

Capital Stack, LLC v Raharney Capital, LLC
2018 NY Slip Op 33389(U)
December 26, 2018
Supreme Court, New York County
Docket Number: 652807/2015
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

-----X
 CAPITAL STACK, LLC, :
 :
 Plaintiff, :
 :
 -against- :
 :
 RAHARNEY CAPITAL, LLC and :
 SEAN MURRAY, :
 :
 Defendants. :
 -----X

Index No. 652807/2015
 Motion Sequence Nos.
 007 and 008

-----X
 SEAN MURRAY and RAHARNEY :
 CAPITAL, LLC, :
 :
 Third-Party Plaintiffs, :
 :
 -against- :
 :
 CAPITAL STACK, LLC, a New York limited :
 liability company, or CAPITAL STACK, LLC, :
 a Nevada limited Liability company, DAVID :
 RUBIN a/k/a DAVID RUBINOV and :
 EPRODIGY FINANCIAL, LLC, :
 :
 Third-Party Defendants. :
 -----X

DECISION AND ORDER

EILEEN BRANSTEN, J.S.C.:

In motion sequence 007, plaintiff Capital Stack, LLC (Capital Stack) moves for summary judgment on its causes of action for breach of fiduciary duty, tortious interference with prospective economic relations, and declaratory judgment against defendants Raharney Capital, LLC (Raharney) and its principal Sean Murray (Murray) (collectively, Defendants).

In addition, motion sequence 007 seeks dismissal of Defendants’ causes of action for fraudulent misrepresentation, fraudulent concealment and unjust enrichment, which Defendants

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assert as third-party plaintiffs, against Capital Stack, David Rubin, a/k/a David Rubinov (Rubin), and eProdigy Financial, LLC (eProdigy).¹

In motion sequence 008, Defendants contend that Capital Stack has failed to make out prima facie showings on its claims and seek summary judgment, dismissing all of Capital Stack's causes of action.

The motions are consolidated for disposition.

I. BACKGROUND

In September 2012, Capital Stack and Raharney formed Daily Funder, LLC (hereinafter "Daily Funder"), a Delaware limited liability company. *See* Amended Verified Complaint (hereinafter AVC) ¶ 8; Amended Verified Answer (hereinafter "AVA") ¶ 8; Boxer Affirm. Exs A, B. Capital Stack and Raharney are 50% owners and the only members of Daily Funder. *See* Plaintiff's Rule 19-A Statement, ¶ 21.

Daily Funder was formed to operate a trade magazine and website devoted to the "merchant cash advance and alternate lending industry". *See id.*, ¶¶ 19, 25. Its revenue is derived from its sale of advertisements on its website and in its print magazine. *Id.* at ¶ 43.

The term "merchant cash advance" describes a type of alternative financing for small businesses, in which they sell their receivables at a discount to a funder, rather than obtaining a loan from a bank or commercial lender. *See id.* at ¶ 5.²

¹ Rubin is chief executive officer of Capital Stack and eProdigy. *See* Plaintiff's Rule 19-a Statement, ¶ 2. Capital Stack is a subsidiary of eProdigy. *See id.*, ¶ 23.

² Contracts for purchase and sale of accounts receivable are commonly described as factoring agreements. *See Irving Tr. Co. v. B. Lindner & Bro.*, 264 N.Y. 165, 169 (1934); *BNY Fin. Corp. v. Clare*, 172 A.D.2d 203, 203 (1st Dept 1991).

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Raharney created a website in 2010 named Merchant Processing Resource (MPR), which used the domain name merchantprocessingresource.com. *See id.* at ¶18. In late 2014, Raharney rebranded this website, naming it deBanked.com, and forwarded MPR users to the new website. *See id.* at ¶ 69.

In October 2014, Raharney filed a petition to dissolve Daily Funder in New York State Supreme Court, New York County. *See id.* at ¶ 73; *see also* Boxer Affirm., Ex. 10 (Notice of Petition for Dissolution and Verified Petition, dated October 28, 2014, in *Raharney Capital, LLC v. Capital Stack, LLC* [Index No. 160175/2014]). In November 2014, Justice Schlesinger of this court entered a decision and order, dismissing Raharney's petition on the ground that New York courts lack subject matter jurisdiction over claims for dissolution of foreign limited liability companies. *See id.* at ¶ 75; *see also* Boxer Affirm., Ex. 11. Raharney appealed. The First Department affirmed Justice Schlesinger's decision on February 25, 2016. *See id.* at ¶ 76; *see also* *Matter of Raharney Capital, LLC v. Capital Stack, LLC*, 138 AD3d 83 (1st Dept 2016).

In August 2016, Defendants commenced a second dissolution proceeding in Delaware Chancery Court. *See* Basso Affirm., exhibit I (verified petition for dissolution e-filed Aug 8, 2016). This second proceeding has been stayed pending resolution of this action. *See Matter of Daily Funder, LLC*, 2017 WL 349269 (Del Ch, Jan 23, 2017, No. 12637-VCMR) (trial order).

Capital Stack alleges that, after dismissal of the New York dissolution proceeding, Murray, as Raharney's sole member, took steps to benefit deBanked at Daily Funder's expense, and to compete against Daily Funder. *See id.* at ¶ 71. Murray is alleged to have begun turning his back on Daily Funder in November 2014, by resigning as Daily Funder's magazine's editor on the day after Raharney's New York petition for dissolution was dismissed. *See id.* at ¶ 83.

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Capital Stack further asserts, among other things, that Murray took control of Daily Funder's administrative functions, changed computer passwords to prevent Rubin from accessing those functions, stopped copying Rubin on communications, and changed the number of Daily Funder's telephone, to which only Murray now has access and which he has not answered since the end of 2014. *See id.* at ¶¶ 77, 79.

Capital Stack alleges that Defendants diverted advertisers away from Daily Funder and to deBanked, caused Daily Funder to make an improper distribution of \$30,000 to each of its members in June 2015, and tortuously interfered with Capital Stack's business partners. *See id.* at ¶¶ 100-115, 123, 128-134.

Capital Stack asserts that Defendants ignored its request for information needed to continue publication of Daily Funder's magazine and that Daily Funder has not published a single edition of the print magazine since the November 2014 dismissal of Raharney's New York dissolution petition. *See id.* at ¶ 87-88. Raharney also began publishing a magazine under the deBanked name in March 2015, only months after Murray resigned as editor of Daily Funder's magazine. *See id.* at ¶ 90.

II. Pleadings

In its AVC, Capital Stack asserts seven causes of action against Defendants: (1) breach of fiduciary duty; (2) unfair competition; (3) conversion; (4) libel per se; (5) tortious interference with economic relations; (6) unjust enrichment; and (7) declaratory judgment. Defendants answered, generally denying Capital Stack's allegations and asserting 10 affirmative defenses in their AVA.

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Defendants commenced a subsequent action in this court, captioned *Murray v Capital Stack, LLC* (Index No. 653740/2015). In their verified complaint, e-filed November 11, 2015, Murray and Raharney, as plaintiffs, asserted 6 causes of action against Capital Stack, Rubin and eProdigy, for: (1) breach of fiduciary duty, against Capital Stack; (2) breach of fiduciary duty, against Rubin; (3) fraudulent misrepresentation, against Rubin; (4) fraudulent concealment, against Rubin; (5) fraudulent misrepresentation, against eProdigy; and (6) unjust enrichment, against Rubin and Capital Stack.

In their verified answer in this second action, e-filed on December 7, 2015, defendants Capital Stack, Rubin and eProdigy generally denied the allegations of the verified complaint and assert 8 affirmative defenses.

Counsel for the parties entered a stipulation, which was “so ordered” by the court and e-filed on March 25, 2016, to consolidate the second action with the first and to amend the caption to reflect the consolidation (NYSCEF Doc. No. 18).

III. Discussion

A movant seeking summary judgment “has the burden to establish 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. If the moving party fails to meet this initial burden, summary judgment must be denied regardless of the sufficiency of the opposing papers”. *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 734 (2014).

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To prevail, the movant must produce evidentiary proof in admissible form sufficient to warrant granting summary judgment in its favor. *See GTF Mktg. v Colonial Aluminum Sales*, 66 N.Y.2d 965, 967 (1985). Once the movant makes its showing, the burden shifts to the opposing party, to submit proof in admissible form sufficient to show a question of fact exists, requiring trial. *See Kosson v. Algaze*, 84 N.Y.2d 1019, 1020 (1995).

In deciding the motion, the court must view evidence in the light most favorable to the nonmovant. *See Prine v. Santee*, 21 N.Y.3d 923, 925 (2013). Party affidavits and other proof must be examined carefully “because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue”. *See Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 (1978). Still, “only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment”. *See id.*

A. Capital Stack’s Motion for Summary Judgment (Motion Seq. No. 007)

Capital Stack seeks summary judgment on its causes of action for breach of fiduciary duty, tortious interference with prospective economic relations and declaratory judgment.

1. Breach of Fiduciary Duty

Plaintiff alleges that Defendants breached their fiduciary duty to Daily Funder by launching deBanked as a rival business, usurping valuable business opportunities rightfully belonging to Daily Funder, diverting subscribers, readers and online visitors from Daily Funder’s website, online forum and magazine to deBanked, dismissing Daily Funder’s contractors,

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removing advertisers from its website and magazine, blocking new advertisers on Daily Funder's website, and preventing continued publication of its magazine.

Capital Stack also alleges that, after Raharney failed in its effort to dissolve Daily Funder, Defendants further breached their fiduciary duties by interfering with the rights of Capital Stack and Rubin to participate in Daily Funder's management by unilaterally locking them out from all corporate operations, denying them access to Daily Funder's telephone, email account, server, bank account and other facilities, issuing improper distributions and unauthorized payments to Raharney and Murray, and moving Daily Funder's business and equipment to another location. *See* AVC, ¶¶ 123-128; *see also* Plaintiffs' 19-A ¶¶ 77-127. Defendants are also alleged to have unilaterally diverted business from Daily Funder to a new venture deBanked. *See also* Plaintiffs' 19-A ¶¶ 96-127.

In their response statement, the Defendants merely reference Sean Murray's Affidavit statement opposing Capital Stacks statement. The citation to the affidavit of Murray, without more, is insufficient to generate a material issue of fact. An opposing party must "assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions." *Genger v. Genger*, 123 A.D.3d 445, 447 (1st Dept 2014), quoting *Schiraldi v. U.S. Min. Prods.*, 194 A.D.2d 482, 483 (1st Dept 1993). This was not done by the Defendants in their Responses to Plaintiff's 19-A ¶¶96-127, therefore, the Plaintiff's 19-A is to be considered as fact.

On its motion, Capital Stack asks that it be granted partial summary judgment, holding Raharney liable for breach of its fiduciary duty to Capital Stack, not only because of its

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interference with Capital Stack's exercise of its rights as a member of Daily Funder, but also because of Raharney's efforts to build its competing business by acting to the detriment of Daily Funder.

Capital Stack alleges that "Raharney and its principal, Murray, were owners, managers and members of Daily Funder". See AVC, ¶ 121. Defendants admit that "Raharney was an owner, manager and member of Daily Funder" but deny this assertion with respect to Murray. See AVA, ¶ 121. The court initially notes that because Daily Funder is a Delaware LLC, it must apply Delaware's substantive laws as they pertain to Raharney's potential liability as Daily Funder's manager. See NY Limited Liability Company Law 801(a) ("the laws of the jurisdiction under which a foreign limited liability company is formed govern its organization and internal affairs and the liability of its members and managers"); see also *Boxer Affirm. Exs. A, B*.

"Under Delaware law, . . . absent a provision to the contrary in the governing LLC agreement, an LLC's managers and controlling members owe the traditional fiduciary duties that directors and controlling shareholders in a corporation would (including the traditional duties of loyalty and care)". See *Coventry Real Estate Advisors, L.L.C. v. Developers Diversified Realty Corp.*, 84 A.D.3d 583, 584 (1st Dept 2011).

The parties agree that no operating or LLC agreement was ever adopted for Daily Funder's operating agreement.³ Accordingly, as no contrary agreement provision exists,

³ In its October 17, 2014 verified petition to dissolve Daily Funder, at ¶ 13 (NYSCEF Doc. No. 1 in *Raharney Capital, LLC v. Capital Stack LLC, supra*), Raharney alleged that "[t]here is no written operating agreement governing Daily Funder's operations." In paragraph 13 of its Verified Answer in that New York dissolution proceeding, e-filed on November 10, 2014 (NYSCEF Doc. No. 28), Capital Stack confirmed that there was then "currently no written operating agreement for Daily Funder."

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Raharney owes fiduciary duties, including traditional duties of loyalty and care, to both Daily Funder and Capital Stack as Daily Funder's managing member.

“Delaware courts have held that case law governing corporate derivative suits is applicable to derivative suits brought on behalf of an LLC. To determine whether a claim is individual or derivative, the Court must consider two issues: (1) who suffered the alleged harm; and (2) who would receive the benefit of any recovery or other remedy”. *See Kroupa v. Garbus*, 583 F. Supp. 2d 949, 952-53 (N.D. Ill 2008), citing, *inter alia*, *Metro Communication Corp. BVI v. Advanced Mobilecomm Tech. Inc.*, 854 A.2d 121, 167–68 (Del Ch 2004) (applying test in case involving LLC); *see also Yudell v. Gilbert*, 99 A.D.3d 108, 114 (1st Dept 2012), quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del 2004) (in determining whether claim is direct or derivative, “court should consider ‘(1) who suffered the alleged harm [the corporation or the stockholders]; and (2) who would receive the benefit of any recovery or other remedy [the corporation or the stockholders individually]’”).

The breaches of fiduciary duty Capital Stack has alleged are a mix of direct and derivative claims. For example, Capital Stack's assertions that Raharney prevented it from participating in the management and operations of Daily Funder is a direct claim, alleging harm suffered by Capital Stack, in the exercise of its rights as a member of Daily Funder. Its allegations of Raharney's mismanagement of Daily Funder, refusal to accept advertising at Daily Funder and diversion of advertisers to deBanked are derivative, as they allege wrongs suffered by Daily Funder.

Murray asserts in his affidavit in opposition to Capital Stack's summary judgment motion, sworn to June 7, 2018, that he and Rubin “never had an operating agreement prepared.” *See Murray Affirm.* ¶ 28.

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New York's choice-of-law rules provide that procedural matters are governed by the law of the forum while substantive issues, including such questions as whether plaintiff asserting a derivative cause of action has complied with pre-suit demand requirements, are governed by the law of the state of the company's formation. *See Lerner v. Prince*, 119 A.D.3d 122, 128 (1st Dept 2014).

Under Delaware law, a

“stockholder may not pursue a derivative suit to assert a claim of the corporation unless the stockholder: (a) has first demanded that the directors pursue the corporate claim and directors have wrongfully refused to do so; or (b) establishes that pre-suit demand is excused because the directors are deemed incapable of making an impartial decision regarding the pursuit of the litigation”

Wood v. Baum, 953 A.2d 136, 140 (Del 2008) (applying Court of Chancery Rule 23.1 to determine sufficiency of derivative claim regarding LLC).⁴

Capital Stack asks that, if dismissal is granted on this cause of action, for mistakenly asserting it as a direct claim, that it be granted leave to amend its complaint, to recast this cause of action as a derivative claim. A party may amend its pleading under CPLR 3025(b) at any time by leave of the court, which is “freely given upon such terms as may be just” including the granting of costs and continuances. *See Murray v. City of New York*, 43 N.Y.2d 400, 404-05 (1977). In exercising its discretion, the court must consider whether the proposed amendment would “surprise or prejudice” the opposing party, *see id.* at 406, and whether the proposed

⁴ Court of Chancery Rule 23.1 provides, in pertinent part, that “the complaint shall allege that the plaintiff was a . . . member at the time of the transaction of which the plaintiff complains. . . . The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort.”

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amendment is meritorious. *See Thomas Crimmins Contr. Co. v. City of New York*, 74 N.Y.2d 166, 170 (1989).

The proposed amendment is meritorious. Leaving aside any confusion of direct and derivative claims, Capital Stack's allegations would otherwise establish a prima facie cause of action for breach of fiduciary duty. For example, Capital Stack alleges that, after Justice Schlesinger denied its petition for dissolution, Raharney refused to accept any further advertising for Daily Funder and solicited advertising for deBanked from businesses which had sought to advertise with Daily Funder. Defendants have not raised a bona fide issue of material fact to counter these allegations.

A business's fiduciary "must refrain from doing anything that would work an injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it. . ." *See Guth v. Loft, Inc.*, 5 A2d 503, 510 (Del 1939). Delaware's business judgment rule "presumes that 'in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company'". *See Frederick Hsu Living Tr. v. ODN Holding Corp.*, 2017 WL 1437308, at *25 (Del Ch, Apr 14, 2017, C.A. No. 12108-VCL.), *as corrected* (Apr 24, 2017), quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del 1984).

To invoke the protection of the business judgment rule, however, Defendants would first need to show that that they "neither appear on both sides of [the] transaction nor expect to derive a personal benefit in the sense of self-dealing, as opposed to a benefit which [would] devolve[] upon" Daily Funder or all members generally. *See id.*, *citing, inter alia, Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del 1971); *see also VGS, Inc. v. Castiel*, 2000 WL 1277372, *5 (Del

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Ch, Aug 31, 2000, C.A. No. 17995), *aff'd*, 781 A2d 696 (Del 2001) (holding LLC managers who breached duty of loyalty not entitled to protection of business judgment rule).

Here, Capital Stack makes its prima facie showing that Raharney's conduct was intended to benefit Defendants and deBanked, to the detriment of Daily Funder. Raharney asserts that it acted in Daily Funder's best interests, but it fails to explain how its conduct could possibly work to Daily Funder's advantage or profit. Raharney's decisions to forego renewal of Daily Funder's advertising contracts and to divert Daily Funder's prospective advertisers to deBanked could only result in financial harm to Daily Funder. Thus, this court may infer that Raharney acted in bad faith and in breach of its fiduciary duties, as alleged.

In addition, the proposed amendment may be granted without causing Defendants undue prejudice. Capital Stack will be permitted to amend its AVC, but only to change claims it mistakenly asserted as direct claims to derivative claims, to be asserted on behalf of Daily Funder by Capital Stack, as its member. Capital Stack shall not allege any facts which have either not been previously alleged or not been previously disclosed in discovery and shall not add any new theory of liability or a new plaintiff to this action.

The Court also notes that Capital Stack does not allege in the AVC that it made a pre-suit demand upon Daily Funder or Raharney, or that its failure to do so should be excused, regarding its claim for breach of fiduciary duty, or any of its other causes of action. Therefore, Capital Stack must also meet this prerequisite to assert derivative claims in its proposed amended complaint.

Accordingly, summary judgment is granted to Defendants, dismissing Capital Stack's first cause of action for breach of fiduciary duty, without prejudice. Capital Stack is hereby

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granted leave to amend its AVC within 20 days of the date of this decision and order, in accordance herewith.

2. Tortious Interference with Prospective Economic Relations

Capital Stack also seeks summary judgment with respect to its fifth cause of action, for Raharney's tortious interference with its prospective economic relations. This cause of action is premised on allegations that Raharney and Murray directly harmed Capital Stack, in its relations with Meir Kahtan Public Relations, Capital Stack's public relations consultant, and PR Newswire, an organization through which Capital Stack published press releases.

Capital Stack alleges Raharney tortiously interfered by improperly contacting Meir Kahtan and PR Newswire and making misrepresentations to them for the sole purpose of harming Capital Stack's business relationships with them. Capital Stack also alleges that Chris Murray, who is both defendant Sean Murray's brother and served as Raharney's counsel of record in the New York dissolution action and appeal, contacted Meir Kahtan and, through fraudulent misrepresentations, induced Meir Kahtan to disclose to it non-public information about Capital Stack. Plaintiff's 19-A ¶¶ 133-43.

Capital Stack also alleges Raharney interfered with its existing relationship with PR Newswire. *See id.* at ¶144. Murray is alleged have contacted PR Newswire complaining about a "fake press release" which identified Capital Stack and Daily Funder as companies affiliated with eProdigy. *See id.* ¶¶144-56.

To prevail on a claim for tortious interference with prospective economic advantage, "a party must prove (1) that it had a business relationship with a third party; (2) that the defendant

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knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party” See *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 (1st Dept 2009), citing, *inter alia*, *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 189 (2004).

“Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship *but for* the defendant's wrongful conduct”. See *Vigoda v. DCA Prods. Plus Inc.*, 293 A.D.2d 265, 266 (1st Dept 2002); see also *Rondeau v. Houston*, 118 A.D.3d 638, 639 (1st Dept 2014) (dismissal warranted where plaintiff failed to allege that he was prevented from entering specific business relationship by reason of purported tortious interference). Capital Stack, however, does not allege that Meir Kahtan Public Relations or PR Newswire would have entered, or continued, their economic relationships with Capital Stack, *but for* Defendants’ wrongdoing.

Rather, Capital Stack asserts that a call from Chris Murray to Meir Kahtan was only “one of the factors that led to the termination of the relationship”, see Plaintiff’s 19-A ¶ 143, not the “but for” cause for its termination. Furthermore, although Capital Stack alleges that it had a business relationship with PR Newswire and that Defendants tortiously interfered with it, it fails to allege that this interference had anything to do with the termination of the relationship. Accordingly, Capital Stack fails to state a cause of action for tortious interference with prospective economic relations. Capital Stack’s motion for summary judgment is therefore denied and Defendants’ motion for summary judgment, dismissing Capital Stack’s fifth cause of action, is granted.

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3. *Declaratory Judgment*

Capital Stack also moves for summary judgment on its seventh cause of action, in which it seeks a declaratory judgment against Defendants, stating that it is an equal 50% owner of Daily Funder and has an equal right to manage Daily Funder with Raharney.

Defendants do not oppose this facet of Capital Stack's motion, but they do seek dismissal of this cause of action in the context of their own summary judgment motion, in sequence number 008. Therein, they argue that this cause of action must be dismissed because there is no justiciable controversy. They also argue that Daily Funder's lack of an operating agreement, and the prior refusal of Capital Stack and Rubin to take part in management of Daily Funder, mandate dismissal of this claim.

Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy. The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations. While fact issues certainly may be addressed and resolved in the context of a declaratory judgment action, the point and the purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact. *See Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 100 (1st Dep't 2009)

"Before granting a declaratory judgment the court must be convinced it will serve some practical purpose by disposing of real controversies and stabilizing disputed legal relations". *See Shapiro v. Nulife Garments Co.*, 270 App. Div. 121, 122 (1st Dept 1945).

Here, granting the declaratory judgment Capital Stack seeks would serve no practical purpose. Capital Stack and Raharney are two 50% members of a limited liability company engaged in a joint venture. They have been unable to agree on the management of the LLC for years and they have no operating agreement on which to rely, that could provide them a

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“reasonable exit mechanism” or other device to break their deadlock. *See Achaian, Inc. v. Leemon Family LLC*, 25 A.3d 800, 812 (Del Ch 2011). If they cannot reconcile their differences, or at least agree between themselves on a less drastic course, the only way to resolve their dispute is for the parties to go forward with the Chancery Court proceeding in Delaware and dissolve Daily Funder. Accordingly, Capital Stack’s motion for summary judgment with respect to its seventh cause of action is denied and Defendants’ motion for summary judgment, dismissing that cause of action, is granted.

B. Summary Judgment on Defendants’ Counterclaims

As third-party Defendants, Capital Stack, Rubin, and eProdigy also seek summary judgment dismissing the Defendant’s counterclaims for fraudulent misrepresentation, fraudulent concealment and unjust enrichment. As it pertains to Third-Party Defendant eProdigy, there is no allegation that either eProdigy or Rubin, individually, were members or manager of DailyFunder, thus the court must apply New York law to the claims against eProdigy. *See NY Limited Liability Company Law 801(a)* (“the laws of the jurisdiction under which a foreign limited liability company is formed govern its organization and internal affairs and the liability of its members and managers”). The Court must, nonetheless, apply Delaware’s laws to Capital Stack as it is a 50% member of DailyFunder. *See id*; *see also* Plaintiff’s 19-A ¶21.

1. Fraudulent Misrepresentation

Defendants’ third and fifth causes of action assert fraudulent misrepresentation against Rubin and eProdigy, respectively. “The elements of fraudulent misrepresentation are: (1) the

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defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiffs reasonably relied upon the representation, and (4) the plaintiffs suffered damage as a result of their reliance”. See *J.A.O. Acquisition Corp. v. Stavitsky*, 18 A.D.3d 389, 390 (1st Dept 2005), citing *Swersky v. Dreyer and Traub*, 219 A.D.2d 321, 326 (1st Dept 1996).

Under New York Law, Defendants fail to state causes of action against Rubin or eProdigy. With respect to their third cause of action, they assert Rubin is liable for fraudulent misrepresentation because, being the owner of a merchant cash advance company, “he seemed to be an honest, knowledgeable and technologically savvy person. . . who would be able to help in the management, operation and development of the business”. See Defendants’ memorandum in opposition at 21, citing *Murray Affid*, ¶ 26. Defendants also assert that Rubin “made material factual representations about what he could and would perform and provide as a 50% member of Daily Funder, all of which turned out to be false or never happened”. See *id.*, citing *Murray Affid*, ¶ 35.

This assertion, however, is not supported by paragraph 35 of Murray’s affidavit, in which he avers, “I would never have gone into business with Rubin and Capital Stack if I had known before forming Daily Funder that my business partner would leave it to me to take on all the responsibilities of running Daily Funder. All of what I viewed to be the benefits of going into business with Rubin turned out to either be false or never came to fruition.” See *Murray Affid*. ¶35.

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Defendants do not identify any misrepresentation Rubin allegedly made to them, and they fail to proffer any evidence that Rubin ever claimed to possess any technical knowledge or skills. They do not even allege, much less make a showing prima facie, that Rubin stated he would do anything to contribute to Daily Funder's operation or management. Accordingly, Defendants' allegations do not state a cause of action for fraudulent misrepresentation against Rubin. *See Norddeutsche Landesbank Girozentrale v. Tilton*, 149 A.D.3d 152, 162 (1st Dept 2017), citing CPLR 3016(b) (fraudulent misrepresentation must be pleaded with particularity); *Jacobs v. Lewis*, 261 A.D.2d 127 (1st Dept 1999) (alleged misrepresentations which "amounted to no more than. . . ultimately unfulfilled promises. . . not actionable as fraud").

a. Alleged Violation of NY General Business Law by eProdigy

Defendants, as third-party plaintiffs, concede that their fifth cause of action, for fraudulent misrepresentation against eProdigy, is not viable and so they attempt to recast it on this motion as a claim for deceptive business practices under Section 349 of New York's General Business Law (GBL). In their opposition, they now claim eProdigy placed false and misleading statements in press releases and on its website, directed to consumers, that Daily Funder is a subsidiary of eProdigy and that Daily Funder is an eProdigy company, implying that it owns Daily Funder. They further claim that this has caused "confusion in the marketplace," to their detriment. This attempt to recast their fourth cause of action is not successful.

To state a viable cause of action for violation of GBL Section 349, Defendants would have had to show, among other things, that eProdigy's "challenged acts and practices are 'consumer-oriented'". *See Med. Socy. of State of N.Y. v. Oxford Health Plans, Inc.*, 15 A.D.3d

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206, 206-07 (1st Dept 2005), quoting *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000).

“‘Consumers’ are ‘those who purchase goods and services for personal, family or household use’”. See *id.*, quoting *Sheth v. New York Life Ins. Co.*, 273 A.D.2d 72, 73 (1st Dept 2000).

Here, the parties agree that they are both involved in the merchant cash advance industry and that Daily Funder, at the center of their dispute, was set up to operate a website with an online forum and to publish a magazine devoted to the merchant cash advance industry. None of eProdigy’s challenged acts and practices could be considered “consumer-oriented,” so no GBL 349 claim will lie. Capital Stack’s motion for summary judgment, dismissing defendants’ third cause of action, is granted.

2. *Fraudulent Concealment*

In their fourth cause of action, Defendants, as third-party plaintiffs, allege that Rubin fraudulently failed to inform them that he had a history of fraudulent sales practice violations with the Securities and Exchange Commission (SEC), before they entered their joint venture with Capital Stack to form and operate Daily Funder.

“A cause of action for fraudulent concealment requires, in addition to the four foregoing elements [necessary to state a cognizable claim for fraudulent misrepresentation], an allegation that the defendant had a duty to disclose material information and that it failed to do so. In addition, in any action based upon fraud, ‘the circumstances constituting the wrong shall be stated in detail’”

See *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dept 2003), quoting CPLR 3016(b).

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Defendants argue, correctly, that the parties' relations as members of Daily Funder, a Delaware limited liability company, is governed by Delaware law. They assert mistakenly, and without citation to any authority, that Rubin's alleged fraudulent concealment is actionable because, as principal of Daily Funder member Capital Stack, he owes Murray and Raharney fiduciary duties which required him to disclose material information about his SEC history.

"Under Delaware law. . . , absent a provision to the contrary in [a] governing LLC agreement, an LLC's managers and controlling members owe the traditional fiduciary duties that directors and controlling shareholders in a corporation would (including the traditional duties of loyalty and care)". *See Coventry Real Estate Advisors, L.L.C.*, 84 A.D.3d at 584. Accordingly, "under Delaware law, fiduciary duties are imposed *only* on managers and those designated as controlling members of an LLC" *See id.* (emphasis in the original).

Here, neither Defendants nor Capital Stack have alleged that Rubin is or has been a manager or controlling member of Daily Funder. As a result, he owes no fiduciary duties to Raharney or Murray and so this cause of action must also be dismissed.

3. *Unjust Enrichment*

Capital Stack also seeks summary judgment, dismissing Defendants' sixth cause of action for unjust enrichment. Defendants allege Capital Stack was unjustly enriched by receiving distributions from Daily Funder and by accepting free advertising on Daily Funder, while failing to contribute to Daily Funder's management and operation.

Capital Stack denies these assertions. Among other things, it contends that it contributed to Daily Funder's operation by assisting with its business plan, and by soliciting advertisers and

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content providers on Daily Funder's behalf. Capital Stack also claims that it provided to Daily Funder office space and staff free of charge, and paid Raharney \$4,000 a month for its services to Daily Funder. It further alleges that it only stopped contributing to Daily Funder's management because Defendants locked it out, and that, as Daily Funder members, both Capital Stack and Raharney advertised for free on Daily Funder and that Defendants only sought to charge Capital Stack for advertising after their relationship soured, Raharney seized control and sought dissolution.

Clearly, this dispute centers on Capital Stack's rights, duties and potential liability as a member of Daily Funder. Defendants' cause of action must therefore be asserted under Delaware law. *See* NY LLC Law § 801(a). Both Capital Stack and Defendants, however, rely on New York law for their arguments.

Relying upon *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382 (1987), Capital Stack argues that Defendants' unjust enrichment claim sounds in quasi-contract and so must be dismissed because the contract between the parties precludes a quasi-contract claim. Delaware follows this same rule.

"The elements of unjust enrichment are: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law". *See Feuer on behalf of CBS Corp. v Redstone*, 2018 WL 1870074, *17 (Del Ch, Apr 19, 2018, No. 12575-CB). "When the complaint alleges an express, enforceable contract that controls the parties' relationship, however, a claim for unjust enrichment will be dismissed". *See id.*

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The relationship between members of a Delaware limited liability company is necessarily contractual, and so Defendants cannot maintain a claim for unjust enrichment here. *See Fisk Ventures LLC v. Segal*, 2008 WL 1961156, *8 (Del Ch, May 7, 2008, No. 3017-CC), *aff'd*, 984 A2d 124 (Del 2009) (“In the context of limited liability companies, which are creatures. . . of contract, those duties or obligations [among members] must be found in the LLC Agreement or some other contract”). Summary judgment is therefore granted to Capital Stack, dismissing Defendants’ sixth cause of action for unjust enrichment.

C. Defendants’ Motion for Summary Judgment (Motion Seq. No. 008)

Defendants Raharney and Murray move for summary judgment, seeking dismissal of all seven of Capital Stack’s causes of action. Capital Stack opposes, asserting that it is entitled to summary judgment, holding Defendants liable for breach of fiduciary duty and tortious interference with prospective economic relations and declaring that it is a 50% owner of Daily Funder, with an equal right to participate in its management. Capital Stack also asserts that the court must deny Defendants’ motion for summary judgment to dismiss its remaining causes of action for unfair competition, conversion, libel per se, and unjust enrichment, because material issues of fact exist which require trial.

Capital Stack maintains that it has asserted its cause of action for breach of fiduciary duty as a direct claim, not a derivative claim, because Defendants do not dispute that they owe fiduciary duties directly to Capital Stack.

In reply, Defendants assert all seven of Capital Stack’s causes of action must be dismissed as a matter of law. They also assert that Capital Stack’s request to amend its AVC

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should be denied because allowing Capital Stack to change its theory of liability and to add Daily Funder as a party would be unduly prejudicial to them, this far along in this action, after discovery has been completed.

In motion sequence number 008, Defendants move for summary judgment, seeking dismissal of all of Capital Stack's causes of action. Capital Stack's first cause of action for breach of fiduciary duty, fifth cause of action for tortious interference with prospective business relations, and seventh cause of action for declaratory relief, are addressed above in the context of Capital Stack's motion for summary judgment in motion sequence number 007. Defendants' motion, seeking dismissal of Capital Stack's second cause of action for unfair competition, third cause of action for conversion, fourth cause of action for libel per se, and sixth cause of action for unjust enrichment, are addressed below.

1. Unfair Competition

In its second cause of action, Capital Stack asserts that Defendants used deBanked to compete unfairly against Daily Funder. As alleged, the unfair competition complained of is a derivative claim, as it seeks to remedy harm Defendants allegedly caused to Daily Funder. Capital Stack, however, asserted it as a direct claim.

As this cause of action involves Daily Funder's internal affairs and the potential liability of its manager, Raharney, Delaware law governs. *See* New York Limited Liability Law § 801(a). To "succeed in a claim for unfair competition, a plaintiff must show (a) a reasonable expectancy of entering into a valid business relationship, (b) interference with that relationship by defendant, and (c) consequent defeat of plaintiff's legitimate expectancy. *See EDIX Media Group, Inc. v.*

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Mahani, 2006 WL 3742595, *11 (Del Ch, Dec 12, 2006, CIV.A 2186-N), citing *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1057 (Del Super 2001).

Defendants argue for dismissal, citing New York law. Defendants return to its direct/derivative argument, asserting that a party cannot state an unfair competition claim if the advantage it seeks to protect is not exclusively its own. They also contend that Capital Stack cannot show that Defendants engaged in unfair competition with Daily Funder to benefit deBanked, insisting that Daily Funder and deBanked are too different to be considered competitors. They also assert that they never “deceived” any Daily Funder advertiser.

Capital Stack has adduced sufficient evidence to make out its prima facie showing, if its claim were made derivatively, even under Delaware law, while the arguments Defendants have offered may be unavailing. Of course, the advantage at issue in a derivative claim would be exclusively that of Daily Funder, and interference with that advantage by Daily Funder’s manager would be a breach of the manager’s fiduciary duty to Daily Funder. Finally, whether any Daily Funder advertiser was ever deceived by Defendants is immaterial, and the parties’ factual dispute over whether deBanked and Daily Funder were competitors would otherwise preclude summary judgment.

It is incumbent upon the parties to address this cause of action under Delaware law. Accordingly, Defendants’ motion for summary judgment seeking dismissal of Capital Stack’s second cause of action for unfair competition is granted, without prejudice, and Capital Stack is granted leave to amend its AVC within 20 days of the entry of this decision and order, to restate this cause of action as a derivative claim.

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2. *Conversion*

In its third cause of action for conversion, Capital Stack complains about Daily Funder's distribution of \$30,000 each, to it and Raharney. Claims involving distributions to the members of a Delaware LLC are necessarily derivative and are governed by Delaware's LLC law.

"Conversion is 'any distinct act of dominion wrongfully exerted over the property of another, in denial of [the plaintiff's] right, or inconsistent with it'". See *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 889 (Del Ch 2009), quoting *Drug, Inc. v Hunt*, 167 A 87, 93 (Del 1933).

Capital Stack does not contend that it received less than its share, or that Raharney took more than its share, from the total amount distributed. Capital Stack does not contend that it was beyond Raharney's powers, as managing member, to make this distribution but only that the distribution should not have been made without Capital Stack's consent.

Delaware law generally permits distributions to LLC members, even distributions paid to members before the member's resignation and before the LLC's dissolution and winding up. See e.g., 6 Del C §§ 18-504 (allocation of distributions), 18-604 (distribution upon resignation), § 18-601 (interim distributions).

Presented as a derivative cause of action, Capital Stack's claim, that Daily Funder was aggrieved by Raharney making ill-advised distributions to members, sounds in waste. See *Matter of Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 74 (Del 2006) ("claim of waste will arise only in the rare, unconscionable case where directors irrationally squander or give away corporate assets").

Delaware treats waste as a breach of a fiduciary's duty of loyalty. See, e.g., *Matter of Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 749 (Del Ch 2005) ("The Delaware Supreme Court has implicitly held that committing waste is an act of bad faith"), citing *White v. Panic*,

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783 A.2d 543, 553–55 (Del 2001). This makes Capital Stack’s claim for conversion duplicative of its breach of fiduciary duty cause of action. *See Guth*, 5 A.2d at 510 (corporate officers and directors, as fiduciaries, “must refrain from doing anything that would work an injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it. . .”).

Accordingly, Defendants’ motion for summary judgment, dismissing Capital Stack’s third cause of action for conversion, is granted.

3. *Libel Per Se*

Capital Stack’s fourth cause of action is a direct claim against Raharney and Murray for wrongs they allegedly inflicted upon Capital Stack by making false and defamatory statements to PR Newswire that would tend to injure Capital Stack in its business.

The elements of libel are: (1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which are published to a third party and which (4) results in injury to plaintiff.

Penn Warranty Corp. v. DiGiovanni, 10 Misc. 3d 998, 1002 (Sup Ct, NY County 2005) (Gische, J.).

“Certain statements are considered libelous *per se*. They are limited to four categories of statements that: (1) charge plaintiff with a serious crime; (2) tend to injure plaintiff in its business, trade or profession; (3) plaintiff has some loathsome disease; or (4) impute unchastity. Where statements are libelous *per se*, the law presumes that damages will result and they need not be separately proved”. *See id.* at 1002-03.

In sum and substance, Capital Stack alleges that Defendants made certain false statements about Capital Stack: stating to PR Newswire, that Capital Stack was not a 50% owner

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of Daily Funder. *See* AVC, ¶149; stating to unidentified contractors involved in publishing Daily Funder’s magazine, that their work would no longer be needed because the magazine would no longer be published, *see id.* at ¶ 151; by removing the title of “publisher” next to Rubin’s name in Daily Funder’s magazine, and so creating the false impression upon readers that his position at Daily Funder had changed, *see id.* at ¶ 153; and falsely telling a person named Glenn Fisher that Defendants had sued Capital Stack and Rubin. *See id.* at ¶ 155.

A statement which would tend to injure a party in its business or profession “is defamatory on its face when it suggests improper performance of one’s professional duties or unprofessional conduct”. *See Frechtman v. Gutterman*, 115 A.D.3d 102, 104 (1st Dept 2014); *see also Chiavarelli v. Williams*, 256 A.D.2d 111, 113 (1st Dept 1998), quoting *Golub v. Enquirer/Star Group*, 89 N.Y.2d 1074, 1076 (1997) (“The law presumes that damage results when a person’s business reputation is impugned. In order to be libelous per se, the challenged statements ‘must be more than a general reflection upon the plaintiff’s character or qualities’, and must suggest improper performance of his duties or unprofessional conduct”).

Even if Capital Stack’s allegations were true, these statements are not actionable as libel because they do not suggest that Capital Stack performed its duties improperly or engaged in unprofessional conduct. They are simply not defamatory and so Defendants’ motion for summary judgment, to dismiss Capital Stack’s fourth cause of action, is granted.

4. *Unjust Enrichment*

Defendants seek dismissal of Capital Stack’s cause of action for unjust enrichment. First, Capital Stack contends that Raharney, taking member distributions to which it was not entitled,

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unjustly enriched itself. This claim involves Raharney's rights and duties as the managing member of Daily Funder. As noted, Delaware law governs relations between members of a Delaware limited liability company. *See* NY LLC Law § 801(a). Delaware also views relations between members of its domestic LLC as contractual in nature, *see Fisk Ventures LLC*, 2008 WL 1961156, *8, and so no claim for unjust enrichment between LLC members may possibly arise. *See Feuer*, 2018 WL 1870074, *17.

Capital Stack also contends that Raharney was unjustly enriched by being allowed to use Capital Stack offices and facilities for free, to conduct its business. Delaware and New York both define unjust enrichment as improperly retaining benefits, at another's expense, in circumstances that violate principles of justice, equity and good conscience. *See, e.g., Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011); *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del 2010).

Capital Stack admits that, from the start of its relationship with Raharney as members of Daily Funder, Raharney worked at Capital Stack offices to provide Capital Stack consulting services, for which it paid Raharney between \$5,000 and \$8,500 per month. *See Plaintiff's 19-A ¶ 48*. It also worked on behalf of Daily Funder at Capital Stack's offices, which included editing Daily Funder's magazine, through at least August 2014. *See Plaintiff's 19-A ¶¶ 49, 67*. Thus, Raharney's use of Capital Stack's offices did not result in it unjustly receiving a benefit at Capital Stack's expense because Raharney's presence at Capital Stack's offices was to their mutual benefit.

Defendants' motion for summary judgment, dismissing Capital Stack's cause of action for unjust enrichment, is hereby granted.

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For the foregoing reasons it is hereby

ORDERED that Capital Stack's motion for partial summary judgment with respect to its first cause of action, for breach of fiduciary duty, is denied and Defendants' motion for summary judgment, to dismiss this cause of action, is granted, without prejudice, and Capital Stack is hereby granted leave to amend its amended verified complaint within 20 days of the entry of this decision and order, in accordance with the court's directions herein; further

ORDERED that discovery in this action will be considered complete following the amendment of the complaint unless a motion is made within 60 days following the entry of this order; further

ORDERED that Capital Stack's motion for summary judgment with respect to its fifth and seventh causes of action is denied, and Defendants' motion for summary judgment, seeking dismissal of those causes of action, is granted; further

ORDERED that Capital Stack's motion for summary judgment, dismissing third-party Plaintiffs' third, fourth, fifth and sixth causes of action is granted; further

ORDERED that Defendants' motion for summary judgment, dismissing Capital Stack's second cause of action for unfair competition is granted, without prejudice, and Capital Stack is hereby granted leave to amend its amended verified complaint within 20 days of the entry of this decision and order, in accordance with the court's directions herein; further

ORDERED that Defendants' motion for summary judgment, dismissing Capital Stack's third, fourth and sixth causes of action, is granted; further

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ORDERED that counsel for the parties shall contact the Part 3 Clerk to schedule a conference.

Dated: December 26, 2018

ENTER:


HON. EILEEN BRANSTETTER
J.S.C.