SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

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GENESIS REOC COMPANY, LLC,JAZZ REALTY II, LLC,INDIVIDUALLY AND ON BEHALF OF, GENESIS REOC COMPANY, LLC AND JAZZ GENESIS II, LLC AND, JAZZ GENESIS II, LLC,

Plaintiff,

- v -

STUART POPPEL, POPPEL LAW LLC,BERMAN INDICTOR LLP, INDIVIDUALLY AND AS THE SUCCESSOR IN INTEREST TO BERMAN INDICTOR & POPPEL LLP, CHARLES WILLIAMS, PECKAR & ABRAMSON PC,

Defendant.

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INDEX NO. 156733/2017

MOTION DATE 9/24/2020

MOTION SEQ. NO. 003 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 107, 111, 114, 117, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 221, 224, 227, 230, 234, 235

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 108, 112, 115, 118, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 222, 225, 228, 231, 236

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 109, 113, 116, 119, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 223, 226, 229, 232, 237

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

ORDERED that the motion of Berman Indictor & Poppel LLP and Berman Indictor LLP, individually and as the successor in interest to Berman Indictor & Poppel LLP (motion sequence 004) to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; 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 counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the motions of both Stuart D. Poppel, Esq. and Poppel Law LLC (motion sequence number 003) and Charles E. Williams, III, Esq. and Peckar & Abramson PC (motion sequence 005) to dismiss the complaint herein are granted to the extent that all claims except for the legal malpractice claim (first cause of action) are dismissed as against them; and it is further

ORDERED that plaintiffs' remaining claim shall continue; and it is further

ORDERED that defendants are directed to serve an answer to the first amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for Defendants shall serve a copy of this Order along with Notice of Entry on all parties within twenty (20) days of entry.

MEMORANDUM DECISION

In this action grounded in legal malpractice, plaintiffs Genesis REOC Company, LLC (Genesis, or Company), Jazz Realty, II, LLC (Jazz Realty), individually and on behalf of Genesis and Jazz Genesis II LLC (Jazz Genesis), and Jazz Genesis claim that all defendants, who are plaintiffs' former attorneys, violated Judiciary Law § 487 and engaged in, among other things, legal malpractice, breach of fiduciary duty and fraudulent misrepresentation.

In motion sequence 003, defendants Stuart D. Poppel, Esq. and Poppel Law LLC (collectively, Poppel), move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the amended complaint as against them.

In motion sequence 004, Berman Indictor & Poppel LLP and Berman Indictor LLP, individually and as the successor in interest to Berman Indictor & Poppel LLP (collectively, Berman Indictor), move, pursuant to CPLR 3211 (a) (1), (5) and (7), for an order dismissing the amended complaint as against them.

In motion sequence 005, Charles E. Williams, III, Esq. and Peckar & Abramson PC (collectively, Williams), move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the amended complaint as against them. Motion sequence numbers 003, 004 and 005 are hereby consolidated for disposition.

For the reasons set forth below, Berman Indictor's motion is granted in its entirety and the complaint is dismissed as against them. Poppel and Williams's motions are granted to the extent that all causes of action are dismissed except for the first cause of action grounded in legal malpractice.

BACKGROUND FACTS

Genesis is a limited liability company formed in 2011 by Jazz Realty, through its member nonparty Andrew Stone (Stone), and by nonparty Genesis Member, LLC (Genesis Member), through its member nonparty Karim Hutson (Hutson). The Company was formed for the purpose of investing in "low and moderate-income housing projects backed by tax credit equity investors in New York and New Jersey." (First Amended Complaint (FAC), ¶ 14 [NYSCEF No. 77].) Jazz Realty was "the investor partner and contributed capital to fund the Company's investment activities . . . ." (Id., ¶ 17.)

Pursuant to the Company's limited liability agreement (Agreement) dated January 27, 2011, Hutson was appointed as the manager of the Company and was responsible for identifying potential investments for approved projects. (Id., ¶ 18.) Hutson was also required to receive Jazz Realty's approval prior to using the Company's funds for any investment opportunity and was prohibited from referring these opportunities to any other party, including himself, prior to obtaining Jazz Realty's approval.

Poppel and Williams are both lawyers and were members of Berman Indictor and Pecker & Abramson PC, respectively. The FAC alleges that defendants acted as counsel for the Company from the date the Company was formed in 2011 through July 2017, when defendants resigned their representation. (Id., ¶ 23.) Plaintiffs state that Jazz Realty, acting on the advice of defendants, invested over three million dollars to fund the Company's approved investments. Defendants allegedly represented to plaintiffs that the Company would earn "developer fees, construction revenues, and profits . . ." (Id., ¶ 25.)

The Agreement set forth that revenues from the projects were supposed to be paid to the Company and distributed first to Jazz Realty to cover the cost of the capital contributions prior to distributing any profits to the other members of the Company. However, plaintiffs allege that

defendants drafted transactional documents and structured the transactions so that the profits from the Company's transactions would flow directly to the Hutson Affiliates, entities owned by Huston, and not to the Company. Defendants purportedly created "the web of Hutson Affiliates," which provided Hutson with "complete ownership of all the developer fees, construction revenues, cash flow, [and] equity interests . . ." (Id., ¶ 43.) According to the FAC, only $300,000 has been returned to Jazz Realty.

The FAC alleges that based on defendants' advice that it would earn developer fees, construction revenues and equity interests, among other benefits, Jazz Realty invested in multiple projects. However, defendants failed to disclose that the transactions were structured to divert all economic benefits away from the Company and to the Hutson Affiliates. (Id., ¶ 44.) Plaintiffs became aware of these transactions in January 2016. Evidently, defendants informed them that the transactions were set up so that the Company "made undocumented loans to one of Hutson's companies" using Jazz Realty's funds, without Jazz Realty's knowledge or consent. (Id., ¶ 47.) "Under this scheme," Hutson's companies were able to use these undocumented loans for investment in the Projects, with the revenues directly flowing to Hutson. (Id., ¶ 47.)

Plaintiffs claim that, among other damages, they are entitled to revenues, among other profits, totaling not less than $45 million, plus interest.

The Abyssinian Development Corporation's Y15 Project (Y15 Project)

The Y15 Project, a "low-income housing project in Harlem, involving the rehabilitation of 31 buildings containing more than 350 low income housing units and commercial space," is described in the FAC as one of the Company's largest investments. (Id., ¶ 27.) The FAC explains that, "[b]ased upon Defendants' assurances that the investment in the Y15 Project was being made for the benefit of the Company and its members, in June 2015 Jazz Realty agreed to

the request by making a cash transfer of approximately $252,000, causing its affiliate Jazz Genesis to provide that guarantee, and by making a further transfer of $2,500,000 to backstop that Jazz Genesis guaranty." (Id., ¶ 33.) However, unbeknownst to plaintiffs, defendants structured the transactions so that all revenues and equity would flow directly to Hutson and his affiliates, rather than to the Company. Defendants never informed plaintiffs that these Hutson Affiliates would become the sole beneficial owner of the Y15 Project, among other things, despite having numerous conversations with defendants regarding the structure of the Y15 Project and the projected benefits to Company.

Procedural History

In December 2015, plaintiffs commenced a separate action against Hutson and his affiliated companies (the Hutson Action), seeking to recover profits earned in connection with the Company's projects. Plaintiffs alleged, among other claims, an individual and derivative claim against Hutson for breach of fiduciary duty. This cause of action stated that, as manager, Hutson breached his fiduciary duty to the Company by, among other things, "[m]isappropriating Company investments for his own benefit . . . ." (Berman Indictor's exhibit B, Complaint, ¶ 154 [NYSCEF No. 85].) Plaintiffs claimed that, as a result of Hutson's breaches, "the Company and Jazz Realty have been damaged in an amount to be proved at trial but in no event less than $41,306,574." (Id., ¶ 155.)[1]

[1] Regarding Poppel and Williams, the complaint alleged that, "at Hutson's and Poppel's request, Jazz Realty permitted Poppel to set up a new Jazz Realty subsidiary called Jazz Genesis II LLC to act as a guarantor and indemnitor . . . . in connection with the [Y15 Project]." (Id., ¶ 60.) The papers submitted with the Hutson Action had alleged that Williams represented the Company "in connection with at least two of the most significant projects disputed . . . the 'Y15' and 'Bradhurst Cornerstone II' projects. In this capacity, Williams played a central role in negotiating on [the Company's] behalf and provided legal advice to [the Company] and Andy Stone . . . over the course of years." (Berman Indictor's exhibit C, Parrot affirmation in support, ¶ 5 [NYSCEF No. 86].)

Plaintiffs also sought, and were granted, a preliminary injunction against Hutson and his affiliates restraining them from diverting funds generated by the Company's projects away from the Company. The FAC states that defendants appeared as counsel for Hutson in the Hutson Action and did not seek to obtain a waiver of their conflict of interest.

Subsequently, in brief, on November 7, 2017 the parties entered into a stipulation of settlement resolving the Hutson Action. Huston resigned as manager and Genesis Member assigned its interests in the Company to Jazz Realty. The settlement agreement addressed the economic benefits of the projects and how the revenues should be distributed to the parties. The settlement agreement stated that, although Hutson and his affiliates were released from any claims as a result of settling, the payments made to the plaintiffs do not satisfy plaintiffs' claims. Further, "Jazz Realty's claim for adjusted capital, its claim for Fees and Expenses and any other claims . . . shall remain outstanding and not compromised by this Agreement . . . ." (Plaintiffs' exhibit 30, stipulation of settlement, ¶ 13 [NYSCEF No. 152].) In addition, any claim that plaintiffs may have against any legal professional shall not be compromised as a result of the settlement.

Instant Action- the FAC and the parties' arguments

Plaintiffs commenced this legal malpractice action by filing a summons with notice on July 26, 2017.[2]

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[2] The settlement in the Hutson Action was revised on February 12, 2018. Considering the potential need to review the final settlement documents, the parties extended the time for defendants to respond to the complaint and the time for plaintiffs to file an amended complaint. The FAC was filed on April 10, 2018, and contains eight causes of action. In addition to the damages set forth in the causes of action, in pertinent part, plaintiffs seek punitive damages and request that the court direct defendants to "disgorge all amounts by which they have been and will be unjustly enriched . . . ." (FAC at 25.)

Legal Malpractice

The first cause of action, alleging legal malpractice and/or negligence, states that defendants held themselves out to plaintiffs as representing the Company, Jazz Realty and Jazz Genesis and that they negligently performed that representation by "structuring the Company's investments including the Y15 Project and the other Projects referenced above, so that the benefits would flow to Hutson and the Hutson Affiliates rather than to the Company, (ii) mispresenting that the benefits of these transactions would flow" to plaintiffs. (FAC, ¶ 65.) Further, defendants failed to exercise the "degree of care, skill and diligence commonly exercised by a member of the legal profession," and purportedly advanced the interests of Hutson and his affiliates over the interest of plaintiffs and failed to obtain a waiver of the conflict of interest. (Id., ¶ 67.) Defendants' legal services caused plaintiffs to fund projects that, unbeknownst to plaintiffs, benefitted Hutson and its affiliates and also caused plaintiffs to be exposed to millions of dollars in liability in connection with the Y15 Project. Plaintiffs claim that they sustained damages in an amount not less than $45 million and in addition to an excess of $3.332 million in legal fees and costs related to protecting their interest in the Company and the projects.

Poppel

Poppel argues that plaintiffs' claim for legal malpractice fails to state a cause of action because they are unable to allege that Poppel is the "but for" cause of any actual and ascertainable damages. Poppel explains that, in the Hutson Action, plaintiffs sought the same damages as in the instant action, based on similar theories. Plaintiffs voluntarily settled in the Hutson Action. As they cannot allege that they were forced to settle on disadvantageous terms

due to any of Poppel's actions, Poppel continues that plaintiffs cannot adequately plead a legal malpractice claim.

Stone submits an affidavit explaining that, following the "formation of the Company [in 2011], Hutson suggested that we retain Poppel to represent both of us, i.e. the Company, and both members, so we could reduce costs and increase speed and efficiency." (Stone Aff In Opp., ¶ 7 [NYSCEF No. 121]). Starting with the Company's first investment, Poppel "came up with a creative structuring solution wherein Hutson would technically be the owner of the asset through a new shell company but that I would receive 50% of the economic share of the revenues and profits . . . ." (Id., ¶ 8.) Poppel then used this same prototype for every investment. Stone agreed to Poppel's plans on the condition that he would be an equal partner. Poppel allegedly continued to advise Stone that he did not need his own attorney as Poppel was representing him. (Id., ¶ 10.)

Poppel started working at Berman Indictor in 2012 and continued to represent Jazz Realty and the Company.[3] After Poppel left in 2013, he "continued to hold himself out to me as counsel for the Company and Jazz Realty in connection with the foregoing investments." (Id., ¶ 11.)

In 2014, Poppel "would repeat this deception in connection with the Company's largest investment known as the Y15 Project. . . . He gave me ongoing advice regarding the Y15 transaction." (Id., ¶ 12.) Poppel allegedly took the lead role in negotiating the Y15 transaction and Stone signed documents based on assurances that Poppel was working in Jazz Realty's and the Company's best interests. Based on Poppel's advice, Jazz Realty transferred over $2.5

[3] The legal work Poppel allegedly performed for plaintiffs while he worked at Berman Indictor will be addressed below.

million to fund the transaction. Poppel set up a "new subsidiary called Jazz Genesis to act as a guarantor . . . ." (Id., ¶ 15.)

In 2016, Poppel "admitted that he had created a web of special purpose entities, wholly-owned entities by Hutson, to divert the benefits of the Company's investments, including but not limited to the Y15 Project, away from the Company and Jazz Realty." (Id., ¶ 17.) Further, Stone became aware of undocumented loans made by Jazz Realty to fund Hutson's other businesses. These loans were prohibited by the operating agreement and amounted to more than $2.6 million. According to Stone, "Poppel actively assisted Hutson in breaching the Agreement, looting the Company and leaving the Company an empty shell." (Id., ¶ 19.)

Berman Indictor

In its motion to dismiss, Berman Indictor argues that the claim for legal malpractice should be dismissed as time-barred. Poppel started working for Berman Indictor in July 2012 and then left to start his own firm in August 2013. According to Berman Indictor, any legal malpractice claims started to accrue no later than August 2013. As the complaint was filed in July 2017, which is one year after the three-year statute of limitations, the legal malpractice claim must be dismissed as untimely.

Berman Indictor provides an affidavit from Steven Berman (Berman), member of Berman Indictor. (NYSCEF No. 94.) Berman states that he, Penny Indictor and Poppel formed Berman Indictor & Poppel LLP in July 2012 and that each member brought his/her existing clients to the firm. Hutson was one of Poppel's existing clients. In August 2013, Poppel left the firm and took his existing clients with him as well. After Poppel left the firm, the name was changed Berman Indictor LLP. Berman Indictor did not retain any files pertaining to Hutson,

never performed any legal services for Hutson and did not represent any party in the underlying action.

In addition, among other arguments, Berman Indictor states the legal malpractice claim should be dismissed, as plaintiffs have failed to plead the existence of an attorney-client relationship between plaintiffs and Berman Indictor. According to Berman Indictor, the FAC did not allege that Berman Indictor provided any legal representation in connection with the underlying acts which form the basis of the legal malpractice claim. For instance, the Company's operating agreement was drafted in 2011, prior to Poppel joining Berman Indictor. Further, the claims stemming from the structuring of the Y15 Project occurred between 2014 and 2016, which was after Poppel left Berman Indictor.

Plaintiffs' Reply

In response to Berman Indictor's motion, Stone submits an affidavit explaining the circumstances surrounding plaintiffs' attorney-client relationship with Berman Indictor. (Stone Aff. In Opp. [NYSCEF No. 154].) Stone claims that, between July 2012 and August 2013, while Poppel was working for Berman Indictor, Poppel represented plaintiffs, and structured and documented transactions for several transactions. Stone sets forth the details for seven investments, which include the Independence Crossing project, "involving the development of a mixed-use building containing 64 apartment units for veterans and seniors and ground floor commercial space with a projected total developer fee of $812,731 . . ." (Id., ¶ 4.)

Stone states that, without his knowledge or consent, Poppel caused the company to make undocumented loans to Hutson's shell company and then used those funds to pay Berman Indictor's legal fees. He continues, "with full knowledge that their legal fees were being funded

by me, Berman Indictor accepted payment for legal services rendered for the exclusive benefit of Hutson and his shell company without my knowledge." (Id., ¶15.)

Stone submits an email he received from Poppel in January 2013, where Poppel sent him several documents regarding the formation of nonparty Jazz Genesis LLC, asking Stone to sign the documents that same day. In response to this request, Stone emailed:

> "Have you guys sent me 7 documents totaling 150 odd pages that you want me to review and sign within 24 hours? Have I seen these docs previously? Has anyone? Stu, as our attorney on this and looking out for my best interest, can you rep [sic] that I should have NO concerns with any of these since clearly, there is no time to review them? Don't I need to get another attorney involved? Karim, couldn't these have been sent to me last week? (or last month?) This is just what I told you about my concern of the logistics getting sloppy. I am frustrated and disappointed."

(Plaintiffs' exhibit 4 at 1 [NYSCEF No. 126].)

Poppel then emailed the following, in relevant part, "[t]he organizational docs I sent to you before, along with the equity docs. I can walk you through them, if you want . . . ." (Id.)

With regards to the statute of limitations argument made by Berman Indictor, plaintiffs argue that here, even though Poppel left Berman Indictor in August 2013, the continuous representation doctrine tolls the statute of limitations. Stone maintains that, after Poppel left Berman Indictor, Poppel continued to advise him on the prior transactions until 2016. He continues that, at no time did Berman Indictor ever advise him that it was terminating its relationship with plaintiffs, nor did it ever disclose to Stone that it was representing Hutson.

Williams

Williams argues that, as there was no written retainer agreement, plaintiffs failed to plead the existence of an attorney-client relationship with Williams. Williams further argues that an attorney representing a corporate entity such as Genesis does not represent its members, such as the affiliate Jazz Genesis. In addition, Williams claims that where, like here, there had been a

voluntary settlement of the underlying action, a legal malpractice claim is only viable if the plaintiff alleges defendants' malpractice caused plaintiff to enter into a disadvantageous settlement. Williams continues that the underlying action constituted a business dispute between plaintiffs and their business partners, where plaintiffs sought the same damages as the current action. Plaintiffs voluntarily settled for a share in the economic benefits, among other things. As a result, plaintiffs cannot establish actual and ascertainable damages as they would have to speculate that they may have been able to recover a more favorable result in the settlement.

In his affidavit, Stone explains the circumstances surrounding the attorney-client relationship between Williams and the other parties. (Stone Aff. In Opp. [NYSCEF No. 187].) According to Stone, he and Hutson interviewed Williams and advised him that they "had decided to retain him as counsel for the Company and as counsel for both of us (Jazz Realty and Genesis Member) to explore making acquisitions of church-owned properties that fit our investment profile." (Id., ¶ 7.) As early as November 2011, Williams started exploring investment opportunities on their behalf.

Stone states that Williams acted as external counsel for plaintiffs in negotiating the Y15 project and that he worked with Poppel, who was the regular transactional lawyer. According to Stone, Williams "specifically asked for my authority to take certain negotiating positions and for authority to commence litigation against the seller when those negotiations broke down." (Id., ¶ 12.) Stone attaches emails that he, Hutson and others received from Williams providing legal advice to the Company in terms of negotiating a sales agreement in the Y15 Project. For example, an email dated April 21, 2015 states the following:

> "If the delay is the result of the failure of the Court to act I suggest that the position is that the legal obligation for good faith and fair dealing MANDATES a further extension for a reasonable time. We argue that any of the options below (or similar ones) constitute

> actionable bad faith by ADC so that Genesis is justified to and will seek immediate judicial intervention.
> I request authorization to start preparing for that possibility if we don't hear anything by the end of business on Thursday."

(Plaintiffs' exhibit 16 at 1 [NYSCEF No. 204].)

Similar to what he alleged against Poppel, Stone states that he "agreed to fund the transaction by a $251,813 cash transfer on June 8, 2015, and a further $2,500,000 transfer to satisfy the guaranty liquidity requirement on June 19, 2015." (Stone Aff, ¶ 16.) Williams allegedly advised Stone to finance the Y15 Project and did not disclose to him that "he and Poppel had surreptitiously structured the transaction to divert all economic benefits away from me . . . . Had I known this, I would not have funded the transaction." (Id., ¶ 15.) Stone claims that, after the closing, he learned that Williams and Poppel had structured the transactions so that Hutson and his entities, and not the Company, would receive all of the economic benefits of the Y15 Project. Plaintiffs were unaware that its interests were not protected in the transactions, in breach of the agreement. Stone claims that "Williams knowingly concealed this material information from me to induce me to finance the transaction, with the expectation that I would not discover this fraud until after the transaction closed." (Id., ¶ 17.)

When confronted, Williams allegedly acknowledged that "the economic benefits of the Y15 Project had been secretly diverted exclusively to Hutson . . . ." (Id., ¶ 18.) Stone states that "[i]n early 2016, I learned that Hutson had structured the Y15 transaction, with Williams [sic] knowledge and active assistance, to divert all economic benefits to Hutson and his wholly-owned companies, in breach of the Agreement." (Id.) According to plaintiffs, as alleged in connection with Poppel, "[b]ut for Williams' knowing participation in his undisclosed scheme, Hutson would not have breached the Agreement. But for Williams' constant assurances to me, I would have retained separate counsel to protect my interests in the Y15 Project . . ." (Id.) Further, after

plaintiffs commenced the Hutson action, Williams appeared on behalf of Hutson without seeking the consent of the Company.

Breach of Fiduciary Duty

The second cause of action, breach of fiduciary duty, alleges that defendants, as counsel to the Company, "owed the highest duties of undivided loyalty good faith and fair dealing to the Company and its members" and that they breached these fiduciary duties by advancing the interests of Hutson and other parties over the interests of the Company and its members. (FAC, ¶ 72.) According to plaintiffs, defendants structured the investments to the detriment of the Company. Defendants represented Hutson and the Hutson affiliates in litigation and arbitration adverse to plaintiffs and failed to obtain a waiver for their conflict of interest. As a result of defendants' breach of fiduciary duty, among other things, plaintiffs were induced to transfer millions of dollars to fund projects without receiving any benefit and were exposed to liability on the Y15 Project. The requested damages are the same as in the cause of action for legal malpractice.

Defendants' Motions

Poppel and Williams argue that the claim for breach of fiduciary duty must be dismissed as duplicative of the claim for legal malpractice, as it arises out of the same set of facts and seeks the same damages.

Among other arguments, Berman Indictor asserts that, as claims for breach of fiduciary duty are subject to a three-year statute of limitations, plaintiffs' claim should be dismissed as time barred.

Plaintiffs' Opposition

Plaintiffs assert that the claim for breach of fiduciary duty is not duplicative of the claim for legal malpractice, as the FAC adequately alleges the existence of a fiduciary relationship, a breach of the fiduciary duties and ascertainable damages. With respect to Berman Indictor, plaintiffs mention that this claim is tolled due to Poppel's continuous representation of plaintiffs until he was terminated in 2016.

Fraudulent Concealment, Fraudulent Misrepresentation and Negligent Misrepresentation

The third cause of action for fraudulent concealment alleges that defendants owed plaintiffs "a duty to disclose the material facts concerning the Company, the Projects and the use of funds," and "a duty to disclose the material fact, that they were advancing the interests of Hutson and the Hutson affiliates over the interest of the Company and its members." (FAC, ¶ ¶78, 79.) However, defendants purportedly concealed these material facts to plaintiffs' detriment. (Id., ¶ 80.) The FAC continues that "Jazz Realty and Jazz Genesis acted in justifiable reliance on Defendants' concealment." (Id., ¶ 81.)

In the fourth cause of action, plaintiffs claim that defendants engaged in fraudulent misrepresentation by making misrepresentations of material facts, with knowledge of the falsity of those misrepresentations. Some of these misrepresentations include advising plaintiffs that the Company would receive the revenues of the Y15 Project and that Jazz Realty and Jazz Genesis's interests were protected. Defendants allegedly made these misrepresentations with the intent that plaintiffs would, among other things, approve the Projects, advance funds to support the Projects and cause Jazz Genesis to guarantee the Y15 Project, and that Jazz Genesis and Jazz Realty justifiably relied on those misrepresentations.

Negligent misrepresentation, the fifth cause of action, alleges that "[d]efendants acted with negligence and/or gross negligence in making the misrepresentations of material fact to Jazz Realty and Jazz Genesis identified above." (Id., ¶ 87.)

The third, fourth and fifth causes of action allege that, as a result of defendants' actions, plaintiffs were damaged "in an amount of not less than $45 million, plus interest thereon, and expenses, legal fees and related costs in excess of $3.332 million." (Id., ¶ 90.)

Defendants' Motions

Defendants argue that causes of action three through five should be dismissed as duplicative of the legal malpractice claim as they arise out of the same facts as the legal malpractice claim and do not seek additional damages distinct from that claim. In addition, Berman Indictor and Williams assert that plaintiffs failed to plead the fraud claims with sufficient detail as required by CPLR 3016 (b).

Plaintiffs' Opposition

In response, plaintiffs argue that, at this stage, prior to determining whether the legal malpractice claim is viable, the remaining claims should not be dismissed as duplicative because plaintiffs would then be left with no remedy. Further, they contend that, the FAC, as amplified by the Stone affidavit, details Poppel and Williams's undisclosed collusion with Hutson, the manager of the Company, "to loot the Company and defraud Jazz Realty." (Plaintiff's memo of law at 23, [NYSCEF No. 186].)

Unjust Enrichment

In the sixth cause of action, plaintiffs claim that defendants were unjustly enriched when they received legal fees in connection with the subject transactions. Jazz Realty did not "consent to funding Defendants' legal fees incurred in connection with advancing the interest of Hutson . .

. over the interest of Plaintiffs." (FAC, ¶ 95.) According to plaintiffs, defendants understood that any legal fees paid by the Company would be paid as compensation for work done to benefit the Company, not to advance adverse interests. Defendants did not attempt to seek a waiver for their conflicts. Plaintiffs state that their damages are "measured by the full value of all fees and other benefits paid to Defendants by Hutson, Genesis Member, the Genesis Companies LLC, and/or the other Hutson Affiliates." (Id., ¶ 98.)

Defendants' Motions

Defendants argue that the claim for unjust enrichment should be dismissed as duplicative of the one for legal malpractice. Specifically, Berman Indictor alleges that, looking at the essence of the claims, "[p]laintiffs' legal malpractice claim is premised on Berman Indictor's alleged advancement of Hutson's interests over Plaintiffs' interests in connection with the Underlying Projects," and that the "unjust enrichment claim is based on these very same factual allegations." (Berman Indictor's memo of law at 21, [NYSCEF No. 82].)

Plaintiffs' Opposition

Plaintiffs do not directly address the claim for unjust enrichment on reply, but reiterate, in relevant part, that any remaining claims are not duplicative of the one for legal malpractice and that defendants accepted legal fees paid by Jazz Realty for legal services that were rendered for Hutson's benefit.

Tortious Interference with Contract

The seventh cause of action alleges that defendants "intentionally procured" Hutson's breach of the Company's agreement. Plaintiffs seek the same amount of damages as in the other causes of action.

Defendants' Motions

Defendants argue that this claim should be dismissed as duplicative of the one for legal malpractice. Berman Indictor also argues that the claim should be dismissed as plaintiffs failed to plead any supporting factual allegations that defendants intentionally procured Hutson's breach. Williams adds that plaintiffs fail to state a claim because, among other reasons, "[p]laintiffs do not allege that Hutson would not have breached the 'contract' 'but for' defendants' conduct." (Williams's memo of law at 21, NYSCEF No. 97].)

Plaintiffs' Opposition

Plaintiffs argue that defendants were aware of the Company's operating agreement, induced Hutson to breach the Agreement and that but for defendants' knowing participation in the "undisclosed scheme, Hutson would not have breached the Agreement." (Plaintiff's memo of law at 14.)

Judiciary Law § 487

In this cause of action, plaintiffs allege that, "[i]n derogation of [the injunction entered by this court on February 6, 2017], Hutson, with Defendants' assistance, continued to expend Project related monies on operations of the Hutson Affiliates, which were unnecessary to completing the approved projects – without Plaintiffs' consent – and to conceal the full extent of that diversion from Plaintiffs." (FAC, ¶ 109.) Defendants allegedly assisted and colluded with Hutson, with actual knowledge of the injunction and with an intent to deceive plaintiffs. According to the FAC, "at least $4.686 million in developer fees and construction revenue has been generated from the subject Projects from and after entry of the Injunction." (Id., ¶ 114.) However, a "substantial" amount of that money has been improperly expended on Hutson's operations, thereby damaging plaintiffs. (Id., ¶ 115.) Plaintiffs are seeking to recover "the total

amount of Diverted Funds, to be determined at trial, plus interest, costs and attorneys' fees, and that total trebled." (Id., ¶ 116.)

Poppel's Motion

Poppel concedes that he was one of the several transactional attorneys working on the projects.[4] However, as he did not represent a party in the Hutson Action, plaintiffs cannot assert a claim against him for a violation of Judiciary Law § 487. Poppel further argues that, in any event, if plaintiffs believed that Poppel engaged in deceit in the Hutson Action, plaintiffs were required to raise the Judiciary Law § 487 claim in that action.

In response, plaintiffs state that Poppel actively engaged in deceit during the pendency of the Hutson Action. Poppel represented Hutson in the litigation and the arbitration, without a waiver from plaintiffs, until Poppel resigned in July 2017. Plaintiffs allege that after the injunction was granted in February 2017, Poppel continued to assist Hutson in diverting millions of dollars away from the Company, even though it was prohibited by the injunction and that he also "refused to disclose the full scope of those transfers despite Jazz Realty's repeated requests." (Stone Aff. In. Opp. ¶ 21.) Plaintiffs further allege that Poppel "refused to turn over documents relating to the transactions in which he represented the Company, Jazz Realty and Jazz Genesis on the purported grounds of attorney/client privilege, thereby attempting to thwart their efforts to protect their interests and keep Hutson from further looting the Company." (Id.)

Berman Indictor

[4] During oral argument, counsel for Poppel stated that, although Poppel did not raise the issue in his motion to dismiss, Poppel believes that "there was no attorney-client relationship between [Poppel] and all of the plaintiffs." (Tr of oral argument held 6/27/2019 at 7, [NYSCEF No. 239].)

Berman Indictor argues that, as it was undisputedly not counsel for any party in the Hutson Action, the Judiciary Law § 487 claim is not viable and must be dismissed as against it.

Plaintiffs do not address this argument in their opposition papers.

Williams

Williams argues that the FAC's allegations related to the misconduct underlying the Judiciary Law § 487 claim lack particularity and should be dismissed. In addition, Williams maintains that he did not engage in deceitful conduct while representing his client's position in court.

In connection with the Hutson action, the transcript of the hearing dated February 6, 2017 indicates that this court granted an injunction, among other things, restraining those defendants "from transferring and/or disposing of any income or other profits or gains or monies of any kind received from any Genesis REOC projects 22 listed in Schedule A . . . ." (Plaintiffs' exhibit 27 at 8, [NYSCEF No. 215].)

The documentary evidence indicates that, after the court issued this injunction, plaintiffs wrote a letter to the court, seeking to discuss a motion to hold defendants in contempt for failing to abide by the terms of the injunction. In response, Williams wrote a letter to the court stating that his clients have not violated the injunction and that they only are expending funds necessary to satisfy the contractual obligations they have in order to keep the properties running. Communication ensued between the parties as to the scope of the injunction and what expenditures were deemed necessary. Now among other claims, plaintiffs allege that these statements made by Williams were disingenuous and that Williams "knew but did not disclose to the Court that none of the monies in question were needed to finish any of the approved projects . . ." (Stone Aff. In Opp., ¶20.)

Furthermore, in June 2017, based on Williams's assurances that defendants would comply with the terms of the injunction, plaintiffs did not pursue a motion for contempt but entered into an escrow agreement for all "incoming fees and revenues generated by the investments." (Id., ¶ 21.) Nonetheless, no fees were deposited, as Hutson, with the help of Williams, continued to divert the fees to Hutson's companies. Stone states that he understands "those funds were used to pay Hutson's salary, legal fees, and other expenses unrelated to completing the subject projects." (Id.) Stone concludes that Williams made misrepresentations to the Court and plaintiffs regarding this diversion of revenues.

DISCUSSION

I. Dismissal

"[O]n a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, facts as alleged in the complaint are accepted as true, plaintiffs are afforded the benefit of every possible favorable inference, and the motion court must only determine whether the facts as alleged fit within any cognizable legal theory." (D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa., 168 AD3d 505, 506 [1st Dept 2019].) The Court may "consider affidavits submitted by plaintiffs to remedy any defects in the complaint, because the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one (internal quotation marks and citations omitted)." (Rushaid v Pictet & Cie, 28 NY3d 316, 327 [2016].) However, "bare legal conclusions and factual assertions that are flatly contradicted by the documentary evidence" are not deemed to be true (Dragon Head LLC v. Elkman, 102 A.D.3d 552, 552, 1st Dept 2013].) Under CPLR 3211 (a) (1), dismissal is appropriate "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d 83, 88 [1994].) "On a

motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on the ground that the complaint is barred by the applicable statute of limitations, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." (Barry v Cadman Towers, Inc., 136 AD3d 951, 952 [2d Dept 2016].)

II. Legal Malpractice

Legal malpractice claims are subject to a three-year statute of limitations. (CPLR 214 [6].) The continuous representation doctrine is applied to "toll the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed (internal quotation marks and citation omitted)." (Shumsky v Eisenstein, 96 NY2d 164, 167-168 [2001].) However, application of the doctrine is "limited to the course of representation concerning a specific legal matter . . . [T]he doctrine is not applicable to a client's . . . continuing general relationship with a lawyer . . . involving only routine contact for miscellaneous legal representation . . . , unrelated to the matter upon which the allegations of malpractice are predicated." (Id. at 168.)

Berman Indictor

Berman Indictor moves to dismiss this cause of action as untimely. It argues that any potential malpractice claim against Berman Indictor must be linked to actions taken by Poppel while he worked there. Poppel only worked with Berman Indictor between July 2012 and August 2013, severing the attorney-client relationship between plaintiffs and Berman Indictor at that time. As the action was not commenced until 2017, Berman Indictor argues that the claim for legal malpractice should be dismissed as untimely.

According to plaintiffs, the continuous representation doctrine tolls the malpractice claims that accrued during the time Poppel worked with Berman Indictor. As set forth in the

facts, in brief, during the time he worked for Berman Indictor, Poppel provided advice to plaintiffs regarding seven investments, helped plaintiffs create the entity Jazz Genesis to guaranty those investments and assured plaintiffs that he was looking out for Jazz Realty's best interests. Plaintiffs further allege that Poppel continued to represent Jazz Realty and the Company in connection with those transactions.

The FAC indicates that the majority of the legal malpractice claims stem from the legal advice received in connection with the Y15 Project, leading to Jazz Realty's subsequent advancement of over $2.5 million. Poppel was no longer at Berman Indictor at this time. Plaintiffs have not sufficiently alleged that there was a "mutual understanding" that Berman Indictor, through Poppel, would continue to represent plaintiffs in these new matters. (See e.g. Davis v Cohen & Gresser, LLP, 160 AD3d 484, 486 [1st Dept 2018]) ("lack of a mutual understanding that defendant would continue to represent the estate in the Devine action, even if there was a continuation of a general professional relationship.")

Nevertheless, plaintiffs argue that the seven investments were not discrete transactions but concern a specific legal matter, i.e. "part of the Genesis REOC deal," and that Poppel continued to work on them after he left Berman Indictor. (Tr of oral argument at 33.)

The court finds that plaintiffs have not sufficiently alleged that the work done with respect to the other unrelated investments is related to the specific legal matter underlying the malpractice claims. To begin, the documentary evidence provided does not support such an expansive interpretation that all legal representation given to plaintiffs throughout the years could be considered part of the same transaction. (See e.g. Davis, 160 AD3d at 486) ("fact that defendant represented the estate in related matters is not sufficient to establish continuous representation, as these matters were sufficiently distinct as to not be part of a continuing,

interconnected representation [internal quotation marks and citation omitted].") The record establishes that these other investments were discrete transactions that were performed by Poppel while he was at Berman Indictor. As noted above, nonparty Jazz Genesis LLC, not plaintiff Jazz Genesis II, LLC, was formed as the entity to guaranty the other investments. Further, Jazz Genesis LLC was not a party in the Hutson Action.

Further, even assuming that Poppel continued to provide advice regarding the seven investments that he worked on while at Berman Indictor, "the continuous representation does not apply where there is only a vague ongoing representation (internal quotation marks and citation omitted)." (Id.) Berman Indictor's continued relationship with plaintiffs, through Poppel, was no more than a "continuing general relationship with a lawyer . . . involving only routine contact for miscellaneous legal representation . . . , unrelated to the matter upon which the allegations of malpractice are predicated." (Shumsky, 96 NY2d at 168.)

Accordingly, the continuing representation doctrine does not toll plaintiffs' legal malpractice claim alleged against Berman Indictor and it is dismissed.

Poppel and Williams

A claim for legal malpractice may not be maintained in the absence of an attorney-client relationship. (Cusack v Greenberg Traurig, LLP, 109 AD3d 747, 747 [1st Dept 2013].) At the outset, Williams argues that plaintiffs fail to plead the existence of an attorney-client relationship between him and the Company as there was no written retainer agreement. It is well settled that "an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon a payment of a fee, [and a] court must look to the words and actions of the parties to ascertain the existence of such a relationship." (Id. at 911.) However, "a party cannot create the relationship based on his or her own beliefs or actions." (Pellegrino v Oppenheimer & Co., Inc.,

49 AD3d 94, 99 [1st Dept 2008].) Here, as shown above, documentary evidence, including emails from Williams to Stone, Hutson and others regarding the Y15 Project indicate that Williams was acting as counsel to the Company.

Williams further argues that, as an attorney representing a corporate entity does not represent its members, even if he represented the Company, there is no basis to conclude that he represented its members. In *Cobble Creek Consulting, Inc. v Sichenzia Ross Friedman Ference LLP* (2012 NY Slip Op 31677 [U], *7 [NY Sup Ct, 2012]), affd 110 AD3d 550 (1st Dept 2013), the court held, in relevant part:

> "As defendant correctly points out, a corporation's attorney ordinarily represents the corporate entity, not its shareholders or employees. Here, however, the complaint, as amplified by the Rubin affidavit, pleads an attorney-client relationship based not on plaintiffs' subjective belief or their status as shareholders of the corporation, but on the allegation that defendant affirmatively advised Plaintiffs that Defendant was also representing them . . . . (internal quotation marks and citations omitted)."

(Id.)

Similarly, for purposes of this motion, the documentary evidence submitted, as amplified by the Stone affidavit, pleads an attorney-client relationship between Williams and the Company, Jazz Realty and Genesis Member. Stone explains that he and Hutson agreed that Williams would represent the Company, in addition to its two members. Williams was interviewed, advised of this representation, and retained.

In order to establish a cause of action to recover damages for legal malpractice, a plaintiff must prove three elements: "(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages (internal quotation marks and citations omitted)." (Ulico Casualty Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1, 10 [1st Dept 2008].); (see also Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 [2007]) ("a plaintiff must demonstrate that the attorney failed to exercise the

ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages (internal quotation marks and citation omitted.") Proximate cause is shown if the plaintiff can establish "that 'but for' the attorney's negligence, the plaintiff would have prevailed in the matter in question." (Tydings v Greenfield, Stein & Senior, LLP, 43 AD3d 680, 682 [1st Dept 2007], affd 11 NY3d 195 [2008].)

The court finds that plaintiffs have sufficiently pled that Poppel and Williams were negligent and that their negligence was the proximate cause of plaintiffs' losses. Through the FAC as amplified in Stone's affidavits, plaintiffs allege that defendants were negligent in their legal representation by, among other things, structuring the Company's investments in a way contrary to the terms of the Company's operating agreement. This investment structure purportedly advanced one of the member's interests over plaintiffs' so that the revenues were flowing directly to Genesis Member, instead of to the Company and to Jazz Realty, the other members. Plaintiffs further claim that they were unaware of the investment structure. For example, part of the undisclosed scheme included making undocumented loans so that Hutson's member company could use them to invest in the projects. Defendants purportedly advised plaintiffs that their economic stake in the investments were protected. Based on these representations, plaintiffs funded the investment projects and subjected themselves to liability in connection with the guaranty agreements.

Defendants were retained to provide accurate information and advice for the investment projects. However, plaintiffs alleged that they were ultimately damaged by defendants' actions in that they did not earn the revenues that they were entitled to. Thus, plaintiffs have established,

"that but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages." Pellegrino v File, 291 AD2d 60, 63 [1st Dept 2002].)[5]

i. Damages

Damages in a legal malpractice action are "designed to make the injured client whole" and include "litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct (internal quotation marks and citations omitted)." (Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d at 443.) "[C]onclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action. . . . Although we have also noted that actual damages need not be precisely quantified in the pleadings, at the least, actual damages must be reasonably inferred from the pleadings." (InKine Pharm. Co. v Coleman, 305 AD2d 151, 154 [1st Dept 2003].)

For purposes of the motion to dismiss, plaintiffs have sufficiently alleged damages to support a legal malpractice claim. Irrespective of the Hutson Action, which will be addressed below, plaintiffs are seeking legal fees and expenses incurred in commencing this action. If these legal fees and expenses resulted from defendants' negligence or departure from the ordinary standards of professional conduct, they would be recoverable. These damages alone,

[5] In a legal malpractice claim alleging a conflict of interest in violation of the Code of Professional Responsibility, in relevant part, "liability can follow where the client can show that he … suffered actual damage as a result of the conflict (internal quotation marks and citation omitted)." (Kaminsky v Herrick, Feinstein LLP, 59 AD3d 1, 13 [2008].) Regarding a conflict of interest, plaintiffs state that, but for defendants' assurances that they were protecting plaintiffs' interests, plaintiffs would have retained separate counsel to protect their interests from this undisclosed scheme and would not have been damaged. While the court finds that plaintiffs have sufficiently alleged that they have incurred damages as a result of defendants' conflicts of interest, the assertion that they would not have incurred damages if they retained alternative counsel, is speculative. (See eg. Cobble Creek Consulting, Inc. v Sichenzia Ross Friedman Ference LLP, 110 AD3d at 551) ("Plaintiffs further alleged, without elaborating, that defendant failed to advise them to seek independent counsel at any time. Plaintiffs failed to allege how this omission proximately caused their injuries. Any claim that independent counsel could have . . . insulated plaintiffs from incurring any losses upon a conversion, is speculative.")

are differentiated from those sought in the Hutson Action, as defendants were not parties to that action.

ii. The Settlement Agreement

As noted above, plaintiffs settled in the Hutson Action. During oral argument the court asked plaintiffs, "[w]hat is your best case law for that proposition, that if the party is not made whole, the settlement agreement is not a bar to the malpractice claim?" (See tr at 34.) However, the only case law presented by plaintiffs, or any party, in the context of a settlement agreement and a claim for legal malpractice pertained to when the lawyers provided counsel to plaintiff in negotiating a settlement agreement. (See e.g. Bernstein v Oppenheim & Co., P.C., 160 AD2d 428, 430 [1st Dept 1990]) ("A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel.") However, in this situation, the court finds these decisions inapplicable, as defendants were not plaintiffs' counsel in the Hutson Action.

Further, plaintiffs' arguments that they have made "carve outs" in the settlement agreement in order to bring claims against counsel is misplaced, as defendants were not parties to the settlement agreement. (See tr or oral argument at 33.) In addition, plaintiffs' declarations in the settlement agreement that they are accepting less than 100% of their damages or their assertions during oral argument that Hutson is not performing his obligation under the agreement, are irrelevant. (See also plaintiffs' memo of law at 19 noting that Hutson has refused to make any payments.) Plaintiffs voluntarily chose to settle in the Hutson action.

Plaintiffs brought the Hutson Action to recover for many of the same damages as alleged in the present action. Plaintiffs argue that their damages are not speculative and can be calculated after full disclosure of the books and records. As it stands, the court agrees with

defendants that part of plaintiffs' requested damages, as they relate to the settlement agreement, are speculative. Plaintiffs have not provided the specific amount of money that they expect to receive under the terms of the settlement agreement as written and it is unclear from the settlement agreement what damages remain.[6]

As noted, "[t]he object of compensatory damages is to make the injured client whole." (Campagnolla v Mulholland, 76 NY2d 38, 42 [1990].) In addition to the legal expenses above, the loss sustained by plaintiffs as a result of defendants' negligence is alleged to be, in pertinent part, the improperly diverted revenues and unauthorized taking of capital that was also sought as damages in the Hutson Action. Thus, if ultimately successful in this action, plaintiffs' recoverable damages would be limited to the amount of remaining damages not accounted for in the settlement agreement. "To hold otherwise would go beyond the usual purpose of tort law to compensate for loss sustained and would give the client a windfall opportunity. . . . (internal quotation marks and citation omitted)." (McKenna v Forsyth & Forsyth, 280 AD2d 79, 83 [4th Dept 2001].)

III. Breach of Fiduciary Duty

"The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's (internal quotation marks and citations omitted)." (Johnson v Proskauer Rose LLP, 129 AD3d 59, 72 [1st Dept 2015].) To recover against an attorney for breach of a fiduciary duty, a client is required to prove a "breach

[6] For example, the settlement was structured so that the economic benefits would first affect Jazz Realty's adjusted capital. However, the settlement agreement also provides that the parties agree that Jazz Realty's claims for adjusted capital, fees and expenses shall remain outstanding.

of a duty owed to it and damages sustained as a result (internal citations omitted)." (Ulico Casualty Co., 56 AD3d at 10.) "[A] client must establish actual and ascertainable damages that would not have occurred but for the attorney's conduct (internal quotation marks and citations omitted)." (Country Club Partners, LLC v Goldman, 79 AD3d 1389, 1391 [3d Dept 2010].)

In general, a three-year limitations period applies to a cause of action alleging a breach of fiduciary duty. (CPLR 214) (see also Yatter v William Morris Agency, Inc., 256 AD2d 260, 261 [1st Dept 1998]) ("Because plaintiff's breach of fiduciary duty claim seeks only money damages, the applicable limitations period is three years.") Plaintiffs allege that Berman Indictor's fiduciary duty to them arose out of the attorney-client relationship. Courts have held that the "fiduciary relationship end[s] when the[] attorney-client relationship ends[]." (Access Point Med., LLC v Mandell, 106 AD3d 40, 45 [1st Dept 2013].) As Poppel left Berman Indictor in August 2013, the breach of fiduciary claim against Berman Indictor is dismissed as time-barred.

Although the allegations in the FAC are similar for breach of fiduciary duty and legal malpractice, the claims as against Poppel and Williams are not duplicative. Both claims are premised on defendants' role, while acting as counsel, in structuring the investments to the detriment of the Company. However, the breach of fiduciary claim is also based on at least one conflict of interest and also on defendants' actions that arose after plaintiffs commenced the Hutson Action. (Country Club Partners, LLC, 79 AD3d at 1391) ("contrary to defendants' contention, since plaintiff's breach of fiduciary duty claim relates, in part, to Goldman's allegedly improper actions occurring after SGMS's representation of plaintiff ceased, and plaintiff's malpractice claim relates, in part, to defendants' allegedly improper actions occurring during SGMS's representation of plaintiff, the two claims are not duplicative.") (see also Kurman v Schnapp, 73 AD3d 435, 435 [1st Dept 2010]) ("[p]laintiff's breach of fiduciary duty cause of

action is not duplicative of his legal malpractice cause of action, since it is premised on separate facts that support a different theory.")

As set forth in the FAC and supplemented by the Stone affidavits, plaintiffs allege that Poppel and Williams represented Hutson in litigation and an arbitration adverse to the Company. During the course of the litigation, Poppel and Williams, among other things, allegedly refused to turn over documents and continued to assist Hutson in diverting the Company's revenues against the interest of the Company.

Nonetheless, as set forth below, addressing the merits, as plaintiffs failed to plead any ascertainable or actual damages as a result of defendants' actions during the course of the litigation, the breach of fiduciary claims must be dismissed as against Poppel and Williams. As noted above, the FAC lists the same amount of damages as under the legal malpractice cause of action. Further, although plaintiffs assert that Williams and Poppel continued to divert millions of dollars away from the Company during the course of litigation, their allegations regarding damages are conclusory. (See e.g. Country Club Partners, LLC, 79 AD3d at 1391-1392) (Although breach of fiduciary claim was not duplicative of the legal malpractice claim, the court granted summary judgment and dismissed the claim as "plaintiff failed to raise a question of fact that defendants' breach proximately caused it any ascertainable damages.")

Accordingly, all defendants are granted dismissal of the second cause of action alleging breach of fiduciary duty.[7]

IV. Fraudulent Concealment and Fraudulent Misrepresentation

[7] Plaintiffs argue that it would be premature to dismiss the additional causes of action prior to determining the viability of the legal malpractice cause of action because then plaintiffs may be left with no remedy. However, the cases cited by plaintiffs do not propose that conclusion. For example, in Palmeri v Wilkie Farr & Gallagher LLP (156 AD3d 564, 567 [1st Dept 2017]), although the legal malpractice cause of action was dismissed as time barred, the breach of fiduciary duty cause of action was tolled as a result of defendants' continuing wrongs. However, that claim remained because the Court found that plaintiffs raised a triable issue of fact in response to defendants' motion for summary judgment, not because plaintiffs would otherwise have no remedy.

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury." (Kaufman v Cohen, 307 AD2d 113, 119 [1st Dept 2003].) Claims for fraudulent concealment are based on "acts of concealment," rather than "affirmative representations . . . where the defendant had a duty to disclose material information. (Id. at 119-120.)

In addition, pursuant to the pleading requirements set forth in CPLR 3016 (b), "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." Here, many of the allegations provided in support of the fraud claims fail to satisfy the pleading requirements. As provided in the Stone affidavits, Poppel and Williams are alleged to have made many of the same exact misrepresentations to plaintiffs.[8] (See e.g. INTL FCStone Mkts., LLC v Corrib Oil Co. Ltd., 172 AD3d 492, 493 [1st Dept 2019]) ("The allegations supporting the fraud claims also lack particularity, as, with minimal exceptions, they fail to identify who made the misrepresentations, when the misrepresentations were made, and the substance of the misrepresentations.")

Even assuming arguendo, that plaintiffs pleaded the fraud claims with sufficient specificity to survive this motion to dismiss, as set forth below, the claims would still be dismissed. As discussed above, in relevant part, in the causes of action grounded in fraud, similar to the claim for legal malpractice, plaintiffs describe defendants' active role as counsel in structuring the Y15 Project, among other projects. Plaintiffs allege that defendants' knowingly

[8] "Poppel urged me to make that cash infusion and fund that guarantee, assuring me that Jazz Realty's economic stake in the Y15 project would be fully protected." (Stone Aff. In Opp., ¶ 14.) Compare "Williams urged me to make that cash infusion and fund that guarantee, assuring me that Jazz Realty's 50% economic stake in the Y15 Project would be fully protected." (Stone Aff. In Opp., ¶ 16.)

made misrepresentations of material facts regarding these investments and that Jazz Realty and Jazz Genesis justifiably relied on those misrepresentations in approving the Projects and operating budgets, advancing funds to the support the Projects, and guaranteeing the Y15 Project, among other things. Plaintiffs do not specifically address the fraud causes of action in their memorandum of law, as they refer the court to the Stone affidavits. They state that the fraud claims are "based on extensive allegations that Poppel and Williams engaged in undisclosed collusion with Hutson to loot the Company and defraud Jazz Realty." (Plaintiffs' memo of law at 13.)

A claim for fraud is dismissed as duplicative of a legal malpractice claim when it is "not based on an allegation of independent, intentionally tortious conduct and fail[s] to allege separate and distinct damages (internal quotation marks and citations omitted)." (Carl v Cohen, 55 AD3d 478, 478-479 [1st Dept 2008]). Plaintiffs seek the same exact amount of damages, word for word, in the legal malpractice, fraudulent concealment and fraudulent misrepresentation causes of action. Accordingly, even if plaintiffs are able to set forth "independent, intentionally tortious conduct," plaintiffs have not sufficiently alleged that they incurred "separate and distinct damages" as a result of relying on defendants' misrepresentations. (Id. at 478-479.) (See e.g. White of Lake George v Bell, 251 AD2d 777, 778 [3d Dept 1998]) ("Inasmuch as plaintiffs have not shown that their reliance upon these alleged misrepresentations subjected them to any damages beyond those resulting from the purported malpractice alone, their fraud claim is not maintainable.") (see also Sitar v Sitar, 50 AD3d 667, 670 [2d Dept 2008]) (Court dismissed the causes of action grounded in fraud and fraudulent misrepresentation "inasmuch as those causes of action arise from the same facts as the cause of action alleging legal malpractice and do not allege distinct damages".)

V. Negligent Misrepresentation

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." (J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 [2007].) In the claim for negligent misrepresentation, plaintiffs allege that defendants acted negligently in making the misrepresentations which, in sum and substance, form the basis of the FAC. Plaintiffs seek the same amount of damages as in the legal malpractice cause of action. As these causes of action allege the same facts and seek the same relief as the legal malpractice cause of action, they must be dismissed as duplicative. (See e.g. Sitar v Sitar, 50 AD3d at 670) (Court dismissed the negligent misrepresentation and other causes of action as duplicative "inasmuch as those causes of action arise from the same facts as the cause of action alleging legal malpractice and do not allege distinct damages.")

VI. Unjust Enrichment

To successfully plead a claim for unjust enrichment, "[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered (internal quotation marks and citations omitted)." (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011].) The Court of Appeals has held that "unjust enrichment is not a catchall cause of action to be used when others fail. . . . An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." (Corsello v Verizon N.Y., Inc.,18 NY3d 777, 790 [2012].)

Plaintiffs allege that defendants were unjustly enriched when they provided legal services to plaintiffs' detriment yet still retained legal fees. Plaintiffs seek disgorgement of payment received in connection with the transactions that are the subject of the FAC. In response to defendants' motion, plaintiffs do not directly address this cause of action. In any event, as set forth below, all defendants are granted dismissal of this cause of action. Although plaintiffs differentiate this claim by referring to the term disgorgement, "[t]hese claims were predicated on the same factual allegations [as the first cause of action alleging] legal malpractice, and the complaint did not allege damages distinct from the damages that were allegedly caused by legal malpractice." (Blanco v Polanco, 116 AD3d 892, 897 (2d Dept 2014]). "[A] negligent attorney is precluded from collecting a fee." (Campagnolla, 76 NY2d at 42.) Thus, if plaintiffs are ultimately successful in their claim for legal malpractice, defendants will have to return legal fees paid and this will become a part of plaintiffs' damages. (See e.g. Mecca v Shang, 258 AD2d 569, 570 [2d Dept 1999]) (Disgorgement of legal fees are recoverable under the legal malpractice claim.)

VII. Tortious Interference

In order to establish a cause of action for tortious interference with a contract, plaintiff must establish: "(1) the existence of a valid contract between [plaintiffs and a third party]; (2) defendants' knowledge of that contract; (3) defendants' intentional procuring of the breach of that contract; and (4) damages. Specifically, a plaintiff must allege that the contract would not have been breached 'but for' the defendant's conduct (internal citation omitted)." (Burrowes v Combs, 25 AD3d 370, 373 [1st Dept 2006].)

This cause of action alleges that "Hutson breached the Agreement, with Defendants' active assistance." FAC, ¶ 103. A claim that is "premised on the same facts and seeking the

identical relief sought in the legal malpractice cause of action, is redundant and should be dismissed." (Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 [1st Dept 2004].) The Appellate Division, First Department has found that the "focus . . . in determining whether claims are duplicative [should be] the essence of the claims." (Johnson,129 AD3d at 70.) Here, the "essence" of both the tortious interference with contract and the legal malpractice claims is that defendants assisted Hutson, the manager of the Company, in breaching the operating agreement and structuring the transactions in a way contrary to the terms of the agreement. In addition, the damages sought in both claims are the same. As a result, all defendants are granted dismissal of the tortious interference with contract claim as it is duplicative of the legal malpractice claim. (See e.g. Weksler v Kane Kessler, P.C., 63 AD3d 529, 531 [1st Dept 2009]) ("Plaintiff's remaining causes of action against the firm, for negligent misrepresentation and tortious interference, are dismissed as redundant of the legal malpractice claim.")

VIII. Violation of Judiciary Law § 487

Judiciary Law § 487 provides for a cause of action alleging attorney misconduct and states, in pertinent part: "an attorney . . . who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . forfeits to the party injured treble damages, to be recovered in a civil action." (See Judiciary Law § 487 [1].) As relevant here, "the alleged deceit forming the basis of such a cause of action, if it is not directed at a court, must occur during the course of a pending judicial proceeding (internal quotation marks and citation omitted)." (Costalas v Amalfitano, 305 AD2d 202, 204 [1st Dept 2003].) Damages may only be recovered when the attorney has shown a "chronic, extreme pattern of legal delinquency (internal quotation marks and citation omitted)." (Schindler v Issler and

Schrage, 262 AD2d 226, 228 [1st Dept 1999].) "Allegations regarding an act of deceit or intent to deceive [under Judiciary Law § 487] must be stated with particularity; the claim will be dismissed if the allegations as to scienter are conclusory and factually insufficient (citations omitted)." (Facebook, Inc. v DLA Piper LLP (US), 134 AD3d 610, 615 [1st Dept 2015].)

In the present case, plaintiffs cannot maintain a Judiciary Law § 487 claim against Berman Indictor because any alleged misconduct did not occur during a pending judicial proceeding. It is undisputed that Berman Indictor was not involved in the 2017 litigation and the alleged misconduct occurred at least four years prior to its commencement. (See e.g. Sun Graphics Corp. v Levy, Davis & Maher, LLP, 94 AD3d 669, 669 [1st Dept 2012]) ("The cause of action alleging a violation of Judiciary Law § 487 fails to state a cause of action, since plaintiffs do not allege that defendants engaged in any deceptive conduct during a pending proceeding in which plaintiffs were parties.")

At the outset, Poppel's argument that plaintiffs should have brought this claim alleging deceit in the Hutson Action, is misplaced. During oral argument, counsel cited to decisions, such as Yalkowsky v Century Apts. Assocs. (215 AD2d 214, 215 [1st Dept 1995]), where, in support of a claim under Judiciary Law § 487, a plaintiff had alleged that his claim for constructive eviction was dismissed as a result of the attorney's false statements to the Court. The Court dismissed the Judiciary Law § 487 claim, holding, in relevant part:

> "Assuming arguendo, plaintiff's allegation that Levine falsely stated to the Civil Court that defendants obtained a Certificate of Occupancy for plaintiff's combined apartment, resulting in the dismissal of his claim for constructive eviction, to be true, plaintiff's remedy lies exclusively in that lawsuit itself, i.e., by moving pursuant to CPLR 5015 to vacate the civil judgment due to its fraudulent procurement, not a second plenary action collaterally attacking the judgment in the original action."

(Id. at 215.)

However, the Appellate Division, First Department has specifically held that where, like here, plaintiffs are not seeking to collaterally attack any prior judgment, a claim for a violation of Judiciary Law § 487 is not required to be "asserted in the same action in which the violation occurred." (Melcher v Greenberg Traurig LLP, 135 AD3d 547, 554 [1st Dept 2016].) Further, the Court emphasized that, a court may not grant a motion for leave to amend a complaint to add a section 487 claim in the action in which the violation occurs, particularly if adding that claim would, as in the instant situation, "require the disqualification of counsel and prejudice [the defendant's] right to be represented by attorneys of its choice (internal quotation marks and citation omitted.") (Id. at 555.)

Nonetheless, as set forth below, the claims are dismissed as against Williams and Poppel as plaintiffs are unable to allege a "chronic, extreme pattern of legal delinquency." (Schindler, 262 AD2d at 228.) Courts have found that "[s]tatements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud [in a claim alleging a violation of Judiciary Law § 487]." (Facebook, Inc. v DLA Piper LLP (US), [134 AD3d at 615].) With respect to Williams, after the court issued the injunction in the Hutson Action, Williams advised the court that his clients were not violating the injunction and that they were only expending money necessary to keep the properties running. Plaintiffs' allegations that Williams was being disingenuous and that Williams "knew but did not disclose to the Court that none of the monies in question were needed to finish any of the approved projects," are conclusory and cannot support a violation of Judiciary Law § 487. (Stone Aff. In Opp., ¶ 20).

For the same reasons, the claim is dismissed as against Poppel. Stone maintains that, after the injunction, Poppel continued to represent Hutson and assist him with diverting money

from the Company. However, Stone's statements that Poppel assisted with these diversions, despite knowing that the transfers were prohibited by the injunction and knowing that they were "directly at odds with representations made to the Court," are speculative. (Stone Aff. In Opp., ¶ 21.)

IX. Punitive Damages

In order to be entitled to punitive damages, a private litigant "must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally (internal quotation marks and citation omitted)." (Macy's Inc. v Martha Stewart Living Omnimedia, Inc., 127 AD3d 48, 57 [1st Dept 2015].) Here, as defendants' conduct was alleged to be part of a private transaction and was not directed at the public generally, plaintiffs' request for punitive damages is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion of Berman Indictor & Poppel LLP and Berman Indictor LLP, individually and as the successor in interest to Berman Indictor & Poppel LLP (motion sequence 004) to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; 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 counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on

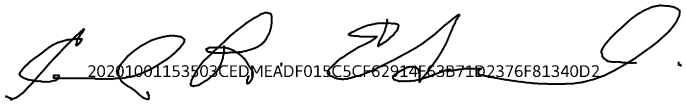
Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the motions of both Stuart D. Poppel, Esq. and Poppel Law LLC (motion sequence number 003) and Charles E. Williams, III, Esq. and Peckar & Abramson PC (motion sequence 005) to dismiss the complaint herein are granted to the extent that all claims except for the legal malpractice claim (first cause of action) are dismissed as against them; and it is further

ORDERED that plaintiffs' remaining claim shall continue; and it is further

ORDERED that defendants are directed to serve an answer to the first amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for Defendants shall serve a copy of this Order along with Notice of Entry on all parties within twenty (20) days of entry.



10/1/2020
DATE

CAROL R. EDMEAD, J.S.C.

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