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Stavroulakis v Pelakanos
2018 NY Slip Op 50180(U)
Decided on February 13, 2018
Supreme Court, New York County
Kornreich, J.
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Decided on February 13, 2018

Supreme Court, New York County

John Stavroulakis, individually and derivatively on behalf of Bareburger, Inc., Plaintiff,

against

Euripides Pelakanos, GEORGIOS RODAS, GEORGIOS DELLIS, EFTYCHIOS PELEKANOS, JOHN SIMEONIDIS, SPIRIDON APOSTOLATOS, BAREBURGER GROUP, LLC, BE MY BURGER, LLC, RE-GRUB, LLC, KMVA HOLDINGS, LLC, APOSTOLATOS, LLC, YURI GAGARIN RETURNS, LLC, NEGROPONTE, LLC, EVP HOLDINGS, LLC, GAMMA, LLC, JOHN DOE INDIVIDUALS 1-5, and JOHN DOE ENTITIES 1-5, Defendants, -and- BAREBURGER, INC., Nominal Defendant.

653478/2015

Sadis & Goldberg LLP, for plaintiff.

O'Donoghue PLLC and Stern & DeRossi LLP, for defendants.

Shirley Werner Kornreich, J.

Plaintiff John Stavroulakis moves, pursuant to CPLR 3212, for partial summary judgment on the third, fourth, fifth, sixth, ninth, eleventh, and twentieth causes of action in his amended complaint (the AC). Defendants Euripides Pelakanos (Euripides), Georgios Rodas (Rodas), Georgios Dellis (Dellis), Eftychios Pelekanos (Jimmy), John Simeonidis (Simeonidis) (collectively, the Shareholder Defendants), Spiridon Apostolatos (Apostolatos) (collectively with the Shareholder Defendants, the Individual Defendants), Bareburger Group, LLC (Bareburger Group), Be My Burger, LLC (Be My Burger), Re-Grub, LLC (Re-Grub), KMVA Holdings, LLC (KMVA), Apostolatos, LLC, Yuri Gagarin Returns, LLC (YGR), Negroponte, LLC [*2](Negroponte), EVP Holdings, LLC (EVP), and Gamma, LLC (Gamma) oppose and cross-move for partial summary judgment on the third, fourth, fifth, sixth, ninth, and twentieth causes of action. Plaintiff opposes the cross-motion. For the reasons that follow, plaintiff's motion is granted in part and denied in part, and defendants' cross-motion is denied.

I. Factual Background & Procedural History

This case concerns plaintiff's interest in the "Bareburger" chain of restaurants. As discussed herein, plaintiff, a United States citizen who now lives in Greece, originally owned 16.66% of the entity that franchised Bareburger — Bareburger, Inc. (the Company), a New York corporation. Plaintiff was a passive investor and did not work for the Company. Unbeknownst to him and without his consent, after plaintiff moved to Greece, the defendants, who collectively owned the rest of the

Company, transferred all of the Company's assets to other entities in which defendants (but not plaintiff) have an interest. They did so for no consideration either to plaintiff or the Company, rendering the Company an empty shell. In this action, plaintiff seeks a determination of his stake in the Company and damages for defendants' conduct. He asserts both direct claims for shareholder oppression and derivative claims on behalf of the Company, *inter alia*, for breach of fiduciary duty.

The material facts are not in dispute.[FN1] Plaintiff, Euripides, Simeonidis, and non-party John Mavroudis owned and operated a bar called Sputnik in Brooklyn. Around 2007, the bar started selling organic burgers that proved to be quite popular. Plaintiff, Euripides, and Simeonidis decided to open an organic burger restaurant, which they named "Bareburger". To finance the restaurant, they sold equity in it to Jimmy, Rodas, and Dellis (collectivity, with plaintiff, Euripides, and Simeonidis, the Founders). In January 2007, the Founders formed a New York corporation, 3321 Astoria, Inc. (3321 Astoria), to own the first Bareburger restaurant. The shares of 3321 Astoria were distributed to reflect each Founder's initial capital investment. Thus, plaintiff, Euripides, and Jimmy owned 15% each; Rodas and Dellis owned 22% each; and Simeonidis owned 11%. In April 2009, the Founders developed the logo (which is still used today) for Bareburger that, as discussed herein, they would eventually trademark. *See* Dkt. 122 (the Trademark).[FN2] In June 2009, the first Bareburger restaurant was opened, as its corporate namesake suggests, at 33-21 31st Avenue in Astoria. Euripides and Simeonidis worked full time for this restaurant and drew salaries. Plaintiff, Rodas, Dellis, and Jimmy did not because they had full-time jobs.[FN3]

The first restaurant was a success, and the Founders decided to franchise Bareburger. To do this, in October 2009, they formed the Company. Each of them invested $6,000 in the Company, and each was granted 16.66% of its stock. While a shareholders' agreement was drafted, it was never executed.[FN4] In November 2009, the Company filed the Trademark with the United States Patent and Trademark Office (the PTO), and it was registered by the PTO in July 2010. Until other events occurred (discussed herein), the Trademark, which obviously is an essential predicate to franchising Bareburger restaurants that use its logo, was owned by the Company (i.e., not any of the Founders or the entities that owned the restaurants).

The Founders also opened a second restaurant located at 535 LaGuardia Place in Manhattan. In December 2009, they formed another New York corporation, Bare Burger DIO, Inc. (DIO), to operate this new restaurant. Again, each Founder, along with four additional individuals, received shares in DIO proportional to the amounts each invested. Dellis, Rodas, Euripides, Jimmy, and Simeonidis each got 9.4%, and plaintiff received 8%. In April 2010, a shareholders' agreement for DIO was executed. *See* Dkt. 123 (the DIO Agreement). Section 12 of the DIO Agreement provides that DIO "will enter into a franchise agreement with [the Company] pursuant to which [DIO] shall pay to [the Company] a royalty of four (4%) percent of the gross sales of [DIO], payable weekly, retroactive to the date upon which [DIO] commences operations." *See id.* at 12.

In August 2010, the Company issued its first Franchise Disclosure Document (FDD).[FN5] *See* Dkt. 124. In it, Euripides is identified as CEO, Rodas the President, Simeonidis the CFO, Dellis the Director of Construction Management, and Jimmy the Director of Operations; all of them are referred to as officers. *See id.* at 12-13. The FDD was drafted by an attorney, Harold Kestenbaum. In "[t]he Biographical Information Forms submitted to Mr. Kestenbaum to aid his office in the drafting of the FDD **[plaintiff] is listed as a 'Silent Partner'**." Dkt. 184 at 11 (emphasis added), citing Dkt. 126 at 16. In November 2010, a shareholders' agreement for 3321 Astoria was executed. *See* Dkt. 127 (the 3321 Astoria Agreement). It, like the DIO Agreement, contains a section 12 that provides for a weekly 4% royalty payment to the Company. *See id.* at 12.[FN6]

Months earlier, the Shareholder Defendants began discussing plaintiff. In a letter dated May 2, 2010, which was sent by email to the other Founders, Rodas wrote:

> Dear Bareburger Colleagues,
>
> The only way this company can grow and move forward is with the right people on board fulfilling their obligations consistently. We are expected to individually contribute and maintain a strong work ethic. Regretfully we are facing a repetitive issue regarding our partner, [plaintiff] John Stavroulakis. I believe we have reached a fork in the road and a decision at this time must be made. All partners must be able to contribute and act without supervision - after all we are the supervision. After repeated attempts to work and motivate him we have not seen the results expected by this company. As per our conversation with him, he was granted a probationary period that

> has now lapsed. At this time, **I propose we terminate** our good friend but inattentive partner John Stavroulakis. I am not happy about this decision but this distraction has to come to an end. Confirming this decision, each partner has expressed his lack of commitment and effort on this team on numerous occasions. It seems to me that repeated discussions' [sic] on this issue over months on end has now turned into a waste of our energies.

Dkt. 129 at 2 (emphasis added).[FN7]

It is undisputed that "[s]ometime later in 2010, the Shareholder Defendants asked [plaintiff] to give 6.66% of his stock in [the Company] to them on the grounds that [plaintiff] allegedly was not devoting as much time to [the Company] or the Bareburger restaurants, as the rest of the Founders." Dkt. 184 at 12. Plaintiff admits that he "verbally agreed to reduce his share in the business from 16.66% to 10%," but he claims this oral agreement was based on "the understanding that the matter was settled and he would no longer be devoting any time whatsoever to the day-to-day operations of the business." *See* Dkt. 184 at 12-13. However, "even after verbally agreeing to reduce [plaintiff] to 10% of [the Company], the Shareholder Defendants continued discussing the complete removal of [plaintiff] from the business." *Id.* at 13, citing Dkt. 114 at 30 (Euripides' 3/23/17 Dep. Tr. at 115-17) (admitting that Shareholder [*3]Defendants were still discussing "removing" plaintiff from Company). This is further reflected in the meeting minutes of November 17, 2010, which note that the Shareholder Defendants "held a meeting at the Bareburger office in which they discussed their desire to completely eliminate [plaintiff] from [the Company]." Dkt. 184 at 13, citing Dkt. 131 at 1:

> Discussion on the absence of John Stavroulakis. All other members have been putting in many hours of work and have expressed disappointment with the fact that John has been absent and is not making any contribution. The money invested is minimal compared to the amount of labor and time involved, everyone agrees that the situation needs to be addressed asap. His absence is having an adverse effect on the business and its potential for growth, also affecting moral of members.
>
> Options discussed include **(1) removing him (2) giving back the $6,000 invested plus interest (3) start over with those willing to do the work required**. Members/shareholders agree that they will either remove him or take other measures to the same effect. He should receive fair value for the amount he contributed.[FN8]

Any interests John has in the actual physical restaurant will not be affected.

(emphasis added).

In January 2011, the Shareholder Defendants again discussed the matter. "Euripides wanted to renege on the agreement that [plaintiff's] interest would be reduced from 16.66% to 10%"; "[b]ut Rodas wanted to honor the earlier verbal agreement and leave [plaintiff] with 10%." Dkt. 184 at 13. Rodas confirmed the existence of this agreement in a January 13, 2011 email. He wrote, regarding the "The Stavroulakis situation", that "**We all agreed** to the terms a few months ago, **lets [sic] not waste time trying to screw our partner again**," and that "we have to stop making deals with people and then backing out of them." *See* Dkt. 133 (emphasis added). Indeed, Euripides admitted the existence of that agreement in his email response:

> You have to stop living in the past. **We made that decision** months ago when we had no idea how things work in the real world. Now that we have gathered more information on what needs to happen, now we can make a more informed decision. If you feel so bad, then you can give up shares in your equity to make things happen.

Dkt. 135 at 2 (emphasis added). Rodas replied that "I'm not parting with any of my shares or am I someone to dictate and take shares that don't belong to me." *See id.*

Jimmy's answer was telling (and foreshadowed defendants' malfeasance that gave rise to this action):

> First off George stop the nonsense you are way out of line. Secondly my brother is right [plaintiff] could tie up our hands with valuable equity that we can use in the future. Ultimately this needs to be addressed now with a decision based on what is best for our [*4]business. **The main word is OUR business**.
>
> Guys let's not lose focus and stop the bickering **or we might as well shut it down or start restructuring everything**.

Id. (emphasis added). On January 14, 2011, Rodas again referenced the oral agreement with plaintiff, which none of the others on the email chain denied:

> The way I see it: **we all came to terms a few months ago so that we can put this behind us and move forward**. Now someone wants to stir the pot again and create the useless conversation we are now having. The question is why now again? And the answer is because this one individual has a vendetta. And every couple of months history repeats it's self [sic]. I'm tired of it occupying my time this way. JUST LET GO.

See id. at 1 (emphasis added; capitalization in original). Responding to another email by Euripides, Rodas wrote:

> I believe in being fair and honest with my partners and friends. I also believe in good karma and that my word is my bond. Maybe I'm just old fashioned. On the other hand the interest of the company does concern me and I will be at every meeting. Maybe you should take a step back and evaluate your behavior toward others.

Id.[FN9]

The following week, on January 21, 2011, the Individual Defendants formed Bareburger Group, a New York LLC, [FN10] to replace the Company as the Bareburger franchisor.[FN11] "Euripides, Jimmy, Rodas, Dellis and Simeonidis were each granted 20% membership interests in Bareburger Group;[FN12] [plaintiff] was given no interest in Bareburger Group," nor was plaintiff [*5]informed of its formation.[FN13] Dkt. 184 at 15. At the time, the Company had three principal assets: (1) its rights to royalties under agreements with its franchisees; (2) cash; and (3) the Trademark. Shortly after forming Bareburger Group, the Individual Defendants caused the Company to transfer the first of these assets to Bareburger Group. This was done pursuant to an Assignment and Assumption Agreement dated April 1, 2011. *See* Dkt. 137 (the Franchise Agreement Assignment).[FN14] It is undisputed that neither Bareburger Group nor plaintiff were paid anything for losing the

right to the Company's royalty payment revenue. While defendants suggest that Bareburger Group assumed the Company's debts, there is no evidence of any such debts in the record. Defendants do not indicate how much debt there was, nor, critically, do defendants even seek to establish that the exchange of the Company's royalty payments for such debt assumption could satisfy entire fairness scrutiny (a governing, dispositive legal standard that, as discussed here, they ignore in their briefs). Since July 2011, all of the Bareburger royalties were paid to Bareburger Group.[FN15] By December 2011, all of the Company's remaining cash was transferred to Bareburger Group. The Company, despite not operating as a going concern, remains an active corporation.[FN16]

In April 2014, "Jimmy reached out to [plaintiff] and told him that the other Founders [*6]were planning on selling off their DIO shares to an investor who worked in the DIO restaurant, and asked [plaintiff] to sell his shares along with them." Dkt. 184 at 17. The purchaser was Bareburger Group. Jimmy did not, however, explain the Individual Defendants' relationship with Bareburger Group or reveal the Franchise Agreement Assignment. Without knowing this information, plaintiff agreed to sell his DIO shares. That sale is governed by a Share Purchase Agreement, pursuant to which plaintiff transferred his DIO shares to Bareburger Group on May 12, 2014 in consideration for $44,000. *See* Dkt. 149.

Around the same time, plaintiff "asked Jimmy by phone and email to send him the 2013 K-1s from 3321 Astoria and the Bareburger franchisor, which [plaintiff] believed at the time to be [the Company]." Dkt. 184 at 18. Plaintiff needed the K-1s to file his taxes. "Although Jimmy eventually sent [plaintiff] his K-1 for 3321 Astoria, Jimmy did not send [plaintiff] a K-1 for [the Company]." *Id.* It was only a year later, in the summer of 2014, that Apostolatos informed [plaintiff] that [the Company] was no longer operating and that John would therefore not be receiving a K-1 from [the Company]." *Id.*

On July 1, 2014, in an email exchange, Euripides reported to Rodas, Simeonidis, and Jimmy that [plaintiff] had spoken to Apostolatos and threatened to sue them. *Id.* at 19; *see* Dkt. 156. The next day, in an attachment to an email, Apostolatos sent plaintiff the Company's 2012 tax returns, which reported that it had no income or assets. *See* Dkt. 157. On July 10, 2014, Euripides emailed the following to plaintiff:

> From what I understand, you've been asking for K1's from [the Company] to finalize your taxes for 2013. You don't have to wait for K1's from [the Company], as that corporation has been closed and a new corp has been formed. In the last few years we have restructured the company's structure to include Class A and Class B members, as well as bringing in a substantial investment. The investment group requested and dictated the restructuring.
>
> So please go ahead and file your taxes for 2013 and moving forward, you will not be receiving a K1 from the new group that has been formed. So there is no confusion in the matter, you are not a member of this new group, as your involvement and participation in our company was limited to our first unit at best. Obviously, much has happened in the last six years: restructuring, sweat equity, capital investments, to help fuel our growth.

Dkt. 158.

After retaining counsel, plaintiff sent defendants a demand letter dated March 3, 2015. *See* Dkt. 159. It "noted that Bareburger Group was operating an identical business to [the Company] as the Bareburger franchisor, that the Individual Defendants were attempting to cut [plaintiff] out of this business, and that Bareburger Group was using [the Company's] intellectual property such as 'logos, artwork, and other trademarked images and materials.'" *See* Dkt. 184 at 19. "**That same day**, Apostolatos—who in addition to being [the Company's] and Bareburger Group's accountant had since invested in Bareburger Group and become its CFO—formed [Be My Burger] on behalf of Bareburger Group." *Id.* at 19-20 (emphasis added). "[Be My Burger] was formed to be the entity through which Bareburger Group held equity interests in individual [*7]Bareburger restaurants." *Id.* at 20.[FN17] The following week, Rodas — again signing for both the Company and Bareburger Group — executed a Trademark Assignment Agreement dated March 10, 2015, which assigning the Trademark and accompanying goodwill from [the Company] to Bareburger Group. *Id.*; *see* Dkt. 183 (the Trademark Assignment Agreement). "Although the Trademark Assignment [Agreement] stated that it was for 'good and valuable consideration,' **no actual cash or other assets of value were paid by Bareburger Group to [the Company].**" Dkt. 184 at 20 (emphasis added); *see* Dkt. 115 at 55 (Rodas' 5/2/17 Dep. Tr. at 214-15) (admitting that in consideration for the Trademark, the Company "didn't receive anything."). "The Trademark Assignment [Agreement] was registered with the [PTO] on March 18,

2015." Dkt. 184 at 20. "On that same day, Bareburger Group filed a trademark application for the simple word 'Bareburger' (the "Word Mark") based on its ownership of the 'Bareburger Organic' trademark." *Id.* at 20-21. "Bareburger Group's application for the Word Mark **cited first use dates in 2009, well before Bareburger Group existed**, and included a Bareburger menu as a specimen that contained the Trademark." *Id.* at 21 (emphasis added).

Plaintiff explains why this was fraudulent:

> As explained in Item 13 of the Bareburger, Inc. FDD, the right of a franchise to use the Bareburger name and logos —and in particular the Trademark—is granted by the Bareburger franchisor in the franchise agreement. Section 9 of each and every franchise agreement that Bareburger Group executed between July of 2011 and March 10, 2015 was entitled "Marks" and contained a provision that stated "[w]e grant you the right to use the Marks during the term of this Agreement" and a provision that stated "[w]e are the owner of all right, title and interest in and to the Marks and the goodwill associated with and symbolized by them." This provision allows the franchisees to use not only the Trademark and Bareburger name but also the Bareburger system, menu, and other Bareburger intellectual property as well as benefit from the Bareburger brand. However, because Bareburger Group was not the true "owner of all right, title and interest in and to the Marks and the goodwill associated with and symbolized by them" it did not actually have the power and authority to license their use. Bareburger Group falsely represented that it owned the Trademark in its 2011, 2012, 2013, and 2014 FDDs and failed to mention the assignment (although it finally acknowledged [the Company] as a predecessor) in its 2015 and 2016 FDDs. Bareburger Group also falsely represented that it owned the Trademark when it applied to register the Trademark in Canada, Japan, and the United Arab Emirates.

Dkt. 184 at 21 (citations omitted).

On October 19, 2015, plaintiff commenced this action by filing a summons with notice. He filed his original complaint on December 15, 2015. *See* Dkt. 3. There has never been a motion to dismiss or any dispositive motion practice until now. Defendants filed an answer to the original complaint on January 8, 2016. *See* Dkt. 6. Discovery commenced after a [*8]preliminary conference was held in March 2016. *See* Dkt. 16.

Plaintiff filed his operative pleading, the AC, on October 7, 2016. *See* Dkt. 30. It asserts the following 20 direct and derivative causes of action (the bolded ones being the only claims at issue on the instant motions): (1) conversion, asserted derivatively against Bareburger Group; (2) conversion, asserted derivatively against the Shareholder Defendants; **(3) breach of fiduciary duty (corporate waste and self-dealing), asserted directly against the Shareholder Defendants; (4) breach of fiduciary duty (shareholder oppression), asserted directly against the Shareholder Defendants; (5) breach of fiduciary duty (corporate waste, self-dealing, and usurpation of a corporate opportunity), asserted derivatively against the Shareholder Defendants; (6) trademark infringement under the Lanham Act (15 USC § 1114 *et seq.*), asserted derivatively against Bareburger Group and Be My Burger**; (7) fraudulent assignment of the Trademark and accompanying goodwill, asserted derivatively against the Shareholder Defendants; (8) conversion of the Trademark and associated goodwill, asserted derivatively against Bareburger Group and the Individual Defendants; **(9) fraud on the Trademark Office under 15 USC § 1120, asserted derivatively against Bareburger Group and the Individual Defendants**; (10) fraudulent inducement of plaintiff's sale of his DIO shares to Bareburger Group, asserted directly against Bareburger Group and the Shareholder Defendants; **(11) fraudulent conveyance (constructive and intentional) under the New York Debtor and Creditor Law (DCL), asserted both individually and derivatively against all defendants**; (12) an equitable accounting from all defendants of Bareburger Group, Re-Grub (a Bareburger Group subsidiary), and Be My Burger; (13) inspection of the Company's books and records; (14) unjust enrichment, asserted directly against Bareburger Group and the Shareholder Defendants; (15) unjust enrichment, asserted derivatively against all defendants; (16-17) rescission of the transfer of assets from the Company to Bareburger Group and of the transfer of plaintiff's DIO shares;[FN18] (18) disgorgement of profits;[FN19] (19) a declaratory judgement that plaintiff owns 16.6% of the Company's stock; and **(20) aiding and abetting breach of fiduciary duty, asserted both individually and derivatively against Apostolatos**. Defendants filed an answer to the AC on October 26, 2016. *See* Dkt. 38.

On May 23, 2017, defendants moved by order to show cause to quash a subpoena duces tecum that plaintiff had served on Apostolatos' accounting firm. This was the first and only other motion filed in this case. By order dated June 7, 2017, the court denied the motion. *See* [*9]Dkt. 84. The court was dismayed at the quality of defendants' discovery, which, among other things, did not result in a clear production of all of the relevant contracts. *See* Dkt. 85 (6/7/17 Tr.). Over the course of

several subsequent discovery conferences, after overruling defendants' numerous objections to producing clearly relevant documents and given their refusal to provide clear and thorough discovery responses regarding the existence of certain key documents, defendants were ordered to substantially supplement their responses and production. *See* Dkt. 101. After initially failing to comply (*see* Dkt. 102), defendants belatedly did so; Apostolatos was then required to appear for another deposition to testify about this production. *See* Dkt. 103. While expert discovery was not to be completed until the end of 2017, plaintiff sought to file an early motion for partial summary judgment on liability. On September 14, 2017, he filed the instant motion, which only concerns the third, fourth, fifth, sixth, ninth, eleventh, and twentieth causes of action. On October 3, 2017, defendants filed a cross-motion for partial summary judgment seeking dismissal of those causes of action. The court reserved on the motions after oral argument. *See* Dkt. 210 (11/28/17 Tr.).[FN20]

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Before the court addresses the allegations of defendants' wrongdoing, it must first address the threshold question of how much equity plaintiff has in the Company. Critically, the parties do not dispute that plaintiff is currently a stockholder (and thus has derivative standing). They, however, dispute whether plaintiff owns 16.66% or 10% of the Company's stock. Though neither party's notice of motion formally seeks summary judgment on this issue, both sides raised this issue in their briefs and at oral argument.[FN21]

Regardless, summary judgment on this issue is denied. While there is no question of fact that the parties agreed that plaintiff's stake would be reduced to 10%, there are material questions of fact as to whether he did so for any consideration and whether, even if there was agreed-upon consideration, defendants performed. Defendants do not explain what consideration they supposedly provided. It appears, however, that their position is they were threatening to cut plaintiff out of the business due to him not working at the restaurants. Yet, as discussed herein, they had no legal right to do so because plaintiff had no obligation to work for the Company. Hence, it is not clear they gave anything up of value. That said, plaintiff contends that defendants did agree to provide him consideration — an agreement not to complain about or challenge his merely being a passive investor. Even assuming, however, that resolving defendant's frivolous legal threat amounts to sufficient consideration to form a binding agreement, there is no question that defendants breached that agreement by seeking to cut plaintiff out of the Company due to him not actively working. In fact, they are still complaining about plaintiff not contributing and proffer that fact as a justification for their conduct.

There is no question of fact that either (1) plaintiff was never actually provided consideration for agreeing to reduce his stake in the Company to 10%; or (2) defendants breached that agreement. A finding of the first option means that plaintiff still has a 16.66% stake; the remedy for the latter might be rescission of the agreement. *Kassab v Kasab*, 137 AD3d 1138, 1140 (2d Dept 2016) ("rescission of a contract is permitted 'for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but ... only for such as are material and willful, or, if not willful, **so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract**.'") (emphasis added; citations omitted); *see Jacobs Private Equity, LLC v 450 Park LLC*, 22 AD3d 347 (1st Dept 2005), citing *Babylon Assocs. v Suffolk County*, 101 AD2d 207, 215 (2d Dept 1984) ("If rescission is based upon a breach of the contract, the

breach must be material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract.") (citation and quotation marks omitted). Nonetheless, given the failure of the parties to adequately brief this issue, the court will not resolve it until after trial, as the parties' testimony concerning the circumstances of the agreement and its breach will elucidate the facts. The parties' agreement was oral (though it is reflected in defendants' written emails), and the questions of consideration and breach turn on credibility determinations that are not properly made on a motion for summary judgment.

Turning to the merits, there is no question of fact **[FN22]** that all of the Company's assets — [*10]including its right to franchise Bareburger, the intellectual property necessary to do so, and its cash — were transferred to Bareburger Group and Be My Burger for no consideration. This was done by the Shareholder Defendants, who were officers of the Company. As officers and majority shareholders in a closely held corporation, the Shareholder Defendants owed the Company and plaintiff fiduciary duties of care and loyalty. *O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 282 (1st Dept 2007); *Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 98 (1st Dept 2006) ("Holme, as a shareholder in Global, a closely held corporation, owed a fiduciary duty to the other Global shareholders. Additionally, Holme owed a fiduciary duty to Global arising out of his status as a corporate officer and director.") (citations omitted), *see* BCL § 717(a).

Ordinarily, when officers discharge such duties, "the business judgment rule prohibits judicial inquiry into [their] actions," but *only* if they were "taken in good faith and in the exercise of honest judgment in the lawful and **legitimate furtherance of corporate purposes**." *Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-38 (1990) (emphasis added), quoting *Auerbach v Bennett*, 47 NY2d 619, 624 (1979). The business judgement rule *does not* apply to acts that do not further the interest of the corporation, especially when the directors have a personal stake in the transaction. *See Marx v Akers*, 88 NY2d 189, 195 (1996) ("a director whose independence is compromised by undue influence exerted by an interested party cannot properly exercise business judgment and the loss of independence also justifies the excusal of a demand without further inquiry."). "The business judgment rule does not foreclose judicial inquiry into the decision of a board of directors where the board acted in bad faith, e.g., **deliberately singled out an individual for harmful treatment**." *Owen v Hamilton*, 44 AD3d 452, 456 (1st Dept 2007) (emphasis added). Defendants, thus, cannot rely on the business

judgment rule to create a presumption of legality. Instead, they bear the burden as"**interested directors or shareholders** to prove **good faith and the entire fairness** of the challenged transaction," because directors' actions are "subject to the limitation that such conduct may not be for the aggrandizement or undue advantage of the fiduciary to the exclusion or detriment of the stockholders." *See Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 569-570 (1984) (emphasis added). Directors "must treat all shareholders, majority and minority, fairly." *Id.*

"This 'entire fairness' standard has two components: fair process and fair price." *In re Kenneth Cole Prods., Inc.*, 27 NY3d 268, 275 (2016). "The fair process aspect concerns timing, [*11]structure, disclosure of information to independent directors and shareholders, how approvals were obtained, and similar matters." *Id.* "The fair price aspect can be measured by whether independent advisors rendered an opinion or other bids were considered, which may demonstrate the price that would have been established by arm's length negotiations." [FN23] *Id.* "Considering the two components, the transaction is viewed as a whole to determine **if it is fair to the minority shareholders**." *Id.* at 275-76 (emphasis added).[FN24]

Likewise, where, as here, there is corporate waste — "the diversion of corporate assets for improper or unnecessary purposes" — the business judgment rule does not apply. *See SantiEsteban v Crowder*, 92 AD3d 544, 546 (1st Dept 2012). The "transfer of assets without consideration" and permitting "corporate property [to be] given to a foreign corporation without consideration" are classic examples of waste. *Aronoff v Albanese*, 85 AD2d 3, 5 (2d Dept 1982) (citations omitted). "To disprove a waste claim, **a director who had a personal interest in challenged payments has the burden** of showing that they were made in good faith and were fair to the corporation." *Id.* (emphasis added).

Equally impermissible is the diversion of corporate opportunities by the directors to other companies in which neither the corporation nor its minority shareholder has an interest. *Alexander & Alexander of NY, Inc. v Fritzen*, 147 AD2d 241, 246 (1st Dept 1989) ("The doctrine of 'corporate opportunity' provides that corporate fiduciaries and employees cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation."); *see Moser v Devine Real Estate, Inc. (Florida)*, 42 AD3d 731, 734-35 (3d Dept 2007) ("A corporate opportunity is defined as any property, information, or prospective business dealing in which the corporation has an interest or tangible expectancy or

which is essential to its existence or logically and naturally adaptable to its business."), quoting *Matter of Greenberg*, 206 AD2d 963, 964 (1st Dept 1994). This doctrine is violated where, as [*12]here, a director secretly forms a new entity and transfers the corporation's entire business to that entity. *Yu Han Young v Chiu*, 49 AD3d 535, 536 (2d Dept 2008).

Simply put, where the defendants are either conflicted or have engaged in corporate waste, they have the burden of establishing entire fairness. Here, the Shareholder Defendants (or their wholly owned LLCs) are members of Bareburger Group, which owns Be My Burger. Hence, the subject transfers of the Company's assets are interested transactions. That, in addition to the discussed evidence of waste and theft of corporate opportunities, makes entire fairness the applicable the standard of review.**[FN25]**

Plaintiff correctly avers that there is no record evidence of any meaningful (let alone any) consideration paid to the Company to compensate it for its loss of its assets. Since the Shareholder Defendants raised no material question of fact as to the fairness of taking the Company's material assets for no consideration, summary judgment is warranted. Remarkably, the expression "entire fairness" does not appear in defendants' opposition brief. The effect of this critical omission is that defendants abdicated their burden of showing that the consideration paid to the Company was fair in light of what was taken from it.

Further, even without formal reference to the entire fairness doctrine, defendants have not proffered any justification for their theft. As noted earlier, the only suggestion of any consideration provided to the Company was the new LLCs' assumption of the Company's debts. If such debts existed and amounted to a sum commiserate with the value of what was taken from the Company, that fact might satisfy entire fairness review. However, defendants neither explain how much alleged debt the new LLCs assumed nor compare that supposed debt to the value of what was taken from the Company. Consequently, they have not raised any material question of fact about whether the transfers satisfy entire fairness review.

To the extent defendants invoke the concept of "fairness" by contending that it was fair to cut plaintiff out of the Company because he was not working for it, as noted earlier, that [*13]contention is legally baseless. When the restaurants were opened and the Company was formed, the evidence shows the parties understood that only some of the shareholders

would have to work for the Company. Those that did were paid a salary. Neither the BCL nor any executed shareholders' agreement contains any requirement for plaintiff to work for the Company. Defendants do not dispute this fact. Rather, they relied on a subjective belief that plaintiff's lack of contributions warranted taking plaintiff's interest in the Company.

This belief is misguided at best and disingenuous at worst.[FN26] Many businesses have passive investors. After the initial investment, the passive investor's stake in the company may be worth far more than the amount invested. This is a good thing, and is an aspirational outcome in the minds of many who decide to chance their money on a fledging business. If investors intend to condition an equity grant on the requirement of further contribution (either labor or capital), they must expressly agree to such a condition. The majority investors may not, as here, later decide that *pari passu* treatment of active and passive investors is not fair. Likewise, to the extent a majority believes a business would be better off without a problem shareholder, there is *legal* recourse available to them, such as a buyout or a freeze-out merger. *See generally Alpert*, 63 NY2d 557; *see also Friedman v Beway Realty Corp.*, 87 NY2d 161, 167 (1995). The Shareholder Defendants did not avail themselves of these permissible options, but took all of the Company's assets, leaving plaintiff with equity in an empty shell corporation. This is corporate malfeasance amounting to a breach of the Shareholder Defendants' breach of their fiduciary duty of loyalty to the Corporation. They engaged in corporate waste and stole the Company's corporate opportunities and gave them to their newly formed LLCs. Plaintiff has standing to prosecute these claims on the Company's behalf given the Shareholder Defendants' substantial likelihood (now, really, a guaranteed possibility) of personal liability.[FN27]

Plaintiff also asserts a direct claim of shareholder oppression. While plaintiff's claims are (by plaintiff's own admission) classically derivative, there is some controlling authority that permits the maintenance of a claim for direct recovery under these circumstances. In *Venizelos v Oceania Mar. Agency, Inc.*, 268 AD2d 291 (1st Dept 2000), the First Department appeared to recognize a direct claim for damages suffered by an oppressed shareholder in a closely held corporation where all of the other shareholders are the liable defendants:

> In this dispute between members of a ship-owning family, the trial court found that defendant Mourginakis, who was entrusted with management of the family business by reason of being the family's only male member, managed the business in a manner intended to divest plaintiffs, his aunt and female cousins, of their interests

> therein. Upon the basis of this finding, which is not challenged on appeal and was largely uncontested at trial, the trial court awarded plaintiffs damages in their individual capacities in proportion to their share holdings in the holding company that controlled the family's interest in various vessels. **We reject defendants' argument that plaintiffs' damages were derivative, not direct, and that any award of damages should have been in favor of the holding company. Clearly, Mourginakis breached fiduciary duties he owed to plaintiffs independent of the duties he owed to the holding company**, and the sole purpose and effect of his transactions with respect to the holding company, which required little active management, was to steal from plaintiffs. Plaintiffs are not seeking to vindicate their rights as stockholders but to recover their share of the family assets, which was stolen from them. Moreover, **the reason for the rule requiring that damages generally be awarded to the corporation in suits brought by shareholders, even when the corporation is closely held, is to prevent impairment of the rights of the corporation's creditors whose claims may be superior to those of the innocent shareholder. No such concern is present here**.

Id. at 291-92 (emphasis added; citations and quotation marks omitted). This holding represents an exception to how derivative claims normally operate.[FN28]

Ordinarily, on a derivative claim, the recovery goes to the corporation; the derivative plaintiff merely has an indirect interest in that recovery by virtue of his interest in the corporation. *Yudell*, 99 AD3d at 114; *see O'Neill*, 39 AD3d at 281-82 ("A claim for diminution of the value of stock holdings is a derivative cause of action belonging to that corporation and not to plaintiffs individually."). However, as in *Venizelos*, in certain situations, a direct recovery to the plaintiff may be more appropriate. *See Cortazar v Tomasino*, 150 AD3d 668, 671 (2d Dept 2017) ("While 'allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only,' and a shareholder may not recover in his or her individual capacity for wrongs against the corporation, **an exception to that rule exists where the shareholder has sustained a loss disproportionate to that sustained by the corporation**.") (emphasis added), quoting *Abrams v Dontai*, 66 NY2d 951, 953-54 (1985).[FN29] To be sure, it must be one or the other.

While damages are not at issue on this motion, the court finds it worth noting that the court is strongly inclined to award plaintiff a direct monetary recovery commensurate with his [*14]interest in the Company (e.g., his share of lost profits plus

the present value of his share of the Company), rather than holding defendants personally liable to the Company for the full value of what taken from the Company. Defendants would be personally liable, jointly and severally, to plaintiff. Any other remedy would complicate matters for all. For instance, the defendants clearly wanted a business divorce, and this approach would permit them to be rid of plaintiff. They would avoid having to account for how plaintiff's effective interest in the new companies affects their corporate, capital, and equity structure. The plaintiff, of course, would get the benefit of a liquid cash recovery and would no longer be at the mercy of defendants. That said, the court is mindful of the possible issues such an approach may present and finds it prudent to forgo any formal determination of the proper remedy until the issue can be fully briefed after trial.**[FN30]**

That said, summary judgment also is granted to plaintiff on his claim that Apostolatos aided and abetted the Shareholder Defendants' breach of fiduciary duties. "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v Cohen*, 307 AD2d 113, 125 (1st Dept 2003). The second prong requires a showing of "substantial assistance." *Roni LLC v Arfa*, 15 NY3d 826, 827 (2010). "[S]ubstantial assistance means more than just performing routine business services for the alleged fraudster." *McBride v KPMG Int'l*, 135 AD3d 576, 579 (1st Dept 2016). The defendant's participation must be meaningful. *See Goldin v TAG Virgin Islands, Inc.*, 149 AD3d 467, 468 (1st Dept 2017); *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 12 (1st Dept 2008). "Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 476 (1st Dept 2009) (citation and quotation marks omitted).

Apostolatos substantially assisted the Shareholder Defendants' breaches. As plaintiff explains, Apostolatos' involvement was extensive:

> Apostolatos knowingly and intentionally participated in the Shareholder Defendants' breaches of fiduciary duty by (i) advising and helping them to create Bareburger Group and transfer all of [the Company's] assets into the new

company; (ii) crafting audited financials that hid the illicit formation of Bareburger Group, the asset transfer, and the exclusion of [plaintiff]; (iii) helping the Shareholder Defendants explain [plaintiff's] status to their attorneys; (iv) preparing Bareburger Group tax returns and operating agreements that excluded [plaintiff]; (v) not sending [plaintiff] the [Company's 2012] tax return until July of 2014; and (vi) seeking out and participating in business opportunities diverted from [the Company] to Bareburger Group and [Be My Burger] as a member and CFO of Bareburger Group. Apostolatos admitted that he went so far as to illegally file [*15]fraudulent tax returns at the request of Shareholder Defendants.[FN31]

Dkt. 184 at 32 (citations omitted).

Additionally, the transfers that give rise to plaintiffs' claims for breach of fiduciary duty amount to constructive fraudulent conveyances under DCL §§ 273 and 273-a. *See generally Wimbledon Financing Master Fund, Ltd. v Bergstein*, 2017 WL 3024254 (Sup Ct, NY County 2017) ("A conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration. Moreover, even if there is fair consideration, a transfer is still constructively fraudulent in the absence of good faith on the part of both the transferor and the transferee.") (citations and quotation marks omitted). That said, while summary judgment is warranted in plaintiff's favor on this claim, the court finds the claim to be duplicative, as it would not result in any additional relief for plaintiff or the Company. The same is true of plaintiff's claim for intentional fraudulent conveyance under DCL § 276. *See id.* at *5 ("DCL § 276 provides that '[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.'"). While a successful claim under § 276 would warrant plaintiff recovering his attorneys' fees from defendants, [*see id.* at *7, citing *Setters v AI Props. & Developments (USA) Corp.*, 139 AD3d 492, 494 (1st Dept 2016)], under BCL § 626(e), the same is true of plaintiff's successful derivative claims for breach of fiduciary duty. The DCL claims are academic and dismissed as duplicative.

By contrast, plaintiff's derivative claim for trademark infringement is not dismissed as duplicative because, under 15 USC § 1117, plaintiff may be entitled to treble damages (and attorneys' fees, though plaintiff, as noted, will get that under

BCL § 626(e)). *River Light V, L.P. v Lin & J Int'l, Inc.*, 2015 WL 3916271, at *6 (SDNY 2015) ("The Lanham Act also provides for penalty enhancement. '[U]nless the court finds extenuating circumstances,' courts must award treble damages on the greater of either defendant's profits or plaintiff's damages 'if the violation consists of ... intentionally using a mark or designation, knowing such mark or designation is a counterfeit mark.'"), quoting 15 USC § 1117(b); *see Excelled Sheepskin & Leather Coat Corp. v Oregon Brewing Co.*, 2016 WL 8458987, at *6 (SDNY Aug. 12, 2016) ("While a successful plaintiff in a trademark infringement action is entitled to recover damages, an award of attorneys' fees is 'reserved for exceptional cases' [under section 1117(a).] Section 1117(b) provides for a mandatory attorneys' fee award for willful infringement."), *report and recommendation adopted*, 2016 WL 5409482 (SDNY Sept. 28, 2016).

There is no question of fact that, prior to March 10, 2015, Bareburger Group used the Trademark without authorization and without providing any consideration to the Company. This [*16]is trademark infringement. 15 USC § 1114; *see Time, Inc. v Petersen Publ'g Co.*, 173 F3d 113, 117 (2d Cir 1999) (citation omitted). Defendants do not dispute the validity of the Trademark (which is registered with the PTO), nor do they dispute Bareburger Group's use of the mark.[FN32] Indeed, the very reason why they executed the Trademark Assignment Agreement was because they recognized that Bareburger Group and Be My Burger needed to obtain the rights to the Trademark to validly use and license it to the franchisees.

Finally, plaintiff seeks summary judgment on its claim under 15 USC § 1120, which provides:

> Any person who shall procure registration in the [PTO] of a mark by a false or fraudulent declaration or representation, oral or in writing, or by any false means, **shall be liable in a civil action by any person injured thereby** for any damages sustained in consequence thereof.

(emphasis added); *see Sik Gaek, Inc. v Yogi's II, Inc.*, 682 FApp'x 52, 55 (2d Cir 2017) ("Section 1120 provides a cause of action to seek 'damages sustained in consequence' of a false or fraudulent registration."). There is uncontroverted record evidence that demonstrates that [*17]defendants made misrepresentations to the PTO regarding their rights to the Trademark.[FN33] Simply put, "[d]espite knowing that [the Company] was making a claim to the mark, Defendants represented to the PTO that no such claim existed-a blatant and willful fraud." Dkt. 194 at 32. Nonetheless, this claim is dismissed as

duplicative because the same damages are recoverable on plaintiff's derivative claims for breach of fiduciary duty and trademark infringement.[FN34] Accordingly, it is

ORDERED that plaintiff is granted summary judgment on liability on the third, fourth, fifth, sixth, and twentieth causes of action; the ninth, eleventh, sixteenth, seventeenth, and eighteenth causes of action are dismissed as duplicative; and the parties cross-motions are otherwise denied; and it is further

ORDERED that the parties shall jointly call the court within three weeks of the entry of this order on NYSCEF to update the court on the status of their settlement discussions and to discuss the scheduling of a pre-trial conference.

Dated: February 13, 2018

ENTER:

_____

J.S.C.

Footnotes

Footnote 1:*See* Dkt. 105 (joint statement of undisputed material facts). References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing system (NYSCEF).

Footnote 2: It is "the word 'Bareburger' in a stylized font above a bear riding a bicycle holding a hamburger and a beer stein." Dkt. 184 at 10.

Footnote 3:"Rodas and Dellis owned and operated an electric contracting business"; "Jimmy owned and operated a yellow taxi business"; and plaintiff "worked for his father's property management businesses." Dkt. 184 at 9.

Footnote 4: It is undisputed that the New York Business Corporation Law (BCL) governs the internal affairs of the Company. *See Ferolito v Vultaggio*, 99 AD3d 19, 26 (1st Dept 2012).

Footnote 5:"An FDD is a document setting forth certain disclosures by franchisors required by federal and state laws to be provided to prospective franchisees, including information about the franchisor and any predecessors, litigation history, franchise fees, typical costs, trademarks and licenses, etc." Dkt. 184 at 11 n.3; *see EV Scarsdale Corp. v Engel & Voelkers N.E. LLC*, 48 Misc 3d 1019, 1029-32 (Sup Ct, NY County 2015).

Footnote 6: Plaintiff notes that, originally, "[t]he royalty rate for DIO and 3321 Astoria was only four percent because they were owned by the Founders," but that "DIO and 3321 Astoria now pay the same five percent as other franchisees." Dkt. 184 at 12.

Footnote 7: The court notes here, and discusses further herein, that in the absence of a shareholders' agreement requiring plaintiff to work for the Company or the two restaurants, and absent any contractual agreement permitting the Founders to deprive John of his stock for not doing so, Rodas' threat to "terminate" John was entirely without legal foundation. Indeed, "other Shareholder Defendants, such as Rodas and Jimmy, were busy operating other businesses"; yet no one complained about them not working for the Company. *See* Dkt. 184 at 12. To be sure, as discussed further herein, while the Founders could have sought to effectuate a freeze-out merger to obtain a business divorce from plaintiff, they did not do so. Rather, as discussed herein, they simply stole all of the Company's assets by transferring them to other entities for no consideration. It also should be noted that the shareholders' agreements for the two restaurants do not require plaintiff to work for the restaurants. On the contrary, they provide that the General Manager (non-party Mikhail Levin for 3321 Astoria and Euripides for DIO) is responsible for day-to-day management. *See* Dkt. 123 at 2-3; Dkt. 127 at 3. While the board of directors has responsibilities, plaintiff was not on the board of either company. *See* Dkt. 123 at 2; Dkt. 127 at 2.

Footnote 8: This, of course, is not the law. To divest a stockholder of his equity, he must be paid fair value for his

proportionate interest in the company as a going concern, i.e., what an arm's length purchaser would pay (and not simply the amount of his capital contribution). *See Matter of Seagroatt Floral Co.*, 78 NY2d 439, 444-45 (1991).

Footnote 9: Rodas was prescient. The karma at this stage is that the Shareholder Defendants face significant personal liability to plaintiff.

Footnote 10: Bareburger Group is currently governed by an amended operating agreement dated as of November 1, 2014. *See* Dkt. 138.

Footnote 11: Defendants' suggestion that there was nothing nefarious about desiring to move from the corporate to the LLC form is disingenuous. The Individual Defendants could have, but did not, convert the Company to an LLC.

Footnote 12: Plaintiff notes that:

Over time the Individual Defendants moved their membership interests in Bareburger Group to various entities and all of the Individual Defendants are on the Board of Managers of Bareburger Group. Currently, Euripides owns his 18.92% interest through his wholly-owned [YGR]; Simeonidis owns his 16.63% interest through his wholly-owned Negroponte, LLC; Jimmy owns his 16.63% interest through his wholly-owned [EVP]; Rodas and Dellis hold their joint 34.03% interest through their jointly-owned [Gamma]; Apostolatos holds his interests through [KMVA] and Apostolatos, LLC, which own 10% and 1.5% of Bareburger Group respectively.

Dkt. 184 at 15 n.5.

Footnote 13: That plaintiff was in Greece is not an excuse because defendants had his personal email address, which they used to send him K-1s; they also spoke to him by phone. *See* Dkt. 184 at 17.

Footnote 14: In a somewhat ironic twist, Rodas (who apparently was plaintiff's biggest sympathizer) executed the Franchise Agreement Assignment on behalf of *both* the Company and Bareburger Group. *See* Dkt. 137 at 3. He also did so on the other assignment agreement discussed herein.

Footnote 15: Since this summary judgment motion deals only with liability, and not damages, the court will not provide a detailed discussion of numbers, which obviously will be pertinent at trial, but simply notes that the business appears quite valuable. *See* Dkt. 184 at 22 ("In 2014, Bareburger Group earned $3,704,878 in Gross Income, had franchise agreements

with twenty-nine franchisees, and total Bareburger sales were over $48 million. In 2015, Bareburger Group earned $4,324,193 in Gross Income, had twenty-nine open restaurants and had franchise agreements with at least thirty-four franchisees, including three international franchisees, and total Bareburger sales were over $59 million. In 2016, [] Bareburger Group earned at least $4,837,327, had at least thirty-nine open restaurants, including international franchisees, and total Bareburger sales were $80 million. Today, there are at least 45 Bareburger franchises in the United States, Germany, Japan, and the United Arab Emirates. Bareburger restaurants are projected to earn over $90 million in sales in 2017.") (citations and paragraph break omitted).

Footnote 16: In support of their motion to quash (discussed further herein), Jimmy submitted an affirmation in which he falsely claimed that the Company was dissolved. *See* Dkt. 46 at 3.

Footnote 17: Be My Burger, a New York LLC, is governed by an operating agreement dated as of February 17, 2016. *See* Dkt. 162.

Footnote 18: Though not at issue on the instant motion, the court notes that rescission is really just an equitable remedy for some of the other pleaded causes of action. *See Cherokee Owners Corp. v DNA Contracting, LLC*, 96 AD3d 480, 481 (1st Dept 2012); *Stambovsky v Ackley*, 169 AD2d 254, 258 (1st Dept 1991). The court, therefore, *sua sponte* dismisses the sixteenth and seventeenth causes of action without prejudice to plaintiff seeking the remedy of rescission (which, to be clear, is demanded by the AC in its ad damnum clauses). *See* Dkt. 30 at 31-32.

Footnote 19: Like rescission, disgorgement is a remedy, not an independent cause of action. *See NWM Capital, LLC v Scharfman*, 144 AD3d 414, 415 (1st Dept 2016). Thus, the eighteenth cause of action is *sua sponte* dismissed without prejudice to plaintiff seeking the remedy of disgorgement (which also is demanded in the ad damnum clauses). *See* Dkt. 30 at 32.

Footnote 20: Expert discovery has since been completed, and plaintiff filed a Note of Issue on January 30, 2018. *See* Dkt. 211.

Footnote 21: The issue affects the amount of damages.

Footnote 22: Defendants erroneously contend that plaintiff's failure to submit an affidavit in support of his motion warrants denial of his motion. *See Olan v Farrell Lines Inc.*, 64 NY2d 1092, 1093 (1985) ("defendant put forth sufficient evidentiary proof in admissible form, and plaintiff raised no issue of material fact to support its claim . **The fact that defendant's**

supporting proof was placed before the court by way of an attorney's affidavit annexing plaintiff's deposition testimony and other proof, rather than affidavits of fact on personal knowledge, does not defeat defendant's right to summary judgment.") (emphasis added). While such an affidavit may, of course, be used in support of summary judgment [*see* CPLR 3212(b)], it is not mandatory. It is well settled that the submission of documentary evidence produced in discovery along with deposition testimony can warrant summary judgment if that evidence is admissible and uncontroverted. *Alvarez,* 68 NY2d at 325; *see De-Spec, Inc. v Sadick*, 147 AD3d 425 (1st Dept 2017); *Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614, 616 (1st Dept 2009). That is the case here. Indeed, the key allegations made by plaintiff and supported with record evidence — the failure to provide consideration for the subject transfers of the Company's assets — are not actually disputed by defendants. Defendants' do not meaningfully address the controlling legal standard — entire fairness. While this case has an extensive factual record, a thorough review of the evidence makes it clear that it is not a close call. No amount of rhetorical noise in defendants' briefs can obfuscate this fact. Simply put, the record evidence and the defendants' admissions demonstrate that the subject defalcations occurred and that they constitute breaches of fiduciary duty.

Footnote 23: This indisputably did not occur.

Footnote 24: The subject transactions cannot have been ratified by the Shareholder Defendants because they were not disinterested and there was no ratifying vote by a majority of the disinterested shareholders. *See Kenneth Cole*, 27 NY3d at 276, citing *Kahn v M & F Worldwide Corp.*, 88 A3d 635, 644 (Del 2014). It should be noted that under Delaware law, relied on by the New York Court of Appeals to formulate its entire fairness standard, an allegation concerning the "[s]ale of corporate assets to [an insider] for an unfair price states perhaps the quintessential derivative claim [and] results in entire fairness review." *In re Straight Path Commc'ns Inc. Consol. S'holder Lit.*, 2017 WL 2017 WL 5565264, at *4 (Del Ch 2017), citing *Americas Mining Corp. v Theriault*, 51 A3d 1213, 1239 (Del 2012) ("When a transaction involving self-dealing by a controlling shareholder is challenged, **the applicable standard of judicial review is entire fairness, with the defendants having the burden of persuasion**. In other words, the defendants bear the burden of proving that the transaction with the controlling stockholder **was entirely fair to the minority stockholders**.") (emphasis added); *see also Owen*, 44 AD3d at 455-56 ("these directors receive[d] a direct financial benefit from the transaction which is different from the benefit to shareholders generally. They were, therefore, interested directors who were disqualified from consenting to the transaction.") (citation and quotation marks omitted).

Footnote 25: Upon a finding of liability, the Shareholder Defendants are liable to disgorge all profits realized by virtue of their breach of fiduciary duty. *105 E. Second St. Assocs. v Bobrow*, 175 AD2d 746 (1st Dept 1991) ("The measure of damages for breach of fiduciary duty is the amount of loss sustained, including lost opportunities for profit on the properties by reason of the faithless fiduciary's conduct."); *see Excelsior 57th Corp. v Lerner*, 160 AD2d 407, 408-09 (1st Dept 1990)

("where claims of self-dealing and divided loyalty are presented, a fiduciary may be required to disgorge any ill-gotten gain even where the plaintiff has sustained no direct economic loss."); *see generally Matter of Rothko's Estate*, 43 NY2d 305, 320-22 (1977) (fiduciaries are liable for appreciation damages); *see also Frame v Maynard*, 83 AD3d 599, 604 (1st Dept 2011) ("Subsequent cases have upheld the *Rothko* rule in both estate and other fiduciary situations, awarding appreciation damages when a fiduciary has engaged in self-dealing."). This amount will be determined at trial. That said, the forgoing authority on disgorgement and appreciation damages, it should be noted, precludes defendants from arguing that the value of the Company at the time of the transfers determines damages (one theory apparently behind their expert report). Rather, it is the current value (along with past lost profits, e.g., *pari passu* distributions) that is subject to disgorgement.

Footnote 26: Defendants note they are not corporate lawyers. However, the subject transactions were done with the aid of a lawyer and accountant. Leaving aside the court's dismay that a lawyer could agree to help structure an illegal transaction, defendants cannot hide behind their ignorance of corporate law to claim a lack of bad faith. Their contemporaneous emails demonstrate a clear intent to steal plaintiff's interest in the business, which Rodas recognized was problematic.

Footnote 27:"The controlling case in New York on demand futility [i.e., *Marx*] establishes that there are three types of circumstances in which shareholders may proceed with derivative claims in the absence of a demonstrated attempt to persuade the board to initiate an action itself." *In re Comverse Tech., Inc.*, 56 AD3d 49, 53 (1st Dept 2008). "The complaint must allege with particularity that '(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction.'" *Id.*, quoting *Marx*, 88 NY2d at 198; *see also Bansbach v Zinn*, 1 NY3d 1, 9 (2003). Defendants now, for the first time, complain that plaintiff has not adequately pleaded demand futility. The court has doubts about the ability of a defendant to raise failure to adequately *plead* demand for the first time after having answered, engaged in years of discovery, and filed summary judgment motions. *See In re Ezcorp Inc. Consulting Agreement Deriv. Lit.*, 2016 WL 301245, at *26 (Del Ch 2016) (demand futility standard is "pleading-stage limitation on weak derivative claims"; substantive entire fairness standard, not case law on demand futility pleading requirements, applies to merits analysis). Indeed, at the summary judgment stage, the question is no longer the sufficiency of the pleading, but rather the sufficiency of the evidence. Of course, if the pleading is insufficient, it can always be amended to conform to the proof. *See Ainetchi v 500 W. End LLC*, 51 AD3d 513, 516 (1st Dept 2008). Regardless, here, the proof of the Shareholder Defendants' liability and the fact that they control the majority of the Company's shares suffices to establish that a pre-suit demand would have been futile. Hence, any deficiency in plaintiff's demand futility pleadings does not justify dismissal at this juncture.

Footnote 28: As this court has explained:

The First Department [subsequently] has adopted Delaware's *Tooley* test for determining whether a claim is direct or derivative, which requires the court to examine "the nature of the wrong and to whom the relief should go." *Yudell v Gilbert*, 99 AD3d 108, 114 (1st Dept 2012), quoting *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 (Del 2004). For a claim to be direct, "[t]he stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder ***and that he or she can prevail without showing an injury to the corporation***." *Id.* (emphasis added). "Thus, under *Tooley*, a court should consider '(1) who suffered the alleged harm (the corporation or the stockholders); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually).'" *Id.*; *see NAF Holdings, LLC v Li & Fung (Trading) Ltd.*, 118 A3d 175, 180 (Del 2015) (an "important initial question has to be answered: does the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?"). "[E]ven where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand." *Serino v Lipper*, 123 AD3d 34, 40 (1st Dept 2014).

1993 Trust of Joan Cohen v Baum, 2017 WL 1739706, at *3 (Sup Ct, NY County 2017) (emphasis in original).

Footnote 29: It should be noted that there are circumstances where Delaware law permits a direct recovery where, as here, there are both direct derivative claims and where the wrongdoers are all of the equity holders in the company other than plaintiff. *In re Activision Blizzard, Inc. S'holder Lit.*, 124 A3d 1025, 1068 (Del Ch 2015) ("I believe that when granting a remedy for dual-attribute claims, a court can impose a remedy at either the corporate or the stockholder level as the facts and equities of the case requires."); *see Allen v El Paso Pipeline GP Co.*, 90 A3d 1097, 1110 (Del Ch 2014) ("If El Paso Parent and the General Partner are proven to be wrongdoers, this factor would support awarding relief to the class of innocent unitholders, not to El Paso MLP."), citing *In re Gaylord Container Corp. S'hareholders Lit.*, 747 A2d 71, 80 (Del Ch 1999) ("In a case where wrongfully erected defenses are proved to have damaged the stockholders by causing the stockholders to lose a sales opportunity or to sell at too low a price, should the directors be entitled to recover damages for the economic injury they inflicted on themselves as stockholders? If the answer is no because of the fact that they created the harm, this factor would support awarding relief to the class of innocent stockholders, not to the corporation.").

Footnote 30: Given that this decision should rationally impel settlement, the parties are of course free to settle in a manner that achieves this same result without the further costs of litigation.

Footnote 31:*See* Dkt. 136 at 30 (Apostolatos 3/16/17 Dep. Tr. at 114) (admitting that he did not report all royalty income on tax return because Shareholder Defendants "didn't want to pay taxes

on it" because they wanted to use "some of that cash to pay some of the undocumented labor"; he also admitted that what he did was not legal). As noted earlier, the court is dismayed at how a lawyer and accountant were complicit in the Shareholder Defendants' actions.

Footnote 32: Multiple contentions in the portion of defendants' opposition brief that addresses trademark infringement are demonstrably false and borderline frivolous. Three assertions are worth mentioning. First:

Defendants argue that Plaintiff does not have standing to assert a trademark infringement claim because he is not the owner of the mark. But Plaintiff does not bring the claim in his personal capacity-he brings it on behalf of the undisputed owner of the mark, [the Company].

Dkt. 194 at 31. Second:

Defendants argue that that there was a merger between [the Company] and Bareburger Group, which entitled Bareburger Group to use the mark. But it is undisputed that there was no merger. Defendants never created a plan of merger, ever submitted a plan of merger to the board of each company for adoption, never gave each shareholder of record notice of the required shareholders meeting to vote on the plan of merger, and never actually conducted a shareholder vote. Defendants try to circumvent the complete lack of merger evidence by arguing that a license was given from [the Company] to Bareburger Group. But there is no license agreement in the summary judgment record.

Id. (citations omitted). Even if there was a license agreement, the Company "has not received any consideration for the purported license." *Id.* Finally, defendants appear to suggest that they ratified Bareburger Group's use of the Trademark prior to the execution of the Trademark Assignment Agreement. While there is no evidence that they in fact did so, even if they did, such ratification would be ineffective as it would be yet another conflicted transaction that cannot satisfy entire fairness scrutiny and would amount to a breach of fiduciary duty. Allowing another company in which plaintiff is not a member to use the Trademark without consideration paid to the Company is corporate waste.

Footnote 33:*See* Dkt. 184 at 42 ("the application contained a Declaration stating that 'the applicant is the owner of the trademark/service mark' and 'no other person has a right to use the mark in commerce.' This Declaration was knowingly false because, as with the Trademark Assignment [Agreement] on the same day, the Defendants knew that [the Company]—through [plaintiff]—had recently made a demand for Bareburger Group to cease using [the Company's] intellectual property

such as 'logos, artwork, and other trademarked images and materials.'") (citations omitted).

Footnote 34: At this juncture, the court declines to *sua sponte* address other seemingly duplicative claims in the AC, but may do so at trial if the case does not settle.

Return to Decision List