SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

----------X

THE ORIGINAL HOMESTEAD RESTAURANT, INC., THE ORIGINAL HOMESTEAD RESTAURANT, INC. DERIVATIVELY ON BEHALF OF DNT ACQUISTION, LLC,

Plaintiffs,

- v -

ROWEN SEIBEL, R SQUARED GLOBAL SOLUTIONS, LLC, THE SIEBEL FAMILY 2016 TRUST, BRIAN ZIEGLER, CRAIG GREEN,

Defendants.

----------X

INDEX NO. 650145/2018

MOTION DATE _____

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 66, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 132, 133, 134, 137
were read on this motion DISMISS.

In motion sequence number 003, defendants Rowen Seibel, R Squared Global Solutions, LLC (RSG), the Seibel Family 2016 Trust (Trust), Brian K. Ziegler, and Craig Green (both individually and as trustees of the Trust) move, pursuant to CPLR 3211, to dismiss the amended complaint filed by plaintiffs The Original Homestead Restaurant, Inc. (OHR), individually and derivatively on behalf of DNT Acquisition, LLC (DNT.)[1]

[1] After dismissal of the complaint on a prior motion to dismiss, plaintiffs were granted leave to replead within 60 days. Plaintiffs filed their amended complaint within the allotted time. (NYSCEF Doc. No. 66, Amended Complaint.) The caption of the amended complaint filed by plaintiffs identifies plaintiffs as "The Original Homestead Restaurant, Inc., individually and derivatively on behalf of DNT Acquisition, LLC". (*Id.* at 1.) Defendants, in connection with this motion, submit a copy of an amended complaint, which is identical to the amended complaint filed by plaintiffs, except the caption includes Marc and Greg Sherry as plaintiffs. (NYSCEF 110.) There is no explanation for the difference in these amended complaints. For this motion, the court relies on the amended complaint filed by plaintiffs, which is NYSCEF Doc. No. 66.

I. Background

The following facts are alleged in the amended complaint, and, for the purposes of this motion to dismiss, accepted as true.

A. Execution of DNT Agreement and Sub-License Agreement I

In 2009, defendant Seibel and nonparty Desert Palace, Inc. (Caesars) commenced a business relationship. (NYSCEF Doc. No. [NYSCEF] 66, Amended Complaint ¶ 33.) Pursuant to Nevada gaming regulations, Seibel completed a Business Information Form (BIF), in which he represented under oath "that he had not been party to a felony in the last ten (10) years, and that there was nothing that would prevent [him] from being licensed by a gaming authority." (*Id.* ¶ 33 [internal quotation marks omitted].)

In early 2011, "Seibel approached Marc Sherry and Greg Sherry (collectively, the Sherrys), the principals of OHR, with the concept of establishing an Old Homestead Steakhouse® in Caesars Palace, Las Vegas, utilizing the Old Homestead System, Old Homestead Marks and Old Homestead Materials." (*Id.* ¶ 25.) Seibel represented to the Sherrys that he had a favorable relationship with Caesars, which had led him to secure a location within Caesars' Palace for the operation of a steakhouse. (*Id.* ¶ 26.) After verifying the relationship between Seibel and Caesars, the Sherrys, through OHR, engaged in two distinct negotiations with Seibel which led to the DNT Sub-License Agreement (Sub-License Agreement I), and the DNT LLC Agreement (DNT Agreement), respectively. (*Id.* ¶ 27.)

On June 21, 2011, Caesars, OHR and DNT executed the Sub-License Agreement I, in which "DNT sub-licensed to Caesars the Old Homestead System, Old Homestead Marks and Old Homestead Materials for Caesars' use in connection with its build-out and operation of an Old Homestead Steakhouse® in Caesars Palace." (*Id.* ¶¶

29-30; NYSCEF 112, Sub-License Agreement I.) "In accordance with Section 11.2 of the [Sub-License Agreement I] and at the inception of their relationship with Caesars, the DNT Parties (OHR and RSG) were required to provide, and did provide, to Caesars detailed written disclosures regarding, among other things, the DNT Associates (Seibel, Ziegler and the Sherrys)." (NYSCEF 66, Amended Complaint ¶ 37.)

On June 6, 2011, prior to the execution of the Sub-License Agreement I, Seibel submitted the BIF to Caesars and plaintiffs, in which he swore that the statements contained therein were true. (*Id.* ¶ 38.) Specifically, question 7 of the BIF asked whether Seibel had "been a party to ... any felony, high misdemeanor, misdemeanor or disorderly person offense in any jurisdiction with the last ten years? If so, please explain circumstances." (*Id.* ¶ 41 [internal quotation marks omitted].) Question 11 asked "[i]s there anything in [your] past ... that would prevent [you] from being licensed by a gaming authority." (*Id.* ¶ 42 [internal quotation marks omitted].) Despite having engaged in an illicit tax evasion scheme, Seibel answer both questions in the negative. (*Id.* ¶¶ 41-42; 49-74.) Plaintiff allege that Ziegler and his law firm assisted Seibel "in the completion and submission of the BIF" all while they "had actual knowledge of Mr. Seibel's prior and ongoing engagement in criminal conduct." (*Id.* ¶¶ 39-40.)

Sub-License Agreement I also conditioned, pursuant to Section 11.1, that each party, including Seibel, had an ongoing and continuous obligation to conduct themselves with the highest standards of honesty, integrity, quality and courtesy. (*Id.* ¶ 45; NYSCEF 112, Sub-License Agreement I § 11.1.) Parties to Sub-License Agreement I were also required, pursuant to Section 11.2, to update prior inaccurate disclosures of their own accord, when an inconsistency became known to them. (NYSCEF 66, Amended Complaint ¶ 46; NYSCEF 112, Sub-License Agreement I, § 11.2.) Seibel

never updated the information contained in the BIF or otherwise disclosed his illicit activities to plaintiffs or Caesars. (NYSCEF 66, Amended Complaint ¶ 47.) Ziegler, too, did not at any point amend the information contained in the BIF, despite his obligations as a DNT manager. (*Id.* ¶ 48.)

On July 11, 2011, OHR and RSG as Members, and Seibel, Ziegler, and the Sherrys as Managers, executed the DNT Agreement, which governs DNT's management and affairs. (*Id.* ¶ 28.) Specifically, pursuant to Section 6.1, OHR granted DNT "the exclusive right and license to use the Old Homestead System, the Old Homestead Marks and the Old Homestead Materials only in connection with the operation of the Restaurant and the right and license to sell therefrom merchandise bearing the Old Homestead Marks." (NYSCEF 111, DNT Agreement § 6.1.) Also, in that Section, OHR acknowledged and agreed DNT's licensing rights would be "sublicensed to Caesars pursuant to the Sublicense Agreement, the terms of which Sublicense Agreement are hereby deemed to be acceptable to OHR." (*Id.*) The DNT Agreement also established the percentages by which the licensing fees would be distributed to OHR and RSG. (*Id.* § 7.2.)

B. Material Non-Disclosures Leading to the Unauthorized Amendment, Unauthorized Membership Interest Assignment, and Change in Management

By letter dated May 16, 2014, Seibel, purportedly on behalf of DNT, entered into an agreement with Caesars to amend Sub-License Agreement I (Unauthorized Amendment). (*Id.* ¶ 77.) Seibel, RSG and Ziegler failed to inform plaintiffs or seek their approval regarding the Unauthorized Amendment, in alleged contravention of the DNT Agreement. (*Id.* ¶ 79.) At the time Caesars negotiated and executed the Unauthorized Amendment, Caesars was led to believe, by both Seibel and Ziegler, that OHR and the

Sherrys had authorized and approved the amendments. (*Id.* ¶ 81.) The Unauthorized Amendment were never disclosed to plaintiffs and plaintiffs were never provided with a copy of them. (*Id.* ¶ 83.) Plaintiffs did not learn of the Unauthorized Amendment until approximately two years later, when following press reports surrounding Seibel's felony conviction in August 2016, Caesars provided plaintiffs with a copy of the Unauthorized Amendment upon request. (*Id.* ¶ 84.)

By letter, dated April 8, 2016, Seibel informed Caesars that, effective "April 13, 2016 and based on the terms of the Unauthorized Amendments, 'All obligations and duties of DNT and/or Rowen Seibel that are specifically designated to be performed by Rowen Seibel shall be assigned and delegated by DNT and/or Rowen Seibel to, and will be performed by, J. Jeffrey Frederick'" (April 8 Letter). (*Id.* ¶ 85.) This letter was drafted by Ziegler and signed by Seibel. (*Id.*). Enclosed with the letter was a document entitled "Membership Interest Assignment Agreement", by which Seibel (i) assigned his membership interest in RSG to the Seibel Trust (of which he was the Grantor and his family were beneficiaries, with Green and Ziegler serving as Trustees); (ii) resigned as the sole Manager of RSG, but not as a Manager of DNT; and (iii) appointed Green sole Manager of RSG." (*Id.* ¶ 86.) Although the April 8 Letter was purportedly issued on behalf of DNT, Seibel, Ziegler, and Green did not provide plaintiffs with a copy the letter or the Membership Interest Assignment Agreement. (*Id.* ¶ 87.)

C. Caesar's Bankruptcy and Sub-License Agreement II

"On January 15, 2015, Caesars filed a Chapter 11 Petition in the United States Bankruptcy Court for the Northern District of Illinois." (*Id.* ¶ 88.) Caesars proposed to DNT that it assume the Sub-License Agreement I on modified financial terms, which would include a reduction in the license fees payable to DNT. (*Id.* ¶ 89.) Subsequently,

Caesars and DNT negotiated a modified sub-license agreement (Sub-License Agreement II), which would be eventually be assumed by Caesars' in its Reorganization Plan. (*Id.* ¶ 90.) During the first half of 2016, Seibel was deeply involved in the negotiations with plaintiffs of Caesars' assumption of Sub-License Agreement II. (*Id.* ¶ 91.) However, at no point during these negotiations did Seibel, Ziegler, or Green disclose to OHR, the Sherrys, or OHR's counsel the following information: (i) Seibel's continuing engagement in illicit tax activity; (ii) "Seibel's felony conviction;" (iii) "Seibel's impending imprisonment and house confinement;" (iv) the execution and existence of the Unauthorized Amendment; (v) the existence and execution of the Membership Interest Assignment Agreement or any management changes reflected therein. (*Id.* ¶ 92.)

Disagreements arose between Seibel, OHR and the Sherrys with respect to the terms of Sub-License Agreement II. (*Id.* ¶ 93.) On June 13, 2016, OHR and the Sherrys formally noticed a meeting of the Managers and Members of DNT to be held later the same month at the Old Homestead Steakhouse in New York City. (*Id.*) The notice was addressed and delivered to Seibel and Ziegler, as Managers of DNT, and to Seibel, as the sole Member of RSG, a Member of DNT. (*Id.* ¶ 94.) Neither Seibel nor Ziegler objected to their respective company designations. (*Id.*) In communications exchanged between Ziegler and OHR's counsel, Ziegler confirmed that Seibel would be attending the meetings as RSG's principal, as well as one of the four Managers of DNT. (*Id.* ¶ 96.) Two meetings were held on June 15 and June 23, 2016 and attended in person by Seibel, Ziegler, the Sherrys, Green, and OHR's counsel. (*Id.* ¶ 98.) Plaintiffs allege that, although Green was in attendance, his purpose and presence at the meetings were unexplained; the Sherrys reportedly knew Green to simply be an acquaintance of

Seibel. (*Id.*) Once again, at no point during these meeting were plaintiffs informed of Seibel's criminal tax fraud, felony conviction, and impending imprisonment and house confinement, or Seibel's execution of the Unauthorized Amendment and the Membership Interest Assignment Agreement. (*Id.* ¶ 99.)

D. Seibel's Felony Conviction, Subsequent Termination of the Sub-License Agreement II, and Execution of Sub-License Agreement III

On April 16, 2016, Seibel was charged with corruptly attempting to obstruct or impede the administration of the Internal Revenue laws, in violation of 26 U.S.C. § 7212(a), a Class E Felony. (*Id.* ¶¶ 70-71.) The same day, Seibel entered a plea deal with the United States Attorney's Office for the Southern District of New York. (*Id.*) On August 19, 2016, Seibel appeared before the Honorable William H. Pauley III for his sentencing hearing and was sentenced to thirty (30) days in prison, six (6) months of home confinement and 300 hours of community service. (*Id.* ¶ 73.)

On August 20, 2016, multiple news outlets ran articles with the headline "Gordon Ramsey's Business Partner [Seibel] Gets Jail Time for Tax Evasion Scheme," and stating, in relevant part as follows: "A wealthy Manhattan restaurateur [Seibel] was sentenced to a month in the slammer for lying to the IRS about more than $1 million he stashed in Switzerland as part of a years-long tax evasion scheme." (*Id.* ¶ 74 [internal quotation marks omitted].)

On September 21, 2016, Caesars terminated Sub-License Agreement II because of Seibel's criminal conviction and deceitful conduct. (*Id.* ¶ 120.) Following the termination of the Sub-License Agreement II, Caesars and OHR entered into a new agreement, the Restaurant License Agreement (Sub-License Agreement III), in which "OHR directly licensed to Caesars the right and privilege to operate and manage an Old

Homestead Steakhouse® in Caesars' Palace, utilizing the Old Homestead System, Old Homestead Marks and Old Homestead Materials." (*Id.* ¶124.)

Plaintiffs subsequently commenced this action. In the amended complaint, plaintiffs allege claims for breach of the DNT Agreement, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and seeks a declaratory judgment and monetary damages.

II. Discussion

DNT is a Delaware limited liability company. Section 14.2 of the DNT Agreement provides that the Agreement

> "shall be governed by and construed in accordance with the laws of the State of Delaware ... All parties consent to the personal jurisdiction of the State of New York and agree that any action, suit or proceeding arising out of or relating to this Agreement shall be brought in a State Supreme Court located in New York."

(NYSCEF Doc. No. 111, DNT Agreement §14.2.) "[W]hen parties include a choice-of-law provision in a contract, they intend application of only that state's substantive law .... Unlike substantive law, matters of procedure are governed by the law of the forum state." (*Royal Park Investments SA/NV v Stanley*, 165 AD3d 460, 461 [1st Dept 2018] [internal quotation marks and citations omitted].) Accordingly, the court will apply CPLR 3211, New York's applicable procedural rule on a motion to dismiss (*Davis v Scottish Re Group Ltd.*, 30 NY3d 247, 257 [2017]), but will decide the substantive legal issues pursuant to Delaware law. (*Project Cricket Acquisition, Inc. v FCP Investors VI, L.P.*, 159 AD3d 600, 599 [1st Dept 2018].)

CPLR 3211 (a) (7) provides that, on a motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every

possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) However, factual allegations "that consist of bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence", cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]; *see also* CPLR 3211 [a] [1].)

A. Damages

Defendants argue that plaintiffs' direct and derivative claims for breach of contract (First and Second Causes of Action), breach of the implied covenant of good faith and fair dealing (Third and Fourth Causes of Action), breach of fiduciary duty (Fifth and Sixth Causes of Action), and aiding and abetting in breach of fiduciary duty (Seventh and Eighth Causes of Action) must be dismissed for failing to allege damages.

OHR alleges the following damages resulting from defendants' alleged breach of the DNT Agreement, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty and aiding and abetting in breach of fiduciary duty:

- "Damages resulting from Caesars' refusal to pay to OHR pre-bankruptcy License Fees in the amount of $102,484.00, which, in accordance with Section 8.2 of the [Sub-License Agreement I], were to be paid by Caesars directly to OHR and not to DNT;" (OHR Category 1 Damages)

- "Damages in the form of attorney's fees and litigation costs paid by OHR to its counsel (Lebensfeld Sharon & Schwartz P.C.) and to DNT's counsel (Adelman & Gettleman, Ltd.) in connection with the negotiation of the [Sub-License Agreement II], rendered futile by reason of the SZRSG Defendants' prior, but undisclosed breaches of the DNT LLC Agreement;" (OHR Category 2 Damages)

- "Damages in the form of attorney's fees and litigation costs incurred in connection with OHR's required defense of claims, and/or participation, in the multiple litigations pending in Illinois and Nevada involving Caesars and OHR, based upon Caesars' termination of the [Sub-License Agreement I], with respect to which OHR is entitled to be reimbursed pursuant to Section 20 of the DNT LLC Agreement; and" (OHR Category 3 Damages)

- "Damages resulting from the potential profits lost pursuant to the [Sub-License Agreement I], which would have been paid directly to OHR, not to DNT" (OHR Category 4 Damages).

(NYSCEF 66, Amended Complaint ¶¶ 129, 138, 149, 163.) OHR, derivatively on behalf of DNT, alleges the following damages resulting from defendants' alleged breach of the DNT Agreement, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty and aiding and abetting in breach of fiduciary duty:

- "DNT has suffered substantial monetary damages in an amount finally to be determined at trial, including, but not limited to, damages resulting from Caesars' refusal to pay to DNT pre-bankruptcy License Fees in the amount of $204,968" (DNT Damages).

(*Id.* ¶¶ 132, 141, 157, 169.)

As to the OHR Category 1, 2, and 3 Damages, defendants have failed to support their position with Delaware law. As the claims in this action are governed by Delaware law, defendants must support their arguments with such. The same is true as to the DNT Damages.

As to the OHR Category 4 Damages, defendants, in their reply, cite to *Spector Upholstery, Inc. v Reuben H. Donnelly Corp.*, 1983 WL 471936 (Del Super Ct 1983) to support the proposition that Delaware prohibits lost profit claims that are speculative or conjectural in nature. The *Spector* Court, on a motion for summary judgment, stated, that "[i]n order to support its claim for damages, plaintiff must provide some reasonable basis upon which a jury may estimate plaintiff's lost profits. Lost profit claims should not be speculative or conjectural." (*Spector Upholstery, Inc.*, 1983 WL 471936, *2.) The Delaware Court held that "Delaware law requires that plaintiff establish a reasonable basis for demonstrating that it would have had profits but for the fraudulent

misrepresentation." (*Id.*) On a pre-answer motion to dismiss, however, plaintiffs are not required to demonstrate that it would have had profits and a basis for the jury to calculate such damages.

At this pre answer stage, it is premature to dismiss plaintiffs' claims for failure to state damages. Plaintiffs have sufficiently stated damages at this juncture.

B. First Cause of Action

Defendants argue that the breach of contract claim must be dismissed against Green, as an individual, and Ziegler and Green, as trustees of the Trust.

Under Delaware law, "to state a breach of contract claim, the plaintiff must demonstrate; first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff." (*VLIW Tech., LLC v Hewlett-Packard Co.*, 840 A2d 606, 612 [Del 2003].)

Here, defendants Green, as an individual and trustee, and Ziegler, as trustee, are not parties to the DNT Agreement. To the extent that plaintiffs allege that "Seibel Trust has acted and served as Seibel's nominee or alter ego, for the purpose, among others, of disguising Seibel's de facto control and ownership of RSG" (NYSCEF 66, Amended Complaint ¶ 23), such a conclusory allegation, without more, is insufficient to support an alter ego theory. (*See* Fitzgerald v Cantor, 1998 WL 842316 [Del Ch 1998].)

C. The Second Cause of Action

The second cause of action is for breach of the DNT Agreement brought by OHR, on behalf of DNT, against the SZRSG Defendants. The alleged breaches and resulting damages are the same as the first cause of action. Thus, for the reasons discussed above, this claim is only dismissed as to Green, as an individual and trustee, and Ziegler, as trustee.

D. The Third Cause of Action

The third cause of action brought by OHR against the SZRSG Defendants is for breach of the implied covenant of good faith and fair dealing.

As the breach of contract claims are dismissed against Green and Green and Zielger, as trustees, this claim is also dismissed against them.

"The implied covenant of good faith and fair dealing involves a 'cautious enterprise,' inferring contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated." (*Nemec v Shrader*, 991 A2d 1120, 1125 [Del 2010].) "It requires contracting parties to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." (*Matthew v Laudamiel*, 2012 WL 605589, *16 [Del Ch 2012] [internal quotation marks and citation omitted].)

Further, "[t]he implied covenant only applies to developments that could not be anticipated, not developments that the parties simply failed to consider." (*Id.* at 1126.) "Delaware's implied duty of good faith and fair dealing is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract." (*Id.* at 1128.) Accordingly, courts will "not rewrite the contract to appease a party who later wishes to rewrite a contract." (*Id.* at 1126.) "[T]he covenant is ... limited and extraordinary." (*Id.* at 1128.) Nevertheless, "[t]o state a claim for breach of the implied covenant, a litigant must allege a specific obligation implied in the contract, a breach of that obligation, and resulting damages." (*Matthew v Laudamiel*, 2012 WL 605589 *16.)

Here OHR asserts that the DNT Agreement did not expressly require Seibel to give OHR notice of the transfer of Seibel's membership or managerial role in RSG to Green and the Seibel Family Trust and the delegation of his duties as DNT's representative at the Old Homestead Restaurant in Caesar to Fredrick and the failure to give such notice was breach of the implied covenant. First, the DNT Agreement expressly permits Seibel to transfer his membership interest in RSG, so long as there is no DNT change in control. (NYSCEF 111, DNT Agreement § 11.3.) A failure to give notice to OHR of this transfer was not a breach of the implied covenant. The court will not rewrite a contract to include a requirement that the parties did not. Further, "[a] party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party." (*Nemec v Shrader*, 991 A2d at 1128.) Seibel was permitted to make this transfer and the contract did not require notice. The court notes that plaintiffs do not allege that there was a "DNT Change in Control".

As to Seibel's failure to give notice of the delegation of his duties as DNT's representative at the Old Homestead Restaurant in Caesar to Fredrick, this too was not a breach of the implied covenant. The court will not infer a specific notice requirement especially when Section 8.4 (b) provides that Seibel shall keep OHR appraised of Seibel's communications with Caesars. (NYSCEF 111, DNT Agreement § 8.4.[b].)

OHR also argues that since the DNT LLC Agreement contained no express provision requiring Seibel to disclose his criminal activities and conviction for tax evasion, the implied covenant of good faith and fair dealing required Seibel to make full disclosure of those facts and he failed to do so.

Section 8.7 of the DNT Agreement provides that a DNT manager can be removed on the demand of all Members, but only if that manager has pleaded guilty to, or been found guilty of, a criminal act constituting a felony or (d) been determined to be an Unsuitable Person (as such term is defined in the Sublicense Agreement). (NYSCEF 111, DNT Agreement § 8.7.) Thus, it is clear from this section that the contracting parties anticipated the possibility that a manager may be convicted of a felony or determined to be "unsuitable." However, despite these anticipated situations, the parties failed to include a notice requirement these grounds for removal arise. Again, "[t]he implied covenant only applies to developments that could not be anticipated, not developments that the parties simply failed to consider" and the court "will not rewrite the contract to appease a party who later wishes to rewrite a contract." (*Nemec v Shrader*, 991 A2d at 1126.)

The third cause of action is dismissed.

E. The Fourth Cause of Action

The fourth cause of action is brought by OHR on behalf of DNT for breach of the implied covenant of good faith and fair dealing against the SZRSG Defendants. (NYSCEF 66, Amended Complaint ¶¶ 139-141.) This claim is dismissed for the same reasons as the third cause of action.

F. The Fifth and Sixth Causes of Action

The fifth cause of action for breach of fiduciary duty is allegedly brought by OHR against the SZRSG Defendants. The sixth cause of action is brought by OHR on behalf of DNT for breach of fiduciary duty against the SZRSG Defendants.

Defendants argue that these breach of fiduciary duty claims are duplicative of the breach of contract claims. They are not. Under Delaware law, fiduciary duty claims

arising from the same conduct as that alleged in a breach of contract claim are superfluous because "[t]o allow a fiduciary duty claim to coexist in parallel with [a contract] claim, would undermine the primacy of contract law over fiduciary law in matters involving ... contractual rights and obligations." (*Grayson v Imagination Station, Inc.*, 2010 WL 3221951, *7 [Del Ch 2010].) However, a narrow exception exists allowing joint pleading of breach of contract and fiduciary duty claims under the "same nucleus of operative facts" if the fiduciary duty claim can be "maintained independently of the breach of contract claim." (*Grunstein v Silva*, 2009 WL 4698541, *6 [Del Ch 2004].) "The relevant inquiry then is whether the obligation sought to be enforced arises from the parties' contractual relationship or from a fiduciary duty." (*Grayson*, 2010 WL 3221951, *7). Here, the obligation to disclose the facts of Seibel's prior and ongoing criminal wrongdoing as well as his guilty plea arises from his fiduciary duties of loyalty and care. Accordingly, this claim may be maintained independently of the contract.

However, this claim cannot be maintained against Green and RSG. A claim for breach of fiduciary duty "has only two formal elements: (i) the existence of a fiduciary duty and (ii) a breach of that duty." (*HOMF II Investment Corp. v Altenberg*, 2020 WL 2529806 [Del Ch 2020] [citations omitted].) OHR fails to allege that Green owed OHR fiduciary duties because OHR fails to allege that Green is a Manager of DNT.

Additionally, the amended complaint undermines any argument that Green is a Manager by stating that, despite Seibel, Zeigler and the Sherrys' status as "the remaining Managers of DNT," "Green presently claims to be a Manager of DNT." (NYSCEF 66, Amended Complaint ¶ 2.) Moreover, the DNT Agreement states that "so long as [Seibel] is alive and not permanently disabled, [Siebel] shall serve as one of the RSG Managers (unless OHR shall otherwise agree)." (NYSCEF 111, DNT Agreement §

8.2.) Plaintiffs do not allege that OHR otherwise agreed that Siebel could be replaced by Green as a Manager; to contrary, the plaintiffs allege that they were unaware of this alleged transfer. Therefore, this claim is dismissed against Green without prejudice if discovery reveals a valid transfer of interest.

As to RSG, plaintiffs fail to satisfy the second element. There is no allegation concerning RSG's awareness of Seibel's prior and ongoing criminal wrongdoing and the guilty plea is present in this 46-page amended complaint. OHR fails to argue otherwise or remedy this defect with an affidavit.

This claim is dismissed as to Green and RSG.

G. Seventh and Eighth Cause of Action

The seventh cause of action is brought by OHR against the Trust and Green for aiding and abetting breaches of fiduciary duty. The eighth cause of action is brought by OHR on behalf of DNT against the Trust and Green for aiding and abetting breaches of fiduciary duty.

Defendants argue that plaintiffs have failed to allege substantial assistance or knowing participation by Green and/or the Trust. Defendants rely on *Marino v Grupo Mundial Tenedora, S.A.*, 810 F Supp 2d 601, 613 (SDNY 2011), which recites the element of "knowing participation by the alleged aider and abettor in the fiduciary's breach of duty" under Delaware law as required to state a claim for aiding and abetting breaches of fiduciary duty. As to the Trust, there are no allegations that the Trust knowingly participated in any breach of fiduciary duty. Again, the conclusory allegation that Trust "acted and served as Seibel's nominee or alter ego" is not enough to support this claim. However, at this stage, plaintiffs have alleged enough as to Green.

(NYSCEF 66, Amended Complaint ¶¶ 72, 108; *Marino*, 810 F Supp 2d 601 ["Delaware courts have found that knowing participation need not be pled with particularity"]).

The seventh and eighth causes of action are dismissed as to the Trust.

H. Ninth Cause of Action

The ninth cause of action is brought by OHR for a judgment declaring that OHR's grant of the License to Caesars and entry into the Sub-License Agreement III did not violate DNT's, RSG's or Seibel's rights, pursuant to the DNT LLC Agreement or otherwise and for a judgment declaring that OHR and its shareholders have no further obligations whatsoever to DNT, RSG or Seibel, whether pursuant to the DNT LLC Agreement or otherwise. (NYSCEF 66, Amended Complaint at 46.)

As a preliminary matter, the DNT Agreement provides that "[a]ll parties consent to the personal jurisdiction of the State of New York and agree that any action, suit or proceeding arising out of or relating to this Agreement shall be brought in a State Supreme Court located in New York." (NYSCEF 111, DNT Agreement ¶ 14.2.) Accordingly, this court may issue a declaratory judgment concerning the DNT Agreement and whether it was breached by OHR.

Defendants argue that the issue of whether the Sub-License Agreement I was properly terminated is essential to this relief. Defendants assert that a pending action in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division concerns the propriety of Caesars' termination of the Sub-License Agreement I (Bankruptcy Action), and the validity of Caesars' purported termination of the Sub-License Agreement I is at the heart of another action pending in the District Court of the State of Nevada, Clark County is (Nevada Action).

CPLR 3211 (a) (4) provides,

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires."

"CPLR 3211(a)(4) vests a court with broad discretion." (*Whitney v Whitney*, 57 NY2d 731, 732 [1982].) The Bankruptcy Action and Nevada Action concern the propriety of Caesars' termination of the Sub-license Agreement I, whereas this action concerns whether OHR violated the DNT Agreement by entering into the Sub-License Agreement III, the claims are different. They concern different contracts and seek judgments declaring the rights and obligations of different parties.

Defendants also argue that the DNT Agreement provides for ongoing obligations owed to RSG and DNT even if the Sub-license Agreement I was properly terminated. In support, they cite to various provisions of the Sub-License Agreement I, including Section 4.3.2(a). However, the cited provisions do not utterly refute this claim on this motion. Dismissal on these grounds is denied.

Defendants further argue that the ninth cause of action improperly seeks to dissolve DNT. This argument is rejected because the ninth cause of action makes no mention of dissolution and does not request such relief. (NYSCEF 66, Amended Complaint at 45-46.)

Finally, defendants argue that Caesars is a necessary party, and therefore, this claim should be dismissed for failure to join Caesars under CPLR 3211 (a) (10), 1001 and 1003. Specifically, they argue that Caesars is necessary for any determination concerning the termination of Sub-License Agreement I and the propriety of the Sub-License Agreement III.

"Joinder rules serve an important policy interest in guaranteeing that absent parties at risk of prejudice will not be 'embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard.'" (*Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 458 [2005] [citation omitted].) Here, defendants fail to assert or articulate why Caesars ought to be a party if complete relief is to be afforded between the current plaintiffs and defendants or how Caesars might be inequitably affected by a judgment. Indeed, Caesars is not a party to the DNT Agreement and this claim concerns whether OHR violated the DNT Agreement by entering into the Sub-License Agreement III.

Dismissal on these grounds is denied.

The court has considered the balance of the parties' arguments and they do not yield a different result.

Accordingly, it is

ORDERED that the motion of defendants to dismiss are granted, in part, and the first (as to Green and Ziegler only), second (as to Green and Ziegler only), third (as to Green and Ziegler only), fourth (as to Green and Ziegler only), fifth (as to RSG and Green only), sixth (as to RSG and Green only), seventh (as to the Trust only), and eighth (as to the Trust only) causes of action of the complaint are dismissed; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that movants are directed to serve a copy of this decision and order on the Clerk of the Court and General Clerk's Office, in accordance with the proper protocols, who are directed to amend the caption; and it is further

ORDERED that the remaining defendants file an answer within 20 days of this order's filing on NYSCEF.

7/1/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	[ ]	CASE	[X]	NON-FINAL		
APPLICATION:	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
CHECK IF	[ ]	SETTLE		[ ]	SUBMIT ORDER	
	[ ]	INCLUDES		[ ]	FIDUCIARY	[ ] REFERENCE