and Andrew Chang – oppose the motion.[3] Defendants' motion is granted in part and denied in part.

Background

The facts are drawn from the complaint (Dkt. 12) and are assumed to be true unless clearly refuted by the documentary evidence.

Plaintiffs allege that at some point in 2009 and 2010, Park and Song decided to open a food truck serving "Korean-Mexican barbeque" (Complaint ¶¶ 2, 18-19). "In 2010, as the food truck proved to be successful and its business thrived, Park operated and managed the daily business of the truck while [Song] managed the back office, and also tried to raise capital to expand the food truck concept." At the outset, Park and Song considered themselves "equal partners" (¶ 22), and did not execute a written agreement governing the business. Eventually, seeking to expand, they solicited investment from Yang and Lee (as well as non-party Eric Yu) (¶ 25). It was at this point that a New York

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[2] Because plaintiffs are *pro se*, their opposition papers are afforded the requisite "special solicitude" (*see Hill v Curcione*, 657 F3d 116, 122 [2d Cir 2011]). Their complaint, however, was drafted by a lawyer (who has since withdrawn), and therefore it is evaluated under the usual standards (*see Pezhman v City of New York*, 29 AD3d 164, 168 [1st Dept 2006] [*pro se* complaint should be construed liberally]). Since this is plaintiffs' first complaint, those causes of action found to be insufficiently pleaded are merely dismissed without prejudice. In that regard, given the complexity of the applicable corporate law issues, plaintiffs are again urged to retain new counsel. While they have every right to represent themselves (and have done an admirable job thus far), their opposition papers evidence an understandable unfamiliarity with the law that may well hamper their ability to prevail.

[3] Plaintiffs submitted two affidavits in opposition – an affidavit of Yang (Dkt. 70) and a joint affidavit of Lee, Park, and Chang (Dkt. 79 [the Joint Affidavit]). References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

LLC – the Company – was formed to own and operate the business. The Company is governed by a First Amended and Restated Operating Agreement dated November 2, 2010 (*see* Dkt. 66 [the Operating Agreement]).[4] The Operating Agreement provides that Song, Im, Yu, and three of the four plaintiffs – Park, Yang, and Lee – are the Company's Members (*see id.* at 1).[5] However, paragraph 27 of the Complaint alleges that the Operating Agreement was only signed by Song, Yang, and Yu. During discovery, Lee located and produced a version of the Operating Agreement that bears his signature (*see* Dkt. 100 at 12).[6]

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[4] The Operating Agreement is governed by New York law (*see* Dkt. 66 at 10). While the Operating Agreement purports to be a "First Amended" version, the parties do not claim an earlier version exists nor was an earlier version submitted on this motion. Nor do the Operating Agreement's recitals mention the existence of a prior version (a notable omission since amended agreements typically reference prior versions). The parties agree that the Company is governed by the Operating Agreement; therefore, the terms of any prior agreement are irrelevant.

[5] Chang became a Member after purchasing 2.5% of Yang's interest for $10,000, and this allegedly occurred at "Song's request" (Complaint ¶ 37). Song appears to admit that Chang is a Member in his emails (*see* Dkt. 83 at 2).

[6] Defendants challenge the authenticity of the version singed by Lee (*see* Dkt. 101). While authenticity is a question of fact that cannot be resolved on a motion to dismiss, the court notes that the signature page produced by Lee, unlike the one without his signature, is undated. Also, the location of the individuals' initials on the prior pages is different. Then again, the pages in the originally filed version, unlike Lee's version, appear to be missing pages 11-12 (*compare* Dkt. 66 at 10-13, *with* Dkt. 100 at 10-12). Moreover, the memorandum attached to the original (discussed herein) is not attached to the version submitted by Lee. Indeed, it is unclear if page 12 of Lee's version is really the signature page of the Operating Agreement, as the only signature page of the original version appears to relate to the memorandum (this would explain the original missing page 12). These discrepancies raise many important questions of fact that must be probed in discovery. Nonetheless, aside from the question of whether Lee is a Member, the terms of the Operating Agreement in the two versions are not alleged to differ. While the Operating Agreement does not set forth the Members' percentage interests in the Company, plaintiffs submitted emails (Dkts. 83, 84, 85) and a document prepared by Song (Dkt. 82) that purport to reflects their equity split (*see also* Complaint ¶ 38 [alleging equity split]). This evidence suggests that, regardless of who signed the Operating Agreement, all four of the plaintiffs are Members of the Company. Lee's emails in 2012 contain a signature line in which

The Complaint sets forth the parties' contributions to the Company (in addition to their collective investment of approximately $180,000). Lee designed the food truck (Complaint ¶ 29). Park selected the trucks' tools and equipment and was in charge of production and food organization (*id.*). While the Operating Agreement names Song as the Company's Manager,[7] plaintiffs allege he had no experience running a food truck (¶ 30; *see* Dkt. 66 at 3). Indeed, despite the Company's business being "fast-paced," requiring "long days on the trucks," Song "did not participate in the work on the truck in any meaningful way" (¶¶ 39-40).

Notwithstanding Park and Song being the Korilla food trucks' original founders, and despite Lee having designed the food trucks, Song caused the Company's intellectual property – chiefly its Korilla trademark – to be held in the name of LET, an LLC owned exclusively by Song (and not the Company's other Members). This expressly contravened section 1.2 of the Operating Agreement, which provides that "[t]he name of the Company is Korilla BBQ, LLC" and the "[t]he business of the Company shall be

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he refers to himself as a "Co-Founder of Korilla BBQ" (*see, e.g.*, Dkt. 85). This evidence, along with the other allegations in the complaint regarding Lee's role, permits a reasonable inference that Lee was always a member of the Company.

[7] Section 3.4 of the Operating Agreement contains a broad non-compete that applies to all Members except for Yang (who owned a creperie) (*see* Dkt. 66 at 5). Without opining on its enforceability, the inclusion of such a provision must mean that the parties intended to be bound by the default fiduciary duty of loyalty, which prohibits competing with the Company while serving as its Manager (*Alexander & Alexander of N.Y., Inc. v Fritzen*, 147 AD2d 241, 246 [1st Dept 1989] ["The doctrine of 'corporate opportunity' provides that corporate fiduciaries and employees cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation."]; *see 105 E. Second St. Assocs. v Bobrow*, 175 AD2d 746 [1st Dept 1991] ["The measure of damages for breach of fiduciary duty is the amount of loss sustained, including lost opportunities for profit on the properties by reason of the faithless fiduciary's conduct"]). Hence, the unfair competition alleged in the Complaint (discussed herein) runs afoul of such fiduciary duty, regardless of the enforceability of (or the court's willingness to blue-pencil) section 3.4.

conducted solely under such name ***and title to all assets of the Company shall be held in such name***" (Dkt. 66 at 1 [emphasis added]). This is reiterated in section 2.7 (*see id.* at 3 ["***All property*** of the Company, whether real, personal or mixed, ***tangible or intangible, shall be deemed to be owned by the Company as an entity, and no Member, individually, shall have any direct ownership interests in such property***"] [emphasis added]). The Operating Agreement does not exempt the Company's trademark from this rule. Hence, in the Operating Agreement, the Members agreed that the Company's trademark must be owned by the Company.[8]

While the Operating Agreement addresses LET's relationship to the Company, it never states that LET owns, or is supposed to own, the trademark. Rather, in Article 5, which governs transfers of membership interests, section 5.1.2(c) provides that when "valuing the Company"

> all factors including but not limited to expected cash flow and tangible assets shall be considered. However, ***the value of goodwill and other intangible assets shall be valuated separately as the sole compensation to [LET]*** for their sale in Membership Interests and they shall not profit from proceeds arising from the book value of their Membership Interests.

Dkt. 66 at 8 (emphasis added).[9]

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[8] Section 7.2 of the Operating Agreement only permits amendments in a signed writing (Dkt. 66 at 10). That Song may have unilaterally prepared documents indicating the trademark was owned by LET (e.g., pitch books or trademark filings) does not overcome the Operating Agreement's unambiguous pronouncement that the Company's trademark must belong to the Company.

[9] This provision is difficult to understand. For instance, the pronoun "their" appears to refer to LET, even though it is an LLC. Moreover, it is unclear why LET is being compensated for a sale of its membership interest in the Company, as it is unclear why (or if) it was ever considered a Member. Indeed, even if LET somehow legitimately acquired the Company's trademark prior to

LET is next mentioned in Exhibit A to the Operating Agreement, which simply states "Please see attached" and contains the following footnote:

> Percentage owners shall be determined by the number of units of membership interest with respect to the total outstanding units. Notwithstanding, ***[LET's] percentage interest shall remain unaffected by additional outstanding units and shall maintain its 15% interest of the Company.***

Dkt. 66 at 11 (emphasis added).[10]

A Memorandum of Agreement (the MOA) that purports to be between Song and the Company accompanied the Operating Agreement (*see id.* at 12).[11] It is signed by Song, Yang, and Yu (but not by Park, Lee, or Chang) (*see id.* at 13).[12] The MOA's first recital states that the Company and LET:

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the Operating Agreement's execution, the Operating Agreement makes it quite clear that the Company is supposed to own it.

[10] While the bolded portion of this quote again suggests LET was a Member of the Company, this conflicts with the list of Members set forth on the first page of the Operating Agreement (*see* Dkt. 66 at 1). The pin citation to page 11 of Dkt. 66 is actually page 13 of the Operating Agreement, as pages 11 and 12 are missing. Simply put, the odd legal manner in which LET is mentioned in the Operating Agreement suggests that there is a question of fact as to the true legal relationship of LET to the parties and the Company that certainly cannot be resolved on this motion to dismiss.

[11] It is unclear whether the MOA was actually attached to the signed agreement. No such memorandum accompanied the version of the Operating Agreement submitted by Lee.

[12] The MOA itself recognized that not all of the members were signing it (*see* Dkt. 66 at 12 ["Members as listed below are not exhaustive of protected parties under this agreement such that in the event name and signature are omitted herein, bound party's responsibilities are not in any way diminished or affected."]). While defendants suggest that Yang is bound by the MOA, which purports to (but, as discussed, does not actually) permit LET to own the Company's trademark, defendants misconstrue the nature of plaintiffs' claims founded upon LET's ownership of the trademark – namely, that it is a derivative claim that belongs to the Company, and not any of the its Members individually. Since the Operating Agreement vests the rights to the trademark in the Company, an agreement to permit LET to own the trademark is not binding on the Company unless all (or at least a majority of the disinterested) Members agree

> have contracted within the Operating Agreement for [LET] that as consideration ***for services*** provided by [LET] under such agreement, fifteen percent (15%) of [the Company's] net profits shall be paid to [LET] ***as licensing and/or franchise fee.***

Dkt. 66 at 12 (emphasis added). Neither the Operating Agreement nor the MOA explain what services LET was providing.[13] Nor does the MOA state that LET owns the Company's intellectual property (defendants' counsel's representation to the contrary [*see* Dkt. 60 at 25] is demonstrably false). Rather, the MOA simply provides that Song is responsible for paying LET's fees (*see id.*).

Plaintiffs allege that since the food trucks were doing well, the parties decided to move to an upgraded commissary to better prepare food (Complaint ¶¶ 41-42). The food trucks became so popular that the Company was invited to participate in a Food Network reality television show called the Great Food Truck Race (¶ 43). The parties hoped that being on the show would lead to greater publicity that would result in lucrative new business, such as catering jobs (¶ 46). The parties decided that one of their three food trucks would be used in the race, and that Lee, Park, and Song would participate (¶¶ 47-48). As anticipated, being on the show "generated positive press and social media exposure", and by the summer of 2011, the Company earned nearly $100,000 of income (¶¶ 49-50).

However, the parties' relationship began to deteriorate after the show when "Lee and the others discovered that the [Company's] books and revenue records had not been

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otherwise. They did not. Hence, Yang's execution of the MOA does not affect the Company's right to own the trademark.

[13] Plaintiff alleges that MOA "was a means for [Song] to skim money from [the Company] with the veneer of a proper business arrangement" (Complaint ¶ 36).

properly kept" (¶ 51). "Lee took over most of the company bookkeeping, with Yang double-checking some of the work "(¶ 52). "Lee also overhauled [the Company's] social media presence, including its substantial presence on Twitter, Instagram and Facebook" (¶ 53). But this caused friction with Song, "who insisted that he take over the bookkeeping" and, more significantly, "wanted full control of [the Company]" (¶ 54). "Song refused to allow anyone other than himself to control the business and banking records" (¶ 55). Song then started stealing money from the Company (¶¶ 56-58). He used some of this money to fund competing Korilla-branded companies, and also sent money to his girlfriend (Choi) and her companies (the Mokbar Companies), his friend (Chung) and his company (Aegis), and his mother (Young Sun) (¶ 59). Song also used Company "funds to renovate his parents' personal property under the guise of the space being used for [the Company]" (¶ 60).[14] The complaint sets forth a litany of other defalcations, which he was able to keep secret due to the Company's revenue being mostly cash based and his control over its records (¶¶ 70-89). Due to Song's alleged theft, Lee had to loan $15,000 to the Company so it could pay its bills (¶ 81). He has not been repaid (*id.*).

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[14] While defendants deny some of these allegations, they do not proffer documentary evidence completely refuting them. Their mere denials cannot warrant dismissal since facts alleged in the complaint must be assumed to be true on a motion to dismiss. Where defendants rely on documentary evidence, they misrepresent its contents (e.g., claiming the MOA expressly addresses the trademark). Indeed, plaintiffs allege that "Song, acting alone, filed assignment documents by which he assigned and transferred [the Company's trademark to LET]" without paying any consideration to the Company (¶¶ 63-64). If proven, such an act would constitute a clear violation of the Operating Agreement and Song's fiduciary duty of loyalty (*see Stavroulakis v Pelakanos*, 58 Misc 3d 1221[A], at *9-11 [Sup Ct, NY County 2018] [granting summary judgment to plaintiff on similar claim, where the company's officers transferred the company's trademark to competing entity for no consideration]).

Things kept getting worse, as

> Song's mismanagement led to the permit and license fees for two trucks to go unpaid, something not then known to plaintiffs, leading to the two trucks being suspended from street operations crippling [the Company] and removing it from its street business and street visibility. While the trucks were off the street, equipment was stolen off them and from the commissary. Due to [Song's] behavior, [the Company's] business quickly collapsed.

Complaint ¶¶ 86-88. Making matters even worse, in 2014, Song and Im opened a storefront business called "Korilla FiDi" (¶ 100). They stole the Company's equipment from its commissary to use in their new restaurant (¶ 115). Plaintiffs have no interest in this business, despite it using the Company's trademark. Later that year, Song sold one of the Company's food trucks and kept all of the money for himself (¶ 106). He later terminated plaintiffs' corporate email accounts and changed the Company's social media passwords, locking plaintiffs out (¶ 110). He then started stealing the Company's catering revenue (¶ 121). By 2016, due to Song's actions, the Company became defunct[15] after its "last truck was booted and towed due to unpaid parking tickets," which plaintiffs did not know about became "because they were mailed to "[Song's] house and [Song] never informed plaintiffs" (¶¶ 135-36).

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[15] Plaintiffs appear to want to attempt to revive the Company's business. However, defendants contend that the Company cannot be given the rights to its trademark because "[t]he entity does not exist" (Dkt. 60 at 25). The situation is more complicated. According the website of the New York State Division of Corporations, the Company is an inactive LLC because it was dissolved on May 8, 2017 – *after* this action was commenced. It is unclear who caused the dissolution (though that *should not* have occurred during the pendency of this action). Plaintiffs are again urged to retain counsel to advise them on the implications of a dissolution on their standing to assert derivative claims and the corrective measures they can take upon a wrongful dissolution by defendants. But since the standing arguments in defendants' moving brief do not touch upon the implications of a dissolution on the maintenance of derivative claims, the court will not further address the issue.

On January 11, 2017, plaintiffs, then represented by counsel, commenced this action by filing a Summons with Notice. On February 27, 2017, plaintiffs filed a complaint (Dkt. 12) with the following causes of action:[16] (1) an accounting, asserted against all defendants; (2) unjust enrichment, asserted against all defendants; (3) declaratory judgment that the Company is the rightful owner of the Korilla trademarks purportedly owned by LET; (4) conversion (of the Korilla trademarks), asserted against LET and Song;[17] (5) a "transfer order" requiring LET and Song to transfer the Korilla trademarks to the Company;[18] (6) breach of contract and breach of the covenant of good

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[16] While the caption indicates that plaintiffs assert both direct and derivative claims, the causes of action do not indicate which claims are direct or derivative. While defendants do not formally move to dismiss on this ground or based upon failure to plead demand futility (a warranted concession under the circumstances), it is clear that all of plaintiffs' claims that survive dismissal are derivative except for their claim to not have received *pari passu* treatment when Song made distributions to himself. In short, a claim is derivative if the alleged harm affected the company and only harmed the individuals merely due to their equity in the company (*Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012]; *see O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 281-82 [1st Dept 2007] ["A claim for diminution of the value of stock holdings is a derivative cause of action belonging to that corporation and not to plaintiffs individually"]). Recovery on a derivative claim ordinarily goes to the company, while recovery on a direct claim goes to the individual (*see id.*). Here, the claims grounded on theft and unfair competition hurt the Company, so it is the Company that has the causes of action (*see Serino v Lipper*, 123 AD3d 34, 41 [1st Dept 2014] ["The lost value of an investment in a corporation is quintessentially a derivative claim by a shareholder"]). By contrast, the claim that Song paid himself certain distributions (whether couched as theft or improper compensation under the Operating Agreement) sounds in unequal treatment where the proper remedy is for Song to disgorge the share rightfully belonging to plaintiffs (i.e., if Song is a 41.7% member as alleged in the Complaint, he must disgorge 58.3% of what he took, and distribute those funds to the other members in accordance with their respective membership interests).

[17] In the Joint Affidavit, plaintiffs also claim that Chung stole a grill from the Company's commissary (*see* Dkt. 79 at 6), and that Song admitted he sold it for $1,200 (*see* Dkt. 91). However, the conversion claim is not asserted against Chung.

[18] While this indisputably is not a cause of action (and is dismissed as such), as discussed herein, it is a possible remedy for LET's alleged improper acquisition of the trademark, and thus is deemed to have been included in the Complaint's ad damnum clause.

faith and fair dealing, asserted against Song; (7) prima facie tort, asserted against Song and Im; (8) breach of fiduciary duty, asserted against Song and Im;[19] (9) breach of the duties of loyalty and care, asserted against Song and Im;[20] and (10) unfair competition and violations of Business Corporation Law (BCL) § 301 and General Business Law (GBL) §§ 133 and 349, asserted against Song, Im, Chung, Korilla East, White Tiger, and LET. On March 21, 2017, defendants filed an answer with seven counterclaims (Dkt. 13).[21] Plaintiffs answered the counterclaims on April 6, 2017 (Dkt. 19).

On September 11, 2017, a preliminary conference was held and a discovery schedule was set (*see* Dkt. 23). Discovery stalled the following month when plaintiffs' counsel moved to be relieved. By order dated October 25, 2017, plaintiffs' counsel was relieved (*see* Dkt. 33). Plaintiffs chose to proceed *pro se* (*see* Dkt. 36) and a new discovery schedule was set at a December 7, 2017 conference attended by the four

[19] In Yang's affidavit, he argues that Im, Young Sun, Chung, Choi, and LET should be held liable for aiding and abetting breach of fiduciary duty (*see* Dkt. 70 at 7-10). But the complaint does not plead an aiding and abetting cause of action. If plaintiffs wish to assert this claim, they must move for leave to amend. That said, the court is skeptical that Young Sun (Song's mother) and Choi (his girlfriend) can be held liable merely because Song gave them (fungible) money that he allegedly misappropriated from the Company. Likewise, Yang's affidavit also addressed an unpleaded fraud claim against Song (*see id.* at 10). Because the complaint was drafted by a lawyer, the court will not construe it so liberally to infer unpleaded claims, especially ones that are subject to the heightened pleading standard of CPLR 3016(b). The alleged fraud, moreover, on this record seems duplicative of the breach of contract and fiduciary duty claims.

[20] While this cause of action would appear to be duplicative of the prior one (i.e., the duties of loyalty and care are fiduciary duties), as discussed herein, the court construes this claim as relating to certain duty of care claims (e.g., the parking tickets) that are not at issue on the prior cause of action.

[21] The counterclaims, which are not at issue on this motion, will not be addressed even though the viability of certain of the claims is doubtful (e.g., claims predicated on the trademark being owned by LET).

plaintiffs (*see* Dkt. 37). Though plaintiffs missed a few early deadlines, they have since substantially complied with their discovery obligations, including putting together an ESI protocol.[22]

Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). If the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

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[22] Defendants' complaints regarding the *pro se* plaintiffs' discovery compliance is overblown and does not come close to justifying the drastic remedy of striking the complaint. Indeed, defendants' own resistance to providing clearly relevant discovery necessitated the court's issuance of an order dated April 10, 2018 (Dkt. 68), in which defendants were largely denied a protective order on the core claims in this case and compelled to produce financial discovery (*see id.* at 3 [noting defendants waited more than a year to file a motion to dismiss]). To the extent defendants' current motion again seeks discovery sanctions, either in the form of a protective order or a default judgment, the request is denied as plaintiffs have substantially complied with their discovery obligations.

Defendants maintain that "[t]he first 15 pages and 158 paragraphs of the Complaint assert bizarre and fantastical claims as if they are factual statements that can constitute legal claims" (*see* Dkt. 60 at 17). On the contrary, the complaint contains detailed factual allegations that satisfy the heightened pleading standard of CPLR 3016(b), which is applicable where, as here, the action is based on allegations of breach of fiduciary duty (*see Burry v Madison Park Owner LLC*, 84 AD3d 699 [1st Dept 2011]). The rhetoric in defendants' brief employed to describe the supposed frivolity of plaintiffs' suit is extremely overstated, as it ignores seemingly damning (if true) factual allegations and the *actual* terms of the Operating Agreement and MOA. There are, however, fatal problems with some of plaintiffs' causes of action.

To begin, it is well settled that a fiduciary, such as a managing member of an LLC, may be compelled to account to the non-managing members (*see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]; *Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211, 213-14 [1st Dept 1990]; *see Mohinani v Charney*, 156 AD3d 443, 444 [1st Dept 2017]). Plaintiffs – allegedly non-managing members of the Company – have therefore stated a claim for an accounting of the Company against Song, its managing member. None of the other individual defendants, however, are *fiduciaries of plaintiffs*, nor are plaintiffs members of the corporate defendants other than the Company. Hence, plaintiffs' accounting claim is limited to Song and only with respect to the Company. Plaintiffs have sufficiently alleged they have no other adequate remedy at law (*see Unitel Telecard Distribution Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]). The cash heavy nature of the Company's business and Song's insistence on having total control of the books and records renders an accounting necessary to vindicate plaintiffs' claim that Song was stealing the Company's cash.

Next, defendants correctly aver that plaintiffs' unjust enrichment claim must be dismissed because the Operating Agreement governs the parties' rights (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). To be sure, while there are questions regarding the meaning of the Operating Agreement and whether Lee executed it,[23] no one disputes that any and all rights the parties have in the Company are governed by the Operating Agreement. This is true even as to the claims asserted against defendants who are not parties to the Operating Agreement (*see Randall's Island Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012]).

Plaintiffs have stated a claim for a declaratory judgment regarding the Company's trademark because there is a justiciable controversy over its ownership (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009]). Defendants erroneously argue that the claim is time-barred under the three-year statute of limitations applicable to trademark infringement or unfair competition. Those are not the applicable statue of limitations because the Company's right to the trademark is governed by contract (*Gress v Brown*, 20 NY3d 957, 959 [2012] ["the statute of limitations in an action for a declaratory judgment is determined by reference to the gravamen of the claim or the status of the defendant party"]; *see* CPLR 213[2] [six-year limitations period for

[23] If Lee is not a Member, his rights are not governed by the Operating Agreement; however, he would then lack standing and his unjust enrichment claim, among others, would fail on the merits.

breach of contract]). On the merits, because the Operating Agreement provides that the rights to the trademark belong to the Company, Yang's execution of the MOA has no bearing on those rights.[24] And in any event, the MOA simply does not provide that LET has any rights in the Trademark (as opposed to a mere fee for "services"), while the Operating Agreement expressly requires the trademark to be owned by the Company (*see Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014] ["Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract"]).

The conversion claim is dismissed as duplicative (*see Sebastian Holdings, Inc. v Deutsche Bank, AG*, 108 AD3d 433 [1st Dept 2013]).[25] The Company's right to its trademark is governed by the Operating Agreement, to which Song is bound as a Member and to which LET is bound as a party to the MOA, which is part of the Operating

[24] Defendants argue that Yang "has no claim to any intellectual property or licensing of such property and is estopped by the [MOA] from asserting same" (Dkt. 96 at 4). But as previously discussed, this claim is derivative–it belongs to the Company–and thus Yang's individual rights, to the extent they were affected by the MOA, are not relevant. More importantly, since Song owns LET, his causing the Company to execute the MOA is an interested transaction, and thus (like many of the other disputed transactions discussed herein) is subject to entire fairness scrutiny. Since a majority of unconflicted members *did not* sign the MOA, Yang could not have ratified it on behalf of the Company.

[25] Though the conversion claim appears to relate only to the trademark (*see* Complaint ¶¶ 193-197), to the extent it also relates to Song's alleged theft, the claim is duplicative of plaintiffs' well pleaded claims for an accounting and breach of fiduciary duty (discussed herein). Those claims are not time barred because they have a six-year statute of limitations, which covers claims all the way back to 2011 since this action was filed in January 2017 (CPLR 213[7] [governing "an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith"]; *see Oxbow Calcining USA Inc. v Am. Indus. Partners*, 96 AD3d 646, 651 [1st Dept 2012]; *Kaufman v Cohen*, 307 AD2d 113, 123 n.5 [1st Dept 2003]).

Agreement. The independent cause of action seeking a "transfer order" is dismissed as plaintiffs have asserted a cause of action based on improper diversion of the trademark and there is no separate claim for a remedy (*see NWM Capital, LLC v Scharfman*, 144 AD3d 414, 415 [1st Dept 2016] [remedy should not be pleaded as independent cause of action]).

Plaintiffs have stated a claim for breach of the Operating Agreement.[26] While defendants claim the Complaint does not clearly itemize the alleged breaches, even if this were true, Yang remedied this problem in his affidavit in opposition (Dkt. 70 at 4-5; *see Carlson v. Am. Int'l Grp., Inc.*, 30 NY3d 288, 298 [2017] ["a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint"], quoting *Leon*, 84 NY2d at 88). He itemizes 14 breaches, such as breaches of: sections: 1.2 and 2.7, which require the Company to own its trademark; section 2.5, which requires Members to be allocated net cash flow on a *pari passu* basis (*see* Dkt. 66 at 3); section 3.2.1, which prohibits Song from being paid compensation for his services as Manager (*see id.* at 5); and section 3.4, which prohibits Song from operating a competing business.[27] While specific dates are not alleged, since the Operating Agreement does not

[26] Even if some of the plaintiffs did not sign the Operating Agreement, if they are Members, and the Operating Agreement governs (as defendants contend), plaintiffs have standing to derivatively assert the *Company's* right thereunder. Since the only direct claim concerns plaintiffs' distributions, plaintiffs would have a claim for unequal treatment, so long as they are Members, even if they did not execute the Operating Agreement.

[27] In reply, defendants respond with factual contentions, proffered only by counsel, that supposedly defeat the claims (*see, e.g.*, Dkt. 96 at 3 [contending there was no profit and, therefore, no money to distribute]). Such factual contentions cannot be considered on a motion to dismiss (nor, unless they come from someone with personal knowledge aside from counsel, could they be considered on a summary judgment motion).

appear to have been executed until at least February 2011, and since most (if not all)[28] of the alleged breaches occurred after the Food Network show in the middle of 2011, fewer than six years elapsed between the alleged breaches and this action's commencement on January 11, 2017 (CPLR 213[2]; *see Krog Corp. v Vanner Grp., Inc.*, 158 AD3d 914, 916 [1st Dept 2018] ["The general rule applicable to contract actions is that a six-year statute of limitations begins to run when a contract is breached or when one party omits the performance of a contractual obligation"]).[29] Thus, the court rejects defendants' contention that the breach of contract claims are barred by the state of limitations (*see N.Y. City Sch. Const. Auth. v Ennead Architects, LLP*, 148 AD3d 618 [1st Dept 2017] ["On this CPLR 3211(a)(5) motion, defendant did not meet its initial burden of establishing, prima facie, that the time in which to sue has expired"]).

Plaintiffs have not, however, stated a claim for breach of the covenant of good faith and fair dealing under the Operating Agreement. Each of their claims concerns express breaches of the Operating Agreement or implicates a breach of fiduciary duty. No gap in the Operating Agreement is alleged for the implied covenant to fill; thus, the claim is dismissed as duplicative (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]).

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[28] The court notes that even if LET owned the trademark in 2010, Song did not have a *contractual* obligation to make sure it was owned by the Company until the Operating Agreement was executed in February 2011 – less than six years before this action was commenced in January 2011.

[29] Thus, even if the breach of contract claim was first noticed in the complaint on February 27, 2017--and not in the Summons with Notice in January--the claims are still timely.

The prima facie tort claim is dismissed. The complaint itself makes plain that defendants' actions were economically motived and were not purely the product of "disinterested malevolence" (*AREP Fifty-Seventh, LLC v PMGP Assocs., L.P.*, 115 AD3d 402, 403 [1st Dept 2014]; *see Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332 [1983]).

Plaintiffs have stated a claim for breach of fiduciary duty, but only against Song in his capacity as Manager of the Company (*see Pokoik*, 115 AD3d at 429 ["As the managing member of the LLCs, [defendant] owed plaintiff-a nonmanaging member-a fiduciary duty"]). Song is alleged to have breached his duty of loyalty to the company by starting new Korilla businesses without providing an opportunity to the Company or its Members to participate (*see id.* ["it is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty"], quoting *Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989]). A new restaurant version of a food truck using the same intellectual property is surely a corporate opportunity (*see Moser v Devine Real Estate, Inc. (Florida)*, 42 AD3d 731, 734-35 [3d Dept 2007] ["A corporate opportunity is defined as any property, information, or prospective business dealing in which the corporation has an interest or tangible expectancy or which is essential to its existence or logically and naturally adaptable to its business"], quoting *Matter of Greenberg*, 206

AD2d 963, 964 [1st Dept 1994]). Since Song personally has an interest in the new company, it is an interested transaction subject to entire fairness scrutiny (*Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 569-570 [1984]; *see Kenneth Cole Prods., Inc.*, 27 NY3d 268, 275 [2016] [explaining "fair process" and "fair price" prongs of entire fairness standard]; *see also* Dkt. 60 at 30 [defendants recognizing that entire fairness scrutiny applies]). Song has not endeavored to explain how his operating a competing business was fair to the Company (especially in light of section 3.4's restrictive covenant) or why the Company could not have availed itself of the opportunity to participate (which perhaps it could have done had Song not allegedly pilfered its assets). Moreover, as discussed, the claim is not time barred (*see Oxbow*, 96 AD3d at 651).

The court construes the seemingly duplicative ninth cause of action as separately concerning Song's breach of his duty of care to the Company, for instance, by failing to ensure that the food trucks' parking tickets were paid. While he claims that was plaintiffs' responsibility, the allegation that the tickets were mailed to Song and that he neither informed plaintiffs nor caused the Company to pay them states a claim for breach of the duty of care. Song had every reason to foresee what would happen to the food trucks (that they would be towed and thus unavailable for business) if he ignored the tickets. As the Company's Manager, that is a serious abdication of responsibility and thus a breach of fiduciary duty. Notably, Song does not argue that he is exculpated for this conduct under section 3.1.2 of the Operating Agreement, which requires Song, in his capacity as Manager, to "use ordinary care and reasonable diligence in carrying out the affairs of the Company," and which does not preclude Members from being held liable for bad faith or willful misconduct (*see* Dkt. 66 at 4).

Finally, with respect to the unfair competition claims, GBL § 133 prohibits the use of a corporate name with the intent to deceive the public. Defendants do not argue that plaintiffs fail to state a claim under § 133, but only that Aegis and Korilla East are the only proper defendants, as they licensed the "Korilla" name from LET to identify their businesses. Plaintiffs do not respond to this argument. Moreover, as a statutory claim, under CPLR 214(2), defendants argue that the claim is limited to damages accruing within three years of the filing of this action, i.e., claims from January 11, 2014 onward. While this argument is not necessarily correct (*see People v Credit Suisse Sec. [USA] LLC*, 31 NY3d 622, 629 [2018] [CPLR 214(2) only applies "where liability would not exist but for a statute"]), this issue is not material since the competing businesses are alleged to have opened in 2014.

Defendants correctly contend that GBL § 349 only prohibits consumer-oriented deceptive business practices (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995] [plaintiff "must demonstrate that the acts or practices have a broader impact on consumers at large."]). Plaintiffs do not address this issue. To be sure, while the deception of restaurant patrons "is arguably consumer-oriented" (*see Jonas v Nat'l Life Ins. Co.*, 147 AD3d 610, 613 [1st Dept 2017]), plaintiffs do not actually claim that consumers are being deceived about the food they are receiving

– Korilla's Korean-Mexican barbeque. Rather, plaintiffs are really claiming that defendants are engaging in unfair competition based on trademark infringement.

"The essence of an unfair competition claim under New York's common law is that the defendant assembled a product or provides a service which bears such a striking resemblance to the plaintiff's product or service that the public will be confused as to the identity of the products." (*Cold Spring Harbor Const., Inc. v Cold Spring Builders, Inc.*, 2014 WL 6755957, at *2 [Sup Ct, Suffolk County 2014], accord *Shaw v Time-Life Records*, 38 NY2d 201 [1975]; *see generally ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 476-79 [2007] ["We have long recognized two theories of common-law unfair competition: palming off and misappropriation … when a business, through renown in New York, possesses goodwill constituting property or a commercial advantage in this state, that goodwill is protected from misappropriation under New York unfair competition law"]). The tort of unfair completion "is rooted in the bad faith misappropriation of the labors and expenditures of another, likely to cause confusion or to deceive purchasers as to the origin of the goods or services" (*Cold Spring,* 2014 WL 6755957, at *2). To "prevail in an unfair competition case, the plaintiff may prove either: (1) that the defendant's activities have caused confusion with, or have been mistaken for, the plaintiff's activities in the mind of the public, or are likely to cause such confusion or mistake; or (2) that the defendant has acted unfairly in some manner" (*id.*, quoting 104 NY Jur 2d, Trade Regulation § 196).

While the complaint does not cite GBL § 360-k or plead a claim under the Lanham Act (15 USC §§ 1114 and 1125), it is clear that plaintiffs intended to plead – and indeed have stated a claim for – unfair competition based on trademark infringement. "A party asserting a claim for unfair competition predicated upon trademark infringement … must show that the defendant's use of the trademark is likely to cause confusion or mistake about the source of the allegedly infringing product" (*Beverage Mktg. USA, Inc. v S. Beach Bev. Co.*, 20 AD3d 439 [2d Dept 2005]; *see Allied Maintenance Corp. v Allied Mechanical Trades, Inc.*, 42 NY2d 538 [1977]). Moreover, plaintiffs must plead that the alleged infringement was in bad faith (*Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425 [1st Dept 2012]).

The complaint permits a reasonable inference of bad faith. Plaintiffs allege that Song, in essence, stole Korilla's trademark for his wholly owned LLC, and then licensed the trademark to his other competing businesses. Through this misappropriation, Song was able to sell Korilla's food in his new restaurants, thereby competing with the Company's food trucks. This claim is not merely capable of being asserted against the competing LLCs, but also against the corporate officers responsible for the trademark infringement (*Lifeguard Licensing Corp. v Ann Arbor T-Shirt Co., LLC*, 2018 WL 3364388, at *2 [SDNY July 9, 2018], citing *Int'l Diamond Importers, Inc. v Oriental Gemco (NY), Inc.*, 64 FSupp3d 494, 515 [SDNY 2014]; *see Guthrie Healthcare Sys. v ContextMedia, Inc.*, 2014 WL 185222, at *13 [SDNY Jan. 16, 2014]). The complaint plausibly alleges that Song, Im, and Chung are responsible for the infringement of Korilla

East, White Tiger,[30] and Aegis. Their actual role in the alleged infringement is a question of fact.

Plaintiffs' unfair competition claim also purports to be based on BCL § 301, which governs the naming of corporations. Defendants complain that plaintiffs do not explain how or why they have a private right of action under this statute. However, there is authority for the proposition that BCL § 301(a)(2) provides a private right of action for employing a deceptively similar corporate name (*see Ivy League Sch., Inc. v Danick Indus., Inc.*, 44 Misc3d 1223[A] [Sup Ct, Suffolk County 2014], citing *Vantage Careers, Inc. v Vantage Agency, Inc.*, 79 AD2d 912 [1st Dept 1981]). Since defendants do not argue on this motion that their competing Korilla businesses are named in manner sufficient to distinguish them from the Company (*see Little India Stores, Inc. v Singh*, 101 AD2d 727, 730 [1st Dept 1984] [Kupferman, J., dissenting]), the claim survives as against Korilla East, White Tiger, and Aegis. Accordingly, it is

ORDERED that defendants' motion to dismiss the Complaint is granted only to the extent that the following causes of action are dismissed without prejudice: (1) the first (accounting) against all defendants other than Song; (2) the second (unjust enrichment); (3) the fourth (conversion); (4) the fifth (transfer order); (5) the portion of the sixth (breach of contract) concerning breach of the implied covenant; (6) the seventh (prima

[30] In his moving brief, defendants' counsel writes that White Tiger "is an empty LLC that was never actually used for any business purpose" and thus "has no liability to the plaintiffs as it does not and has never operated." (*see* Dkt. 60 at 32). Such a statement by counsel, without any citation to documentary evidence, cannot be considered on this motion to dismiss (*see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 n.4 [1st Dept 2014]; *compare* Complaint ¶ 128 ("Song's store called Korilla BBQ, ***but operated under Korilla White Tiger*** or [LET], was operational and actively and openly competing with [the Company]" [emphasis added]).

facie tort); (7) the eighth (breach of fiduciary duty) against Im; (8) the ninth (breach of fiduciary duty) against Im; and (9) the portions of the tenth (unfair competition) asserted (a) under GBL § 133 against all defendants except for Aegis and Korilla East; (b) under GBL § 349; (c) under BCL § 301 against all defendants except for Korilla East, White Tiger, and Aegis; and (d) based on trademark infringement against all defendants except Song, Im, Chung, Korilla East, White Tiger, and Aegis; and it is further

ORDERED that defendants' motion to dismiss is otherwise denied; and it is further

ORDERED that this action shall now bear the following caption:

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STEPHEN PARK, THOMAS YANG, PAUL LEE and ANDREW CHANG, individually and on behalf of KORILLA BBQ, LLC

Index No.: 650186/2017

Plaintiffs,

-against-

EDWARD SONG, DAVID IM, KORILLA EAST VILLAGE TRUCK, INC., WHITE TIGER NAMED KORILLA, LLC, LET GROUP, LLC, AEGIS 233 LLC, and HARDY CHUNG,

Defendants,

-and-

KORILLA BBQ, LLC,

Nominal Defendant.

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And it is further

ORDERED that since one of the plaintiffs (Yang) is indisputably a member who is owed fiduciary duties by Song, within one week of the entry of this order, Song's counsel shall file a letter (not to exceed three pages) in which he shows cause as to why the court should not *sua sponte* grant summary judgment to Yang on his accounting claim and immediately order Song to provide an accounting of the Company for the period January 11, 2011 to the present.

Dated: October 10, 2018

ENTER:

Jennifer G. Schecter, J.S.C.