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Fulton County Superior Court
EFILEDQW
Date: 4/26/2021 9:15 AM
Cathelene Robinson, Clerk

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 CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The above styled action is before this Court on: (1) Defendants' Motion for Summary Judgment, filed January 14, 2021 and (2) Plaintiff's Motion for Summary Judgment – Breach of Contract, filed January 15, 2021. Having reviewed the record and considered the argument of counsel during an April 7, 2021 hearing, the Court enters the following order.

1. SUMMARY OF FACTS

1.1 Primary Shareholders of Rainforest Resolve Disputes with Reconciliation Agreement

Defendant Rainforest Production Holdings, Inc. ("Rainforest") was registered as a Georgia corporation in 1996 by founders Defendant Robert E. Hardy ("Hardy") and Defendant William E. Packer (Packer) to participate in the film production business. (Compl., ¶ 24; Answer, ¶ 24.) In 1998, Hardy and Packer formed Defendant TRF Productions, LLC ("TRF") as a subsidiary of Rainforest in order to develop, produce, and distribute a film titled *Trois*. (Defs. SMF, ¶ 9; Pl. Resp. to Defs. SMF, ¶ 9.)[1] After production of the film, Hardy and Packer were unable to secure funding from a movie studio to distribute *Trois*. (Defs. SMF, ¶ 18; Pl. Resp. to Defs. SMF, ¶ 18.) 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 interest in investing in *Trois*. (Defs. SMF, ¶¶ 18-19, 21; Pl. Resp. to Defs. SMF, ¶¶ 18-19, 21.) Bronner entered into a number of subscription agreements with TRF (collectively "Subscription Agreement"). (Compl., ¶ 85; Answer and Countercl., ¶ 85.) Bronner subsequently invested and/or helped to secure investments of over $500,000.00 in *Trois* and

[1] This citation as used here and throughout this order refers to Defendants' Statement of Material Facts and Theories of Non-Recovery, filed January 14, 2021, in support of its current motion for partial summary judgment and Plaintiff's response thereto, filed February 17, 2021. Occasionally, throughout the order, the Court will refer to prior statements filed in relation to earlier motions for summary judgment. When making such citation, the Court will so note with the filing date.

Rainforest and ultimately became a shareholder, director and Vice President of Marketing for Rainforest. (Defs. SMF, ¶¶ 22, 27; Pl. Resp. to Defs. SMF, ¶¶ 22, 27.)

After *Trois*, Rainforest was involved in the production of various films, including: *Trois 2: Pandora's Box, The Gospel*, and *Stomp the Yard.* (Defs. SMF, ¶¶ 47, 49, 55; Pl. Resp. to Defs. SMF, ¶¶ 47, 49, 55.) However, disagreements arose regarding the management, day-to-day operations and finances of Rainforest.[2] The parties ultimately sought to resolve their differences via a Shareholder's Reconciliation Agreement, dated October 8, 2010, and signed by Rainforest, its wholly owned-subsidiary Rainforest Films, Hardy, Packer, and Bronner ("Reconciliation Agreement").[3] (Defs. SUMF, ¶ 84; Pls, Resp. to Defs. SUMF, ¶ 84.) The Reconciliation Agreement expressly stated Hardy and Packer were "primarily responsible for and actively involved in the management and oversight of the day-to-day operations and affairs of [Rainforest] and its affiliates . . ." (Reconciliation Agreement, Recitals, ¶ 4.) Hardy and Packer executed the Reconciliation Agreement as "Founders" and collectively assumed certain responsibilities and received certain benefits in that capacity. (See e.g., Id., §§ 1.5, 2.2, 3.1, 3.3, 3.4, 4.1.)

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[2] See e.g., Defs. SMF, ¶¶ 37, 40-42, 62, 64-68, 73, 75, 79-83; Pl. Response to Defs. SMF, ¶¶ 37, 40-42, 62, 64-68, 73, 75, 79-83.

[3] An authenticated copy of the Reconciliation Agreement is attached to the Consolidated Pre-Trial Order. (Id. ¶ 10, Ex. A.)

As an initial matter, the Reconciliation Agreement required Rainforest to prepare an accounting of the revenues received from *Trois* and deliver it to Bronner ("*Trois* Financial Report"). (Id., § 1.6.)

The Reconciliation Agreement also addressed the structure of the Rainforest business going forward. It broadly described the purpose of the business as performing "feature film, television, and other motion business activities (the **"Core Business"**) that involve the direct or indirect provision of services by the Founders" or other Rainforest-related personnel (emphasis in original). (Id., Recitals, ¶ 3.) It indicated the Founders were "primarily responsible" for overseeing "all projects that are part of its Core Business (such projects, collectively, **"Core Business Projects"**) undertaken by Rainforest . . . (emphasis in original). (Id., ¶ 4.)

Article II of the Reconciliation Agreement addresses compensation issues and outlines the company's finances. Section 2.1 provides,

> [Rainforest] shall continue to use Rainforest Films or another operating entity of or controlled by [Rainforest] 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, except as provided in this Agreement or unless such compensation or other payment is approved by the Board of Directors . . .

Section 2.2 established a base annual salary of $175,000 for Hardy and Packer for their work on "Core Business activities." Sections 2.3 and 2.4 outlined how

compensation Hardy and Packer received from third parties for their work on Core Business Projects would be shared with Rainforest. Section 2.3 concerned projects where Hardy or Packer worked individually. Generally, the provision allowed Hardy or Packer to keep 50% of any "front-end" payment with the other 50% being allocated to Rainforest. With regard to "back-end" compensation payments, 10% would be paid to the Hardy or Packer, depending on who performed the work, and 90% would be allocated to Rainforest. (Id.) Section 2.4 concerned projects where the two worked together. Section 2.5 requires Rainforest to calculate and establish a year-end bonus pool ("Year-End Bonus Pool") following set parameters and then divide the pool equally among Hardy, Packer and Bronner.

Additionally, the Reconciliation Agreement contained release provisions, a mutual non-disparagement clause as well as a clause governing modifications. (Id., §§ 1.3-1.5, 3.1, 5.4.) Pursuant to the modification clause, the agreement could only be modified or amended by a written instrument approved by the Board of Directors of Rainforest and signed by or on behalf of Rainforest, Rainforest Films and Shareholders owning not less than 75% of the Shares. (Id., § 5.4.) When the Reconciliation Agreement was executed, Hardy owned 32.1%, Packer owned 31.5% and Bronner owned 30.8% of Rainforest shares. (Reconciliation Agreement, Recitals, ¶ 1.)

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. (Defs. Feb. 21, 2018 SMF, ¶ 92, Ex. J; Pl. June 21, 2018 Resp. to Defs. SMF, ¶ 92.)[4]

1.2 Disputes Among Primary Shareholders Continue after Reconciliation Agreement and Rainforest Formally Dissolves.

As detailed below, the record indicates that the compensation structure was abandoned in early 2012, and it reflects contradictory versions of events leading to the change.

Following the *Stomp the Yard* films in 2010, Hardy and Packer aver they did not work together on any project. (Hardy Depo., p. 297, 300; Hardy Aff., ¶ 39; Packer Aff., ¶ 38.) They claimed their efforts to pitch Rainforest projects and expand its business were unsuccessful.[5] Hardy and Packer claim they separately began pursuing individual projects, "trying to "capitalize on [their] individual successes."

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[4] Section 1.5 of 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.

[5] For example, Defendants contend, in an effort to raise Rainforest's profile and potentially generate future development opportunities, Packer gave "Executive Producer (vanity) credit to [Rainforest]" for some of his solo movie projects including *Think Like a Man 2*, *Ride Along*, and *About Last Night* whereas Bronner suggests Hardy and Packer did not pursue these efforts to boost the Rainforest profile in good faith and were diverting opportunities and revenues that belonged to Rainforest. (Defs. SMF, ¶ 102-114; Pl. Resp. to Defs. SMF, ¶ 102-114.)

(Hardy Dep., p. 297; Packer Dep., May 5, 2018, pp. 248-249.) They argue these individual projects were not subject to the Reconciliation Agreement. (Hardy Aff., ¶ 30; Packer Aff., ¶ 29). Bronner claims these "loan outs" of Hardy and Packer were part of the Rainforest business model, dating from before the *Stomp the Yard* films. (Packer Dep., Jan. 31, 2018, pp. 166, 169, 172-173; Hardy Dep., pp. 277-279; Pl.'s Appx. of Evid. Mat., filed June 18, 2018, Ex. M.)[6]

Hardy and Packer claim once they began pursuing their separate individual projects, they used some of the money they earned to make capital contributions to Rainforest, attempting to keep the company afloat. (Hardy Aff., ¶ 30; Packer Aff., ¶ 29). However, the allocation of the payments they made to Rainforest appear consistent with the Reconciliation Agreement with one-half of the front-end compensation for these individual projects being allocated to Rainforest. (Hardy Dep., p. 301; Reconciliation Agreement, § 2.3.)

In early 2012, the compensation structure of Rainforest was affirmatively changed. Hardy and Packer decided to stop taking their Rainforest base annual salaries, and they or their individual companies began to keep all compensation (front-end and back-end), they received for work on individual projects. (Hardy Dep., p. 286-288.) Hardy testified Rainforest was struggling financially and the change was motivated by a desire to help keep the company afloat by eliminating

[6] Exhibit M to Pl.'s Appx. of Evid. Mat., filed June 25, 2018 is an April 20, 2014 letter Hardy wrote to Rainforest shareholders as identified in his deposition as Exhibit 3. (Hardy Dep., pp. 274-275).

the overhead costs of their salaries, but he could not explain the reasoning behind eliminating a key source of the company's revenue at a time it was experiencing financial distress. (Id., pp. 290-292, 298.) Hardy could not recall on what authority the compensation structure was changed. (Id., p. 293.)

Packer offered vague and inconsistent testimony about how the decision to change the compensation structure occurred. He first testified that he, Hardy and Bronner together made the determination to change the arrangement after a discussion involving all three. (Packer Dep., May 5, 2018, p. 242.) He later testified he was uncertain about Bronner's thoughts regarding the alteration, but Packer did not recall Bronner raising a "strenuous objection" to the change. (Id., pp. 245-246). When questioned about whether Bronner was informed about the change before it occurred, Packer responded, "[a]t some point [Bronner] would have been informed. . . I don't remember when he was informed." (Id. pp. 246-247.)

The record does not contain any evidence that the modification provisions of the Reconciliation Agreement -- requiring the change be made in writing with 75% shareholder approval -- were followed in making this alteration to Article II. (Reconciliation Agreement, § 5.4.)

The parties continued to disagree on other topics such as the revenues for *Trois* and the use of company-owned resources including a wireless service account opened in the name of Rainforest, a Los Angeles, California apartment owned and

paid for by Rainforest, and a company vehicle.[7] Further, Bronner asserts Packer used $400,000.00 of Rainforest's credit for his personal use without notice to or authorization from shareholders. (Pl's Response to Defs' SMF, filed June 12, 2018, ¶ 117.)

Hardy and Packer sought to dissolve Rainforest, and the dissolution of Rainforest was considered during a June 2, 2014 special meeting of shareholders. (Defs. SMF, ¶ 124; Pl. Resp. to Defs. SMF, ¶ 124.) Prior to that meeting, Bronner served the Rainforest Board of Directors, Packer, and Hardy with a "Shareholder Demand Pursuant to O.C.G.A. § 14-2-742" wherein Bronner unsuccessfully lodged 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. (Defs. SMF, filed Feb. 21, 2018, ¶ 151, Ex. P; Pl. Resp. to Defs. SMF, filed June 21, 2018, ¶ 151.) During the June 2, 2014 meeting, the requisite number of Rainforest shares voted in favor of the proposed dissolution of Rainforest, and the dissolution was later formalized. (Defs. SMF, ¶¶ 124 -125, Pl. Resp. to Defs. SMF, ¶¶ 124-125.)

2. PROCEDURAL HISTORY

2.1 Shortly after Rainforest is Dissolved, Bronner Commences this Lawsuit.

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[7] See Defs. SMF, ¶¶ 79-83, 96-108; Pl's Response to Defs' SMF, ¶¶ 79-83, 96-108.

On June 20, 2014, shortly following Rainforest's dissolution, Bronner filed this lawsuit, asserting multiple causes of action against Hardy, Packer, and TRF, lodging some claims directly on his own behalf and others derivatively on behalf of Rainforest. One of Plaintiff's direct claims was a breach of contract claim against TRF, concerning the Subscription Agreement. (Compl., ¶¶ 84-87.) Plaintiff's complaint made no mention of the Reconciliation Agreement. Plaintiff took the position that it was unenforceable. Rainforest Prod. Holdings, Inc. v. Bronner, Nos. A19A1684, A19A2157 (Ga. App., Mar. 4, 2020), p. 16. Plaintiff also filed a direct claim against Hardy and Packer for fraud. (Compl., ¶¶ 89-90.) Defendants filed various counterclaims that included a count for breach of the Reconciliation Agreement's non-disparagement clause. (Countercl., ¶¶ 57-64; Ver. Countercl., ¶¶ 64-71.) Specifically, Defendants claimed Bronner fed information meant to cast Packer in an unfavorable light to a "tabloid-esque" blog focused on the entertainment industry. (Defs. SMF, Feb. 21, 2018, ¶¶ 126-128.)

2.2 Preliminary Motions, Cross Motions for Summary Judgment and Appellate Opinion Narrow Claims of All Parties.

Plaintiff's cause of action for oppression was dismissed by this Court in a ruling on a preliminary motion. (Ord. on Defs. Mot. to Dismiss and for J. on the Pldgs., pp. 3-4.) Discovery continued for more than two years before the parties filed cross motions for summary judgment. On January 14, 2019 the Court entered a 55-page Order on Pending Motions for Summary Judgment, both granting and

denying summary judgment on various claims. That order was the subject of cross appeals, and on March 25, 2020, the Georgia Court of Appeals issued a 45-page unpublished decision that affirmed in part and reversed in part the trial court's order. Rainforest Prod.

With regard to the prior motions for summary judgment and the subsequent appellate opinion, the Court finds certain issues are especially pertinent to this new round of motions for summary judgment.

First, with regard to Plaintiff's breach of contract claim, this Court found the statute of limitation and the release language of the Reconciliation Agreement, which the Court found enforceable, barred any contract claim prior to its execution on October 8, 2010 including the breach of the Subscription Agreement alleged by Plaintiff. (Order on Pending Mots. for Summ. J., pp. 10-20.) However, despite this finding, the trial court denied summary judgment, determining that a jury question remained as to whether Defendants breached the Reconciliation Agreement. (Id., pp. 19-22.) The Court of Appeals noted that Plaintiff had steadfastly maintained throughout that the litigation that the Reconciliation Agreement was unenforceable as a matter of law. Rainforest Prod., p. 16. It found, "the trial court erred in transforming Plaintiff's breach of contract claim – expressly raised in the complaint against TRF for violations of the Subscription Agreement – to include claims against Hardy and Packer for violations of the Reconciliation Agreement." Id., pp. 17-18.

Accordingly, this Court's decision to deny summary judgment on Plaintiff's claim for breach of contract regarding the Subscription Agreement was reversed. Id., p. 18.

Second, in ruling on the summary judgment motions, this Court determined there were "factual disputes in the record regarding whether Defendants adhered to the compensation structure . . . under the Reconciliation Agreement" noting "the vague circumstances under which that structure was abandoned" were never fully explained. (Order on Pending Mots. for Summ. J., p. 30.) The Court of Appeals adopted this finding.

> In denying summary judgment, the trial court noted that there was at least some evidence in the record to support Plaintiff's allegation that Hardy and Packer unilaterally decided to change the compensation structure established in the Reconciliation Agreement, and forgo their salaries from Rainforest in favor of pursuing independent projects.

Rainforest Prod., p. 24. Later in the opinion, the Court Appeals stated, "[w]e agree with the trial court that there are disputed issues of material fact concerning Hardy's and Packer's compensation." Id., p. 27.

Third, this Court granted summary judgment on Bronner's direct claim against Hardy and Packer for fraud as Bronner failed to establish he was "uniquely injured" because their alleged misrepresentations impacting Rainforest's finances "would result in harm to the corporation and its shareholders alike, not just Bronner." (Order on Pending Mot. for Summ., J., pp. 23-25.) The Court of Appeals concurred

with the Court's reasoning that the fraud claim should be pursued derivatively, not directly, and affirmed the summary judgment. Rainforest Prod., pp. 33-35.

On May 1, 2020, this Court entered a judgment order on the remittitur, formally adopting the appellate decision. Accordingly, at that time, the only claims remaining in the case were Bronner's derivative claims for breach of fiduciary duty, corporate waste and misappropriation of corporate assets (as they had been limited by the summary judgment order and appellate opinion),[8] Defendants' counterclaim for Bronner's breach of the Reconciliation Agreement's non-disparagement clause as well as each side's claims for attorney's fees.

2.3 Post-Appeal Proceedings

On October 21, 2020, before the entry of a Pre-Trial Order, Plaintiff filed a Second Amended Shareholder Direct and Derivative Complaint ("Second Amended Complaint").[9] It restates all the direct and derivative claims found in the Plaintiff's original complaint, as if no dismissal order, summary judgment order or appellate decision had ever been issued. The Second Amended Complaint did raise one new claim, a direct claim against Hardy and Packer for breaching the Reconciliation Agreement. (Second Am. Compl., ¶¶ 93-97.) Defendants sought the opportunity to pursue a dispositive motion on Plaintiff's new breach of contract claim and

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8 Rainforest Prod., pp. 25-28.

9 Earlier that same day, Plaintiff filed his First Amended Shareholder Direct and Derivative Complaint.

expressed consternation about the re-asserted claims. (Defs. Resp. to Mot. for Leave to Amend, pp. 4-5, 13.)

A Consolidated Pre-Trial Order was entered on November 18, 2020. The issues in dispute as identified by the Plaintiff did not include any of the claims where judgment had been previously granted. (Cons. Pre-Trial Ord., ¶ 8.) That same day, the Court entered an Amended Pre-Trial Scheduling Order expressly stating, "[d]ispositive motions, including motions for summary judgment, shall be restricted to new issues raised in Plaintiff's amended pleadings." (Am. Pre-Trial Sched. Order, p. 2.) On January 14, 2021, Defendants filed a Motion for Summary Judgment wherein Defendants: (1) requested the Court provide some clarification regarding the status of claims Plaintiff re-asserted in his Second Amended Complaint and (2) sought summary judgment on Plaintiff's new claim. The following day Plaintiff filed his cross Motion for Partial Summary Judgment – Breach of Contract, seeking summary judgment in favor of its newly asserted claim.

3. DEFENDANTS' REQUEST FOR CLARIFICATION ON PLAINTIFF'S RE-ASSERTED CLAIMS.

As a "house-keeping" matter, Defendants seek an order of clarification regarding the causes of action that Plaintiff re-asserted in his Second Amended Complaint that were previously adjudicated. (Defs. Memo in Supp. of Summ. J., pp. 5-6.) Specifically, Defendants request the Court "to adopt the Georgia Court of Appeals ruling concerning the prior summary judgment." (Id., p. 5.)

The Court has confirmed that all of the re-asserted claims are identical to those found in Plaintiff's original complaint including: (1) oppression,[10] (2) breach of contract regarding the Subscription Agreement,[11] (3) fraud,[12] (4) breach of fiduciary duty,[13] (5) lack of candor,[14] (6) gross mismanagement,[15] (7) unjust enrichment,[16] (8)

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[10] The allegations supporting the oppression claim are identical to those found in the original complaint. (Compl., ¶¶ 81-83; Second Am. Compl., ¶¶ 83-85.) The original claim of oppression was dismissed by this Court in a preliminary motion. (Order on Defs. Mot. to Dismiss and for J. on the Plgs., pp. 3-4.) That dismissal was not appealed. Rainforest Prod., n. 2.

[11] The allegations supporting this breach of contract claim are identical to those found in the original complaint. (Compl., ¶¶ 85-87; Second Am. Compl., ¶¶ 87-89.) As discussed in §2.2, *supra*, the Court of Appeals reversed this Court's decision to deny summary judgment on this claim. Rainforest Prod., pp. 13-18.

[12] The allegations supporting the fraud claim are identical to those found in the original complaint. (Compl., ¶¶ 89-90; Second Am. Compl., ¶¶ 91-92.) This Court's grant of summary judgment was affirmed on appeal. Rainforest Prod., pp. 33-35.

[13] The allegations supporting this breach of fiduciary duty claim are identical to those found in the original complaint. (Compl., ¶¶ 92-95; Second Am. Compl., ¶¶ 99-102.) The Court granted in part and denied in part Defendants' original motion for summary judgment on this claim. (Order on Pending Mots. for Summ. J., pp. 31-37.) The parties filed cross appeals regarding the trial court's decision which was affirmed by the Court of Appeals. Rainforest Prod., pp. 22-25, 35-37, 39-41.)

[14] The allegations of the lack of candor claim are identical to those found in the original complaint. (Compl., ¶¶ 97-98; Second Am. Compl., ¶¶ 104-105.) This Court granted summary judgment on this claim. (Order on Pending Mots. for Summ. J., pp. 37-39.) Plaintiff did not appeal this judgment. Rainforest Prod., p. 3.

[15] The allegations supporting the gross mismanagement claim are identical to those found in the original complaint. (Compl., ¶¶ 100-102; Second Am. Compl., ¶¶ 107-109.) This Court granted summary judgment on this claim. (Order on Pending Mots. for Summ. J., pp. 37-39.) Plaintiff did not appeal this judgment. Rainforest Prod., p. 3.

[16] The allegations supporting the unjust enrichment claim are identical to those found in the original complaint. (Compl., ¶¶ 107-108; Second Am. Compl., ¶¶ 114-115.) This Court granted summary judgment on this claim. (Order on Pending Mots. for Summ. J., pp. 41-42.) Plaintiff did not appeal this judgment. Rainforest Prod., p. 3.

waste of corporate assets,[17] (9) abuse of control,[18] (10) *quantum meruit*,[19] (11) receivership,[20] and (12) misappropriation of corporate assets.[21]

Rather, than have the Court adopt the prior ruling of the Court of Appeals, Plaintiff contends,

> the prudent and proper course is to allow the prior rulings in this case to be governed by thoughtfully-considered and well-established procedures already in effect, including collateral estoppel, res judicata, the remaining protections under the law of the case doctrine, and protections under O.C.G.A. § 9-11-60(h) ('any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court . . .')

(Pl. Resp. to Defs. Mot. for Summ. J., p. 6.)

Without offering any explanation as to why he chose to re-assert numerous identical claims where an adverse judgment has already been entered, Plaintiff has failed to recognize his role in creating confusion. However, in making their request for relief, Defendants do not seem to recognize that this Court has previously entered

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[17] The allegations supporting the claims for waste of corporate assets and misappropriation of corporate assets are identical to those found in the original complaint. (Compl., ¶¶ 104-105, 120-121; Second Am. Compl., ¶¶ 111-112; 127-128.) On summary judgment, the Court considered the misappropriation claim collectively with the waste of corporate assets claim. This Court granted in part and denied in part summary judgment on these two claims. (Order on Pending Mots. for Summ. J., pp. 28-31.) The Court's decision was affirmed on appeal. Rainforest Prod., pp. 25-28.

[18] The allegations supporting the abuse of control claim are identical to those found in the original complaint. (Compl., ¶¶ 110-112; Second Am. Compl., ¶¶ 117-119.) This Court granted summary judgment on this claim. (Order on Pending Mots. for Summ. J., pp. 39-40.) Plaintiff did not appeal this judgment. Rainforest Prod., p. 3.

[19] The allegations supporting the *quantum meruit* claim are identical to those found in the original complaint. (Compl., ¶¶ 114-115; Second Am. Compl., ¶¶ 121-122.) This Court granted summary judgment on this claim. (Order on Pending Mots. for Summ. J., pp. 42-44.) Plaintiff did not appeal this ruling. Rainforest Prod., pp. 2-3.

[20] The allegations supporting the request for a receiver are identical to those found in the original complaint. (Compl., ¶¶ 117-118; Second Am. Compl., ¶¶ 124-125.) This Court granted summary judgment on this claim. (Order on Pending Mots. for Summ. J., pp. 44-46.) Plaintiff did not appeal this ruling. Rainforest Prod., pp. 2-3.

[21] See n. 17, *supra*.

an order on the remittitur and the Consolidated Pre-Trial Order where the disputed issues identified by the Plaintiff were consistent with the prior rulings of this Court and the appellate court. (Cons. Pre-Trial Order, ¶ 8.)

The Court will not step into the morass created by these re-asserted claims. Specifically, the Court notes its November 18, 2020 Amended Pre-Trial Scheduling Order, clearly indicates the Court would only consider dispositive motions on "new issues" raised in Plaintiff's amended complaint. As the Court detailed above, the only new issue raised by Plaintiff in this amended pleading is his direct claim that Defendants Hardy and Packer breached the Reconciliation Agreement.

Because the requested relief seeking clarification is in violation of the Court's Amended Pre-Trial Scheduling Order, the Court rejects Defendants' request for an order of clarification.

4. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

In Fulton County v. Ward-Poag, 2020 WL 5883344, at *3 (Ga. October 5, 2020), the Georgia Supreme Court recently reiterated the "well-established principles" guiding a trial court's review of a motion for summary judgment. "A trial court can grant summary judgment to a moving party only if there are no genuine issues of material fact and the undisputed evidence warrants judgment as a matter of law. See O.C.G.A. § 9-11-56(c). In reviewing the evidence, a court must construe all facts and draw all inferences in favor of the non-movant." Ward-Poag

expressly relied on Messex v. Lynch, 255 Ga. 208, 210 (1985) that further provides, "[t]he party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists, and the trial court must give that party the benefit of all favorable inferences that may be drawn from the evidence."

Further, when cross-motions for summary judgment are filed, "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 (2015) (citation and punctuation omitted).

5. ANALYSIS

5.1 Defendants' Motion for Summary Judgment

5.1.1 The Claim for Breach of the Reconciliation Agreement is not Time-barred.

Defendants argue the recent claim for breach of the Reconciliation Agreement is time-barred. (Defs. Memo. in Supp. of Summ. J., pp. 6-9.) Plaintiff does not dispute the statute of limitation would preclude this claim as it was filed on October 21, 2020 but argues the claim "relates back" to the original action, filed June 20, 2014, thus rendering it timely. (Pl. Resp. to Defs. Mot. for Summ. J., p. 6.) See LAZ Parking/Georgia, Inc. v. Jones, 294 Ga. App. 122, 123 (2008) (when a claim is asserted after the statute of limitation has expired, the amendment is only timely if

it "relates back" to the original complaint.) O.C.G.A. § 9-11-15(c) outlines Georgia's relation-back doctrine. In pertinent part, it provides, "[w]henever the claim or defense asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Tenet Healthsystem GB, Inc. v. Thomas, 304 Ga. 86 (2018), recently addressed Georgia's relation back doctrine. After considering its aims and relationship to other portions of the statute that liberally permit pleading amendments, the Georgia Supreme Court offered this guidance as to how O.C.G.A. § 9-11-15(c) should be interpreted.

> The best formulation for describing the parameters of the relation back doctrine and focusing on its underlying policies is the standard found in the rule itself, i.e., whether the amended pleading alleges matter that arises out of the same conduct, transaction or occurrence as that set forth in the original pleading.

Id. at 630-631 (citations and punctuation omitted). In making this pronouncement, Tenet Healthsystem relied upon Jensen v. Engler, 317 Ga. App. 879 (2012). According to Jensen, the question of whether a claim added by amendment relates back "turns on fair notice of the *same general fact situation* from which the claim arises" and an amendment should liberally be considered to relate back "unless the causes of action are not only different but *arise out of wholly different* facts." Id. at 883 (emphasis in original).

In his amended pleading, Plaintiff alleges Hardy and Packer failed to comply with numerous obligations under the Reconciliation Agreement – including the preparation of a report detailing revenues attributable to *Trois*, payment of agreed upon compensation owed to Hardy and Packer in the form of salary, payment of compensation owed to Rainforest for certain Core Business Projects, and the establishment Year-End Bonus Pools. (Second Am. Compl., ¶¶ 95-96; Reconciliation Agreement, §§ 1.6, 2.2-2.5.) The original complaint contained many similar factual allegations. It alleged Hardy and Packer hid key financial information from Plaintiff. (See e.g. Compl., ¶¶ 51, 56-61.) It included several specific allegations regarding the financial performance of *Trois* and the failure of Hardy and Packer to adequately account for its various revenue streams. (Compl., ¶¶ 43- 50.) The original complaint also contained specific allegations regarding the compensation of Hardy and Packer and their diversion of revenues owed to Rainforest for projects within its "core competency." (Compl., ¶¶ 55, 63.)

Comparing these two pleadings, the Court finds Hardy and Packer had "fair notice" of the "same general factual situation" on which the amended claim rests and that it did not "arise out of a wholly different set of facts." Jensen. Accordingly, the Court finds the amended claim relates back to the original filing and is not time-barred.

5.1.2 The Claim for Breach of the Reconciliation Agreement does not Bar Plaintiff's Claims for Corporate Waste and Breach of Fiduciary Duty.

Defendants argue that, in light of this new claim, "the Court must dismiss Bronner's remaining corporate waste and fiduciary duty claims because the alleged breach of Reconciliation Agreement cannot give rise to asserted torts." (Defs. Memo. in Supp. of Summ. J., p. 9.)

O.C.G.A. § 51-1-1 provides, "[a] tort is the unlawful violation of a private legal right other than a mere breach of contract . . ." Defendants generally argue the Reconciliation Agreement governed Rainforest's compensation and management, and Plaintiff has failed to allege a breach of duty independent of that agreement such that Plaintiff may not properly assert a tort claim. See generally Commercial Bank & Trust Co. v. Buford, 145 Ga. App. 213, 214 (1978) ("if there is no liability except that arising out of a breach of the express terms of a contract, the action must be in contract, and an action in tort cannot be maintained.")

Defendants' argument fails to recognize the breach of contract claim is Bronner's direct claim concerning the breach of duties owed to him independently while the torts Bronner alleges are derivative and concern the breach of duties owed to Rainforest and all its shareholders. This difference is addressed in detail at § 5.1.7, below.

Moreover, Defendants made a similar argument before the before the appellate court, and it was rejected.

> Defendants contend that the trial court erroneously allowed contract and tort actions based on the same conduct to survive summary judgment . . .
>
> **Plaintiff here alleged actions that went beyond Defendants' failure to perform under the contract**, alleging that they breached their fiduciary duties to the company and engaged in deception and self-dealing. 'Where private duties arise from relations created by the contract, express or implied, one may pursue a tort action for damages flowing from the exercise or failure to exercise that duty. [Cit.] Accordingly, Plaintiff was entitled to pursue tort claims based on Defendants' purported breach of their duties beyond those expressly required by contract . . .

Rainforest Prod., pp. 18-19 (emphasis added).

The clear conclusions of the Court of Appeals are binding on this Court, and the Court rejects Defendants' arguments to the contrary. See O.C.G.A. § 9-11-60(h)("any ruling by . . . the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court.")

Accordingly, Defendants' motion for summary judgment on the Plaintiff's tort claims is denied.

5.1.3 Bronner's Breach of Reconciliation Agreement Claim is Not Duplicative of his Tort Claims.

Defendants contend, "Bronner's breach of Reconciliation Agreement claim premised upon the alleged compensation structure and financial report provisions is duplicative of the fiduciary duty and corporate waste claims and thus, subject to

summary judgment." (Defs. Memo. in Supp. of Summ. J., p. 19.) As outlined above, the Court of Appeals expressly determined Bronner's tort claims rested on disputed allegations that Hardy and Packer breached fiduciary duties by engaging in deception and self-dealing that were independent of duties under the Reconciliation Agreement. Rainforest Prod., pp. 18-19. Moreover, Bronner's claim for breach of the Reconciliation Agreement is brought on his own behalf whereas he brings derivative tort claims on behalf of Rainforest's shareholders. See § 5.1.7, *infra*.

Accordingly, the Court rejects the argument that this amended contract claim is duplicative of the prior pending tort claims.

5.1.4 Questions of Fact Remain as to Whether the Reconciliation Agreement was Breached.

Defendants argue that Plaintiff has failed to establish that the Reconciliation Agreement was breached. (Defs. Memo. in Supp. of Summ. J., pp. 20-26.) However, Defendants have failed to offer undisputed evidence in support of this position.

With regard to the *Trois* Financial Report, Bronner was to be provided a 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.)

Defendants assert, "Rainforest Production provided Bronner with the Financial Report demonstrating that *Trois* was not profitable" which report was

prepared by the Rainforest accountant. (Defs. Memo. in Supp. of Summ. J., p. 20.) Both Hardy and Packer aver that they,

> provided Bronner with the *Trois* Accounting prepared by [the company accountant] based upon all the financial information related to *Trois*. Bronner was also provided with all requested financial documents related to *Trois* and the Reconciliation Agreement. After receiving the *Trois* Accounting and the additional financial documents, Bronner never expressed dissatisfaction with the *Trois* accounting, requested additional information, or otherwise expressed that the *Trois* accounting failed to comply with the Reconciliation Agreement.

(Hardy Aff., ¶ 38; Packer Aff., ¶ 37; see also Deposition of Mariellen Ballier ("Ballier Dep."), pp. 55-62.) The company accountant testified he met with Bronner on different occasions to review the information about *Trois* revenues and he produced to Bronner all the *Trois* financial information, and he never received a request for additional information or a protest that the information he provided was insufficient. (Barren Watson Deposition ("Watson Dep."), pp. 200-203, 209-211.)

However, the *Trois* Financial Report identified by Defendants is a cursory, one-page document. (Defs. SMF, filed Feb. 21, 2018, ¶ 100; Ex. L; Watson Dep., pp. 179-184.) Bronner testified the statement he received was incomplete as it was missing information about revenues obtained from television rights. (Bronner Depo., pp. 140-141.) Packer acknowledged the *Trois* Financial Report provided Bronner was incomplete and lacked detail. (Packer Depo., May 5, 2018, pp. 172-174.) He testified one would have to look outside the four corners of the document, "to get specificity." (Id., p. 176.) Considering the evidence in the light most

favorable to Plaintiff, the Court finds a question of fact exists as to whether Bronner received the reasonably detailed *Trois* Financial Report required by the Reconciliation Agreement.

As concerns the Year-End Bonus Pool, the Court of Appeals has adopted this Court's prior finding that material questions of fact exist as to the circumstances whereby Defendants abandoned Reconciliation Agreement's compensation structure. Rainforest Prod., p. 27. Any failure to comply with the compensation structure would directly bear on the amount of monies flowing into the Year-End Bonus Pool, and, therefore, there is a disputed question as to whether § 2.5 of the Reconciliation Agreement was breached.

5.1.5 The Record Reflects Sufficient Evidence of Damages to Merit Consideration by a Factfinder

Defendants argue Bronner has failed to establish his damages with requisite certainty. (Defs. Memo. in Supp. of Summ. J., pp. 26-29.) "To avoid summary judgment, a party is not required to present evidence of a specific dollar amount of damages. Rather, he must only present evidence sufficient to serve as the basis for a factfinder to calculate the amount of damages due should liability be established." Beale v. O'Shea, 319 Ga. App. 1, 6 (2012) (citations and punctuation omitted.)

Defendants made a similar argument about the uncertainty of Plaintiff's damages on the breach of fiduciary duty claims which was rejected on appeal.

Rainforest Prod., p. 28. Applying Beale, the Court of Appeals found record evidence would permit a jury to calculate Plaintiff's damages.

> For example, at Hardy's deposition, he stated that the money he made from the loan-out arrangements went to R. Hardy, LLC, his individual corporation. He then reviewed tax returns from R. Hardy, LLC which represented that his corporation listed gross sales of $301,255 for the 2012 tax year, which could be compared by a jury to the $175,000 salary he gave up, to determine if Rainforest would have received more or less money had Hardy remained on his salary arrangement rather than shifting to the loan-out arrangement.

Id., p. 29.

This Court finds the appellate court's reasoning equally applicable to this claim and finds sufficient record evidence of damages from the breach of the Reconciliation Agreement exists for the jury to decide damages.

5.1.6 Defendants Have Failed to Establish Bronner's Conduct Precludes Recovery on his Claim for Breach of the Reconciliation Agreement

Without citing any authority, Defendants claim Bronner's conduct leaves him without the right to complain of any purported breach. (Defs. Memo. in Supp. of Mot. for Summ. J., p. 29.) Generally referring to their own Statement of Material Facts, Defendants claim Bronner exploited Rainforest for his own benefit. (Def. SMF, ¶¶ 64-83, 116-121, 126-130). In doing so, they ignore the fact that their statements have been largely disputed. (Pl. Resp. to Defs. SMF, ¶¶ 64-83, 116-121; 126-130.)

Defendants also claim that Bronner's breach of the non-disparagement clause of the Reconciliation Agreement precludes him from seeking recovery for the contract's breach. (Defs. Memo. in Supp. of Mot. for Summ. J., p. 29.) As Defendants have acknowledged, after the last round of motions for summary judgment and the appellate court's review, the question of Bronner's alleged violation of the non-disparagement clause remains a jury question. (Defs. Resp. to Mot. for Leave to Amend, p. 3-4; Cons. PTO, ¶ 8.)

Defendants have failed to establish with citation to applicable law or undisputed evidence that Bronner's conduct precludes his recovery under the Reconciliation Agreement.

5.1.7 Bronner has Standing to bring Certain Direct Action Claims for Breach of the Reconciliation Agreement.

Defendants argue, like the fraud claim, Bronner lacks standing to assert a direct claim for breach of the Reconciliation Agreement. (Defs. Memo. in Supp. of Summ. J., pp. 11-16.) Notably, Bronner's response to Defendants' motion offers no opposition to this particular argument.

Crittenton v. Southland Owners Ass'n, Inc., 312 Ga. App. 521 (2011) explains the distinctions between these two types of actions.

> [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.

Id. at 524 (Citations and punctuation omitted; emphasis added).; see also Callicott v. Scott, 357 Ga. App. 780, 786 (2020). Accordingly, the Court must closely review the allegations of breach and determine whether Bronner's claimed injuries are distinct from those injuries suffered by other Rainforest shareholders or whether Bronner seeks to enforce contractual rights specific to himself. The Second Amended Complaint claims the Reconciliation Agreement was breached in three general ways. (Second Am. Compl., ¶ 96.)

One alleged breach concerns financial reporting obligations owed to Bronner and the *Trois* Investors. (Second Am. Compl., ¶ 96.) The Reconciliation Agreement recognizes, "Bronner played a significant role in securing the investment by certain persons" defined as *Trois* Investors, "in connection with the production" of *Trois*. (Reconciliation Agreement, Recitals ¶ 4.) In addition to his own personal investment in this particular film, Bronner testified he convinced friends to invest $200,000 in *Trois*, and he felt personally responsible to account for their investment. (Bronner

Dep., pp. 50-51; 57, 139-140.) Considering the record in a light most favorable to Bronner, the *Trois* Investors were outside investors and not necessarily Rainforest shareholders. Bronner testified that after the success of *Trois*, Rainforest was no longer required to self-finance its own films. (Id., p. 52.)

Section § 1.6 of the Reconciliation Agreement provides,

> [w]ithin 120 days following the end of calendar year 2010, [Rainforest] 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. If and to the extent the Trois Financial Report reflects that "Trois" earned net revenues greater than the aggregate amount of previous distributions made to the Trois Investors . . . then Bronner and the Trois Investors shall be entitled to receive a distribution of such excess net revenue amount pursuant to the formula set forth in the original investment agreement(s) entered into between [Rainforest] and the Trois Investors. In such event, [Rainforest] shall cause any such required distributions to be made to the Trois Investors within 60 days following the preparation of the Trois Financial Report (emphasis in original).

As reflected in the quotation above, these *Trois* Investors had their own investment agreements with Rainforest. (Id. § 1.6) Again, considering the record in the light most favorable to Plaintiff, § 1.6 was drafted to address a concern unique to Bronner and the *Trois* Investors and the alleged breach caused an injury to Bronner that is not shared generally by other Rainforest shareholders. Accordingly, the breach claim may be pursued directly. Crittenton.

Bronner also alleges a breach of § 2.5 of the Reconciliation Agreement concerning the Year-End Bonus Pool. (Second Am. Compl., ¶ 96.) Only Hardy, Packer and Bronner were to benefit from this particular provision, not the Rainforest shareholders generally. Accordingly, the Court finds a direct claim for this breach is permissible. Id.

Finally, Bronner alleges breaches regarding the compensation structure otherwise established in established by §§ 2.2-2.4 of the Reconciliation Agreement. (Second Am. Compl., ¶ 96.) Plaintiff claims Hardy and Packer unilaterally abandoned the structure to pursue independent projects and diverted Rainforest opportunities for their own benefit. (Second Am. Compl., § 64.) While this alleged breach would be relevant to the calculation of the Year-End Bonus Pool discussed above, the claim itself -- for lost Rainforest revenues -- would inure to the benefit of all Rainforest shareholders, not just Bronner. See generally Levy v. Reiner, 290 Ga. App. 471, 473 (2008) (as a general rule, claims relating to the misappropriation of corporate assets concern injuries to all the company's shareholders and belong to the corporation). Therefore, this particular alleged breach of the Reconciliation Agreement should be pursued derivatively.[22]

[22] The Court of Appeals employed this same reasoning in affirming this Court's grant of summary judgment on Plaintiff's direct claim of fraud. Rainforest Prod., pp. 33-35.

5.1.8 Hardy and Packer are Not Obligated under §§ 1.6 and 2.5 of the Reconciliation Agreement.

Defendants claim neither Hardy nor Packer are personally liable for the alleged breach of Reconciliation Agreement § 1.6 regarding provision of the *Trois* accounting or § 2.5 regarding the calculation of the Year-End Bonus Pool as the Reconciliation Agreement obligated Rainforest to fulfill each of these obligations. (Defs. Memo. in Supp. of Summ. J., pp. 17-18.)

Defendants cite Souza v. Berberian, 342 Ga. App. 165 (2017) where plaintiff sued the individual who executed the contract on behalf of the corporate signatory. Souza states, "[i]t is axiomatic that a person who is not a party to a contract is not bound by its terms" and "[a]s a general rule, an action on a contract . . . shall be brought . . . against the party who made it." Id. at 169-170. However, that is not the situation before this Court.[23] Here, Hardy signed the agreement on behalf of

[23] In addition to Souza, Defendants cite other cases where non-parties are pursuing or defending breach of contract claims. (Defs. Memo. in Supp. of Summ. J., pp. 17-18; Defs. Reply, p. 10.) In Levy v. Reiner, 290 Ga. App. 471, 473 (2008), a claim regarding breach of a consulting agreement was dismissed against the corporate defendant because, although the contract obligated the corporation to perform certain duties, the contract was signed by a corporate official in his personal capacity. Accordingly, the contract was not binding on the company. "[E]ach corporation is a separate entity, distinct and apart from its stockholders and a person who is not a party to a contract (i.e., is not named in the contract and has not executed it), is not bound by its terms (punctuation and citation omitted)." Id. Here, unlike Levy, Hardy and Packer are parties to the Reconciliation Agreement which they signed in their individual capacities.

In Accurate Printers, Inc. v. Stark, 295 Ga. App. 172, 175 (2008), the Court of Appeals affirmed the entry of a directed verdict on a breach of contract claim because the corporate plaintiff was not a party to the contract that its principal had signed in his individual capacity and thus the corporation lacked standing to sue. By contrast, here, all the parties to this breach of contract claim -- Bronner, Hardy and Packer -- executed the Reconciliation Agreement in their individual capacities.

Defendants also cite Hall v. Ross, 273 Ga. App. 811 (2005) as "affirming summary judgment in favor of defendant who was sued despite not being a party to the subject contract." (Def. Memo. in Supp. of Summ. J., p. 18.) However, Hall merely notes that plaintiff had sued a corporation "which apparently was not a party to the contract. Thus, the trial court granted summary judgment in favor of the defendant, and [plaintiff] does not challenge that judgment." Id. at n. 1.

Rainforest in his capacity as President. However, Hardy also signed the agreement in his individual capacity as did Packer. Additionally, Hardy and Packer expressly acknowledged in the body of the agreement that they were "primarily responsible for and actively involved in the management and oversight of the day-to-day operations and affairs of [Rainforest] . . ." (Reconciliation Agreement, Recitals, ¶ 4.)

Envision Printing, LLC v. Evans, 336 Ga. App. 635 (2016) involved a dispute regarding the capacity in which a CEO signed a promissory note on behalf of his company. In determining whether he was personally liable for the debt, the appellate court "examine[d] the language of the contract to determine in what capacity the representative [was] bound." Id. at 637. Specifically, it applied the general rules of contract construction, beginning with the first step whereby, "the trial court must decide whether the language is clear and unambiguous. If it is, no construction is required, and the court simply enforces the contract according to its clear terms." Id. at 638.

Here, § 1.6 of the Reconciliation Act expressly requires Rainforest to provide the *Trois* Financial Report and make any necessary distribution to Bronner and the *Trois* Investors. Similarly, § 2.5 expressly requires Rainforest to calculate and establish the Year End Bonus Pool, issue written notifications of its amount, and make any required payments. As noted in Avery v. Grubb, 336 Ga. App. 452, 460 (2016), "[a]s an artificial person, a corporation can act, and does act, alone through

agents. It deals with other corporations and with natural persons by its agents; it can deal with the world in no other way." Thus, while Hardy and Packer as Founders may have been responsible for actually performing these tasks in their Rainforest oversight roles, according to the clear terms of the Reconciliation Agreement, these legal obligations belong solely to Rainforest. See also White v. Shamrock Bldg. Systems, Inc., 294 Ga. App. 340, 348 (2008)("The corporate identity is entirely separate from the identity of its officers and stockholders.")

Moreover, the Court's conclusion is consistent with the framework of the Reconciliation Agreement when considered as a whole. See O.C.G.A. § 13-2-2(4)("the whole contract should be looked to in arriving at the construction of any part.") The contract specifically identifies those obligations that belong to Rainforest and those that belong to Hardy and Packer. For example, provisions of the Reconciliation Agreement regarding releases, non-disparagement, indemnification, warranties and notices treat Rainforest separately from the other signatories Hardy and Packer. (Id., §§ 1.4, 1.5, 3.1, 3.2, 3.5, 4.1, 4.3, 5.1.) Accordingly, the contract itself does not contemplate that Hardy and Packer would individually be responsible for the obligations undertaken by Rainforest.

In light of the foregoing, the Court finds Hardy and Packer are not individually liable to Plaintiff for breaches of §§ 1.6 and 2.5 of the Reconciliation Agreement.

5.2 Plaintiff's Motion for Partial Summary Judgment – Breach of Contract

In light of the Court's determination in Section 5.1.8 above that no portion of Plaintiff's amended claim for breach of the Reconciliation Agreement is viable, the Plaintiff's cross Motion for Partial Summary Judgment – Breach of Contract is denied.[24]

6. CONCLUSION

It is hereby **ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED.** It is further **ORDERED** that Plaintiff's Motion for Partial Summary Judgment – Breach of Contract is **DENIED.**

SO ORDERED this 26th **day of April, 2021.**

JUDGE KELLY LEE ELLERBE
Superior Court of Fulton County
Metro Atlanta Business Case Division
Atlanta Judicial Circuit

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[24] Alternatively, even if the Court were to consider the merits of Plaintiff's motion, summary judgment would not be appropriate.

First, contrary to Plaintiff's argument, a question of fact exists as to whether § 1.6 of the Reconciliation Agreement was breached. (Pl. Mot. for Part. Summ. J., pp. 8-9.) While the formal *Trois* Financial Report may have been cursory, Defendants supplied Bronner with significant amounts of additional financial information about *Trois* and received no complaint from Bronner in response. (Hardy Aff., ¶ 38; Packer Aff., ¶ 37; Ballier Dep., pp. 55-62; Watson Dep., pp. 202-205, 209-211.) Viewing the evidence in the light most favorable to the Defendants, a disputed question of fact exists as to whether Rainforest substantially complied with § 1.6's reporting requirement. See generally, TRST Atlanta, Inc. v. 1815 Exch., Inc., 220 Ga. App. 184, 187 (1996) (while common law required strict compliance in the performance of a contract, "substantial compliance with the terms of the contract is [now] sufficient.")

Second, contrary to Plaintiff's argument that Defendants did not adhere to the Reconciliation Agreement's revenue-sharing provisions, factual disputes would preclude the entry of summary judgment. (Pl. Mot. for Part. Summ. J., pp. 9-10.) The Court of Appeals has adopted this Court's prior determination that a question of fact exists about the circumstances under which the compensation structure, outlined in Article II of the Reconciliation Agreement, was abandoned. Rainforest Prod., p. 24.

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Fulton County Superior Court | Metro Atlanta Business Case Division
Civil Action File No. 2014CV248023
Order on Cross Motions for Summary Judgment