1-14-2019

Bronner v. Hardy et al., ORDER ON PENDING MOTIONS FOR SUMMARY JUDGMENT

Melvin Westmoreland
Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

BERNARD H. BRONNER, Derivatively on behalf of Rainforest Production Holdings, Inc. and directly on behalf of himself,	)	
Plaintiff,	)	Civil Action File No. 2014CV248023
v.	)	
ROBERT E. HARDY, II, WILLIAM E. PACKER, JR. and TRF PRODUCTIONS, LLC,	)	Bus. Case Div. 3
Individual Defendants,	)	
and	)	
RAINFOREST PRODUCTION HOLDINGS, INC.	)	
Nominal Defendant.	)	

ORDER ON PENDING MOTIONS FOR SUMMARY JUDGMENT

The above styled action is before this Court on: (1) Defendants' Motion for Summary Judgment; (2) Counterclaimants' Motion for Partial Summary Judgment; and (3) Plaintiff's Motion for Partial Summary Judgment. Having considered the entire record and argument of counsel, the Court finds as follows:

SUMMARY OF FACTS

The allegations giving rise to this litigation span over two decades. However, the Court provides a brief summary of the most salient facts below:

Rainforest Production Holdings, Inc. ("Rainforest") was registered as a Georgia corporation in 1996 by founders Robert E. Hardy ("Hardy") and William E. Packer (Packer) to produce films directly or through its subsidiaries under the name and mark of Rainforest Films.[1] In May 1998, Hardy and Packer formed TRF Productions, LLC ("TRF") as a subsidiary of Rainforest in order to develop, produce, and distribute a film entitled *Trois*.[2] After production of the film, Hardy and Packer sought investors to finance its distribution. Following a screening of the film at the *Acapulco Black Film Festival* in the summer of 1999, Hardy and Packer were introduced to Plaintiff Bernard H. Bronner ("Bronner"), who expressed his interest in investing in *Trois*.[3] Bronner subsequently invested and/or helped to secure investments of over $500,000.00 in TRF and Rainforest between 1999 and 2000[4] and ultimately became a shareholder, director and the Vice President of Marketing for Rainforest.[5]

After *Trois*, Rainforest was involved in the production of various films, including: *Trois 2: Pandora's Box*; *The Gospel*; *Stomp the Yard*; and *Think Like a Man*.[6] However, disagreements arose regarding the management, day-to-day operations and finances of Rainforest.[7] The parties ultimately sought to resolve their differences via a Shareholder's Reconciliation Agreement

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1 Verified Shareholder Direct and Derivative Complaint ("Complaint"), ¶ 24; Defendants' Verified Answer and Defendants Robert E. Hardy, II, William E. Packer, Jr., and Rainforest Productions Holdings, Inc.'s Counterclaim Against Bernard H. Bronner ("Defs' Answer and Counterclaim"), ¶ 24; Defendants' Verified Amended Answer and Defendants Robert E. Hardy, II, William E. Packer, Jr., and Rainforest Productions Holdings, Inc.'s Amended Counterclaim Against Bernard H. Bronner ("Defs' Amendment to Answer and Counterclaim"), ¶ 8.

2 Defendants' Statement of Material Facts and Theories of Non-Recovery in Support of Summary Judgment ("Defs' SMF"), ¶ 9; Plaintiff Bernard H. Bronner's Response to Defendants' Statements of Material Facts and Theories of Recovery/Non-Recovery in Support of Defendants Motions for Summary Judgment ("Pl's Response to Defs' SMF"), ¶9.

3 Defs' SMF, ¶¶ 18-21; Pl's Response to Defs' SMF, ¶¶ 18-21.

4 According to Bronner, the parties entered into Subscription Agreements concerning his investments on Nov. 2, 1999, Dec. 8, 1999, Jan. 3, 2000, and Feb. 1, 2000. Complaint, ¶85. The Feb. 1, 2000 Subscription Agreement includes a handwritten notation stating: "This Subscription Agreement represents Mr. Bronner's total ownership in TRF Productions, LLC and supersedes all previous Subscription Agreements." Defs' SMF, Ex. K (TRF Productions, LLC Subscription Booklet executed Feb. 1, 2000) at p. 7.

5 Defs' SMF, ¶¶ 22, 27; Pl's Response to Defs' SMF, ¶¶ 22, 27.

6 Defs' SMF, ¶¶ 47, 49, 55, 112; Pl's Response to Defs' SMF, ¶¶ 47, 49, 55.

7 *See, e.g.,* Defs' SMF, ¶¶ 37, 40-42, 62, 64-68, 73, 75, 79-83, Exs. M-N (emails); Pl's Response to Defs' SMF, ¶¶ 37, 40-42, 62, 64-68, 73, 75, 79-83.

("Reconciliation Agreement" or "Agreement" as appropriate) which Rainforest, its wholly owned-subsidiary Rainforest Films, Hardy, Packer, and Bronner entered into in October 2010.[8] At the time, Hardy owned 480,000 shares (32.1%), Packer owned 487,000 shares (31.5%) and Bronner owned 460,000 shares (30.8%) in Rainforest.[9]

Pursuant to the Reconciliation Agreement, Rainforest was required to, *inter alia*: (1) make a "Reconciliation Payment" to Bronner[10], (2) prepare and deliver to Bronner a "Trois Financial Report"[11], (3) calculate and establish certain year-end distributions and a bonus pool[12], and (4) pay $175,000.00 annual base salaries to Hardy and Packer.[13] The Reconciliation Agreement also set out a compensation structure for Core Business Projects as defined therein.[14]

Additionally, the Reconciliation Agreement contains a "Mutual Non-Disparagement" provision which precludes the parties from (1) knowingly and intentionally damaging, discrediting, or otherwise injuring the goodwill, esteem, or reputation of any party, or (2) making any false, misleading, or disparaging statement about any other party with respect to such party's past current or future involvement in Rainforest or any aspect of Rainforest's business or operations.[15] Further, the Agreement contains release provisions whereby Bronner[16], Rainforest

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8 Defs' SMF, ¶ 84, Ex. I (Reconciliation Agreement); Pl's Response to Defs' SMF, ¶84.

9 Reconciliation Agreement, Recitals at ¶ 1; Defs' Amendment to Answer and Counterclaim, ¶14.

10 "Rainforest Productions shall pay to Bronner an aggregate of Two Hundred Thousand Dollars ($200,000) (the "Reconciliation Payment")..." Reconciliation Agreement, § 1.1 (emphasis in original).

11 "Within 120 days following the end of calendar year 2010, Rainforest Productions shall have prepared and delivered to Bronner a financial report (the "Trois Financial Report") setting forth in reasonable detail the financial results of the feature film "Trois", which report shall be prepared consistent with prevailing financial accounting practices in the feature film industry..." Reconciliation Agreement, §1.6 (emphasis in original).

12 "Within sixty (60) days following the end of each fiscal year, Rainforest Productions shall calculate and establish as a "Year-End Bonus Pool" an amount equal to three percent (3%) of the net revenues of Rainforest Productions and all of its operating entities as a whole (including Rainforest films) during the recently-ended fiscal year." Reconciliation Agreement, § 2.5 (emphasis in original).

13 Reconciliation Agreement, §§ 2.2(a), (b).

14 Reconciliation Agreement, §§ 2.3, 2.4

15 Section 3.1 of the Reconciliation Agreement provides in part:

> None of Bronner, the Founders, and Rainforest Productions (or any direct or indirect subsidiary or other affiliated entity of Rainforest Productions and any employee, officer, director or agent of any of the foregoing) shall knowingly or intentionally take any action

Productions[17], and the Founders[18] (Packer and Hardy) released claims and causes of action as to certain parties. Contemporaneously with the Reconciliation Agreement the parties executed a Shareholders Agreement which expressly acknowledged and "operated together" with the Reconciliation Agreement to govern ownership and management of Rainforest moving forward.[19]

Nevertheless, in the years following execution of the Reconciliation Agreement the parties continued to disagree over the operations and finances of Rainforest, including whether the parties had complied with the requirements of the Agreement, which projects that Packer and Hardy worked on constituted Rainforest projects for which it may be entitled to proceeds, and the use of various company-owned resources (*e.g.*, disputes over a wireless service account opened in the name of Rainforest, an Los Angeles, California apartment owned and paid for by Rainforest, and a company vehicle).[20]

Defendants allege "[f]ollowing the *Stomp the Yard* films in 2010, Hardy and Packer have not worked together on any project, let alone a Rainforest Productions Core Business Project" and after those films "Rainforest Productions generated no revenue", requiring Hardy and Packer

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> at any time for the purpose of damaging, discrediting or otherwise injuring the goodwill, esteem or reputation of any other party hereto. Without limiting the foregoing, no party shall make, at any time, any false, misleading or disparaging statement about any other party hereto with respect to such party's past, current or future involvement in Rainforest Productions or any aspect of Rainforest Productions' business or operations…

16 Reconciliation Agreement, § 1.3.

17 Reconciliation Agreement, § 1.4.

18 Reconciliation Agreement, § 1.5.

19 Defs' SMF, ¶ 92, Ex. J (Shareholders Agreement); Pl's Response to Defs' SMF, ¶ 92. The Shareholders Agreement expressly provides:

> Acknowledgment of Reconciliation Agreement. The provisions of this Agreement and the provisions of the Reconciliation Agreement are intended to be consistent and to operate together to establish the parameters and protocols for certain aspects of the relationship among the Founders and Bronner with respect to the operations and affairs of the Corporation and its operating entities, including Rainforest Films. The parties expressly agree that the provisions of this Agreement and those of the Reconciliation Agreement shall be construed and enforced in accordance with such intent.

20 Defs' SMF, ¶¶ 79-83, 96-111; Pl's Response to Defs' SMF, ¶¶ 79-83, 96-108.

to engage in "pre-existing, independent projects with third-parties" and to "make capital contributions using money earned from individual projects to keep Rainforest Productions in business and satisfy its financial obligations."[21] According to Defendants, in an effort to raise Rainforest Productions' profile and potentially generate future development opportunities" Packer gave "Executive Production (vanity) credit to Rainforest Productions for *Think Like a Man 2*, *Ride Along*, and *About Last Night,*" but because Packer allegedly did not use Rainforest's name or assets in the production, marketing, or distribution of these films or others he worked on after 2010, Rainforest was appropriately not compensated.[22]

Bronner alleges that both before and after the *Stomp the Yard* films Hardy and Packer were "loaned out" on various projects as part of Rainforest's business model and they did not make "capital contributions" as they allege, but rather diverted Rainforest monies and opportunities for themselves without authorization and attempt to characterize amounts they did not divert as capital contributions.[23] Bronner also alleges Rainforest's "name" was used on other projects for which Rainforest was not compensated.[24] Further, Bronner asserts Packer used $400,000.00 of Rainforest's credit for his personal use without notice to or authorization from shareholders.[25]

Ultimately, on May 15, 2014, Hardy and Packer circulated a Notice of Special Meeting of Shareholders and Information Statement disclosing the proposed dissolution of Rainforest and

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21 Defs' SMF, ¶¶ 105-112, 131-132.

22 Defs' SMF, ¶¶ 113, 121.

23 Pl's Response to Defs' SMF, ¶¶ 105-112; Plaintiff Bernard H. Bronner's Appendix of Evidentiary Materials Submitted in Support of his Motion for Partial Summary Judgment, Memorandum of Law in Support Thereof and Statement of Material Facts and His Oppositions to Defendants' Motions for Summary Judgment ("Pl's Appendix"), Ex. M (letter dated Apr. 20, 2014 from Hardy to Rainforest Shareholders).

24 Pl's Response to Defs' SMF, ¶¶ 112-114, 121.

25 Pl's Response to Defs' SMF, ¶117.

setting a special meeting to occur on May 28, 2014.[26] The special meeting was subsequently moved to June 2, 2014.[27] On May 23, 2014, Bronner served the Rainforest Board of Directors, Packer, and Hardy with a "Shareholder Demand Pursuant to O.C.G.A. § 14-2-742"[28] wherein Bronner made various demands, including that Rainforest withdraw the Notice of Special Meeting, investigate whether Packer and Hardy had harmed the company by failing to meet their fiduciary duties, engage an appraiser to evaluate the value of the business, and produce various business records.[29] The Notice of Special Meeting was not withdrawn and the special meeting proceeded on June 2, 2014 at which the requisite majority of Rainforest shareholders voted in favor of the proposed dissolution of Rainforest and its subsidiaries, which according to the Board's adopted Plan of Liquidation and Dissolution, involved the establishment of a liquidation trust and a sale of the rights to the Rainforest name and logo to Hardy for $10,000.00.[30] Articles of Dissolution of Rainforest Films, Inc. and Rainforest Production Holdings, Inc. were filed with the Georgia Secretary of State to effectuate the dissolution.[31]

Shortly following Rainforest's dissolution, Plaintiff Bronner filed this lawsuit on June 20, 2014, asserting various causes of action against Defendants directly as well as derivatively on behalf of Rainforest, including: (1) breach of Subscription Agreement (direct claim asserted against TRF Productions); (2) fraud (direct claim asserted against Hardy and Packer); (3) breach of fiduciary duty (derivative claim against Hardy and Packer); (4) "lack of candor" (derivative claim asserted against Hardy and Packer); (5) "gross mismanagement" (derivative claim

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[26] Defs' SMF, Ex. O (Correspondence and Notice of Special Meeting of Shareholders dated May 15, 2014; Information Statement for Special Meeting of Shareholders).

[27] Defs' SMF, Ex. W (Notice of Special Meeting Date Change dated May 19, 2014).

[28] Hereinafter "Shareholder Demand".

[29] Defs' SMF, ¶ 151, Ex. P (Shareholder Demand Pursuant to O.C.G.A. §14-2-742 dated May 23, 2014); Pls' Response to Defs' SMF, ¶ 151; Pl's Appendix, Ex. BB.

[30] Defs' SMF, Ex. Q (Exhibits to Minutes of Special Meeting of Shareholders Jun. 2, 2014), Ex. O (Information Statement for Special Meeting of Shareholders) at pp. 10-17.

[31] Defs' SMF, Ex. R (Articles of Dissolution).

asserted against Hardy and Packer); (6) "waste of corporate assets" (derivative claim asserted against Hardy and Packer); (7) unjust enrichment (derivative claim asserted against Hardy and Packer); (8) "abuse of control" (derivative claim asserted against Hardy and Packer); (9) quantum meruit (derivative claim asserted against Hardy and Packer); (10) appointment of a receiver (derivate claim asserted generally); and (11) "misappropriation of corporate assets" (derivative claim asserted against Hardy and Packer).[32]

Defendants/Counterclaimants have asserted a counterclaim against Bronner alleging that, Bronner and/or his agents made and continue to make false, disparaging, and defamatory remarks about Defendants to third parties, including releasing the contents of his Complaint in this litigation to media outlets so that outlets would publish the allegedly false statements contained therein, and using Sean Merrick a/k/a Jacky Jasper ("Jasper"), who operates the online blog *Hollywood Street King*, to publish false, disparaging, and defamatory statements concerning Packer on Bronner's behalf.[33] Defendants/Counterclaimants allege Bronner maliciously and falsely "asserted that Hardy and Packer engaged in fraudulent practices related to the business operations of Rainforest and have fraudulently failed to pay Rainforest's investors the money the investors are owed as a return of their investments."[34] Additionally, they assert Bronner misappropriated company resources for his personal benefit, including misusing the corporate Los Angeles apartment and improperly using company resources to pay for cellular expenses, travel expenses, and automobile expenses.[35] In their counterclaim, Defendants/Counterclaimants

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32 Bronner's "First Cause of Action" against Hardy and Packer for "oppression" was previously dismissed by the Court. *See* Order on Defendants' Motion to Dismiss and for Judgment on the Pleadings (Apr. 13, 2015).

33 Defs' Amendment to Answer and Counterclaim, ¶ 54, 57-62; Defs' SMF, ¶¶ 126-130; Counterclaimants' Statement of Material Facts and Theories of Recovery in Support of Partial Summary Judgment – Counterclaims ("Counterclaimants' SMF"), ¶¶ 36-42, Ex. B (Packer Aff.) at Ex. 9 (collection of articles at issue referencing Packer; referred to generally herein as "Jasper articles").

34 Defs' Amendment to Answer and Counterclaim, ¶¶ 55-56.

35 Defs' Amendment to Answer and Counterclaim, ¶¶ 80-87; Counterclaimants' SMF, ¶¶ 2, 17-21.

assert causes of action for: (1) breach of contract (asserted by Rainforest, Packer, and Hardy); (2) defamation (asserted by Packer and Hardy); (3) unjust enrichment/set off (asserted by Rainforest); and (4) expenses of litigation.

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted when the movant shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." O.C.G.A. § 9-11-56(c). If the moving party meets its initial burden of proof, the nonmoving party cannot rest on mere allegations or denials in its pleadings, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial. O.C.G.A. § 9-11-56(e).

A genuine issue of material fact exists where the facts in the record create a conflict in the evidence as to a material issue that could affect the outcome of the case under the governing law. *See* Shell v. Tidewater Fin. Co., 318 Ga. App. 69, 69, 733 S.E.2d 375 (2012); Johnson v. Unified Residential Dev. Co., Inc., 285 Ga. App. 852, 857, 648 S.E.2d 163, 168 (2002). Guesses, speculation, and conjecture are not enough to create a genuine issue of fact and defeat summary judgment. Hill v. Jackson, 336 Ga. App. 679, 681, 783 S.E.2d 719, 723 (2016). However, when ruling on a motion for summary judgment, the nonmovant should be given the benefit of all reasonable doubt, and the court should construe the evidence and all inferences and conclusions therefrom most favorably toward the party opposing the motion. ARP v. United Cmty. Bank, 272 Ga. App. 331, 331, 612 S.E.2d 534, 536 (2016); Smith v. Tenet Health Sys. Spalding, Inc., 327 Ga. App. 878, 879, 761 S.E.2d 409, 411 (2014). *See* Word v. Henderson, 220 Ga. 846, 848, 142 S.E.2d 244, 246 (1965) ("Where the evidence on motion for summary judgment is ambiguous or doubtful, the party opposing the motion must be given the benefit of

all reasonable doubts and of all favorable inferences and such evidence construed most favorably to the opposing party opposing the motion").

Further, "[w]hen...the parties file cross-motions for summary judgment, 'each party must show [that] there is no genuine issue of material fact regarding the resolution of [the essential] points of inquiry and that each, respectively, is entitled to summary judgment; either party, to prevail by summary judgment, must bear its burden of proof." Plantation Pipe Line Co. v. Stonewall Ins. Co. 335 Ga. App. 302, 780 S.E.2d 501 (2015) (citing Morgan Enterprises, Inc. v. Gordon Gillett Business Realty, 196 Ga. App. 112, 395 S.E.2d 303 (1990)).

ANALYSIS AND CONCLUSIONS OF LAW

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants move the Court for summary judgment in their favor with respect to all of Plaintiff's direct and derivative claims. Plaintiff has crossed moved for partial summary judgment with respective to his derivative claim for breach of fiduciary duties. The Court shall consider these claims in turn.

A. Plaintiff's Direct Claims

Plaintiff asserts two direct claims against Defendants: a breach of contract claim which based on the record appears to be asserted against TRF for breach of the Subscription Agreement and/or against Defendants for breach of the Reconciliation Agreement; and a fraud claim against Packer and Hardy for allegedly misrepresenting Rainforest's financial figures and accounting and by altering the financial figures relating to *Trois* and TRF in order to divert money that Bronner claims was owed to him.

1. Breach of Contract

"The elements for a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." SAWS at Seven Hills, LLC v. Forestar Realty, Inc., 342 Ga. App. 780, 784, 805 S.E.2d 270, 274 (2017) (citing Dewrell Sacks, LLP v. Chicago Title Ins. Co., 324 Ga. App. 219, 223 (2) (a), 749 S.E.2d 802 (2013)).

Here, Bronner's Complaint alleges TRF breached the Subscription Agreement by failing to make certain corporate distributions.[36] However, Bronner has also alleged in this litigation Defendants breached the Reconciliation Agreement by not establishing year-end bonus pools for several years, failing to provide an adequate financial report concerning *Trois*, and failing to comply with the compensation structure set forth in the agreement for Single Contractor and Joint Contractor Core Business Projects.[37] Defendants assert they are entitled to judgment as a matter of law on the contract claim on several grounds, including: (1) the claim is barred by the applicable statute of limitations, (2) the claim is barred by the parties' Reconciliation Agreement, (3) Bronner lacks standing to bring this claim directly, (4) Bronner is not entitled to the sought-after distributions, and (5) because Bronner cannot establish any recoverable damages.

a) Statute of limitations with respect to breach of contract claims arising before June 2008

In Georgia, "[a]ll actions upon simple contracts in writing shall be brought within six years after the same become due and payable." O.C.G.A. § 9-3-24.

> It is well settled that the six-year statute of limitations applies to claims involving the breach of a written contract…It is equally settled that for simple contracts this six-year period begins to run on the date the contract

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[36] Complaint, ¶ 86.

[37] *See, e.g.,* Bronner Depo. (Jan. 26, 2017), pp. 92-96, 127-140, 147-151; Plaintiff Bernard H. Bronner's Opposition to Defendants' Motion for Summary Judgment ("Pl's Opp. to Defs' MSJ"), pp. 4-5.

> is breached and the wrongful acts occur, not the date the actual damage results or is discovered.

Old Republic Nat'l Title Ins. Co. v. Darryl J. Panella, LLC, 319 Ga. App. 274, 276, 734 S.E.2d 523 (2012). Thus, for the claim to be actionable, a claimant must point to evidence in the record showing that the breach of the contract occurred within six years of the filing of the complaint. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779 (2007).

However, the statute of limitations may be tolled if a claimant can show that the opposing party's conduct prevented him from discovering or asserting the cause of action. *See* O.C.G.A. § 9-3-96 ("If the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud"). In order to establish fraudulent concealment under O.C.G.A. §9-3-96 sufficient to toll the statute of limitations,

> a plaintiff must prove that: (1) the defendant committed actual fraud involving moral turpitude, (2) the fraud concealed the cause of action from the plaintiff, and (3) ***the plaintiff exercised reasonable diligence to discover his cause of action despite his failure to do so within the applicable statute of limitation.***

Cochran Mill Assocs. v. Stephens, 286 Ga. App. 241, 245, 648 S.E.2d 764, 767 (2007) (emphasis added). "The plaintiff has the burden of showing the existence of facts that would toll the statute of limitation." Falanga v. Kirschner & Venker, P.C., 286 Ga. App. 92, 94, 648 S.E.2d 690 (2007).

Importantly,

> [t]he fraud which tolls a statute of limitation must be such actual fraud as could not have been discovered by the exercise of ordinary diligence. This rule is applied even where actual fraud is the gravamen of the action. The statute of limitation is only tolled until the fraud is discovered or by reasonable diligence should have been discovered.

Bauer v. Weeks, 267 Ga. App. 617, 619, 600 S.E.2d 700, 702–03 (2004) (quoting Bahadori v. Nat'l Union Fire Ins. Co., 270 Ga. 203, 205(3), 507 S.E.2d 467 (1998)).

Finally, although the level of diligence in investigating fraud is lessened where a confidential relationship exists, "it is not entirely extinguished." Cochran Mill Assocs., 286 Ga. App. at 247 (citing Hunter, Maclean, Exley & Dunn, P.C. v. Frame, 269 Ga. 844, 848(1), 507 S.E.2d 411, 414 (1998)). Thus, when a party fails to exercise due diligence as a matter of law, the issue of diligence may be resolved on a motion for summary judgment. Smith v. Suntrust Bank, 325 Ga. App. 531, 544, 754 S.E.2d 117 (2014) ("A party may fail to exercise due diligence as a matter of law"); Nash v. Ohio Nat. Life Ins. Co., 266 Ga. App. 416, 418, 597 S.E.2d 512, 515 (2004). *See* Falanga, 286 Ga. App. at 95 (concluding that limitations period was not tolled, despite fiduciary relationship, where the plaintiff failed to review available statements revealing alleged fraud); Almond v. Young, 314 Ga. App. 230, 230-31, 723 S.E.2d 691 (2012) ("This Court has held that mere silence or a failure to disclose, even where there existed a fiduciary relationship, will not toll the statute of limitation for fraud where "the information was open and available") (citation omitted).

Here, Plaintiff alleges Defendants breached the Subscription Agreement by failing to make required distributions. The six-year limitations period began to run when the alleged breaches of the Subscription Agreement occurred, which, according to Plaintiff's deposition testimony, happened on multiple occasions over the course of several years, many of them outside of the limitations period. Specifically, Bronner testified that prior to 2010 "[he] went ten years without receiving a portion of the profits" and in that regard "[he] went ten years of fighting for the original *Trois* investors."[38] In a 2009 email to Defendants Packer and Hardy,

[38] Bronner Depo. (Jan. 26, 2017), p. 123.

Bronner noted that the last distribution he received was sometime in 2005.[39] In regard to Bronner's claim Defendants did not provide accurate financial accounting, Bronner testified Defendants failed to provide documentation regarding alleged losses "from year two, three, four, five, six, seven, eight and nine"[40] of the parties' business dealings (which began in the 1999) and he also testified "[w]ord on the street was Rob [Hardy] and Will [Packer] had just ripped us all off."[41]

Nevertheless, Plaintiff asserts Defendants' fraudulent misrepresentations concerning *Trois'* financial performance tolled the statute of limitations on his contract claim, and although he was "exploring the possibility of legal action" no later than 2009, he instead negotiated with Defendants to enter into the Reconciliation Agreement.[42] Plaintiff asserts he exercised sufficient due diligence in investigating Rainforest's finances, citing to a 2010 meeting with Rainforest's accountant, Barren Watson, to understand the *Trois* accounting statement that was provided following execution of the Reconciliation Agreement.[43] Additionally, Plaintiff contends because there was a confidential relationship with Defendants a lesser level of diligence in discovering his claims is required. The Court is not persuaded.

As noted above, Bronner acknowledged having suspicions regarding Rainforest's financials beginning early in the parties' business dealings and those suspicions festered for at least a decade during which time Defendants allegedly consistently failed to pay distributions Bronner contends were due and did not provide an adequate accounting of the company's

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39 Pl's Appendix, Ex. LL.
40 Bronner Depo. (Jan. 26, 2017), pp. 127-30.
41 Bronner Depo. (Jan. 26, 2017), p. 129.
42 Pl's Opp. to Defs' MSJ, p. 7.
43 Pl's Response to Defs' SMF, ¶ 102; Pl's Opp. to Defs' MSJ, p. 10.

finances despite the apparently public success of *Trois* and various other Rainforest films. As summarized by Bronner:

> ...[Y]ou have not been paid in ten years and you're seeing number one box office every year for ten years and you still have not been getting paid, after ten years any normal person would have these kinds of feelings. This is ten years of not getting paid...After ten years. I kept my peace, kept my cool for nine years. And on the tenth year I basically came to the point that enough is enough.[44]

However, a party on notice of a suspected claim cannot sit on his hands for a decade, fail to exercise rights to obtain information or to pursue such claims, and then allege fraud tolls the applicable limitations period.[45] Such does not constitute due diligence as a matter of law. Accordingly, the Court finds fraud does not toll the six-year limitations period on Plaintiff's breach of contract claim and, as such, any such alleged breach of the Subscription Agreement that occurred before June 20, 2008, is time barred as a matter of law.

b) Breach of contract claims arising after June 2008

i. Enforceability of Reconciliation Agreement and election of remedies

The record demonstrates Plaintiff has asserted two alternative theories of recovery on his breach of contract claim. On one hand, Plaintiff argues the Reconciliation Agreement and the releases contained therein are void and unenforceable (because he was fraudulently induced to enter the contract, among other cited reasons) such that his contract claim is predicated on an alleged breach of the Subscription Agreement by TRF for failing to pay distributions. On the

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[44] Bronner Depo. (Jan. 26, 2017), p. 123.

[45] As an officer and shareholder of Rainforest Productions, Bronner would be entitled to access/inspect certain records of Rainforest, including its accounting records. *See* O.C.G.A. § 14-2-1602(c)(2). *See also* O.C.G.A. §§ 14-2-801(b), 14-2-841. The Georgia Court of Appeals has held that a shareholder "is not entitled to negligently refuse to acquire knowledge that was open and available...through inspection of the corporation's books and records. Put another way, a shareholder cannot turn a blind eye on information available to him." Rollins v. LOR, Inc., 345 Ga. App. 832, 846, 815 S.E.2d 169, 181 (2018) (internal quotations omitted). Despite alleging during his testimony that Defendants made numerous misrepresentations about *Trois'* and Rainforest Production's financial performance, Bronner has not cited to any evidence in the record that he attempted to exercise or enforce his rights as a shareholder or officer to inspect Rainforest's records prior to 2010.

other hand, Plaintiff asserts Defendants breached various provisions of the Reconciliation Agreement.[46]

"In general, a party alleging fraudulent inducement to enter a contract has two options: (1) affirm the contract and sue for breach; or (2) rescind the contract and sue in tort for fraud." Cotton v. Bank S., 231 Ga. App. 812, 813–14, 499 S.E.2d 129, 131 (1998) (citing Jones v. Cartee, 227 Ga. App. 401, 403, 489 S.E.2d 141(1997)). "A contract may be rescinded at the instance of the party defrauded; but, in order to rescind, the defrauded party must promptly, upon discovery of the fraud, restore or offer to restore to the other party whatever he has received by virtue of the contract if it is of any value." O.C.G.A § 13-4-60.

"In order to rescind a contract and sue for restitution, a plaintiff must first restore or make a bona fide effort to restore to the other party whatever benefits he has received from the transaction." Daly v. Mueller, 279 Ga. App. 168, 169–70, 630 S.E.2d 799, 801 (2006) (quoting Graham v. Cook, 179 Ga. App. 603, 604(1), 347 S.E.2d 623 (1986)). However,

> [w]here a party who is entitled to rescind a contract on ground of fraud or false representations, and who has full knowledge of the material circumstances of the case, freely and advisedly does anything which amounts to a recognition of the transaction, or acts in a manner inconsistent with a repudiation of the contract, such conduct amounts to

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[46] *Compare* Pl's Opp. to Defs' MSJ, p. 13-14 ("...Reconciliation Agreement being void and unenforceable..."); Id. at 19 ("The Reconciliation Agreement is void and unenforceable..."); Id. at 22 ("...the Reconciliation Agreement is void and unenforceable..."); Id. p. 16 (Plaintiff asserting that he has standing to assert his direct claim "for breach of contract [] against TRF for breach of his Subscription Agreement with Bronner []") *with* Id. at p. 4 (asserting a material fact remains as to "[w]hether Defendants violated the terms of the Reconciliation Agreement by taking 100% of revenue directed from loan out projects"); Plaintiff's Brief in Opposition to Counterclaimants' Motion for Summary Judgment on Counterclaims ("Pl's Opp. to Counterclaimants' MSJ"), p. 7-8, 12 (Defendants violated the Reconciliation Agreement, Section 2.5 by only performing "certain calculations and establish[ing] year-end bonus pool...for 2010 and 2011, but not for 2012, 2013 or 2014."); Id. at 7, 13 (Defendants failed to comply with the Reconciliation Agreement when they failed to "deliver a certain financial report concerning *Trois*, consistent with prevailing financial accounting practices...such that a determination could be made as to Trois' profitability and appropriate distributions could be made in the event of profit."); Id. at 8 (Defendants violated the Reconciliation Agreement when they did not comply with the "compensation structure for...Hardy and Packer[]" which did not "permit...[them] to take 100% of monies earned from film and other projects."); Bronner Depo. (Jan. 26, 2017), pp. 92-96, 136-151 (discussing Defendants' alleged, multiple breaches of the Reconciliation Agreement).

> acquiescence, and, though originally impeachable, the contract becomes unimpeachable in equity. If a party to a contract seeks to avoid it on the ground of fraud or mistake, he must, upon discovery of the facts, at once announce his purpose and adhere to it. Otherwise he can not avoid or rescind such contract.

Owens v. Union City Chrysler-Plymouth, Inc., 210 Ga. App. 378, 380, 436 S.E.2d 94, 96 (1993) (citing Gibson v. Alford, 161 Ga. 672, 673(5), 132 S.E. 442 (1926)). Indeed, when a party elects to rescind, he must do so before filing a suit. Williams v. Fouche, 157 Ga. 227, 121 S.E. 217 (1924) ("[T]he rule requiring one who seeks the rescission of a contract on the ground of fraud to restore, or offer to restore, the consideration received, as a condition precedent to bringing the action, is settled in this state"); Novare Grp., Inc. v. Sarif, 290 Ga. 186, 188, 718 S.E.2d 304, 307 (2011).

Having considered the record, the Court finds the Reconciliation Agreement is generally enforceable. In Georgia, "[a] contract is an agreement between two or more parties for the doing or not doing of some specified thing." O.C.G.A. §13-1-1. "To constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate." O.C.G.A. §13-3-1.

Here, all essential elements of an enforceable contract are met. Although Plaintiff claims the Reconciliation Agreement fails for lack of consideration because the Reconciliation Payment made to him was for monies already owed to him as an investor, the agreement was expressly intended to reconcile differences among the parties "concerning their respective roles in the business and affairs of Rainforest Productions and its affiliates, and payment to them with respect thereto" and was intended to establish "terms, parameters, and protocols for their future

relationship."[47] With respect to payments previously made or allegedly owed, the Reconciliation Agreement expressly provides:

> Beyond the Reconciliation Payment pursuant to Section 1.1 hereof, and in consideration of the distributions and payments previously made, no further distributions or payments in any form shall be made to Bronner or to any of the Trois Investors in respect of any past promise, commitment, assurance, other statement or indication that may have been previously given to (or understood by) Bronner or any of the Trois Investors, whether oral or in writing, in connection with any investment by Bronner or any Trois Investor in Rainforest Productions or any of its affiliates (each, a "**Prior Investment Commitment**"), unless any such distribution or payment is required pursuant to Section 1.6 hereof. The parties expressly agree that, upon receipt by Bronner of the Reconciliation Payment, all Prior Investment Commitments have been fully and completely satisfied, and neither Bronner nor any Trois Investor shall be entitled to assert or maintain hereafter any claim, cause of action or other alleged right in connection with any purported Prior Investment Commitment, subject to the provisions of Section 1.6.[48]

Thus, even if Plaintiff was previously promised or owed funds as an investor, the Reconciliation Agreement expressly encompassed and resolved such claims as well as other "differences" between the parties in exchange for the Reconciliation Payment as well as other promises and releases contained therein. Such is legally sufficient consideration. *See* Hayes v. Alexander, 264 Ga. App. 815, 818, 592 S.E.2d 465, 469 (2003) ("Any benefit accruing to the one who makes the promise, or any loss, trouble, or disadvantage undergone by, or charge imposed upon, the one to whom the promise is made, is sufficient consideration") (citing Pepsi Cola Bottling Co. of Dothan, Alabama v. First Nat. Bank of Columbus, 248 Ga. 114, 116(2), 281 S.E.2d 579 (1981)). *See also* Sims v. Bayside Capital, Inc., 327 Ga. App. 47, 50, 755 S.E.2d 520, 523 (2014) ("Even if th[e] consideration is wholly inadequate, in the absence of 'great disparity of mental ability in contracting a bargain,' a contract cannot be set aside for inadequate

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47 Reconciliation Agreement, Recitals at ¶5.

48 Reconciliation Agreement, §1.2 (emphasis in original).

consideration") (citing Kimbrell v. Connor, 218 Ga. App. 812, 813–814, 463 S.E.2d 376 (1995)); O.C.G.A. §13-3-46 ("Mere inadequacy of consideration alone will not void a contract").

To the extent Plaintiff claims Defendants failed to satisfy certain conditions or requirements of the Reconciliation Agreement, nothing in the Agreement suggests there were conditions precedent that had to be satisfied before the parties' rights and obligations thereunder were triggered. Indeed, the Reconciliation Agreement expressly provides that it is "effective as of" its execution on October 8, 2010. *See also* Sheridan v. Crown Capital Corp., 251 Ga. App. 314, 318, 554 S.E.2d 296, 300 (2001) ("The law favors conditions to be subsequent rather than precedent and to be remediable by damages rather than by forfeiture") (citing Fulton Cty. v. Collum Properties, Inc., 193 Ga. App. 774, 775, 388 S.E.2d 916, 918 (1989)); O.C.G.A. §13-3-4.

Plaintiff also claims the Reconciliation Agreement is "void and unenforceable" because he was fraudulently induced to enter into it. Specifically, Plaintiff asserts:

> Prior to entering the Reconciliation Agreement, Hardy and Packer deceived Bronner by misrepresenting the financials and operations of Rainforest, including a) omitting the fact that Packer was actively utilizing hundreds of thousands of dollars of Rainforest funds for personal use, b) omitting the fact that Hardy and Packer were diverting Rainforest opportunities for their personal companies[,] c) misrepresenting Rainforest and *Trois* profits (both directly and through accountant Barren Watson.[49]

Nevertheless, Plaintiff has not sought to rescind the Reconciliation Agreement nor returned or offered to return the $200,000.00 Reconciliation Payment he received pursuant thereto. Insofar as Plaintiff has not properly sought to rescind the Reconciliation Agreement on the basis of his alleged fraudulent inducement and by keeping the Reconciliation Payment has taken action "inconsistent with a repudiation of the contract", he can now only affirm the

[49] Pl's Opp. to Defs' MSJ, p. 19.

contract and pursue a claim for breach thereof. Cotton, 231 Ga. App. at 813–14; Jones, 227 Ga. App. at 403; Williams, 157 Ga. at 227; Owens, 210 Ga. App. at 380.

Further, to the extent any such claim for breach of the Reconciliation Agreement is predicated on alleged promises, statements or misrepresentations made before the Agreement was entered into, such is barred by the Agreement's merger provision which states:

> This Agreement supersedes all prior discussions and agreements between or among the parties with respect to the subject matter hereof, and this Agreement, together with documents that are attached hereto as Exhibits and Schedules, contains the sole and entire agreement between or among the parties with respect to the matters covered hereby.[50]

See Cotton, 231 Ga. App. at 814 (where a party fails to timely rescind a contract with a merger clause and instead affirms the contract, he is "estopped from asserting any reliance upon the alleged misrepresentation made prior to execution of the contract"); Owens, 210 Ga. App. at 380. *See also* Liberty v. Storage Tr. Properties, L.P., 267 Ga. App. 905, 910, 600 S.E.2d 841, 845–46 (2004) ("A merger clause prevents a recovery in contract because it 'operates as a disclaimer, establishing that the written agreement completely and comprehensively represents all the parties' agreement'…As a result, where a contract contains a merger clause, a party cannot assert 'they relied upon representations other than those contained in the contract'") (quoting Authentic Architectural Millworks v. SCM Group USA, 262 Ga. App. 826, 828(2), 586 S.E.2d 726 (2003)).

ii. Remaining breach of contract claim

Defendants assert the Reconciliation Agreement and the releases contained therein bar any claims against them premised on alleged events that took place before it was executed on October 8, 2010. The Court agrees.

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[50] Reconciliation Agreement, §5.3.

With respect to the release by Bronner, the Reconciliation Agreement provides:

> Effective as of the Signing, Bronner…hereby fully and generally releases, remises, acquits and fully discharges ***the Founders, Rainforest Productions and their respective affiliates, including, without limitation, any direct or indirect subsidiary or other affiliated entity of Rainforest Productions***, any director, officer, employee, shareholder, professional advisor or agent of any of the foregoing (collectively, the "Rainforest Released Parties") from any and all claims, actions, causes of action and other alleged rights (whether known, unknown, fixed or contingent) that Bronner has, has ever had or may hereafter have against any of [sic] Rainforest Released Parties, with respect to any Prior Investment Commitment and any financial support that Bronner may have provided to Rainforest Productions or any of its affiliates from time to time in the past.[51]

Insofar as the Reconciliation Agreement is enforceable, the foregoing release clearly and unambiguously bars any breach of contract claim (or other direct claims asserted by Bronner against Defendants) arising prior to Oct. 8, 2010, including against TRF given that it is undisputedly an "affiliate" and "subsidiary" of Rainforest Productions. *See* Harkins v. CA 14th Inv'rs, Ltd., 247 Ga. App. 549, 550, 544 S.E.2d 744, 746 (2001).

Nevertheless, construing the evidence and all inferences and conclusions therefrom most favorably to Plaintiff, giving him the benefit of all reasonable doubt, a jury question remains as to whether Defendants breached the Reconciliation Agreement, including whether Defendants: performed the calculations for a Year-End Distribution and Bonus Pool in 2012, 2013, and 2014 pursuant to §2.5[52]; prepared and delivered to Bronner "a financial report…setting forth in ***reasonable detail*** the financial results of the feature film "Trois", which report shall be prepared ***consistent with prevailing financial accounting practices in the feature film industry***" as

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[51] Reconciliation Agreement, §1.3 (bold and italicized emphasis added). *See also* id. at §1.2 (defining "Prior Investment Commitment").

[52] *See, e.g.,* Pl's Response to Defs' SMF, ¶ 99; Packer Depo. (Jan. 31, 2018), pp. 294-309, 311-315, 320; Counterclaimants' SMF, Ex. Q (Year-End Distribution/Bonus Pool Calculations for 2010 and 2011); Defs' SMF, Ex. A (Hardy Affidavit) at ¶37, Ex. B (Packer Affidavit) at ¶36.

required under §1.6 (emphasis added)[53]; and complied with Article II regarding the financial management of Rainforest related to its Core Business[54], including with regards to the use of Rainforest films and its other operating entities and the compensation structure set forth for Single Contractor and Joint Contractor Core Business Projects as defined and described thereunder.[55] Although Defendants contend Rainforest was never profitable and they characterize funds received by Rainforest as voluntary "capital contributions", payments made to investors and shareholders as "gratuitous", and Executive Producer credit given to Rainforest as merely "vanity" credit, given this record the Court simply cannot say as a matter of law no evidence

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[53] *See, e.g.,* Defs' SMF, Ex. L (one page Trois Accounting); Bronner Depo. (Jan. 26, 2017), pp. 136-151 (describing Defendants' alleged failure to comply with §1.6); Packer Depo. (May 5, 2018), pp. 172-173 (acknowledging Trois Accounting did not include revenue from an "HBO deal" and that one would need to reference other materials to understand specific figures).

[54] Notably, the Reconciliation Agreement describes Rainforest's "Core Business" as broadly encompassing film and television activities involving both direct and indirect services provided by Hardy and Packer: "Rainforest Productions uses Rainforest films as its principal operating entity in performing its feature film, television, and other motion picture business activities (the "Core Business") that involve the direct and indirect provision of services by the Founders or other personnel of Rainforest Productions' affiliated group of entities." Reconciliation Agreement, Recitals at ¶ 3. "Core Business Projects" is generally defined as "all projects that are part of its Core Business." Id., Recitals at ¶ 4.

[55] *See, e.g.,* Reconciliation Agreement, § 2.1 ("Rainforest Productions shall continue to use Rainforest Films or another operating entity of or controlled by Rainforest Productions to engage in all Core Business Projects in which either of the Founders receives any compensation or other payment for his services as a result of such Core Business Project. No compensation or other payment may be made to either of the Founders on account of any service performed by a Founder with respect to any Core Business Project, excepted as provided in this Agreement or ***unless such compensation or other payment is approved by the Board of Directors of Rainforest Productions in a vote in which the Bronner Director joins***...") (bold and italicized emphasis added); id. at § 2.3 (setting forth the compensation structure for Single Contractor Core Business Projects "where (1) ***the personal services of only of Hardy or Packer are contracted on an individual basis*** (as opposed to the services of Rainforest Films or another Rainforest Productions operating entity per se) for the project...(2) the other individual is not so contracted or is engaged and paid on a separate basis for personal services that are not part of the Core Business of Rainforest Productions, and (3) ***the name*** or assets ***of Rainforest Films or another Rainforest Production*** operating entity are nonetheless to be used in the project...") (bold and italicized emphasis added); Bronner Depo. (Jan. 26, 2017), pp. 55-57 (describing Sony's role as financing certain projects involving Rainforest where Rainforest "was contracted and paid based on percentage of sales"); Pl's Appendix, Ex. M (letter dated Apr. 20, 2014 from Hardy to Rainforest Shareholders describing "loan outs" of Hardy and Packer's services in exchange for a portion of fees earned being paid to Rainforest until January 2012 when Hardy and Packer stopped receiving a salary from Rainforest and instead kept 100% of the funds generated); Hardy Depo. (Jan. 29, 2018), pp. 274-308, 314-317 (describing the Apr. 20, 2014 letter to shareholders and the change in how Hardy and Packer's compensation was handled); Defs' SMF, ¶¶ 113, 121 (acknowledging Rainforest was given Executive Producer credit for *Think Like a Man 2*, *Ride Along*, and *About Last Night*).

exists to support a breach of contract claim against Defendants.[56] Thus, Defendants' Motion for Summary Judgment is GRANTED, IN PART, and DENIED, IN PART, as set forth above.

2. Fraud

"In order to prove fraud, the plaintiff must establish five elements: (1) a false representation by a defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damage to plaintiff." Engelman v. Kessler, 340 Ga. App. 239, 246, 797 S.E.2d 160, 166 (2017), cert. denied (Aug. 14, 2017) (citing to Sun Nurseries, Inc. v. Lake Erma, LLC, 316 Ga. App. 832, 835 (1), 730 S.E.2d 556 (2012)).

Here, Bronner's Complaint alleges Hardy and Packer committed fraud by "[b]y repeatedly, falsely and fraudulently representing the financial figures and accounting of [Rainforest]" and "[b]y fraudulently altering the financial figures provided to Plaintiff related to *Trois* and [Rainforest] in order to mispresent the true financials of [Rainforest] in order to divert monies that lawfully belong to Plaintiff."[57] Defendants assert they are entitled to a judgment a as a matter of law on the fraud claim because the claim: (1) is barred by the applicable statute of limitations; (2) is barred by the Reconciliation Agreement; and (3) cannot be asserted directly.[58]

a) Statute of limitations with respect to fraud claim arising before June 2010

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[56] Importantly, the Reconciliation Agreement was executed by Rainforest Films and Rainforest Productions as well as by Bronner, Hardy, and Packer individually, and it sets forth specific contractual rights and obligations by and between those parties.

[57] Complaint, ¶ 89.

[58] Defendants also assert judgment should be entered in their favor as a matter of law on Bronner's fraud claim due to the failure to plead fraud with the requisite particularity *See* O.C.G.A. §9-11-9(b). However, given Defendants never moved to dismiss the claim on such grounds and in light of the now exhaustive record which includes multiple allegations and testimony regarding Defendants' alleged failure to provide accurate financial information regarding Rainforest, the Court is not persuaded.

Fraud claims are subject to a four-year statute of limitations. O.C.G.A. § 9-3-31. ("Actions for injury to personalty shall be brought within four years after the right of the action accrues.") As outlined above, a limitations period may be tolled by such fraud which debars or deters the plaintiff from bringing an action. *See, e.g.,* O.C.G.A. §9-3-96; Cochran Mill Assocs., 286 Ga. App. at 245; Bauer v. Weeks, 267 Ga. App. at 619; Bahadori, 270 Ga. at 205(3); Nash, 266 Ga. App. at 417-18, 597 S.E.2d 512 (2004).

Here, although Plaintiff argues Hardy's and Packer's fraudulent concealment and misrepresentation of financial information concerning *Trois* and other Rainforest projects tolled the statute of limitations, for the same reasons set forth in Part I(A)(1)(a), *supra*, the Court finds the limitations period was not tolled with respect to the fraud claim. Thus, to the extent the fraud claim is predicated on conduct that occurred prior to June 20, 2010, the claim is time-barred.

b) Fraud claim arising after June 2010

To extent the fraud claim is based on alleged misrepresentations made prior to execution of the Reconciliation Agreement, as discussed in Part I(A)(1)(b)(ii), *supra*, such is precluded under the release contained therein whereby Bronner "***on behalf of himself***...fully discharge[d] the Founders, Rainforest Productions and their respective affiliates, including...any direct or indirect subsidiary...***from any and all claims, actions, causes of action***...that Bronner has, has ever had or may have hereafter have...with respect to any Prior Investment Commitment and any financial support that Bronner may have provided to Rainforest Productions or any of its affiliates from time to time in the past."[59]

Further, as to Plaintiff's fraud allegations arising within the four-year limitations period, the Court finds Plaintiff has failed to point to evidence in the record establishing that he was

[59] Reconciliation Agreement, §1.3 (emphasis added).

uniquely injured by any alleged fraud committed by Hardy and Packer so as to maintain the fraud claim directly against those Defendants. "In general, derivative actions are required in the ordinary corporate context: (1) to prevent multiple suits by shareholders; (2) to protect corporate creditors by ensuring that the recovery goes to the corporation; (3) to protect the interest of all the shareholders by ensuring that the recovery goes to the corporation, rather than allowing recovery by one or a few shareholders to the prejudice of others; and (4) to adequately compensate injured shareholders by increasing their share values." Levy v. Reiner, 290 Ga. App. 471, 473–74, 659 S.E.2d 848, 851 (2008) (citing Thomas v. Dickson, 250 Ga. 772, 774–775, 301 S.E.2d 49 (1983); Southwest Health & Wellness v. Work, 282 Ga. App. 619, 626(2)(c), 639 S.E.2d 570 (2006)). Thus,

> [a] derivative suit is brought on behalf of a corporation for harm done to it, and any damages recovered are paid to the corporation. And although plaintiffs may bring direct actions for injuries done to them in their individual capacities by corporate fiduciaries, our Supreme Court has held that to have standing to sue individually, rather than derivatively on behalf of the corporation, the plaintiff must allege more than an injury resulting from a wrong to the corporation. ***In fact, to set out an individual action, the plaintiff must allege either an injury which is separate and distinct from that suffered by other members, or a wrong involving a contractual right of a member which exists independently of any right of the corporation***. Thus, for a plaintiff to have standing to bring an individual action, he must be injured directly or independently of the corporation. Furthermore, the determination of whether a claim is derivative or direct is made by looking to what the pleader alleged, and it is the nature of the wrong alleged and not the pleader's designation or stated intention that controls the court's decision.

Crittenton v. Southland Owners Ass'n, Inc., 312 Ga. App. 521, 524, 718 S.E.2d 839, 842–43 (2011) (internal punctuation and citations omitted; emphasis added).

Here, although the Court previously denied Defendants' Motion to Dismiss, finding at the pleading stage, there "[wa]s sufficient pleading of special injury to Bronner as shareholder and

party to the Reconciliation Agreement to allow a direct claim for fraud" to proceed, at the summary judgment stage Plaintiff is required to point to specific evidence he was, indeed, uniquely injured. Plaintiff's fraud claim is premised on Hardy and Packer's having allegedly misrepresented Rainforest's financial information. However, as noted by Defendants, any alleged misrepresentation of corporate financial records would result in harm to the corporation and its shareholders alike, not just Bronner. Further, although Plaintiff relies on the Reconciliation Agreement to support his fraud claim, noting the Agreement "purported to create certain rights for Bronner that were unique to him" and claiming Hardy and Packer made multiple misrepresentations to Bronner in relation thereto,[60] the obligations regarding financial disclosures, *e.g.*, to provide a "Trois Financial Report" and to calculate and establish a "Year-End Bonus Pool" was expressly that of Rainforest, not Hardy or Packer individually. *See* Derbyshire v. United Builders Supplies, Inc., 194 Ga. App. 840, 844, 392 S.E.2d 37, 40 (1990) ("An inherent purpose of incorporation is insulation from liability. A corporation possesses a legal existence separate and apart from that of its officers and shareholders so that the operation of a corporate business does not render officers and shareholders personally liable for corporate acts") (citing Raynor v. American States Ins. Co., 176 Ga .App. 564, 565(1), 337 S.E.2d 43 (1985); Trans–State v. Barber, 170 Ga. App. 372, 374(1), 317 S.E.2d 242 (1984)).

Having considered the entire record and given all of the above, Defendants' Motion for Summary Judgment is hereby GRANTED with respect to Plaintiff's fraud claim.

B. Plaintiff's Derivative Claims

1. *Preliminary Issues*

[60] Pl's Opp. to Defs' MSJ, pp. 17-18.

a) Ante Litem Requirement

Defendants argue the derivative claims should be dismissed because Plaintiff failed to satisfy the statutory ante litem requirements contained in O.C.G.A. § 14-2-742, which provides:

> A shareholder may not commence a derivative proceeding until:
> (1) A written demand has been made upon the corporation to take suitable action; and
> (2) Ninety days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90 day period.

See also Ebon Found. v. Oatman, 269 Ga. 340, 342, 498 S.E.2d 728, 730 (1998).

Here, Defendants initially provided the Notice of Special Meeting of Shareholders on May 15, 2014. Just eight days later, on May 23, 2014, Plaintiff's counsel served the Shareholder Demand on Defendants and expressly requested a response within five days, presumably given the impending special meeting. Defendants did not so respond or delay the special meeting, but rather ten days later, on June 2, 2014, Defendants proceeded with the special meeting to vote on the proposed dissolution of Rainforest, including the Board's adopted Plan of Liquidation and Dissolution. Shortly thereafter, sometime in June, 2010, Hardy executed Articles of Dissolution of Rainforest Films, Inc. and Rainforest Productions Holdings, Inc.

Given this timeline, Defendants' actions can only reasonably be construed as a rejection of Plaintiff's Shareholder Demand. Moreover, in light of the liquidation plan (which included a sale of the rights to the Rainforest name and logo to Hardy) and events occurring near in time (including execution of a no-interest promissory note by Packer for $400,000 that was previously undisclosed to shareholders), there is evidence that irreparable injury to the corporation would result by waiting for the expiration of the 90 day period before bringing suit. Defendants' Motion

for Summary Judgment on the derivative claims on the ground that Plaintiff failed to comply with the ante litem requirement is hereby DENIED.

b) Effect of Reconciliation Agreement on Derivative Claims

Defendants assert the Reconciliation Agreement bars any derivative claims premised on purported events that took place before October 2010. Again, Defendants point to the release clauses contained in the Reconciliation Agreement which operate to bar claims against Rainforest Productions and its affiliates. Defendants argue even though TRF is not a named party to the Reconciliation Agreement, it is nonetheless protected under it because it is an affiliate and a wholly owned subsidiary of Rainforest.

As set forth in Part I(A)(1)(b)(i), *supra*, the Court finds the Reconciliation Agreement and the releases contained therein are enforceable and TRF is covered under Bronner's release as a Rainforest affiliate and subsidiary. However, the Reconciliation Agreement does not bar the derivative claims asserted on behalf of Rainforest against TRF because Bronner's release expressly states the release is by "Bronner, on behalf of himself and his assigns, heirs, executors, administrators and representatives."[61] Additionally, under the "Release by Rainforest Productions", Rainforest only "release[d]" and "full discharge[d] Bronner and his assigns, heirs, executors, administrators and representatives…", not Defendants.[62] Insofar as Rainforest did not release any claims or causes of action against Defendants, the releases in the Reconciliation Agreement do not bar Plaintiff from bringing claims derivatively on behalf of Rainforest against Defendants. Defendants' Motion for Summary Judgment on the grounds the Reconciliation Agreement bars plaintiff's derivative claims is hereby DENIED.

c) Doctrine of unclean hands

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61 Reconciliation Agreement, §1.3.

62 Reconciliation Agreement, §1.4.

Defendants assert Plaintiff's equitable claims and theories of recovery (*e.g.*, unjust enrichment, quantum meruit, and to pierce the corporate veil to assert claims against Hardy and Packer, individually) are barred by the doctrine of unclean hands.

> Under that doctrine, "[h]e who would have equity must do equity and must give effect to all equitable rights of the other party respecting the subject matter of the action." O.C.G.A. § 23-1-10. "The unclean-hands maxim [refers] to an inequity which infects the cause of action so that to entertain it would be violative of conscience." (Citation and punctuation omitted.) Partain v. Maddox, 227 Ga. 623, 637(4)(a), 182 S.E.2d 450 (1971). To assert the doctrine successfully, a party must demonstrate that the wrongdoing is directly related to the claim against which unclean hands is asserted. Adams v. Crowell, 157 Ga. App. 576, 577(2), 278 S.E.2d 151 (1981); see also Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245, 54 S.Ct. 146, 78 L.Ed. 293 (1933).

Matrix Fin. Servs., Inc. v. Dean, 288 Ga. App. 666, 669–70, 655 S.E.2d 290, 294 (2007); Roach v. Roach, 327 Ga. App. 513, 514–15, 759 S.E.2d 587, 589 (2014) ("It is well established…that equity is not available to one who lacks clean hands as to the relief being sought").

Defendants assert Plaintiff's wrongful conduct, including his alleged "wrongful corporate behavior, breach of the Reconciliation Agreement, and deposition perjury", undercut and preclude his equitable claims and theories of relief. The parties have presented an exhaustive record wherein they accuse each other of all manner of personal and corporate misdeeds, allegations which are often hotly disputed. Although many of the allegations are extraneous and unrelated to the equitable claims at issue, others are not. In light of the record before the Court and construing the evidence and all reasonable inferences in Plaintiff's favor as the non-movant, the Court cannot find Plaintiff's equitable claims and theories are barred as a matter of law under the doctrine of unclean hands. Defendants' Motion for Summary Judgment on this ground is hereby DENIED.

2. Waste of Corporate Assets and Misappropriation of Corporate Assets

Plaintiff asserts derivative claims for "waste of corporate assets" and "misappropriation of corporate assets" against Hardy and Packer on the same grounds, as to both claims citing the "[f]raudulent authorization of payment of excessive salaries to themselves"; "[f]raudulent authorization of excessive compensations to themselves"; "[f]raudulent authorization and payment of a $400,000 loan to Defendant Packer"; and "[f]raudulent grant and conveyance of the Company's intellectual property to Defendant Hardy."[63] Defendants assert they are entitled to summary judgment with respect to these claims because Rainforest received adequate compensation for the subject transactions, and Plaintiff cannot establish the unauthorized assumption of Rainforest's assets.

"The directors and managers of a corporation who control and have charge of its effects are bound to care for its property and manage its affairs in good faith, and for a violation of these duties resulting in waste of its assets and injury to the property they are liable to account the same as other trustees." Chalverus v. Wilson Mfg. Co., 212 Ga. 612, 613, 94 S.E.2d 736, 738 (1956) (citing Baker v. Sutton, 47 Ga.App. 176, 170 S.E. 95 (1933). *See also* Pelletier v. Schultz, 157 Ga. App. 64, 66, 276 S.E.2d 118, 120 (1981) ("The relationship of a corporate officer or director to the corporation and its stockholders is fiduciary or quasi-fiduciary, which requires that they act in utmost good faith....Directors and officers in the management and use of corporate property in which they act as fiduciaries and are trustees are charged with serving the interests of the corporation as well as those of all the stockholders") (citations omitted). *Cf.* In re The Home Depot, Inc. S'holder Derivative Litig., 223 F. Supp. 3d 1317, 1327 (N.D. Ga. 2016) ("Under Delaware law, corporate waste is "an exchange that is so one sided that no business person of

63 Complaint, ¶¶ 104, 120.

ordinary, sound judgment could conclude that the corporation has received adequate consideration").

Here, the Court finds Defendants are entitled to judgment as a matter of law on the portion of Plaintiff's waste of corporate assets/misappropriation of corporate assets claims premised on the allegedly fraudulent "authorization of payment of excessive salaries to themselves" and the "grant and conveyance of the Company's intellectual property to Defendant Hardy."[64] The only salary referenced in the record is the $175,000.00 base salary set forth in the Reconciliation Agreement as compensation for the services provided by Hardy and Packer.[65] Insofar as the foregoing salaries were approved by the Board of Directors (Bronner, Hardy, and Packer) and the majority of shareholders (again Bronner, Hardy, and Packer, collectively representing 94.4% of outstanding shares of Rainforest common stock), the Court fails to discern and Plaintiff does not explain how these salaries support a claim for corporate waste and/or misappropriation of corporate assets.[66] Similarly, the dissolution of Rainforest pursuant to an adopted Plan of Liquidation and Dissolution that was approved by the holders of over 67% of the outstanding share of Rainforest common stock provides no support for the claims.[67]

However, in light of the factual disputes in the records regarding whether Defendants adhered to the compensation structure for Single Contractor and Joint Core Business Projects under the Reconciliation Agreement and the vague circumstances under which that structure was abandoned,[68] the Court cannot find the corporate waste/misappropriation of corporate assets claim premised on "excessive compensations" fails as a matter of law. Similarly, the vague

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64 Complaint, ¶¶ 104, 120.

65 Reconciliation Agreement, §2.2.

66 Reconciliation Agreement, Recitals at ¶1; Shareholder Agreement, §§ 1.1, 1.2, 1.4.

67 Shareholder Agreement, §1.4; Defs' SMF, Ex. O (Correspondence and Notice of Special Meeting of Shareholders dated May 15, 2014; Information Statement for Special Meeting of Shareholders).

68 *See* note 55, *supra*.

circumstances under which Packer, unbeknownst to Bronner, "utilized $400,000.00 in Rainforest Productions' credit over an extended period of time" for his personal benefit and then purported to execute a no-interest promissory note several years allowing him to repay the note over the course of two years, at least presents a jury question with respect to the corporate waste/misappropriation of corporate assets claim.[69] Defendants' Motion for Summary Judgment is GRANTED, IN PART, and DENIED, IN PART, as set forth above.

3. Breach of Fiduciary Duty

"It is well settled that a claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." Engelman v. Kessler, 340 Ga. App. 239, 246, 797 S.E.2d 160, 166 (2017), cert. denied (Aug. 14, 2017) (citing Nash v. Studdard, 294 Ga. App. 845, 849-850 (2), 670 S.E.2d 508 (2008)).

"Whether a confidential or fiduciary relationship exists is a matter for the factfinder to decide." Benson v. McMillan, 261 Ga. App. 78, 81, 581 S.E.2d 707, 710 (2003) (citing Hanson v. State, 232 Ga. App. 352, 354(2)(b), 501 S.E.2d 865 (1998)). *See* O.C.G.A. §23-2-58 ("Any relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc."); Wachovia Ins. Servs., Inc. v. Fallon, 299 Ga. App. 440, 448, 682 S.E.2d 657, 664 (2009) ("It is settled law that corporate officers and directors occupy a fiduciary relationship to the corporation and its shareholders, and are held to the standard of utmost good

[69] Defs' SMF, ¶ 117, Ex. BB (Packer Promissory Note); Pl's Response to Defs' SMF, ¶117.

faith and loyalty") (citing Hilb, Rogal, etc. v. Holley, 295 Ga. App. 54, 57–58(2), 670 S.E.2d 874 (2008)). *See also* O.C.G.A. §§ 14-2-830(a), 14-2-842(a) (providing that corporate officers and directors shall discharge their duties "in good faith and with the degree of care an ordinarily prudent person in a like position would exercise under similar circumstances").

Here, Plaintiff alleges Packer and Hardy "breached their fiduciary duties of good faith, loyalty, oversight, and supervision" owed to Rainforest. Specifically, he asserts they breached "their duty of good faith by failing to act in the best interests of the Company and its Shareholders by diverting business opportunities from the Company to their respective affiliated and self-owned business ventures"; breached "their duty of loyalty by self-dealing and engaging self-affiliated companies to provide services to the Company for compensation set by themselves"; and breached "their duty of oversight and supervision by failing to take time to consider corporation actions, make deliberate decisions after candid discussions, and prepare and provide consistent and current financial reports."[70] Plaintiff asserts this claim derivatively on behalf of Rainforest, alleging Hardy and Packer's conduct "had the effect of diverting Company revenues and assets, destabilizing the financial condition of the Company, and reducing the profit and profitability of the Company" such that "Rainforest and its shareholders have been harmed."[71] The parties have cross-moved for summary judgment as to this claim.

a) Statute of limitations with respect to breach of fiduciary duties claims

"Georgia has no specific statute of limitation for breach of fiduciary duty claims. Instead, we examine the injury alleged and the conduct giving rise to the claim to determine the appropriate statute of limitation." Godwin v. Mizpah Farms, LLLP, 330 Ga. App. 31, 38, 766 S.E.2d 497, 504 (2014) (citing Reaugh v. Inner Harbour Hosp., Ltd., 214 Ga. App. 259, 260(1),

70 Complaint, ¶ 93.
71 Complaint, ¶ 94.

447 S.E.2d 617 (1994). The Georgia Court of Appeals has held that breach of fiduciary duty claims arising out of written contracts are subject to a six-year statute of limitations. *See* O.C.G.A. §9-3-24. *See, e.g.,* Niloy & Rohan, LLC v. Sechler, 335 Ga. App. 507, 512, 782 S.E.2d 293, 298 (2016) (holding that six-year statute of limitations applies to breach of fiduciary duty claims arising out of operating agreement); Godwin, 330 Ga. App. at 38 (applying six-year statute of limitation for breach of simple contracts applies to breach of fiduciary duty claims arising under a limited partnership agreement).

Insofar as the fiduciary duties owed by Hardy and Packer arise from their status as officers and directors of Rainforest, relationships generally governed by the written contracts discussed herein, the Court finds the six-year statute of limitations period applicable to simple written contracts applies to the breach of the fiduciary duties claim. *See* Niloy & Rohan, LLC, *supra*; Godwin, *supra*. For the reasons set forth in Parts I(A)(1)(a) and I(A)(2)(a), *supra*, the Court further finds the breach of fiduciary duties claims are time barred to the extent premised on events that occurred before June 20, 2008.

b) Breach of fiduciary duties claim arising after June 2008

The Court finds there is at least some evidence in the record supporting the breach of fiduciary duties claim. With respect to Hardy and Packer's decisions and conduct concerning the loan-out of their services to third parties and compensation, although the 2010 Reconciliation Agreement set forth a specific compensation structure, there is evidence in the record of a purported "2012 agreement" whereby it appears Hardy and Packer unilaterally decided to change the established compensation structure and forego a salary from Rainforest in favor of pursuing television and film projects independent of Rainforest.[72] Further, Hardy and Packer's conduct

[72] *See* Pl's Appendix, Ex. M (letter dated Apr. 20, 2014 from Hardy to Rainforest Shareholders).

surrounding the $400,000.00 in Rainforest credit utilized by Packer for his personal benefit and repaid years later through a no-interest promissory note at a time when Rainforest was allegedly struggling financially provides at least some evidence of breach of fiduciary duty sufficient to withstand summary judgment.

Although Defendants assert their actions are protected under the business judgment rule, the Court is not persuaded.

> [T]he business judgment rule is a settled part of our common law in Georgia, and it generally precludes claims against officers and directors for their business decisions that sound in ordinary negligence, except to the extent that those decisions are shown to have been made ***without deliberation, without the requisite diligence to ascertain and assess the facts and circumstances upon which the decisions are based, or in bad faith***. Put another way, the business judgment rule at common law forecloses claims against officers and directors that sound in ordinary negligence when the alleged negligence concerns only the wisdom of their judgment, ***but it does not absolutely foreclose such claims to the extent that a business decision did not involve "judgment" because it was made in a way that did not comport with the duty to exercise good faith and ordinary care.***

Fed. Deposit Ins. Corp. v. Loudermilk, 295 Ga. 579, 585–86, 761 S.E.2d 332, 338 (2014) (emphasis added).

Here, Plaintiff asserts Hardy and Packer's decisions regarding changes of how they handled their salary and compensation for loan-out projects occurred without notice to or authorization from shareholders and were not disclosed to shareholders until years later in 2014.[73] When questioned about what meetings, agreements, or other corporate formalities documented the change, Hardy was unable to provide specifics.[74] Similarly, the $400,000.00

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[73] Pl's Response to Defs' SMF, ¶115.

[74] Hardy Depo. (Jan. 29, 2018), pp. 280-281, 284-286, 288-289, 293-294. Notably, the Reconciliation Agreement expressly states: "Use of Rainforest Films and Other Operating Entities. Rainforest Productions shall continue to use Rainforest Films or another operating entity of or controlled by Rainforest Productions to engage in all Core Business Projects in which either of the Founders receives any compensation or other payment for his services as a result of such Core Business Project. ***No compensation or other payment may be made to either of the***

Rainforest credit used by Packer occurred in 2009-2010, but was not disclosed to shareholders (other than Hardy) and arrangements for repayment were not formalized until 2014, shortly before pursuing dissolution of Rainforest.[75] In short, the Court finds there is evidence in the record to rebut the presumption Hardy and Packer acted in good faith and ordinary care.

However, with respect to Plaintiff's allegations that Hardy and Packer breached their duties of good faith and/or loyalty by diverting business opportunities from Rainforest, the corporate opportunity doctrine bars Plaintiff's claim.

O.C.G.A. §14-2-831(a)(1)(C) authorizes a derivative proceeding to be brought against a director or officer for "[t]he appropriation, in violation of his or her duties, of any business opportunity of the corporation."

> [The Supreme Court of Georgia] has adopted a two-step process for determining the ultimate question of when liability for wrongful appropriation of a business opportunity should be imposed.
>
> First, a court must determine whether the appropriated opportunity was in fact a business opportunity rightfully belonging to the corporation. If a court finds that the business opportunity was not a corporate opportunity, the directors or officers who pursued the opportunity for personal benefit are immune from liability. However, if the court finds that the business opportunity was a bona fide corporate opportunity, the court must determine whether the corporate official violated a fiduciary duty in appropriating that opportunity. Regarding the second step[,] ... liability should not be imposed upon the acquiring officer if the evidence establishes that his acquisition did not violate his fiduciary duties of loyalty, good faith, and fair dealing toward the corporation.

Founders on account of any service performed by a Founder with respect to any Core Business Project, except as provided in this Agreement or unless such compensation or other payment is approved by the Board of Directors of Rainforest Productions in a vote which the Bronner Director joins." Id. at §2.1 (bold and italicized emphasis added).

[75] Packer Depo. (May 5, 2018), pp. 53-70.

Bob Davidson & Assocs., Inc. v. Norm Webster & Assocs., Inc., 251 Ga. App. 56, 61, 553 S.E.2d 365, 369 (2001) (citing Southeast Consultants v. McCrary Engineering Corp., 246 Ga. 503, 273 S.E.2d 112 (1980)). Thus,

> [t]he threshold question is whether an opportunity presented to a corporate fiduciary is a "corporate" opportunity. That factual determination is to be made from all the relevant facts and circumstances. The burden of proof with regard to the threshold question rests upon the party attacking the acquisition. Liability is not to be imposed upon the fiduciary unless the evidence establishes that the fiduciary violated his fiduciary duties of loyalty, good faith and fair dealing toward the corporation. Thus, the second step involves close scrutiny of the equitable considerations existing prior to, at the time of, and following the officer's acquisition. The burden of proof on the questions of good faith, fair dealing, and loyalty is placed upon the officer who appropriated the opportunity.

Bob Davidson & Assocs., Inc., 251 Ga. App. at 61-62 (citing Phoenix Airline Services v. Metro Airlines, 260 Ga. 584, 587(2), 397 S.E.2d 699 (1990).

Importantly, "[a] business opportunity arises from a 'beachhead' consisting of a legal or equitable interest or an 'expectancy' growing out of a pre-existing right or relationship." Bob Davidson & Assocs., Inc., 251 Ga. App. at 62. *See, e.g.*, United Seal & Rubber v. Bunting, 248 Ga. 814, 815, 285 S.E.2d 721 (1982) (dealings with certain customers did not amount to business opportunities, finding that although company had long standing dealings with customers whose sales accounted for a large portion of its income, no contractual arrangement existed between the company and customers, the customers had no exclusive arrangement with the company and "the opportunity suggested was an ongoing [one] with no finite aspect"); Ins. Indus. Consultants, LLC v. Alford, 294 Ga. App. 747, 751, 669 S.E.2d 724, 729 (2008) (no business opportunity where the business relationships at issue were with prospective clients the plaintiff "hoped to retain or acquire business with, or with whom it had to annually renew contracts" such that "no contractual arrangement between them existed" and "they were not the exclusive customers of

[plaintiff]"); Mau, Inc. v. Human Techs., Inc., 274 Ga. App. 891, 894, 619 S.E.2d 394, 397 (2005) (holding employer did not have reasonable interest or expectancy in business accounts where former employees stated they did nothing on the employer's time or with employer's resources to further their planned, separate venture and employer merely speculated that it should have gotten business from business accounts before former employees left company to start their own company).

Here, Plaintiff only generally asserts Defendants usurped Rainforest's corporate opportunities. Plaintiff appears to take the position any and every film or television project Hardy and Packer worked on constituted a "business opportunity" to which Rainforest had a legal or equitable interest or expectancy. However, the Reconciliation Agreement contemplated loan out arrangements regarding Hardy and Packer's services and did not preclude Hardy and Packer from engaging in work outside of Rainforest. To the extent Plaintiff asserts various projects Hardy and Packer worked on outside of Rainforest were usurped business opportunities, Plaintiff fails to point to evidence there was a pre-existing right or relationship of a finite and specific nature sufficient to constitute a Rainforest business opportunity beyond speculation and aspirations.

Defendants' Motion for Summary Judgment with respect to the breach of fiduciary duties claim is, thus, GRANTED, IN PART, and DENIED, IN PART, as set forth above.

4. Lack of Candor and Gross Mismanagement

Plaintiff asserts a derivative claim on behalf of Rainforest against Hardy and Packer for "lack of candor". According to the Complaint, "[b]y reason of the foregoing acts, practices and

course of conduct[76] [] Hardy and Packer have knowingly or recklessly and in bad faith failed to exercise due care and diligence in the exercise of their fiduciary obligations to Rainforest and/or its shareholders."[77] He further asserts: "Plaintiff has no adequate remedy at law. Only through the exercise of this Court's equitable powers can Rainforest and its shareholders be fully protected from the immediate and irreparable injury which [] Hardy's and Packer's actions threaten and continue to inflict."[78] Plaintiff also asserts a derivative claim against Hardy and Packer for "gross mismanagement", alleging they "abandoned and abdicated their responsibilities and fiduciary duties with regard to prudently managing the assets and business of Rainforest."[79] In moving for summary judgment, Defendants assert these claims all "sound[] in fiduciary duty" and are meritless because Hardy and Packer acted with the requisite deliberation and diligence when exercising business judgment, complied with prevailing corporate practices, and exercised rational business judgment.

The Court finds the "lack of candor" and "gross mismanagement" claims are duplicative of the breach of fiduciary duties claims insofar as they appear to be predicated on the same underlying conduct. Notably, Plaintiff did not explain, support, or even address these specific claims in responding to Defendants' Motion for Summary Judgment. However, on summary judgment "[o]nce the movant has made a prima facie showing that it is entitled to judgment as a matter of law, the burden shifts to the respondent to come forward with rebuttal evidence." Kelly v. Pierce Roofing Co., 220 Ga. App. 391, 392–93, 469 S.E.2d 469, 471 (1996) (citing Ellis v. Curtis-Toledo, Inc., 204 Ga. App. 704, 705, 420 S.E.2d 756 (1992)). *See* O.C.G.A. §9-11-56(e)

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76 Plaintiff presumably refers to the prior section of the pleading wherein Plaintiff asserts a derivative claim on behalf of Rainforest against Hardy and Packer for breach of fiduciary duty. *See* Complaint, ¶¶ 91-95.

77 Complaint, ¶ 97.

78 Complaint, ¶ 98.

79 Complaint, ¶100.

("When a motion for summary judgment is made and supported as provided in this Code section, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him"). *See also* Pfeiffer v. Georgia Dep't of Transp., 275 Ga. 827, 828–29, 573 S.E.2d 389, 391 (2002) ("[I]n responding to a motion for summary judgment, plaintiffs have a statutory duty 'to produce whatever viable theory of recovery they might have or run the risk of an adjudication on the merits of their case.' The same burden is placed on the parties with regard to factual issues") (citing Summer-Minter & Assocs., Inc. v. Giordano, 231 Ga. 601, 606, 203 S.E.2d 173, 177 (1974)). Having considered the record, the Court finds Defendants are entitled to judgment as a matter of law with respect to the "lack of candor" and "gross mismanagement" claims. Accordingly, Defendants' Motion for Summary Judgment is hereby GRANTED as to the foregoing claims.

5. Abuse of Control

Plaintiff asserts a derivative claim on behalf of Rainforest for "abuse of control" against Hardy and Packer alleging they "have entrenched themselves in their positions of power and control at [Rainforest] and continue to receive the substantial benefits, salaries and emoluments associated with their positions at the Company" and that they "have, and continue, to operate Rainforest for their personal gains and goals and to the detriment of its shareholders."[80] Plaintiff further claims Hardy and Packer's "conduct constitutes an abuse of their positions of trust, control and influence over Rainforest."[81]

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80 Complaint, ¶ 110.
81 Complaint, ¶ 111.

Defendants argue they are entitled to a judgment as a matter of law as to the "abuse of control" claim because no such cause of action exists under Georgia law and to the extent it is premised on control and domination in the context of futility, Georgia courts have declined to judicially create an exception to the ante litem demand requirements. *See* Pinnacle Benning LLC v. Clark Realty Capital, LLC, 314 Ga. App. 609, 615–16, 724 S.E.2d 894, 900 (2012) ("And today, the procedures to bring derivative actions in relation to business corporations, nonprofit corporations, and limited-liability companies all contain a similar demand requirement, with no futility exception. Thus, because we find the language of our statute and the intent of the General Assembly clear and unambiguous, we will not judicially create a futility exception out of whole cloth…").

Again, in responding to Defendants' Motion for Summary Judgment, Plaintiff did not explain, support, or even address his abuse of control claim such that the Court is left to speculate as to the legal and factual basis existing in the record for the claim. As noted above, "[o]nce the movant has made a prima facie showing that it is entitled to judgment as a matter of law, the burden shifts to the respondent to come forward with rebuttal evidence." Kelly, 220 Ga. App. at 392–93. Insofar as Plaintiff has not identified any cognizable theory of recovery or specific facts or evidence of record in support of his "abuse of control" claim, the Court is compelled to find that Plaintiff has failed to meet his burden on summary judgment "showing that there is a genuine issue for trial." O.C.G.A. §9-11-56(e); Pfeiffer, 275 Ga. at 828–29.Thus, Defendants' Motion for Summary Judgment is GRANTED as to this claim.[82]

[82] Again, to the extent the claim is premised on Plaintiff's allegations that Hardy and Packer generally abused their positions of authority as officer and directors of Rainforest for their personal benefit, the claim appears duplicative of the breach of fiduciary duties and/or waste claims.

6. Unjust enrichment

Plaintiff has asserted a derivative claim on behalf of Rainforest against Packer and Hardy, alleging only they "have been and will continue to be unjustly enriched at the expense of and to the detriment of the Company."[83] Complaint, ¶ 107.

"The concept of unjust enrichment in law is premised upon the principle that a party cannot induce, accept, or encourage another to furnish or render something of value to such party and avoid payment for the value received...." Scott v. Mamari Corp., 242 Ga. App. 455, 458, 530 S.E.2d 208, 212 (2000) (citing Reidling v. Holcomb, 225 Ga.App. 229, 232(2), 483 S.E.2d 624 (1997)).

> Unjust enrichment is an equitable concept and applies when as a matter of fact there is no legal contract, but when the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefitted party equitably ought to return or compensate for. ***A claim for unjust enrichment is not a tort, but an alternative theory of recovery if a contract claim fails.***

Collins v. Athens Orthopedic Clinic, 347 Ga. App. 13, 21, 815 S.E.2d 639, 647 (2018), reconsideration denied (July 16, 2018) (emphasis added). *See, e.g., id.* (affirming dismissal of unjust enrichment claim where plaintiffs "did not plead unjust enrichment as an alternate theory of recovery based on a failed contract"); Cash v. LG Elecs., Inc., 342 Ga. App. 735, 742, 804 S.E.2d 713, 718 (2017) (affirming summary judgment to defendant where plaintiffs "did not plead unjust enrichment as an alternate theory of recovery based on a failed contract"); Wachovia Ins. Servs., Inc. v. Fallon, 299 Ga. App. 440, 449, 682 S.E.2d 657, 665 (2009) (holding unjust enrichment claim fails as matter of law where it is asserted as a separate tort and not as an alternative recovery for a failed contract).

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[83] Complaint, ¶ 107.

Here, various contracts govern the parties' relationship, including the Reconciliation Agreement and Shareholders Agreement. Insofar as there are enforceable contracts governing the parties' business dealings, such precludes recovery under a theory of unjust enrichment. Moreover, to the extent Plaintiff predicates the unjust enrichment claim on Hardy and Packer's alleged "wrongful [fraudulent] conduct and fiduciary breaches" as described in the Complaint, Plaintiff is improperly attempting to assert the claim as a separate tort rather than as an alternative recovery for a failed contract. Collins, 347 Ga. App. at 21; Cash, 342 Ga. App. at 742; Wachovia Ins. Servs., Inc., 299 Ga. App. at 449. Accordingly, Defendants' Motion for Summary Judgment is GRANTED with respect to the unjust enrichment claim.[84]

7. Quantum Meruit

Plaintiff alleges "the initiation and prosecution of this action have conferred a substantial and common benefit to Rainforest and its shareholders through the implementation of structural and corporate governance changes demanded by Plaintiff" such that he "is entitled [to] reasonable compensation for his efforts, expenses and costs" under a theory of quantum meruit.[85]

"Ordinarily, when one renders service or transfers property which is valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof." O.C.G.A. §9-2-7. "The theory of quantum meruit is...an equitable principle...based upon the premise that, 'when one renders service or transfers property which is valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof.'" City of Baldwin v. Woodard

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[84] Additionally, the unjust enrichment claim is time barred to the extent based on events occurring before June 20, 2010. *See* Parts I(A)(1)(a) and I(A)(2)(a), *supra*. *See also* Burns v. Dees, 252 Ga. App. 598, 607, 557 S.E.2d 32, 39 (2001) (applying four year statute of limitations to unjust enrichment and quantum meruit claim, citing O.C.G.A. §9-3-26).

[85] Complaint, ¶¶ 114-115.

& Curran, Inc., 293 Ga. 19, 23, 743 S.E.2d 381, 385 (2013) (citing Georgia Dept. of Community Health v. Data Inquiry, LLC, 313 Ga. App. 683, 687, 722 S.E.2d 403 (2012)).

However, "[i]n Georgia, 'attorney fees are not generally recoverable as damages absent an express provision in a contract or a statutory mandate.'" Doss & Assocs. v. First Am. Title Ins. Co., 325 Ga. App. 448, 464, 754 S.E.2d 85, 98 (2013) (quoting George L. Smith, etc. v. Miller Brewing Co., 255 Ga. App. 643, 644, 566 S.E.2d 361 (2002)). *See* O.C.G.A. §13–6–11 ("The expenses of litigation generally shall not be allowed as a part of the damages..."); Rothenberg v. Sec. Mgmt. Co., 736 F.2d 1470, 1471 (11th Cir. 1984) ("Under the traditional 'American rule,' attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor") (citing Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475, 478 (1967)).

With respect to the award of attorney's fees and litigation expenses arising out of a derivative action, O.C.G.A. §14-2-746 provides:

> On termination of the derivative proceeding the court may:
>
> (1) Order the corporation to pay the plaintiff's reasonable expenses (including attorneys' fees) incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation; or
>
> (2) Order the plaintiff to pay any defendant's reasonable expenses (including attorneys' fees) incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose.

As noted in the Comments to O.C.G.A. §14-2-746, the statute "is intended to be a codification of existing case law." Id. at ¶1 (citing Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)).

Insofar as attorney's fees and litigation expenses are generally not recoverable absent a contractual or statutory provision and, here, O.C.G.A. §14-2-746 governs the payment of

expenses arising from derivative proceedings such as the case at bar, the Court finds Plaintiff's unjust enrichment claim fails as a matter of law. *See* O.C.G.A. §23-1-3 ("Equity jurisdiction is established and allowed for the protection and relief of parties where, from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong or relieving for injuries done"); O.C.G.A. §23-1-4 ("Equity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law"); Southern Healthcare Sys., Inc. v. Health Care Capital Consol., Inc., 273 Ga. 834, 835, 545 S.E.2d 882, 885 (2001) ("A party cannot resort to equity if an adequate legal remedy is available") (citing Besser v. Rule, 270 Ga. 473, 510 S.E.2d 530 (1999)). Accordingly, Defendants' Motion for Summary Judgment is GRANTED as to this claim.

8. Receivership

In the Complaint, Plaintiff alleges he is "unable to fully protect his or [Rainforest's] rights absent emergency relief and there is a manifest danger of loss, destruction and material injury to Plaintiff's interest" such that "[a] receiver should be appointed immediately and without notice to [] Hardy and Packer to prevent them from continuing to sell, exchange, encumber, pledge, dispose of or otherwise transfer any interest in [Rainforest's] assets."[86]

O.C.G.A. §9-8-1 sets forth the grounds for the appointment of a receiver:

> When any fund or property is in litigation and the rights of either or both parties cannot otherwise be fully protected or when there is a fund or property having no one to manage it, a receiver of the same may be appointed by the judge of the superior court having jurisdiction thereof.

As summarized by the Supreme Court of Georgia:

> The purpose of the receivership is to preserve the property which is the subject of the litigation, and to provide full protection to the parties' rights to the property until a final disposition of the issues. Richardson v.

[86] Complaint, ¶¶ 117-118.

> Roland[, 267 Ga. 34, 35(3), 472 S.E.2d 301 (1996)]; *Conner v. Yawn,* 200 Ga. 500, 506, 37 S.E.2d 541 (1946). But the court's power to appoint a receiver should be prudently and cautiously exercised and should not be resorted to except in clear and urgent cases. *Kruzel v. Leeds Building Products,* 266 Ga. 765, 767(1), 470 S.E.2d 882 (1996), citing *Parrish v. Rigell,* 183 Ga. 218, 224(1), 188 S.E. 15 (1936). This is so regardless of the apparent equity of the complainant. *Conner v. Yawn* at 506, 37 S.E.2d 541.

Chrysler Ins. Co. v. Dorminey, 271 Ga. 555, 556, 522 S.E.2d 232, 233–34 (1999). *See* O.C.G.A. §9-8-4 ("The power of appointing receivers should be prudently and cautiously exercised and except in clear and urgent cases should not be resorted to"); Templeman v. Templeman, 173 Ga. 743, 161 S.E. 261, 262 (1931) ("The appointment of a receiver is a harsh remedy, to which resort should not be had, except ***when the interests of creditors are exposed to manifest peril***") (emphasis added) (citing Dixon v. Tucker, 167 Ga. 783, 146 S.E. 736, 737 (1929)); Patel v. Patel, 280 Ga. 292, 293–94, 627 S.E.2d 21, 23 (2006) ("The high prerogative act of taking property out of the owner's hands and putting it in pound, under the order of a judge, ought not to be taken, except to prevent manifest wrong ***imminently impending***") (emphasis added). *See also* Treu v. Humanism Inv., Inc., 284 Ga. 657, 660, 670 S.E.2d 409, 411 (2008) (holding that the trial court did not abuse its discretion when it did not appoint a receiver, reasoning that there was no showing that an appointment of a receiver would reverse the tax implications associated with the choice to establish a corporation as a "C" corporation instead of a partnership).

Here, insofar as it is undisputed that Rainforest has been dissolved in accordance with the requisite majority of voting shareholders, there is no need to prevent any manifest wrong imminently impending with respect to Rainforest and the grounds for the appointment of a receiver simply do not exist. The adopted Plan for Liquidation and Dissolution sets forth the approved procedure for effectuating the dissolution of Rainforest, including the winding up of its

affairs and liquidation of its assets.[87] In this regard, a Liquidation Trust was established and a Liquidation Trustee was appointed.[88] In short, the claim for appointment of a receiver to manage the affairs of Rainforest is moot and any such appointment would be of no practical benefit to the parties. Defendants' Motion for Summary Judgment is GRANTED as to this claim.

9. Punitive Damages

"Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. §51-12-5.1. "Ordinarily, the imposition of punitive damages is a question for the jury." Whitaker Farms, LLC v. Fitzgerald Fruit Farms, LLC, 347 Ga. App. 381, 389, 819 S.E.2d 666, 673 (2018) (citing Baumann v. Snider, 243 Ga. App. 526, 530 (3), 532 S.E.2d 468 (2000).

In light of the Court's rulings herein and insofar as tort claims survive for trial, the Court finds the question of whether the remaining tort claims are of a sufficiently aggravated nature to warrant punitive damages is a question for the jury. Defendants' Motion for Summary Judgment with respect to the punitive damage claim is DENIED.

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87 Defs' SMF, Ex. O (Correspondence and Notice of Special Meeting of Shareholders dated May 15, 2014; Information Statement for Special Meeting of Shareholders).

88 Defs' SMF, Ex. DD (Rainforest Productions, Inc. Establishment of Liquidation Trust and Appointment of Liquidation Trustee).

II. COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Counterclaimants (Hardy, Packer, and Rainforest) and Bronner have cross-moved for summary judgment with respect to Counterclaimants' claims against Bronner for: (1) breach of the non-disparagement provision in the Reconciliation Agreement; (2) defamation; and (3) unjust enrichment. The Court addresses each claim in turn below.

A. Breach of Non-Disparagement Provision

Counterclaimants allege Bronner breached the non-disparagement provision contained in the Reconciliation Agreement. As noted above, "[t]he elements of a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." Norton v. Budget Rent A Car System, Inc., 307 Ga. App. 501, 502, 705 S.E.2d 305 (2010). *See, e.g.,* Eichelkraut v. Camp, 236 Ga. App. 721, 513 S.E.2d 267 (1999) (holding unprompted letters undisputedly authored by former employees which accused employer of ethical violations and stated that criminal investigation of employer was underway was on its face disparaging and violated "non-disparagement" clause of employer and employees' settlement agreement from prior litigation)

In the case at bar, the non-disparagement provision in the Reconciliation Agreement states in relevant part:

> "None of Bronner, the Founders, and Rainforest Productions (or any direct or indirect subsidiary or other affiliated entity of Rainforest Productions and any employee, officer, director or agreement of any of the foregoing) shall knowingly or intentionally take any action at any time for the purpose of damaging, discrediting, or otherwise injuring the goodwill, esteem, or reputation of any other party hereto. Without limiting the foregoing, no party shall make, at any time, any false misleading, or ***disparaging*** statement about any other party hereto with respect to such party's past, current, or future involvement in Rainforest

productions or any aspect of Rainforest Productions' business or operations..."[89]

Counterclaimants allege Bronner breached the foregoing provision by making "disparaging remarks about the Rainforest Parties with the purpose of damaging, discrediting or otherwise injuring the goodwill, esteem, or reputation of the Rainforest Parties [Rainforest, Hardy, and Packer], disparaging the Rainforest Parties' past and current involvement in Rainforest, and disparaging aspects of Rainforest's business operations."[90] In moving for summary judgment as to this claim, Counterclaimants argue Bronner "engag[ed] in a public smear campaign" by allegedly directing Jacky Jasper to publish false, disparaging, and defamatory statements concerning Packer on his website, *HollywoodStreetKings.com*, including various articles alleging Packer had "ripped off" investors.[91] In cross-moving for summary judgment, Bronner argues Defendants' non-performance of certain aspects of the Reconciliation Agreement bars Defendants' claim for breach of the non-disclosure provision, and further asserts that Plaintiffs have not proffered any evidence that he directed Jasper's actions.

The Court finds material questions of fact remain with respect to this claim. As outlined in Part I(A)(1)(b)(i), *supra*, the Court has found the Reconciliation Agreement generally enforceable. It is true that under Georgia law, "[i]f the nonperformance of a party to a contract is caused by the conduct of the opposite party, such conduct shall excuse the other party from performance" S*ee* O.C.G.A. § 13-4-23. However, to constitute a defense in this action, Bronner's nonperformance must have been caused by the conduct of Counterclaimants which made his performance useless or impossible. Ott v. Vineville Mkt., Ltd., 203 Ga. App. 80, 80(1), 416

89 Reconciliation Agreement, § 3.1 (emphasis added).

90 Defs' Amendment to Answer and Counterclaim, ¶ 68.

91 Counterclaimants' SMF, Ex. B (Packer Aff.) at Ex. 9 (Jasper articles).

S.E.2d 362 (1992). Nothing in this record, however, raises the issue that Counterclaimants made Bronner's performance useless or impossible. *See also* Sheridan v. Crown Capital Corp., 251 Ga. App. 314, 318, 554 S.E.2d 296, 300 (2001) ("The law favors conditions to be subsequent rather than precedent and to be remediable by damages rather than by forfeiture") (citing Fulton Cty. v. Collum Properties, Inc., 193 Ga. App. 774, 775, 388 S.E.2d 916, 918 (1989)); O.C.G.A. §13-3-4.

Further, a jury question remains as to what involvement Bronner had, if any, in Jasper's publication of allegedly defamatory articles concerning Packer. There is at best conflicting evidence in the record related to this claim, including that Jasper contacted Bronner to get an interview regarding this litigation and Bronner merely directed him to the Complaint,[92] although one article cites to an "exclusive[]" interview with the "spokesperson for the investors" and another curiously includes the Mission Statement of Bronner's company, Brother Brothers[93]; Jasper communicated with Mariellen Ballier (Bronner' assistant at Bronner Brothers and Director of Operations of Upscale Magazine) in January 2017 regarding "free content for Upscale Magazine for [a] 30-day trial period", but the offer was declined,[94] although Jasper avers that Bronner at one point engaged his company "to commission a celebrity-endorsed digitization campaign to benefit Upscale Magazine"[95]; notwithstanding Bronner's testimony that he did not previously communicate with Jasper, there are emails from 2015-2016 that suggest that Jasper sent articles concerning Packer to email addresses that appear to be associated with Bronner and/or Upscale Magazine[96]. Taken as a whole and construing the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving parties as to the cross-

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92 Bronner Depo. (Jan. 26, 2017), pp. 243-246.
93 Counterclaimants' SMF, Ex. B (Packer Aff.) at Ex. 9 (Jasper articles).
94 Ballier Depo. (Jul. 20, 2017), pp. 38-45.
95 Counterclaimants' SMF, Ex. F (Jasper a/k/a Sean Merrick Aff.) at ¶E.
96 Ballier Depo. 38:7-23, 63:19-25, 64:1-10, 68:23-25, 69:1-6, 83:1-14, 92:16-25, 93:1-8, 93:13-19, 94:1-23, 104:5-25, 105:1-25.

motions for summary judgment, respectively, the foregoing falls short of establishing that Bronner directed or controlled Jasper's action as a matter of law.[97]

Given the above, Counterclaimants' Motion for Partial Summary Judgment and Plaintiff Bronner's Motion for Partial Summary Judgment with respect to this claim are both DENIED.

B. Defamation

"Generally, there are four elements in a cause of action for defamation: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault by the defendant amounting at least to negligence; and (4) special harm or the actionability of the statement irrespective of special harm." Renton v. Watson, 319 Ga.App. 896, 900, 739 S.E.2d 19, 24 (2013) (citations omitted).

Two defamation actions exist under Georgia law: libel and slander. "A libel is a false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule. O.C.G.A. § 51-5-1. The publication of the libelous matter is essential to recovery. O.C.G.A. § 51-5-1(b). Slander or oral defamation consists in relevant part of "making charges against another in reference to his trade, office, or profession, calculated to injure him therein." O.C.G.A. § 51-5-4(3). The elements of both types of defamation are: (1) a false and defamatory statement concerning the plaintiff (or in this case, the counterclaimants); (2) an unprivileged communication to a third party; (3) fault by the defendant amounting at least to negligence; and

[97] To the extent Bronner alleges the disparaging statements in the Jasper articles constitute inadmissible hearsay and moves to strike same from the record, only out of court statements "offered in evidence to prove the truth of the matter asserted" constitute hearsay. O.C.G.A. §24-8-801(c). Although the Jasper articles cannot properly be considered to establish the truth of the statements contained therein, they may be properly considered as establishing publication if the allegedly disparaging/defamatory statements.

(4) special harm or the actionability of the statement irrespective of special harm. Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 356, 713 S.E.2d 456 (2011).

In moving for summary judgment with respect to this claim Plaintiff contends the statute of limitations bars Counterclaimants' defamation claims premised on the Jasper articles. The Court disagrees. The statute of limitations for a defamation claim is one year. O.C.G.A. § 9-3-33 ("injuries to the reputation . . . shall be brought within one year after the right of action accrues"). A defamation claim accrues at the time of the alleged defamatory acts regardless of whether or not the claimant has knowledge of the act or acts at the time of their occurrence. Cunningham v. John J. Harte Associates, Inc., 158 Ga. App. 774, 282 S.E.2d 219 (1981).

Here, Counterclaimants first asserted their defamation claim in Defendants' Verified Answer and Defendants Robert E. Hardy, II, William E. Packer, Jr., and Rainforest Productions Holdings, Inc.'s Counterclaim Against Bernard H. Bronner, which was filed on July 30, 2014, and amended on October 2, 2014.[98] In both filings Counterclaimants expressly allege that "Bronner and/or his agents ***have made and continue to make*** false and defamatory remarks, both orally and in writing or print, to third parties, including media outlets, about Hardy and Packer..."[99]

Georgia's Civil Practice Act merely requires "notice pleading." *See* O.C.G.A. § 9-11-8; Peacock Constr. Co. v. Erickson's, Inc., 121 Ga. App. 544, 545(2), 174 S.E.2d 276 (1970) (allegations of a complaint to the effect that the defendants intentionally and maliciously published false, libelous and defamatory statements about the plaintiff which subjected the plaintiff to ridicule and contempt and which damaged plaintiff's good name and reputation,

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98 Defs' Answer and Counterclaim, ¶¶ 65-70; Defs' Amendment to Answer and Counterclaim, ¶¶ 72-78.

99 Defs' Amendment to Answer and Counterclaim, ¶ 73 (emphasis added).

stated a claim for which relief may be granted and sufficiently notified the defendants of the basis therefor "so as to comply with the very minimal requirements of notice pleadings").

Here, Counterclaimants' October 2, 2014 pleading sufficiently places Bronner on notice of the defamation claim asserted against him and of the allegedly ongoing nature of the tortious conduct of which they accuse him. Any continued defamation, including the Jasper articles, relate back to the initial counterclaim.

Further, although both Counterclaimants and Bronner separately assert they are entitled to judgment as a matter of law based on the evidentiary record (or lack thereof), for the same reasons set forth in Part II(A), *supra*, the Court finds questions of material fact regarding Bronner's involvement with the Jasper articles and whether he slandered Packer preclude summary judgment with respect to the defamation claim. Accordingly, Counterclaimants' Motion for Partial Summary Judgment and Plaintiff Bronner's Motion for Partial Summary Judgment with respect to this claim are both DENIED.

C. Unjust Enrichment

Rainforest asserts a claim for unjust enrichment against Bronner for using company resources for his personal enjoyment rather than for the benefit of Rainforest (*e.g.*, Los Angeles apartment, cellular expenses, travel expenses, and automobile expenses) and alleging he "coerced" Rainforest, Hardy and Packer to incur costs and enter into transactions that promoted or benefitted "Bronner-related entities."[100]

As noted above, "[u]njust enrichment applies when as a matter of fact there is no legal contract…, but where the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefited party equitably ought to return or

[100] Defs' Amendment to Answer and Counterclaim, ¶¶ 80-83.

compensate for." Engram v. Engram, 265 Ga. 804, 806, 463 S.E.2d 12 (1995) (citing Smith v. McClung, 215 Ga. App. 786, 789 (1994)). "The concept of unjust enrichment in law is premised upon the principle that a party cannot induce, accept, or encourage another to furnish or render something of value to such party and avoid payment for the value received." Vernon v. Assurance Forensic Accounting, LLC, 333 Ga. App. 377, 394, 774 S.E.2d 197 (2015).

Nevertheless, "the mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor." Stoker v. Bellemeade, LLC, 272 Ga. App. 817, 819(1), 615 S.E.2d 1 (2005). For unjust enrichment to apply "...the party conferring the...thing of value must act with the expectation that the other will be responsible for the cost." Hollifield v. Monte Vista Biblical Gardens, Inc., 251 Ga. App. 124, 131, 553 S.E.2d 662 (2001).

Here, Counterclaimants did not act with such expectation. The record establishes the benefits provided to Bronner were derived in the normal course of Rainforest's operations and were shared among the directors and that, although the parties regularly discussed the use of company benefits, Counterclaimants never expressed any expectation that Bronner (or any director) was to be personally responsible for the costs of the benefits conferred.[101] Plaintiff's Motion for Partial Summary Judgment with respect to the unjust enrichment claim is GRANTED and Counterclaimants' Motion for Partial Summary Judgment on the claim is DENIED.

D. Expenses of Litigation

Insofar as Counterclaimants' claims for breach of the non-disparagement provision and defamation survive summary judgment, their claim for expenses of litigation also survives. *See* Racette v. Bank of Am., N.A., 318 Ga. App. 171, 181, 733 S.E.2d 457, 466 (2012) ("An award of attorney fees, costs, and punitive damages is derivative of a plaintiff's substantive claims")

[101] Counterclaimants' SMF, Ex. I (AT&T Wireless Service Invoice), Ex. M (emails regarding corporate apartment), Ex. N (emails regarding corpate vehicle); Pl's Appendix, Ex. U (2009 Rainforest P&L) at pp. 2-3.

(citing DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 52(5), 668 S.E.2d 737 (2008)).

CONCLUSION

Having considered the entire record and for the reasons set forth above, the Court hereby: GRANTS Defendants' Motion for Summary Judgment with respect to Plaintiff's claims for fraud, lack of candor, gross mismanagement, abuse of control, unjust enrichment, quantum meruit, and for appointment of a receiver; GRANTS, IN PART, and DENIES, IN PART, Defendants' Motion for Summary Judgment with respect to Plaintiff's claims for breach of contract, waste of corporate assets/misappropriation of corporate assets, and breach of fiduciary duties as outlined above; GRANTS Plaintiff's Motion for Partial Summary Judgment with respect to Counterclaimants' claim for unjust enrichment and DENIES Counterclaimants' Motion for Partial Summary Judgment with respect to that claim; and DENIES Plaintiff's Motion for Partial Summary Judgment and Counterclaimants' Motion for Partial Summary Judgment with respect to Counterclaimants' claims for breach of the non-disparagement provision in the Reconciliation Agreement, defamation, and expenses of litigation.

In light of the Court's rulings, and insofar as there remain claims to be tried by a jury, a proposed, fully consolidated pre-trial order that substantially complies with Uniform Superior Court Rule 7.2 shall be submitted to the Business Court's chambers **before 5:00 p.m. on February 15, 2019.** (Please do not present pre-trial orders to the clerk for filing unless they have been signed by the Court). Plaintiff's counsel shall be responsible for consolidating the pre-trial order. All other counsel shall provide their portions of the consolidated pre-trial order to Plaintiff's counsel before 5:00 P.M. on February 8, 2019. Counsel shall not submit their own individual portion of a pre-trial order to the Court without written certification detailing their

good faith efforts to present the Court with a fully consolidated order. Extensions for submitting proposed pre-trial orders will be granted only for good cause shown.

Upon receipt of counsels' proposed consolidated pre-trial order, the Court will establish deadlines for the submission of motions in limine, requests to charge and for the trial of the remaining claims.

SO ORDERED, this 14th day of January, 2019.

JUDGE MELVIN K. WESTMORELAND
Superior Court of Fulton County
Business Case Division - Atlanta Judicial Circuit

Served upon registered service contacts through eFileGA

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