First Equity Realty v Harmony Group, II
2020 NY Slip Op 32676(U)
August 17, 2020
Supreme Court, New York County
Docket Number: 650273/2015
Judge: Joel M. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

---X

FIRST EQUITY REALTY,	INDEX NO.	650273/2015
Plaintiff,	MOTION DATE	03/02/2020, 03/02/2020
- v -		
THE HARMONY GROUP, II, MADISON AVENUE INVESTMENT PARTNERS, LLC,	MOTION SEQ. NO.	022 023
Defendants.	**DECISION + ORDER ON MOTION**	

---X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 022) 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 769, 770, 771, 772, 773, 774, 804, 805

were read on this motion for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 023) 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803

were read on this motion for PARTIAL SUMMARY JUDGMENT.

This case deals with the fallout from the business break-up between Plaintiff First Equity Realty ("FER") and Defendant The Harmony Group, II ("Harmony"). After five years in business together, the parties devised a separation agreement to outline how they would disentangle their past and present business relationship, as well as the parameters for the limited carried interest each would have in the other's independent future businesses. FER alleges that Harmony failed to live up to its obligations under the agreement, including by misallocating certain distributions generated by Defendant Madison Avenue Investment Partners, LLC ("MAIP"), which Harmony effectively controlled, and by withholding carried-interest payments.

Both sides now move for partial summary judgment to narrow the issues in dispute for trial. For the reasons set forth below, both motions are denied in part and granted in part.

FACTUAL OVERVIEW

A. The Parties' Business Relationship

Beginning around 1996, FER and Harmony went into business together (NYSCEF 697 ¶8 [Boulter Aff.]). Ronald Dickerman is the President of FER, and Bryan Gordon was the Managing Member of Harmony (NYSCEF 755 ¶¶1-2 [Pl.'s Rule 19-a Stmt. of Material Facts ("PSMF")]). Between 1997 and 2002, FER and Harmony, under Dickerman and Gordon, respectively, organized various companies for the purposes of acquiring, managing, and liquidating interests in the parties' collective investment vehicles (Boulter Aff. ¶9). To that end, FER and Harmony became members of various limited liability companies together, most notably MAIP (*id.* ¶4; NYSCEF 747 ¶2 [Dickerman Aff.]).

MAIP was formed to implement the partners' investment strategy, which consisted of acquiring interests in illiquid investments and reaping value through "natural liquidation" (Boulter Aff ¶¶13-4, 19). The company was organized under the laws of Delaware and is governed by an Amended and Restated Operating Agreement, dated as of July 10, 1997 (the "Operating Agreement") (Boulter Aff. ¶10; PSMF ¶2). Income and liquidating distributions from MAIP were allocated, in accordance with the Operating Agreement, to MAIP's members (Boulter Aff. ¶32; *see* PSMF ¶7). The current members of MAIP are FER and Harmony (Boulter Aff. ¶12; PSMF ¶5).[1]

[1] MAIP has been liquidated but not dissolved (Boulter Aff. ¶12).

After working together for several years, Gordon approached Dickerman about ending their business relationship (PSMF ¶6). They memorialized that separation in a letter agreement, dated January 31, 2002 (the "Letter Agreement"), signed by Dickerman, Gordon, FER, and Harmony (*id.* ¶7). The Letter Agreement, as modified by a later Addendum (NYSCEF 701), sets out an intricate process for disentangling the parties' business interests. And it is at the center of the parties' dispute here.

In "restructuring . . . [their] business relationship," the Letter Agreement addressed the future of the parties' shared, existing businesses as well as the independent ventures they would go on to pursue (NYSCEF 700 [Letter Agreement]). Two features of the restructured relationship warrant particular attention. *First*, the Letter Agreement provided that the parties would complete the "Pending Business" of Madison Capital Management, LLC and its subsidiaries and affiliates (collectively, the "MCM Companies"), one of which was MAIP. In other words, MAIP would continue to operate based on existing investments, with FER and Harmony continuing to receive their shares of the resulting profits (PSMF ¶11). But it was Gordon, not Dickerman, who assumed sole responsibility for the administration and day-to-day management of the business and assets of MAIP (*id.* ¶13). To keep FER apprised about MAIP, the Letter Agreement obligated Harmony to furnish FER with periodic financial reporting about FER's interest in the company (*id.* ¶14).

Second, Dickerman and Gordon agreed under the Letter Agreement that after a defined "Transition Date," they would separately "generate, develop, manage and operate any new business and/or funds through one or more new companies" (PSMF ¶15; Letter Agreement ¶¶1, 3). However, FER and Harmony would still hold a limited "carried interest" in each other's investments over the subsequent two years (PSMF ¶20; Letter Agreement ¶11). In the language

of the Letter Agreement, "Ronco will be entitled to receive a carried interest in Bryco's carried interest in each fund or other investment vehicle . . . [that] makes investments in the 'Core Businesses' of the MCM Companies" (*id.*). "Ronco" generally signified the entities through which Dickerman would conduct his independent businesses after the separation but also included, "**as the context requires**, [Mr. Dickerman], individually, and/or FER" (Letter Agreement, ¶3 [emphasis added]). Bryco is similarly defined (*id.*). The "Bryco" investments from which "Ronco" is entitled to a carried interest are designated the "RCarry Funds" (Addendum ¶6).[2]

The Letter Agreement also contained a disclaimer of fiduciary duties as between Ronco and Bryco. Paragraph 3 of the Letter Agreement states that "Ronco and Bryco will be independent of one another and, except as expressly provided herein, Ronco will not owe any duty, fiduciary or otherwise, to Bryco or any of its funds or investment vehicles, and Bryco will not owe any duty, fiduciary or otherwise, to Ronco or any of its funds or investment vehicles."

In addition, as noted above, Gordon and Dickerman executed an Addendum to the Letter Agreement, dated November 1, 2004 (PSMF ¶36; NYSCEF 701 [Addendum]). Among other things, the Addendum imposed additional periodic reporting obligations on Harmony, requiring Harmony to provide FER with reporting on the financial condition and performance of the RCarry Funds (PSMF ¶37; Addendum ¶6). The Addendum also required FER to provide Harmony with reporting on the financial condition and performance of the German Funds (PSMF ¶38; Addendum ¶7).

[2] Conversely, Bryco held a limited carried interest in so-called "German Funds" created by Ronco. The background of those funds is discussed in greater detail in connection with Plaintiff's Motion for Partial Summary Judgment, *see* Part II.A.1, *infra*.

B. The Instant Action

For 12 years following the execution of the Letter Agreement, the separation appeared to unfold peacefully. FER was provided yearly K-1's related to its ongoing interest in MAIP (PSMF ¶39). According to FER, the K-1's were "[t]he only financial information . . . received on a regular basis from MAIP" (Dickerman Aff. ¶14). Meanwhile, both Harmony and FER disregarded the contractual requirements related to reporting on each other's carried interests – Harmony never provided FER with reporting on the RCarry Funds, and FER never provided Harmony with reporting on the German Funds (*id.* ¶¶40-41). Neither side, however, voiced concern about this situation.

Then in August 2014, when Dickerman's accountants requested the prior year's K-1 for MAIP, they were "advised – for the first time – that in fact MAIP was liquidated in 2012, over 20 months earlier" (Dickerman Aff., ¶17). Dickerman says that further requests for "a reconciliation or explanation of MAIP's distribution of assets" from Harmony were "stonewall[ed]", prompting him to retain counsel "to make a formal request" for the accounting information (*id.*). Through the remainder of 2014, FER's counsel "demand[ed] that its representatives be allowed to examine [MAIP's] books and records" in order to "reconcile the allocation of income and cash distributions from [MAIP] to FER which appears improper" (NYSCEF 718 [Dickerman Aff., Exs. C-D]). Following FER's requests for financial information, Harmony and MAIP filed suit against FER in Colorado state court on December 19, 2014, alleging breach of contract and seeking a declaratory judgment (the "Colorado Action") (NYSCEF 707).

The next month, on January 30, 2015, FER commenced this action, asserting nine claims against Harmony and MAIP (NYSCEF 1).[3] In an Order dated October 1, 2015, the Court (Bransten, J.) dismissed six of those claims – conversion (Claim I), fraud (Claim II), negligent misrepresentation (Claim III), breach of fiduciary duty (Claim IV), breach of the covenant of good faith and fair dealing (Claim VII), and conspiracy (Claim IX) – and also struck FER's demand for punitive damages (*see* NYSCEF 35).

On May 10, 2019, FER filed its Fourth Amended Complaint ("FAC") (NYSCEF 715). Four causes of action in the FAC are relevant here. In **<u>Count I</u>**, FER alleges breach of contract against Harmony and MAIP for failing to make proper distributions under the MAIP Operating Agreement. In **<u>Count IV</u>**, FER asserts a separate breach of contract claim against Harmony and MAIP for allegedly failing to remit payments to FER in accordance with the Letter Agreement and Addendum, and for failing to provide the financial reporting also required under those agreements. In **<u>Count V (Colorado Action)</u>**, FER alleges breach of contract against Harmony and MAIP for violating the terms of the Addendum by commencing the Colorado Action. And in **<u>Count V (Accounting)</u>**,[4] FER seeks two different equitable accountings from Harmony: (1) an accounting of MAIP, and (2) an accounting of the RCarry Funds (FAC ¶¶106-107).

Defendants filed an Answer, with Defenses and Counterclaims, to the FAC, including Counterclaim Count II, which seeks a declaratory judgment that Harmony is "discharged" from

---

[3] By agreement of the parties, the Colorado Action was dismissed without prejudice on February 24, 2015 (NYSCEF 708).

[4] The FAC denominates both the breach of contract and accounting claims as "Count V" (*see* NYSCEF 715). For clarity, in this Decision the Court distinguishes the two claims as "Count V (Colorado Action") and "Count V (Accounting)".

performing its obligations under the relevant agreements because FER materially breached its own obligations under the Letter Agreement and Addendum (NYSCEF 741 [C.C.] ¶¶33-43).

DISCUSSION

The standards on a summary judgment motion are well-settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Ostrov v Rozbruch*, 91 AD3d 147 [1st Dept 2012]). If the moving party crosses that threshold, the party opposing the motion "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562; *see Glassman v Weinberg*, 154 AD3d 407, 408 [1st Dept 2017] ["[D]efendant's vague and unsubstantiated allegations . . . [were] insufficient to raise an issue of fact"]).

I. DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants' motion for partial summary judgment seeks to dismiss the entirety of Count IV and Count V (Colorado Action) as to MAIP; to dismiss Count I as to alleged breaches of the MAIP Operating Agreement that accrued prior to January 31, 2009; to dismiss Count IV as to alleged breaches of the Letter Agreement and Addendum that accrued prior to January 31, 2009; and to dismiss Count V (Accounting).

The motion turns on whether four key issues can be decided, as a matter of law, in Defendants' favor: (1) whether MAIP can be held liable, as a non-signatory, for alleged breaches

of the Letter Agreement and Addendum; (2) whether Harmony owed FER fiduciary duties related to MAIP and the Ronco Carried Interest; (3) whether claims prior to January 31, 2009 are timely; and (4) whether FER is entitled to an equitable accounting of MAIP and the RCarry Funds.

For the reasons set forth below, the Court finds that triable issues of fact preclude summary judgment as to MAIP's liability under the agreements, the alleged fiduciary relationship between FER and Harmony concerning MAIP (but not the Ronco Carried Interest), the timeliness of FER's claims, and FER's equitable accounting claim as to MAIP (but not as to the RCarry Funds). As such, Defendants' motion is denied in part, and granted in part.

A. MAIP's Liability as Non-Signatory to the Letter Agreement and Addendum

There are triable issues of fact regarding whether MAIP, as a non-signatory, may be bound by the Letter Agreement and Addendum. "A non-signatory may be bound by a contract under certain limited circumstances, including as a third-party beneficiary or an alter ego of a signatory or where it is a party to another related agreement that forms part of the same transaction" (*Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd.*, 184 AD3d 116 [1st Dept May 21, 2020]; *Array BioPharma, Inc. v AstraZeneca AB*, 184 AD3d 463 [1st Dept 2020] ["Generally, a breach of contract claim cannot be asserted against a non-signatory to the contract, unless a plaintiff pleads liability on veil piercing or alter ego theories"]; *Sheridan Broadcasting Corp. v Small*, 2004 N.Y. Slip Op. 30315[U] [N.Y. Sup Ct, New York County 2004] ["[O]ne corporation will not be found liable for the contractual obligations of another unless it completely dominated and controlled the obligee."], affd, 2005 N.Y. Slip Op. 05531 [1st Dept 2005]).

Defendants fail to make a prima facie showing that MAIP is insulated from contract liability as a matter of law. According to FER, "MAIP and Harmony II ignore[d] each other's separate corporate existences" and "Harmony II . . . used MAIP as [its] alter ego," and FER seeks in its complaint to pierce the corporate veil for both entities (FAC ¶¶45, 88-92). For their part, Defendants provide no evidence to challenge the merits of that theory of recovery, nor do they ask the Court to dismiss the veil-piercing claim (*see generally Sheridan Broadcasting Corp.*, 19 AD3d at 332 ["Piercing the corporate veil generally requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury."]).

Aside from alter ego, other common-law principles of contract law may bind MAIP to the Letter Agreement and Addendum (*see GE Energy Power Conversion France SAS, Corp. v Outokumpu Stainless USA, LLC*, 140 S Ct 1637, 1643 [2020] [noting "'traditional principles of state law' . . . that authorize the enforcement of a contract by a nonsignatory" such as "'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel'"]; *MBIA Ins. Corp. v Royal Bank of Can.*, 706 F Supp 2d 380, 397 [SDNY 2009] ["nonsignatories may be held liable for breach of contract, without being 'alter egos,' if their actions show that they are in privity of contract or that they assumed obligations under the contract"] [applying New York law]). Here, the Letter Agreement impacted MAIP's obligations, including by changing the timing for when payments to its members were due (*see* Letter Agreement ¶2). And MAIP purported to perform the obligations created by the agreements, by making (allegedly unequal) distributions to FER. Defendants'

oversimplified argument – that as a non-signatory, MAIP cannot be held liable under the contract, full stop – fails to demonstrate entitlement to judgment on this issue as a matter of law.

Therefore, the branch of Defendants' motion seeking to dismiss Count IV and Count V (Colorado Action) as to MAIP is **Denied**.

B. Fiduciary Relationship

1. Fiduciary Duties Related to MAIP

The Court finds that triable issues of fact exist as to whether Harmony still owes FER fiduciary duties related to MAIP. Under Delaware law, which governs the MAIP Operating Agreement, "managers and managing members of an LLC … owe fiduciary duties as a default matter" (*Zimmerman v Crothall*, 62 A3d 676, 702 n.145 [Del. Ch. 2013]). The duties of a member of a Delaware LLC, including fiduciary duties, "may be expanded or restricted or eliminated by provisions in the limited liability company agreement" (Del Code Ann Tl 6 § 18-1101 [c]; *see Schroeder v Pinterest Inc.*, 133 AD3d 12, 22 [1st Dept 2015] ["[U]nless the operating agreement provides otherwise, a manager of a Delaware LLC owes fiduciary duties to both the LLC and its members."])). To do so, "[d]rafters of an LLC agreement must make their intent to eliminate fiduciary duties plain and unambiguous" (*Feeley v NHAOCG, LLC*, 62 A3d 649, 664 [Del Ch 2012]; *Bay Ctr. Apartments Owner, LLC v Emery Bay PKI, LLC*, CIV. A. 3658-VCS, 2009 WL 1124451, at *9 [Del Ch Apr. 20, 2009] ["[T]he interpretive scales also tip in favor of preserving fiduciary duties under the rule that the drafters of chartering documents must make their intent to eliminate fiduciary duties plain and unambiguous."]).[5]

[5] The parties dispute whether, under Delaware law, modifications to these fiduciary duties must be made in the LLC agreement itself or if the Letter Agreement could instill those changes. But the Court need not decide that issue because even if the Letter Agreement *could* modify the members' fiduciary duties, it did not clearly do so here.

FER and Harmony are current members of MAIP (Def.'s Rule 19-a Stmt. of Undisputed Material Facts ["SUMF"] ¶5 [NYSCEF 696]; Pl.'s Resp. to Def.'s SUMF ¶5 [NYSCEF 770]; NYSCEF 699 at 1). Harmony therefore owes fiduciary duties to FER, by operation of law, under the MAIP Operating Agreement, which does not by its terms opt out of Delaware's default rule with respect to fiduciary duties. The question, then, is whether the Letter Agreement and Addendum clearly and unambiguously, and as a matter of law, disclaimed the fiduciary duties Harmony owed FER under the MAIP Operating Agreement. They did not.

While the Letter Agreement and Addendum disclaimed fiduciary duties as between "Ronco" and "Bryco," the agreements are ambiguous about whether those umbrella terms encompassed FER and Harmony for purposes of MAIP's continuing business (*see US Oncology, Inc. v Wilmington Tr. FSB*, 102 AD3d 401, 402 [1st Dept 2013] [affirming denial of summary judgment because disputed contract language was ambiguous]; *see generally Georgia Malone & Co., Inc. v E & M Assoc.*, 163 AD3d 176, 185 [1st Dept 2018] ["[A] contract is ambiguous when read as a whole, [it] fails to disclose its purpose and the parties' intent, or when specific language is susceptible of two reasonable interpretations."] [internal citations omitted]).

Ronco is defined as the entities through which Mr. Dickerman would conduct his independent businesses after the separation, "and, *as the context requires*, [Mr. Dickerman], individually, and/or FER" (Letter Agreement, ¶3 [emphasis added]). Bryco is similarly defined (*id.*). In the context of Paragraph 3, the fiduciary-duty disclaimer reasonably can be read to be inapplicable to continuing businesses with fiduciary relationships already in place, like MAIP. Paragraph 3 is titled "New Business After Transition Date" and addresses just that, noting that "[a]fter the Transition Date, each of [them] will generate, develop, manage and operate any new business and/or funds through one or more new companies" (*id.*). These new businesses "can be

in competition . . . with one another" (*id.*). And in that vein, each new business "will be independent of one another" and "will not owe any duty, fiduciary or otherwise," to its potential competitor. MAIP – not a "new business" – arguably falls outside Paragraph 3's intended scope.

The Letter Agreement and Addendum explicitly reference the corporate structures they amend, when the parties intended to do so. In Paragraph 3, for example, the parties stipulate that "FER will withdraw as a member of Madison Capital Management, LLC and that company will thereupon be part of Bryco" (*id.*). And in Paragraph 2, the parties expressly modified the distribution provisions of the MAIP Operating Agreement (*id.* ¶2 ["Any cash available for distribution to FER or Harmony from any MCM Company under the terms of the operating agreement . . . governing that MCM Company will be distributed within 45 days . . . ."]), as well as Dickerman's role in certain MCM Companies, while also "maintain[ing]" FER and Harmony's "current status as members of the MCM Companies" – "[e]xcept as provided in [P]aragraph 3" (*id.* ¶3). That paragraph, as noted, does not expressly reference the MAIP Operating Agreement or modify FER and Harmony's fiduciary relationship arising from MAIP. On the face of the Letter Agreement, therefore, the general disclaimer does not clearly and unambiguously dissolve the fiduciary relationship between FER and Harmony established under Delaware law.

Accordingly, the branch of Defendants' motion seeking summary judgment dismissing Count V on the basis that there is no fiduciary relationship between FER and Harmony regarding MAIP is **denied**.

2. *Fiduciary Duties Related to the Ronco Carried Interest*

By contrast, there is no fiduciary relationship, as a matter of law, between FER and Harmony relating to the Ronco Carried Interest. The Court of Appeals has explained that "[a]

fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [citation omitted]). And "[s]uch a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*id.*; *HF Mgt. Services LLC v Pistone*, 34 AD3d 82, 84 [1st Dept 2006] ["The Court has held that while the determination of a fiduciary relationship is fact-specific, generally no such relationship exists between those involved in arm's length business transactions"]; *Roni LLC v Arfa*, 74 AD3d 442, 444 [1st Dept 2010] ["A conventional business relationship between parties dealing at arm's length does not give rise to fiduciary duties unless the plaintiff shows that the defendant had superior expertise or knowledge about some subject and misled [the] plaintiff by false representations concerning that subject"], affd, 18 NY3d 846 [2011]).

"Before courts can infer and superimpose a duty of the finest loyalty, the contract and relationship of the parties must be plumbed" (*Northeast Gen. Corp. v Wellington Adv., Inc.*, 82 NY2d 158, 162 [1993]). "Generally, where parties have entered into a contract, courts look to that agreement 'to discover . . . the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency,'" guided by the principle that "[i]f the parties . . . do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them" (*EBC I, Inc.*, 5 NY3d at 19, citing *Northeast Gen. Corp.*, 82 NY2d at 160-162). At the same time, "it is fundamental that fiduciary liability is not dependent *solely* upon an agreement or contractual relation," as the parties' actual relationship may evince a fiduciary relationship "independent of" the underlying contract (*id.* [emphasis added]; *see Frydman & Co. v Credit

Suisse First Bos. Corp., 272 AD2d 236, 237 [1st Dept 2000] [finding possibility of fiduciary relationship based on "ongoing conduct between the parties"]).

To begin, "we first examine the scope of the . . . agreement in order to determine whether [the parties] had a principal-fiduciary relationship that transcended it" (*EBC I, Inc. v Goldman Sachs & Co.*, 91 AD3d 211, 214 [1st Dept 2011]). The Letter Agreement and Addendum themselves do not create a fiduciary relationship concerning the carried interest, as FER appears to acknowledge (NYSCEF 769 at 9 ["The Letter Agreement does not clearly *alter* this [existing] fiduciary relationship."] [emphasis added]). Indeed, the Letter Agreement refers explicitly to fiduciary duties only in the course of *disclaiming* them (Letter Agreement §3). Defendants assume no advisory obligations under the agreements, nor do they control FER assets or purport to act on FER's behalf in connection with the carried interest.

The carried interest does provide some shared economic incentives to FER and Harmony in the RCarry Funds, but this alignment of economic interests is insufficient to create a fiduciary relationship (*see, e.g.*, *HF Mgt. Services LLC*, 34 AD3d at 86 ["recogniz[ing] the non-fiduciary nature of the underwriter-issuer relationship"]; *Fekety v Gruntal & Co., Inc.*, 191 AD2d 370, 371 [1st Dept 1993] ["[A] broker does not, in the ordinary course of business, owe a fiduciary duty to a purchaser of securities."]). And FER's right to receive specified profits flowing from the RCarry Funds also does not create an inherently fiduciary relationship (*see Eden v St. Luke's-Roosevelt Hosp. Ctr.*, 96 AD3d 614, 616 [1st Dept 2012] [dismissing fiduciary duty claim where plaintiff "allege[d] merely a profit-sharing arrangement"]).

There is also no evidence, on this record, to support the existence of a fiduciary relationship concerning the carried interest outside the four corners of the agreements (*Furniture Consultants, Inc. v Acme Steel Door Corp.*, 240 AD2d 180, 180 [1st Dept 1997] [dismissing

fiduciary duty claim on summary judgment "for failure to adduce facts showing that the parties' relationship was other than arms-length"]). FER contends that the carried-interest provision preserved, to a limited extent, Harmony's pre-existing fiduciary duties to FER (*see* NYSCEF 769 at 8-9; *EBC I, Inc.*, 5 NY3d at 20; *HF Mgt. Services LLC*, 34 AD3d at 85 ["The Court nevertheless allowed for a fiduciary obligation exception where there was a pre-existing relationship created independently and apart from the contractual one."]). But in contrast to the fiduciary duties related to MAIP, FER fails to identify any statutory or contractual basis for this purported fiduciary relationship. For example, FER is not a member of any of the Bryco funds or investment vehicles relevant to the Ronco carried interest (Pl.'s Resp. to Defs.' Rule 19-a Stmt. ¶¶12-15). While the parties may have indeed "had a close relationship of trust for five years" *prior* to the Letter Agreement, the Agreement fundamentally sought to "restructur[e]" that relationship in light of the parties' "future independent business directions and ventures" (Letter Agreement at 1; *Dubbs v Stribling & Assoc.*, 274 AD2d 32, 37-38 [1st Dept 2000] ["recogniz[ing] that the parties' relationship had experienced a fundamental metamorphosis" so that "it no longer retained any of the fiduciary characteristics previously associated with it"], affd, 96 NY2d 337 [2001]; *Arfa*, 74 AD3d at 444 [1st Dept 2010] [noting that "personal connections of that sort alone between parties to business transactions do not establish a fiduciary relationship"]).

Accordingly, the branch of Defendants' motion seeking summary judgment dismissing Count V on the basis there is no fiduciary relationship between FER and Harmony regarding the Ronco Carried Interest is **granted**.

C. Statute of Limitations

Defendants next challenge the timeliness of FER's claims for breach of (1) the MAIP Operating Agreement and (2) the Letter Agreement and Addendum. On both sets of claims, however, the Court finds that triable issues of fact preclude summary judgment on statute of limitations grounds.

1. Claims Asserting Breaches of the MAIP Operating Agreement

Initially, the record demonstrates that FER's claims stemming from breaches of the MAIP Operating Agreement accrued when the allegedly incorrect distributions were made, not at some indeterminate date thereafter. The statute of limitations on a breach of contract claim is six years, and "the cause of action accrues when the contract is breached" (*Deutsche Bank Natl. Tr. Co. Tr. for Harborview Mtge. Loan Tr. v Flagstar Capital Markets Corp.*, 32 NY3d 139, 145 [2018]; CPLR 213 [2]). As of January 31, 2002, if MAIP decided to make a distribution to its members under Section 4.3 of the MAIP Operating Agreement, then the distribution was to be made "within 45 days after th[e] cash becomes available for distribution, subject to deduction or offset for expenses, repayment of 'Provided Resources loans,' and/or provision of such reserves as [Bryan Gordon] determine[s] to be reasonable" (Letter Agreement ¶2; NYSCEF 770 ¶7 [FER's Resp. to Defs.' Rule 19-a Stmt.]). In support of their motion, Defendants submitted a schedule of distributions made from MAIP to its members between 1999 and 2008 (NYSCEF 706). FER challenges the propriety of these distributions but does not dispute the dates on which they occurred. Under FER's theory of the case, each incorrect distribution breached the contract, and therefore the statute of limitations ran from the date of each incorrect distribution.

That the distribution under Section 4.3 is "subject to deduction or offset" or the provision of certain reserves does not change the result. Those conditions modify the amount of each

distribution, not the timing, so the breaches alleged by FER would have still accrued when each distribution was made. And the prospect of a future remedy – that Defendants could have, at any time, corrected a past distribution – does not change the date of the breach (*ACE Sec. Corp. v DB Structured Products, Inc.*, 25 NY3d 581, 594-95 [2015] [rejecting argument that breach of the representations and warranties in a residential mortgage-backed securities contract, did not accrue until the defendant failed to cure or repurchase the non-conforming loans]; *see also Deutsche Bank Natl. Tr. Co. Tr. for Harborview Mtge. Loan Tr.*, 32 NY3d at 147).

Even if some of its claims fall outside the applicable statute of limitations, however, FER's equitable estoppel defense raises fact issues that preclude summary judgment (*Langston v MFM Contracting Corp.*, 172 AD3d 583, 584 [1st Dept 2019] [denying summary judgment seeking dismissal on statute of limitations grounds where plaintiffs raised issue of fact whether equitable estoppel should apply]; *N. Coast Outfitters, Ltd. v Darling*, 134 AD3d 998, 999 [2d Dept 2015] [denying summary judgment motion where "the evidence raised a triable issue of fact as to the applicability of the equitable estoppel doctrine"]).

"Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding" (*Gen. Stencils, Inc. v Chiappa*, 18 NY2d 125, 128 [1966] [finding equitable estoppel defense "raise[d] issues of fact to be resolved"]).[6] However, "[w]here the defendant has a fiduciary duty to the plaintiff, the doctrine of equitable estoppel may be invoked based on the defendant's failure to disclose facts underlying the claim" (*N. Coast*

---

[6] Although Delaware law governs the MAIP Operating Agreement, the law of the forum – New York law – prescribes the applicable statute of limitations (*see Portfolio Recovery Assocs., LLC v King*, 14 NY3d 410, 415–16 [2010]).

Outfitters, Ltd. v Darling, 134 AD3d 998, 999 [2d Dept 2015], citing *Zumpano v Quinn*, 6 NY3d 666, 683 [2006]; *Kaufman v Cohen*, 307 AD2d 113, 122 [1st Dept 2003] ["The doctrine requires proof that the defendant made an actual misrepresentation or, if a fiduciary, concealed facts which he was required to disclose . . . ."]).

Here, the evidence raises a triable issue of fact about whether equitable estoppel should apply. In light of the parties' fiduciary relationship (*see* Part B.1, *supra*), Defendants' failure to inform FER that they were cutting off MAIP distributions starting in 2007 could estop Defendants from asserting a statute of limitations defense. Even setting aside the fiduciary dimension of the parties' relationship, Defendants' affirmative acts may be sufficient to invoke the doctrine. Until 2014, Defendants issued yearly K-1 reports to FER related to its ongoing interest in MAIP (PSMF ¶39). These reports, which constituted "[t]he only financial information [Mr. Dickerman] received on a regular basis from MAIP or Harmony" (Dickerman Aff. ¶14), took on special significance because Mr. Gordon was solely "responsible for the administration and day-to-day management of the business and assets" of MAIP following the separation (*id.* ¶¶12-13; NYSCEF 750 ¶7 [Written Consent by a Majority of Members to Action of Company]). There are questions of fact about whether these reports misled FER into believing that its interest in MAIP remained unchanged, while in fact its distributions had been terminated years earlier (*Langston*, 172 AD3d at 584 ["evasiveness in response to plaintiffs' requests for information . . . is an affirmative act of concealment that could give rise to equitable estoppel"]).

To be sure, an ultimate finding of equitable estoppel will require FER to also "demonstrate that [it] relied on defendants' fraud, misrepresentation, and deception to [its] detriment" (*Zumpano v Quinn*, 6 NY3d 666, 683 [2006]). But in this case, reliance is a fact issue to be resolved at trial, not on summary judgment (*see Besicorp Grp. Inc. v Enowitz*, 235 AD2d

761, 764 [3d Dept 1997] ["Because the issues of reliance and estoppel are ones of fact, it was improper for Supreme Court to grant summary judgment in favor of defendant on the issue of plaintiff's affirmative defense of equitable estoppel."]).

2. *Claims Asserting Breaches of the Letter Agreement and Addendum*

FER's claims asserting breaches of the Letter Agreement and Addendum prior to January 31, 2009 cannot be deemed untimely as a matter of law because Defendants tender no evidence to establish the dates on which the breaches accrued (*400 E. 77th Owners, Inc. v New York Eng'g Ass'n, P.C.*, 122 AD3d 474, 474-75 [1st Dept 2014] [denying summary judgment where movant "failed to meet its burden of establishing entitlement to judgment as a matter of law on statute of limitations grounds"]; *Pastoriza v State*, 108 AD2d 605, 606 [1st Dept 1985] ["A party moving for summary judgment is obligated to prove through admissible evidence that she is entitled to judgment as a matter of law," and "[w]here plaintiff fails to meet this burden, the motion should be denied even though the papers in opposition may be inadequate."]; *Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004] ["As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense"]).

The focus here is on the Addendum. Section 6 provides that Ronco will be paid its "participation in the Bryco Net Profits Participation *within 10 business days of the date that such participation accrues*" (emphasis added). The starting point for calculating the applicable statute of limitations is determining when, exactly, "such participation accrues." FER is owed payment 10 business days after "such participation accrues," and the statute of limitations on any contract claim arising from a particular payment (or lack of payment) expires six years after that (*see* CPLR 213 [2]; *Morris v Morris*, 74 AD2d 490, 492 [1st Dept 1980] [granting summary

judgment "to the extent that payments which accrued under the agreement more than six years prior to the commencement of the action are barred by the contract Statute of Limitations of six years"]; *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 403 [1993] ["The statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury."] [citation omitted]; *Bulova Watch Co. v Celotex Corp.*, 46 NY2d 606, 608 [1979] [noting limitations periods "running separately for the damages occasioned each time a breach of the obligation . . . occurred"]).

Defendants fail to establish, with admissible evidence, when "such participation accrues" under the Addendum and therefore fail to carry their threshold burden for showing entitlement to summary judgment. While Defendants may be correct that the statute of limitations bars claims "that accrued before January 31, 2009" (NYSCEF 695 at 13 [Defs.' Mem. of Law in Supp. of S.J.]), a claim accrues only after "such participation accrues" under the contract. Defendants have neither defined that term nor applied it to specific dates or distributions. And it is not enough to point back at FER's allegations, which seek additional distributions from as far back as 2002. Such relief is time-barred only to the extent the claims had already accrued, which Defendants have not conclusively established.

* * * *

Therefore, the branch of Defendants' motion seeking to dismiss portions of Count I and Count IV as time-barred are **Denied**.[7]

---

[7] The statute of limitations defense with respect to the equitable accounting claim is covered in Part D.1-2, *infra*.

D. Equitable Accounting

In Count V (Accounting), FER seeks two different equitable accountings from Harmony: (1) an accounting of MAIP, and (2) an accounting of the RCarry Funds (FAC ¶¶106-107). "This equitable remedy is designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession" (*Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 653 [2011]). Defendants seek summary judgment dismissing the claim as a whole. As discussed below, the motion is denied as to the accounting of MAIP, and granted as to the accounting of the RCarry Funds.

1. Equitable Accounting of MAIP

Defendants move for summary judgment dismissing FER's claim for an equitable accounting of MAIP based on four main arguments: (1) there is no fiduciary relationship between FER and Harmony regarding MAIP, (2) FER has an adequate remedy at law, (3) FER failed to demand an accounting from Harmony regarding distributions prior to 2008, and (4) claims prior to January 31, 2009 are time-barred. None of these arguments, however, entitle Defendants to summary judgment.

First, for the reasons stated above, the Court finds that there are triable issues of fact about whether the Letter Agreement disclaimed the fiduciary relationship between FER and Harmony regarding MAIP (*see* Part B.1, *supra*).

Second, because there are fact issues about whether a fiduciary relationship between FER and Harmony still exists, FER need not show, at this stage, that it lacks an adequate remedy at law.[8] That requirement is inapplicable to accounting claims "spring[ing] from [a] fiduciary

[8] As with the statute of limitations analysis, New York law governs FER's claims for an accounting of MAIP (*Estate of Calderwood v ACE Group Intl. LLC*, 157 AD3d 190, 198-199 [1st Dept 2017]).

relationship" (*Mullin v. WL Ross & Co. LLC*, 173 AD3d 520, 522 [1st Dept 2019] ["This right, as distinguished from a claim for an accounting in which there is no fiduciary relationship, does not require a showing that there is no adequate remedy at law."]; *Ull v Royal Car Park LLC*, 179 AD3d 469, 471 [1st Dept Jan. 9, 2020] [holding that because trustee "owe[d] the Trust fiduciary obligations . . . [t]he trustee need not show that she does not have an adequate remedy at law"]). In such cases, "[t]he mere existence of a fiduciary relationship gives rise to a claim for an accounting" (*Dawes v J. Muller & Co.*, 176 AD3d 473, 474 [1st Dept 2019]; *see also Atlantis Mgt. Group II LLC v Nabe*, 2018 NY Slip Op. 32460(U), at *6 [Sup. Ct. N.Y. Cty. Oct. 1, 2018], affd, 177 AD3d 542 [2019]).

Third, Defendants fail to show why FER's equitable accounting claim must be cabined to a particular date range referenced in a pre-litigation demand for an accounting. In letters dated October 29, 2014, counsel for FER demanded "information and records within the next thirty (30) days" and outlined seven broad categories of sought-after documentation, including a "[s]chedule of [] distributions by member/partner . . . if any from 2008 to 2013" (*id.*). Seizing on this date range, Defendants now argue that FER failed to make a demand for an accounting "regarding . . . distributions from 2002 to 2007" (*see* NYSCEF 695 at 24). This argument is untenable. The demand letters sought certain information unbounded by a date range (NYSCEF 718 ["Copies of all paperwork related to the sale/liquidation of investments including a summary of the disbursement of net proceeds."]), and specifically reserved the right to request "[a]dditional information . . . at a later date upon analysis of the information provided above" (which was not provided) (*id.*). In any event, pre-litigation demands for an accounting can be general and informal (*Kaufman*, 307 AD2d at 124 ["[P]laintiffs' informal demands upon Cohen

to explain what he got out of the deal from which plaintiffs were excluded were sufficient to state a cause of action for an accounting."]), and Defendants cite no authority requiring the cause of action to perfectly trace the contours of the initial demand.

Fourth, and finally, the question whether the accounting claim is time-barred with respect to transactions prior to January 31, 2009 cannot be determined as a matter of law because the claim may be subject to fiduciary tolling (*see Homapour v Harounian*, 182 AD3d 426 [1st Dept April 2, 2020]; *Cusimano v Schnurr*, 137 AD3d 527, 530 [1st Dept 2016]). The statute of limitations for an accounting claim is six years (*see* CPLR 213[1]; *Kohan v Nehmadi*, 130 AD3d 429, 429 [1st Dept 2015]). But when an accounting claim arises from a fiduciary relationship, the claim only "accrues when there is an open repudiation of the fiduciary's obligation" (*id.* at 430 [denying summary judgment]). "[T]he dispositive issue is whether the repudiation was clear and made known to the plaintiff" (*Evangelista v Mattone*, 44 AD3d 704, 705 [2d Dept 2007]). Harmony may have continued its fiduciary relationship with FER as to MAIP following execution of the Letter Agreement (*see* Part B.1, *supra*), and Defendants have produced no evidence that it openly repudiated its fiduciary obligations to FER until 2014, when it initiated litigation against FER. The "open repudiation" doctrine therefore may apply to toll any applicable statute of limitations.

2. *Equitable Accounting of the RCarry Funds*

As noted above, Defendants are entitled to summary judgment dismissing FER's claim for an equitable accounting of the RCarry Funds due to the absence of a fiduciary relationship between FER and Harmony (*see* Part B.2, *supra*; *Royal Warwick S.A. v Hotel Representative, Inc.*, 106 AD3d 451, 452 [1st Dept 2013] ["claim for an accounting cannot be maintained in the absence of a fiduciary relationship between plaintiff and defendants"]; *see also* FAC ¶¶110 ["*As*

a result of the breaches of fiduciary duty by Harmony II, FER is entitled to a full accounting of both MAIP and the RCarry Funds."] [emphasis added]). The claim also fails because FER has an adequate remedy at law – namely, FER's breach of contract claim against Harmony and MAIP for allegedly failing to remit payments to FER in accordance with the Letter Agreement and Addendum (Count IV) (*Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011] ["[A] claimant must demonstrate that he or she has no adequate remedy at law."]).

* * * *

Therefore, the branch of Defendants' motion for summary judgment seeking dismissal of FER's equitable accounting claim is **Denied as to MAIP** and **Granted as to the RCarry Funds**.

II. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

FER moves for partial summary judgment dismissing Harmony's counterclaim Count II (the "Counterclaim"), which seeks a declaratory judgment that Harmony is "discharged" from performing its obligations under the relevant agreements because FER materially breached its own obligations under the Letter Agreement and Addendum (C.C. ¶¶33-43). In particular, Harmony alleges that FER "materially breached its obligations by failing to make payments and to provide information to Harmony pursuant to the Letter Agreement and the Addendum" (*id.* ¶35).

For both of those alleged breaches, the question is twofold: (i) whether a breach occurred, and if so, (ii) whether the breach was material, such that it excused Harmony's performance under the relevant agreements. FER contends that "failing to make payments" was not a breach (*see* Part A, *infra*), while "failing . . . to provide information to Harmony" was not a *material* breach that excused performance (*see* Part B, *infra*).

For the reasons set forth below, FER's motion is granted as to the failure to provide information to Harmony, and denied as to the alleged failure to make payments.[9]

A. Breach of Payment Obligations

1. Factual Overview of Bryco's Carried Interest in the German Funds

Under the Letter Agreement, FER (via Ronco) granted Bryco a carried interest in certain investment vehicles called the "German Funds." There are two German Funds – MILF and MILS (SMF ¶27).[10] The carried interest in these Funds was expressed as a percentage of "Ronco Net Profits Participation," in turn defined as "*the promotional net profits participation (or the equivalent*) granted to Ronco in any German Funds . . . ." (*id.* ¶23 [emphasis added]). Bryco was only entitled to carried interest generated from "Invested Capital," meaning "moneys *committed to German Funds during the Transition Period . . . regardless of when such funds are actually contributed* to or invested by any German Fund" (*id.* ¶25 [emphasis added]).

The carried interest in MILF and MILS bore fruit only if the German Funds crossed a series of performance thresholds. First, they had to perform well enough to achieve a preferred

[9] The bulk of FER's statement of material facts (NYSCEF 755) must be deemed admitted for purposes of this motion because Defendants failed to properly respond to FER's statement (*see* 22 NYCRR 202.70 [Commercial Division Rule 19-a(b)] ["[T]he papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried."]). Defendants submitted a chart, called a "counterstatement of material facts" (NYSCEF 792), which fails to "specifically controvert[ ]" many of FER's statements (*see* Rule 19-a [c] [noting that unless a statement of material fact is "specifically controverted by a correspondingly numbered paragraph in the statement," it "will be deemed to be admitted for purposes of the motion."]; NYSCEF 755 at ¶¶8, 14, 15–19, 21–23, 37–38). Equally inappropriate, Defendants also included 18 pages of legal argument as Appendices to the chart (*id.* at 15-33).

[10] These acronyms refer to, respectively, Madison International Liquidity Fund, LLC and Madison International Liquidity Services, LLC.

return to investors and to pay back all of the investors' capital (*id.* ¶24; Dickerman Aff. ¶8 ["[M]y understanding was, if a German Fund did well enough to receive a carried interest, then Bryco would be entitled to a piece of that success."]; *see also* Affirmation of Gary J. Levin, dated January 13, 2020 ["Levin Aff."] ¶¶15–16, 40–41 [describing waterfall of distributions for the German Funds]). If those markers were reached, then the German Funds were entitled to additional fees rewarding fund-manager performance (SMF ¶¶22-26). Only if those fees materialized – and only if they were earned on capital that was originally committed during the Transition Period (*i.e.*, earned on Invested Capital) – would Bryco's carried interest take a share (*id.*).

As it happened, the carried interest in MILF and MILS yielded no distribution payments. But "failing to make [these] payments" was not a breach of the agreements, FER says, because neither of the German Funds met the contractual benchmarks for doing so. FER's arguments about why it did not owe a carried interest differ as between MILF and MILS.

2. MILF

FER makes a prima facie case that it owed Harmony no payments relating to MILF under the Letter Agreement and Addendum. Dickerman avers that "[u]nfortunately, MILF's investments did not perform well enough . . . to earn or receive any carried interest" (NYSCEF 747 ¶10 [Dickerman Aff.]; *see* NYSCEF 802 at 160:6–12 [Dickerman Dep.] ["Q: . . . Was there any Ronco net profits participation that was earned from the two German funds, MILS and MILF? A. . . . [T]here were none."]; *see also* NYSCEF 800 at 58-59 [Hecht Dep.]; NYSCEF 801 ¶¶5-6 [Hecht Aff.] ["[T]he Managing Member has provided a cash flow model . . . which corroborates that no incentive fee was earned or paid to the Managing Member."]). FER's expert agreed. Analyzing the cash flows and distributions made in MILF, Levin concluded that

under the Fund's operative waterfall provisions, "no further distributions could be made with respect to the MILF fund, including any amounts that could be considered Ronco Net Profits Participation" (Levin Aff. ¶31 [the "Expert Affirmation"]; *see id.* ¶¶15-33).

Defendants fail to raise a triable issue of fact in response. For instance, Defendants contend that Levin distorted the unambiguous meaning of "promotional net profits participation" – a term instrumental in calculating the carried interest Ronco owes to Bryco (Letter Agreement ¶13) – but never explain what else "promotional net profits participation" reasonably could be read to mean (NYSCEF 791 at 7-8). Defendants also fail to identify any fact issues pertaining to Levin's analysis of the waterfall of distributions in MILF. So, even if Defendants quibble with Levin's understanding of the term, they have put forward no *evidence* to question the conclusion that Levin's analysis ultimately reached – that MILF did not generate sufficient earnings to yield a carried interest to Bryco.

The other challenges to the Expert Affirmation similarly fail. Levin was permitted to rely on FER's data to analyze MILF (or MILS), since that data constitute FER's business records (*see, e.g.*, CPLR 4518; *Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 508 [2015] ["Certain affidavits and documents submitted in support of a motion for summary judgment may be deemed admissible where those documents meet the requirements of the business records exception to the rule against hearsay under CPLR 4518."] [citations omitted]). And Defendants' argument that Levin's analysis has not been "independently verified" is without merit and unsupported by case law. Levin's analysis itself is being proffered as the independent verification of FER's claim that no carried interest was owed. Defendants fail to counter that conclusion with admissible evidence sufficient to create a genuine fact issue (*see Index Stock Photography, Inc. v United Parcel Serv. Corp.*, 164 Misc 2d 712, 714 [Sup Ct N.Y.

Cty. 1995] ["It is well settled as a matter of law that where a party in opposition to a motion for summary judgment fails to submit sufficient proof to raise a triable issue of fact, the court may infer that none exists."]).

3. MILS

What happened to MILS is less straightforward, and presents fact issues about whether capital was committed to MILS Tranche III during the Transition Period and, if so, whether such capital earned a carried interest. MILS as a whole undisputedly earned a carried interest, but FER asserts that it did so in an investment tranche not funded by capital committed during the Transition Period (PSMF ¶¶34-35). Initially, MILS comprised a single investment, to which $20 million of "Invested Capital" was committed during the Transition Period (*id.* ¶29). After the Transition Period, additional tranches of investments were authorized, and the capital commitment was raised from $20 million to $100 million (*id.* ¶30). According to FER, the $20 million committed during the Transition Period went entirely to Tranche I and Tranche II, which did not yield a carried interest.[11] Tranche III, conversely, earned a carried interest but not from capital committed during the Transition Period (*id.* ¶¶11-12).

Neither Dickerman nor FER's expert provide more than conclusory statements about the capital commitments and carried interest as it relates to Tranche III. Dickerman states that he "earn[ed] a carried interest on Tranche III starting in December 2008, on investments *made* starting in 2005, which occurred much later than the Transition Period" (Dickerman Aff. ¶11

---

[11] By the letter of the contracts, Tranche II should not have received *any* capital during the Transition Period: the amendment to the MILS Agreement that authorized the second tranche came into effect only after the Transition Period ended. But the parties' conduct apparently departed from the contractual language, so Levin undertook to analyze both Tranches I and II (but not Tranche III) as part of the Expert Affirmation (*see* Levin Aff. ¶39).

[emphasis added]). But the key to determining Bryco's interest payment is the date of capital *commitment*, not contribution (*id.* ¶25 [entitling Bryco to carried interest based on "moneys committed to German Funds during the Transition Period . . . regardless of when such funds are actually contributed to or invested by any German Fund"]). And Levin, who performed a thorough analysis of the cash flows for MILF, summarily states that he "did not identify any evidence to suggest that Tranche III received any capital commitments nor made any investments during the Transition Period" (Levin Aff., ¶63).

Defendants disagree with those conclusions, and point to a handful of entries on capital call letters in support. For example, Capital Call Letter 17, dated October 7, 2003, lists a $9,600 "[c]apital [c]all" with the description "Consulting Fees Relating to DB California 1999" (NYSCEF 784). Because "DB California" eventually became a Tranche III investment, Defendants argue that "the capital call letters show that capital was invested (and, *a fortiori* 'committed') during the Transition Period into Tranche III" (NYSCEF 791 at 22). FER does not dispute the validity of the Capital Call Letter but argues that a spreadsheet "clearly shows that no capital was committed to Tranche III until 2005" (NYSCEF 793 at 15). The spreadsheet in question, however, refers only to capital contributions – it is titled "MILS Contribution Summary" and purports to collect "All Contribution Data" (NYSCEF 796; *see also* NYSCEF 793 at 15 ["The Contribution Input tab shows . . . whether the capital was invested in or allocated to Tranche I, Tranche II, Tranche III, or a mixture of the tranches."]). Given the contractual commandment to disregard "when such funds are actually contributed to or invested by any German Fund," the probative value of the spreadsheet is unclear.

To the extent capital contributions dovetail with capital commitments, the evidence in the spreadsheet conflicts with the evidence in the Capital Call Letters, creating a triable issue of fact

(*see generally Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004] ["Summary judgment is issue-finding, rather than issue-determination."]).

Therefore, the branch of FER's motion seeking summary judgment dismissing the Counterclaim as it relates to breach of payment obligations is **denied with respect to the MILS carried interest**, and **granted with respect to MILF**.

B. <u>Breach of Reporting Obligations</u>

Based on the record evidence, FER's admitted breach of the reporting obligations were immaterial as a matter of law and, consequently, does not discharge Defendants from their own performance under the agreements. Under New York law, a party's obligation to perform is excused only if the other party commits a *material* breach of the contract. To be considered "material," the breach must be "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract" (*Bisk v Cooper Square Realty, Inc.*, 115 AD3d 419, 419 [1st Dept 2014]; *Jacobs Private Equity, LLC v. 450 Park LLC*, 22 AD3d 347, 347 [1st Dept 2005] ["The alleged breach by defendant . . . does not defeat the purpose of the contract so substantially as to support a claim for rescission."]; *see Lasker-Goldman Corp. v City of New York,* 221 AD2d 153 [1st Dept 1995] [affirming summary judgment when breach was not "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract"]).

For at least two reasons, the undisputed facts here establish as a matter of law that FER's breach was immaterial and cannot excuse Defendants' performance (*see Cont'l Ins. Co. v RLI Ins. Co.*, 161 AD2d 385, 387 [1st Dept 1990] [materiality is "a matter of law for the court to decide" when "the evidence concerning the materiality is clear and substantially uncontradicted"]; *Aktiv Assets LLC v Centerbridge Partners, L.P.*, 2019 N.Y. Slip Op. 33736[U],

15 [N.Y. Sup Ct, New York County 2019] [same]; *Jafari v. Wally Findlay Galleries*, 741 F Supp 64, 67 [SDNY 1990] [deciding materiality of breach on summary judgment motion]).

First, the financial reporting component of the Letter Agreement was an independent, ancillary piece of the overall transaction. The carried interest payments were at the heart of the transaction, and the obligation to make those payments was not contingent on reporting (Letter Agreement ¶13). The reporting obligations cover a larger segment of investments unrelated to the carried interest, providing that "Ronco will receive all monthly, quarterly and annual financial and other reports customarily prepared by Bryco and the MCM Companies that relate to any interest that you, FER or Ronco have in any funds or other investment vehicles or in any other distributions." In addition, failing to provide the reports did not prevent the parties from otherwise performing under the contract. The apparently mutual indifference to the reporting requirement is shown by the years of payments that were made between the parties without receiving reports (PSMF ¶46). The immateriality of the reporting obligation is further underscored by Defendants' own failure to provide the reporting, despite its claim that it "substantially performed" under the agreements (NYSCEF 716 at 19, ¶34).

Second, Defendants cannot avail themselves of FER's breach when they failed to declare the breach contemporaneously, and instead chose to covertly breach their own obligations (PSMF ¶¶45, 48). "A party to a bilateral contract, when faced with a breach by the other party, must make an election between declaring a breach and terminating the contract or, alternatively, ignoring the breach and continuing to perform under the contract" (*Rebecca Broadway L.P. v Hotton*, 143 AD3d 71, 80 [1st Dept 2016]). Defendants did neither. When FER failed to provide the reports, Defendants silently defaulted on their own obligations under the contract without a word to FER. Defendants had "no right to represent [themselves] as continuing to

perform under the contract – and continuing to receive the other party's performance in exchange – while at the same time surreptitiously breaching [their] own duty" (*id.*; *Computer Possibilities Unlimited v Mobil Oil Corp.*, 301 AD2d 70, 80 [1st Dept 2002] [holding that if a party to a contract, in response to the other party's repudiation of the contract, chooses to "affirm the contract, . . . the nonrepudiating party is deemed to remain obligated to perform under the contract"]; *Albany Med. Coll. v Lobel*, 296 AD2d 701, 702–03 [3d Dept 2002] ["[B]y choosing not to terminate the contract at the time of the breach, the nonbreaching party 'surrenders his [or her] right to terminate later based on that breach."] [citations omitted]; *Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 892 [4th Dept 2007] [same]).

Therefore, the branch of FER's motion seeking summary judgment dismissing the Counterclaim as it relates to breach of the reporting obligation is **granted**.

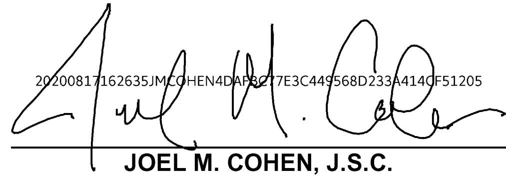
* * * *

Accordingly, it is

ORDERED that Defendants' motion for partial summary judgment is DENIED with respect to MAIP's liability under the agreements, the alleged fiduciary relationship between FER and Harmony concerning MAIP, the timeliness of FER's claims, and FER's equitable accounting claim as to MAIP, and GRANTED with respect to the alleged fiduciary relationship between FER and Harmony concerning the Ronco Carried Interest and FER's equitable accounting claim as to the RCarry Funds.

ORDERED that FER's motion for partial summary judgment is DENIED with respect to the MILS carried interest, and GRANTED with respect to the MILF carried interest and the reporting obligation.

ORDERED that the parties are to appear for an initial pre-trial teleconference on **September 22, 2020 at 11 a.m.** to discuss scheduling the trial and pre-trial submissions.



8/17/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART		[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	