Georgia State University College of Law
Reading Room

Georgia Business Court Opinions

9-8-2021

Rainforest Production Holdings, Inc., derivative suit, Order on Third Set of Cross Motions for Partial Summary Judgment

Kelly Lee Ellerbe
Judge, Superior Court of Fulton County, Metro Atlanta Business Case Division

Follow this and additional works at: https://readingroom.law.gsu.edu/businesscourt

 Part of the Law Commons

Institutional Repository Citation

Kelly L. Ellerbe, *Rainforest Production Holdings, Inc., derivative suit, Order on Third Set of Cross Motions for Partial Summary Judgment*, Georgia Business Court Opinions 512 (2021)
https://readingroom.law.gsu.edu/businesscourt/512

This Court Order is brought to you for free and open access by Reading Room. It has been accepted for inclusion in Georgia Business Court Opinions by an authorized administrator of Reading Room. For more information, please contact gfowke@gsu.edu.

Fulton County Superior Court
EFILEDQW
Date: 9/8/2021 3:57 PM
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, and RAINFOREST PRODUCTION HOLDINGS, INC.	)	Bus. Case Div. 3
Defendants.	)	

ORDER ON THIRD SET OF CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The above styled action is before this Court on: (1) Defendants' Motion for Partial Summary Judgment – Third Amended Shareholder Direct and Derivative Complaint, filed July 20, 2021 and (2) Plaintiff's Motion for Partial Summary Judgment – Breach of Contract, filed July 20, 2021. Having reviewed the record and considered submissions of the parties, the Court enters the following order.[1]

---

[1] Pursuant to the agreement of counsel, these motions were determined solely on the parties' briefing and without oral argument. (Sec. Am. Pre-Trial Sched. Order, p. 2; Order Gr. Pl. Mot. for Leave to file MSJ, pp. 2-3.)

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 and Countercl., ¶ 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.)[2] 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

[2] The two motions before the Court constitute the third set of cross motions for summary judgment filed since the close of discovery, and they concern the same facts addressed in the second set of cross motions for summary judgment. Accordingly, 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 their second motion for partial summary judgment and Plaintiff's response thereto, filed February 17, 2021. Occasionally, throughout the order, the Court will refer to other statements filed in relation to other motions for summary judgment. When making such citations, the Court will so note.

subsequently invested and/or helped to secure investments of over $500,000.00 in *Trois* and 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.[3] 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").[4] (Defs. SUMF, ¶ 84; Pl. 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

---

[3] 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.

[4] An authenticated copy of the Reconciliation Agreement is attached to the Consolidated Pre-Trial Order, entered November 18, 2020. (Id. ¶ 10, Ex. A.)

responsibilities and received certain benefits in that capacity. (See e.g., Id., §§ 1.5, 2.2, 3.1, 3.3, 3.4, 4.1.)

The Reconciliation Agreement required Rainforest to prepare an accounting of the net revenues received from *Trois* and deliver it to Bronner ("*Trois* Financial Report"), and, depending on the amount of revenues reported, make certain distributions not only to Bronner but to designated *Trois* investors that Bronner had been instrumental in recruiting. (Id., Recitals ¶ 4, § 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. 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, and 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.)

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." (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). By contrast, Bronner claims these "loan outs" of Hardy and Packer were part of the Rainforest business model, dating from before the *Stomp the*

[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 projects and revenues that belonged to Rainforest. (Defs. SMF, ¶ 102-114; Pl. Resp. to Defs. SMF, ¶ 102-114.)

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 as one-half of the front-end compensation for these individual projects was 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 the overhead costs of their salaries. Hardy could not recall on what authority the compensation structure was changed. (Id., p. 293.)

[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.)

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."[7] (Id., pp. 246-247.)

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. (See Defs. SMF, ¶¶ 79-83, 96-108; Pl. Resp. to Defs. SMF, ¶¶ 79-83, 96-108.) Further, Bronner asserts Packer used $400,000.00 of Rainforest's credit for his personal use without notice to or authorization from shareholders. (Pl. Resp. to Defs. SMF, filed June 12, 2018, ¶ 117.)

[7] 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.)

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 Files this Lawsuit.

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.) Bronner's

complaint made no mention of the Reconciliation Agreement. Bronner took the position that it was unenforceable. Rainforest Prod. Holdings, Inc. v. Bronner, Nos. A19A1684, A19A2157 (Ga. App., Mar. 4, 2020), p. 16. Bronner 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 First Set of Cross Motions for Summary Judgment Narrows Issues and Receives Appellate Review

Discovery continued for more than two years before the parties filed their first 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 first set of cross motions for summary judgment and the subsequent appellate opinion, the Court finds certain issues are pertinent to this current set of summary judgment motions.

First, with regard to Plaintiff's breach of contract claim, this Court found the Reconciliation Agreement was enforceable and that Bronner's claims arising from the Subscription Agreement were barred. (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 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. Subsequent to the appellate opinion, Bronner amended his complaint to assert claims under the Reconciliation Agreement. Those claims have been the primary subject of the second and third set of cross motions for summary judgment.

Second, in ruling on the first set of 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 affirmed stating,

> [w]e agree with the trial court that there are disputed issues of material fact concerning Hardy's and Packer's compensation . . . The issue in Plaintiff's case . . . is whether Hardy's and Packer's foregoing of the compensation structure established in the Reconciliation Agreement unilaterally changed the compensation structure to one that was less beneficial to Rainforest. Accordingly, **these actions potentially jeopardized corporate assets, namely Rainforest's entitlement to portion of Hardy's and Packer's fees for their loan out services.**

Id., p. 27 (emphasis added). This appellate determination is key to many of Defendants' arguments in the current set of motions because they claim Rainforest earned no revenue during the period in question.

Third, the appellate decision addressed whether certain claims should be pursued directly or derivatively. 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.

Fourth, the Court of Appeals affirmed the grant of summary judgment on two discrete portions of Bronner's claims for corporate waste and misappropriation of

corporate opportunities that concerned: (1) the payment of excessive salaries to Hardy and Packer and (2) the transfer of Rainforest intellectual property to Hardy. Rainforest, pp. 25-28, 37-38. Other aspects of these claims were not subject to summary judgment. Id. However, the two aforementioned issues have reappeared in Bronner's Third Amended Complaint. (Third Am. Complaint, ¶¶ 93(a) and (d), 96(a) and (d).)

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 against Hardy and Packer 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, discussed immediately above), Defendants' counterclaim for Bronner's breach of the Reconciliation Agreement's non-disparagement clause as well as the parties' respective claims for attorney's fees.

2.3 Second Set of Cross Motions for Summary Judgment Addresses Plaintiff's New Claims About Breach of the Reconciliation Agreement

On October 21, 2020, before the entry of a Pre-Trial Order, Bronner filed a Second Amended Shareholder Direct and Derivative Complaint ("Second Amended Complaint").[8] It raised one new claim, a direct claim against Hardy and Packer for

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

breaching §§ 1.6 and 2.2-2.5 of the Reconciliation Agreement. (Second Am. Compl., ¶¶ 93-97.)

The deadline for filing dispositive motions having passed, Defendants sought leave to pursue a dispositive motion on Bronner's new breach of contract claim which this Court permitted. (Defs. Resp. to Mot. for Leave to Amend, pp. 4-5; Am. Pre-Trial Sched. Order, p. 2.) Subsequently, the parties filed cross motions for summary judgment on the newly asserted contract claim. The Court issued its Order on Cross Motions for Partial Summary Judgment on April 26, 2021. It addressed a myriad of arguments but ultimately granted summary judgment to Defendants for the following reasons.

First, the Court determined that Plaintiff suffered a special injury and was thus able to file a direct claim for the breach of §§ 1.6 and 2.5 of the Reconciliation Agreement. (Order on Cross Mots. for Summ. J., pp. 29-30.) However, the Court granted summary judgment because Plaintiff had sued Hardy and Packer for these alleged breaches when the Reconciliation Agreement expressly obligated Rainforest to prepare the *Trois* Financial Report and administer the Year-End Bonus Pool. (Id., pp. 31-33.) Second, as concerned any breach of the Reconciliation Agreement's compensation provisions found in §§ 2.2-2.4, the Court determined that, although this breach could impact the revenues used to calculate the Year-End Bonus Pool established in § 2.5 that only benefited Bronner, Hardy, and Packer, "the claim itself

– for lost revenues – would inure to the benefit of all Rainforest shareholders, not just Bronner." (Id., p. 30.) Therefore, the Court concluded this claim for breach of contract should be pursued derivatively. (Id.)

2.4 *Third Set of Cross Motions for Summary Judgment Address Plaintiff's Attempt to Re-frame his Claims for Breach of the Reconciliation Agreement*

After the Court's order resolving the second set of cross motions for summary judgment, Bronner sought and received leave to amend his complaint to re-frame his breach of contract claims. (Order Gr. Pl. Mot. for Leave to File his Third Am. Compl., entered June 17, 2021.) His Third Amended Shareholder Direct and Derivative Complaint was filed on June 28, 2021. It added direct claims against Rainforest for breaches of §§ 1.6 and 2.5 of the Reconciliation Agreement and derivative claims against Hardy and Packer for breach of §§ 2.2-2.4 of the Reconciliation Agreement. (Third Am. Compl., ¶¶ 83-85; 99-101.) The Court also agreed to allow the parties to file dispositive motions on the newly-framed claims which led to this third set of cross motions for summary judgment. (Second Am. Pre-Trial Sched. Order, p. 2; Order Gr. Pl. Mot. for Leave to File Mot. for Summ. J., p. 2.)

3. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

In Fulton County v. Ward-Poag, 310 Ga. 289, 292 (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) which 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).

4. ANALYSIS

4.1 Defendants' Motion for Partial Summary Judgment

4.1.1 Plaintiff's Claim for Breach of § 1.6 of the Reconciliation Agreement - *Trois* Financial Report

With regard to the *Trois* Financial Report, Rainforest was to provide Bronner with 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.) Depending on the net revenues established by that report, Rainforest would be required to make certain distributions to *Trois* investors. (Id.) Acting pursuant to this provision, Rainforest provided Bronner with a one-page summary of certain financial information about *Trois* reflecting an estimated loss of $35,700. (Defs. SMF, filed Feb. 21, 2018, ¶ 100; Ex. L; Pl. Appx. in Resp. to Defs. SMF, filed June 26, 2018, ¶ 100, Ex. AA; Watson Dep., pp. 179-184.)

Defendants now contend § 1.6 is impermissibly vague because it lacks necessary guidance about preparation of the *Trois* Financial Report. (Defs. MPSJ, pp. 4-7.) Specifically, they complain every aspect of this provision is deficient because it fails to meaningfully describe the level of "reasonable detail" required, what "financial results" should be reported, or the "prevailing financial accounting practices in the feature film industry." (Id., p. 6.) Accordingly, Defendants assert the provision is so uncertain as to be unenforceable and seem to contend it should be severed from the remainder of the contract.[9] See generally Burns v. Dees, 252

[9] Defendants ask the Court to use § 5.7 of the Reconciliation Agreement to sever § 1.6 from the Reconciliation Agreement; however, they merely describe § 5.7 as a "severability provision." (Defs. MPSJ, n. 2.) Considered in its entirety, § 5.7 states:

> 5.7 **Partial Invalidity.** All rights and restrictions contained herein may be exercised and shall be applicable and binding only to the extent that they do not violate any applicable laws, and they are intended to be limited to the extent necessary so that they will not render this [Reconciliation] Agreement illegal, invalid or unenforceable. If any term of this Agreement shall be held to be illegal, invalid, or unenforceable, **so long as the rights or obligations of any party to this Agreement are not materially and adversely affected thereby**, it is the intention of the parties that the remaining terms hereof shall constitute their

Ga. App. 598, 601– 602, (2001)(a contract is unenforceable "if its terms are incomplete, vague, indefinite or uncertain").

Georgia law establishes a high bar for holding a contract unenforceable. "[A] trial court must bear in mind that the law leans against the destruction of contracts on the ground of uncertainty, and the uncertainty and indefiniteness at issue must be extreme to warrant the conclusion that a contract cannot be enforced." Vernon v. Assurance Forensic Accounting, LLC, 333 Ga. App. 377, 382–83 (2015) citing Triple Eagle Assoc. v. PBK, Inc., 307 Ga. App. 17, 19–20 (2010). Similarly, O.C.G.A. § 13-2-2(4) directs, "[t]he construction which will uphold a contract in whole and in every part is to be preferred . . ." See also Milliken & Co. v. Georgia Power Co., 354 Ga. App. 98, 100 (2020)("courts must favor a construction that upholds the contract in whole and in every part.")

In considering whether a contract provision is impermissibly vague, Georgia law further provides,

> [i]t is unnecessary that a contract state definitively and specifically all facts in detail to which the parties may be agreeing, but as to such matters, it will be sufficiently definite and certain if it contains matters which will enable the

---

agreement with respect to the subject matter hereof, and all such remaining terms shall remain in full force and effect, **and to the extent legally permissible, any illegal, invalid or unenforceable provision of this Agreement shall be replaced by a valid provision that will implement the commercial purpose of the illegal, invalid or unenforceable provision** (emphasis supplied).

Defendants fail to address its particular nuances or explain how § 5.7 should properly be applied here if the Court were to declare § 1.6 invalid.

> courts, under proper rules of construction, to ascertain the terms and conditions on which the parties intended to bind themselves.

Vernon at 383.

Evaluating the provision at issue, the Court is also mindful of the longstanding canon of contract construction that, "[w]ords generally bear their usual and common signification." O.C.G.A. 13-2-2(2). In construing § 1.6, the Court finds nothing about its requirement for a reasonably detailed account of financial results prepared in accordance with prevailing financial accounting practices in the feature film industry to display the "extreme" level of uncertainty that would deem it unenforceable. Vernon.

Alternatively, Defendants argue that Rainforest substantially complied with the requirement to provide Bronner with the reasonably-detailed *Trois* Financial Report. (Defs. Third MPSJ, p. 6.) The Court's most recent summary judgment order examined the alleged deficiencies in the formal *Trois* Financial Report supplied to Bronner.[10] It also recounted Defendants' other efforts to provide Bronner with information about the financial results of *Trois* – including meetings between

---

[10] As previously determined by the Court,

> . .. the *Trois* Financial Report identified by Defendants is a cursory, one-page document. (R. Cits.) Bronner testified the statement he received was incomplete as it was missing information about revenues obtained from television rights. (R. Cit.) Packer acknowledged the *Trois* Financial Report provided Bronner was incomplete and lacked detail. (R. Cit.) He testified one would have to look outside the four corners of the document, "to get specificity." (R. Cit.)

(Order on Cross Mots. for Summ. J., p. 24.)

Bronner and the company accountant who provided Bronner with additional data and answered his questions about the financial performance of *Trois*.[11] At that time, the Court rejected the Defendants' argument that summary judgment should be entered, finding a disputed question of material fact as to whether Rainforest had fulfilled this contract term. (Order on Cross Mots. for Summ. J., pp. 23-25.) There has been no additional discovery or evidence on this issue since the Court entered that order just a few months ago. The Defendants' instant motion simply offers the new argument that Rainforest substantially complied with § 1.6.

In Georgia,

> [o]ur general rule with respect to compliance with contract terms is not strict compliance, but substantial compliance. At common law a strict and literal performance of the terms of the contract was required; but by rules of equity, either adopted by statute or recognized by the courts, a substantial compliance with the terms of the contract is sufficient.

---

[11] As previously determined by the Court, Hardy and Packer offered evidence they had,

> 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.
>
> (R. Cits.) 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. (R. Cit.)

(Order on Cross Mots. for Summ. J., p. 24.)

TRST Atlanta, Inc. v. 1815 Exch., Inc., 220 Ga. App. 184, 187 (1996) (citations and punctuation omitted); see also O.C.G.A. § 13-4-20 (contract performance "must be substantially in compliance with the spirit and the letter of the contract and completed within a reasonable time.")

The Court finds the one case cited by Defendants, Labat v. Bank of Coweta, 218 Ga. App. 187 (1995), distinguishable. In Labat, the defendant bank was contractually required to mail plaintiff, its customer, notice of an account closure together with a check for any account proceeds. Id. at 190. While the bank failed to provide its customer with mailed, written notice of the closure, it attempted to notify her by telephone the day of the closure and informed her in person the following day when it also gave her a check for the amount of account balance. The appellate court granted summary judgment on the customer's breach of contract claim finding that bank substantially complied with (and actually "exceeded") the account closure requirements found in the agreement. Id. In Labat, the record revealed that the bank's contractual requirements, prompt notice to the customer and return of funds, were indisputably verified. That is not the case here, where the contractual requirements for Rainforest to supply reasonably detailed financial and accounting information were far more complex and not subject to easy verification.

The financial performance of *Trois* had long been an issue between the parties. (Bronner Dep., pp. 127-130, 135-136.) Bronner not only invested his own funds

into the film, he also secured other investors and felt a personal obligation to share with them accurate information about the film's financial performance and the status of their investments. (Id., pp. 51, 119, 127-130, 135-136, 139-140, 145-147, 215.) Reading § 1.6 in its entirety and considering it with the remainder of the Reconciliation Agreement, the *Trois* Financial Report would be the basis for making distribution decisions, not only to Bronner, but to several investors Bronner secured. (Reconciliation Agreement, Recitals ¶ 4.) Considering the evidence in the light most favorable to Bronner, he bargained not only for financial information about *Trois* but for a formal financial report, completed with a certain level of rigor, where Rainforest formally outlined for a *Trois* investor just how the film performed financially. Accordingly, jury could determine that efforts to supplement the one-page *Trois* Financial Report with information informally produced by Rainforest and the company accountant did not substantially comply with the "spirit and letter" of § 1.6. O.C.G.A. § 13-4-20.

4.1.2 Plaintiff's Claim for Breach of § 2.5 of the Reconciliation Agreement - Year-End Bonus Pool

Defendants seek summary judgment on Bronner's claim that Rainforest failed to establish Year-End Bonus Pools as required in § 2.5 of the Reconciliation Agreement. (Defs. MPSJ, pp. 7-9.) In calculating the Year-End Bonus Pool, Rainforest was to begin with "an amount equal to three percent (3%) of the net revenues of [Rainforest] . . . during the recently ended fiscal year" and deduct certain

expenses and payment obligations. (Reconciliation Agreement, § 2.5.) Defendants assert Rainforest earned no revenues for the period in question thereby nullifying any obligation to establish a Year-End Bonus Pool. (Defs. MPSJ, pp. 7-9.) Specifically, Defendants claim, "[w]ith the lack of revenue, it would have been futile to prepare or calculate a Year-End Bonus Pool." [12] (Id., p. 8.) The Court finds this argument unconvincing as it ignores the interlocking nature of the various compensation provisions found in Article II of the Reconciliation Agreement and the appellate court's findings about these provisions.

Sections 2.2 through 2.4 of the Reconciliation Agreement establish a compensation structure whereby Hardy and Packer would share with Rainforest monies they received for work on Core Business Projects, thereby generating revenue for Rainforest that would have been subject to the Year-End Bonus Pool. As a result of the first round of cross summary judgment motions, the Court of Appeals ruled questions of fact existed as to Hardy's and Packer's departure from this compensation structure and whether their "actions potentially jeopardized corporate assets, namely Rainforest's entitlement to a portion of Hardy's and Packer's fees for their loan-out services." Rainforest, at p. 27. This appellate determination is binding on all future proceedings in this case. O.C.G.A. § 9-11-

[12] Defendants argue that establishing or administering the Year-End Bonus Pool under these circumstances would have been impossible and illegal so as to void the requirement under O.C.G.A. §§ 13-3-5 and 13-8-1. (Defs. MSJ, p. 8.)

60(h) ("any ruling by [an appellate court] in a case shall be binding in all subsequent proceedings in that case in the lower court . . .") Because Defendants' argument that Rainforest complied with its obligation to establish Year-End Bonus Pool is entirely dependent upon Defendants' contention that Rainforest had no revenues, it is foreclosed by the appellate ruling.

4.1.3 Plaintiff's Claim for Breach of §§ 2.2-2.4 of the Reconciliation Agreement - Rainforest Compensation Structure

Defendants offer three separate arguments as to why summary judgment should be granted on Bronner's claim for breach of §§ 2.2-2.4 of the Reconciliation Agreement.

4.1.3.1 Claim is Properly Lodged as Derivative.

Defendants argue Bronner has improperly lodged a derivative instead of a direct claim for alleged breaches of the Reconciliation Agreement's compensation structure.

> In a shareholder derivative action, the shareholder sues on behalf of the corporation for the harm done to it, and any damages recovered by the shareholder are paid to the corporation. Because such an action seeks to redress a wrong sustained by the corporation rather than the individual plaintiff, it has long been recognized that the corporation is a proper and indispensable party.

Barnett v. Fullard, 306 Ga. App. 148, 151 (2010)(citations and punctuation omitted). However, Bronner's Third Amended Complaint alleges he alone suffered harm. In

describing the breach Plaintiff specifically states, "Defendants Packer and Hardy were required to fulfill certain requirements and owed certain obligations **to Plaintiff** by virtue of the Reconciliation Agreement (emphasis supplied)." (Third Am. Compl., ¶ 99.) It further alleges that this breach, "resulted in pecuniary injury, harm, loss and damage **to Plaintiff**" such that, "**Plaintiff is entitled to recover** for any and all damage suffered as a result of Defendant's breach . . . (emphasis supplied)." (Id., ¶ 102.)

In their second motion for partial summary judgment, Defendants argued, and this Court agreed, that claims based upon the failure to comply with the Reconciliation Agreement's compensation structure were properly considered as derivative, not direct. (Defs. Mot. for Summ. J, filed Jan. 14, 2021, pp. 14-15; Order on Cross Mots. for Part. Summ. J., p. 30.) Bronner's recently amended complaint re-frames that claim as being derivative; however, Defendants now argue Bronner "has pled himself out of court" by seeking recovery for injuries he has suffered, not injuries borne by the corporation. (Defs. MPSJ, p. 10.)

Georgia law provides that pleading deficiencies regarding derivative and direct claims are not fatal. "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." Id. at 152 (emphasis supplied); see also Crittenton v. Southland Owners Ass'n, Inc., 312 Ga. App. 521, 524 (2011).

The "nature of the wrong alleged" by Bronner is the breach of §§ 2.2-2.4 of the Reconciliation Agreement which would have negatively impacted Rainforest's revenues, harming all Rainforest shareholders, not just Bronner. Id. Accordingly, the Court again determines that this breach claim is properly considered derivative, just as Bronner has currently lodged it, despite his myopic view of the injuries caused by this breach as described in his Third Amended Complaint. (Order on Cross Mots. for Part. Summ. J., p. 30; Third Am. Compl., §§ 98-102.)

4.1.3.2 Contract Claim is Not Precluded by Appellate Ruling on Breach of Fiduciary Duty Tort Claim

In Rainforest, the Court of Appeals affirmed the grant of summary judgment on a discrete portion of Bronner's breach of fiduciary duty claim. Specifically, it rejected those fiduciary duty claims based on Hardy and Packer's misappropriation of corporate opportunities because, "Plaintiff failed to put forward any evidence that there existed any finite, concrete, or specific business opportunity to Rainforest that was taken by Hardy or Packer." Id. at 41. This decision was based on the statutory prohibition that bars corporate officers from appropriating business opportunities belonging to the corporation that has been clarified through case law. Id. at 39-41.

Defendants now argue this holding by the Court of Appeals based on a lack of necessary evidence amounts to a determination "that Hardy and Packer did not

divert corporate opportunities [which] renders the contract claims related to Sections 2.2-2.4 a nullity." (Defs. MPSJ, p. 11.) However, this is an overstatement of the Court of Appeals' decision. Furthermore, as established above, the Court of Appeals has already made a determination that questions of material fact exist regarding Hardy's and Packer's departure from the Reconciliation Agreement's compensation structure. Rainforest, pp. 24, 27. Essentially, Defendants ask this Court to extrapolate certain meaning from a portion of the appellate opinion, finding a lack of evidence to support one of Bronner's tort claims, and use it to contradict a clear finding made elsewhere in that same appellate opinion about Bronner's contract claims. This the Court refuses to do. It is bound by the clear findings of Rainforest that questions of material fact remain about Hardy's and Packer's compliance with the Reconciliation Agreement's compensation structure. O.C.G.A. § 9-11-60(h).

4.1.3.3 Questions of Fact Exist as to Hardy's and Packer's Compliance

Finally, Defendants argue summary judgment is merited because Hardy and Packer fulfilled their contractual obligations under §§ 2.2-2.4 of the Reconciliation Agreement. (Defs. MPSJ, p. 12.) Again, this argument is based on Defendants' evidence that Rainforest ceased generating revenue. (Id.) And again, the argument that this evidence entitles Defendant to summary judgment is foreclosed by the appellate court's finding that Hardy and Packer abandoned the Reconciliation

Agreement's compensation structure in a manner that could have negatively impacted Rainforest's revenues. O.C.G.A. § 9-11-60(h).

4.1.4 The Law of the Case Doctrine Bars those Portions of Plaintiff's Corporate Waste and Misappropriation Claims based on the Payment of Excessive Salaries to the Founders and the Transfer of Rainforest's Intellectual Property to Hardy

In Rainforest, the Court of Appeals affirmed this Court's decision to strike two discrete portions of Bronner's claims for waste of corporate assets and misappropriation of corporate opportunities, specifically the allegations that Hardy and Packer improperly authorized "excessive salaries" for themselves and improperly conveyed Rainforest's intellectual property to Hardy. Rainforest, pp. 25-26, 37-38. In his Third Amended Complaint, when lodging his corporate waste and misappropriation claims, Bronner inexplicably reasserts these same allegations about excessive salaries and the transfer of Rainforest's intellectual property. (Third Am. Compl., ¶¶ 93(a) and (d), 96(a) and (d).) The Court agrees with Defendants that Bronner's attempt to resuscitate these two aspects of his waste and misappropriation claims is barred by O.C.G.A. § 9-11-60(h). (Defs. MPSJ, pp. 12-13.) However, rather than enter summary judgment for a second time on these allegations, the Court finds the objectionable portions of Bronner's corporate waste and misappropriation claims are immaterial as clearly established by the prior appellate ruling and therefore should be stricken. See O.C.G.A. § 9-11-12(f) (court has unilateral power to strike immaterial matter from a pleading).

4.2 Plaintiff Bernard H. Bronner's Motion for Partial Summary Judgment – Breach of Contract.

Bronner argues he is entitled to summary judgment on liability for Rainforest's breach of § 2.5 of the Reconciliation Agreement, requiring it to establish a Year-End Bonus Pool. In pertinent part, it provides,

> Within sixty (60) days following the end of each fiscal year, [Rainforest] shall calculate and establish as a **"Year-End Bonus Pool"** an amount equal to three percent (3%) of the next revenues of [Rainforest] and all of its operating entities . . . during the recently-ended fiscal year. Such calculation shall include revenues from all sources and shall deduct expenses and other payment obligation of such entities, other than (i) wages and salaries paid to Hardy and Packer in excess of $175,000, (ii) all payments not specified herein that were made to an affiliate of Hardy or Packer, including payments not specifically identified herein that were made to an affiliate of Hardy, or Packer, and (iii) any income tax obligations. (emphasis in original.)

The provision continues with additional reporting and payment requirements.

> **[Rainforest] shall promptly provide Hardy, Packer and Bronner written notice of the Year-End Bonus Pool amount**, and within fourteen (14) days after such determination, [Rainforest] shall pay to each of Hardy, Packer and Bronner, or his personal holding company or other designee, one-third (1/3) of the Year-End Bonus Pool. (Emphasis supplied.)

As repeatedly addressed above, Rainforest has presented evidence that no revenues were earned during the subject time period; however, the Court of Appeals has determined questions of material fact exist about whether Rainforest failed to receive revenues to which it was entitled because the Reconciliation Agreement's compensation structure was abandoned. Because of these disputes in the evidence,

Bronner's motion for summary judgment regarding any breach for failure to establish the Year-End Bonus Pool and make distributions therefrom is denied.

Bronner further argues Rainforest also breached this provision of the Reconciliation Agreement based on its reporting failures. He argues even if, Rainforest was excused from making distributions, it was not excused "from its reporting obligations." (Pl. Reply, pp. 2-3; see also Pl. MPSJ, p. 7.) The Court finds Plaintiff overstates the clarity of the reporting obligation.

Essentially, the Year-End Bonus Pool is a percentage of the company's net revenues. Section 2.5 directs how to calculate that net revenue figure, specifying certain expenses that should not be deducted. Assuming the evidence in the light most favorable to Defendants, Rainforest generated no revenues in 2012, 2013 or 2014. In this regard, the Court finds § 2.5 to be ambiguous because the entire provision is based on the presumption that the Rainforest will have revenues. If a lack of revenue leaves Rainforest unable to "calculate and establish" a Year-End Bonus Pool, it is not clear that Rainforest was required to provide the recipients with "written notice" of the non-existent pool's amount. A jury could reasonably determine in those years where Rainforest had no revenues, all obligations regarding the Year-End Bonus Pool were mooted. Because this ambiguity, which is created by an erroneous presumption found within the contractual provision itself, cannot be resolved by applying the statutory rules of contract construction, the Court finds a

jury should determine what the parties intended with this particular reporting requirement. See generally Wanna v. Navicent Health, Inc., 357 Ga. App. 140, 147 (2020) (if a court cannot resolve a contractual ambiguity "after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.")

The remainder of Plaintiff's motion, seeking attorney's fees under § 3.4 of the Reconciliation Agreement, is dependent upon his prevailing upon the aforementioned breach of contract claim. (Pl. MPSJ, p. 9.) Accordingly, it is denied.

5. CONCLUSION

It is hereby **ORDERED** that Defendants' Motion for Partial Summary Judgment - Third Amended Shareholder Direct and Derivative Complaint, is **DENIED.** It is further **ORDERED** that Plaintiff's Motion for Partial Summary Judgment – Breach of Contract is **DENIED**. Finally, the Court **ORDERS** ¶ 93(a) and (d) as well as ¶ 96(a) and (d) **STRICKEN** from Plaintiff's Third Amended Complaint.

SO ORDERED this 8th **day of September, 2021.**

Kelly Lee Ellerbe

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

Served upon registered service contacts through eFileGA

Attorneys for Plaintiff	Attorneys for Defendants
D. Tennell Lockett **Travis T. Townsend, Jr.** **Steven Pritchett** TOWNSEND & LOCKETT, LLC 1401 Peachtree Street, Suite 500 Atlanta, GA 30309 Telephone: (404) 870-8501 Facsimile: (404) 870-8502 Tennell.lockett@townsendlockett.com Travis.townsend@townsendlockett.com steven.pritchett@townsendlockett.com	**Regina S. Molden** **T. Orlando Pearson** THE MOLDEN LAW FIRM, LLC Peachtree Center - Harris Tower 233 Peachtree Street, N.E. Suite 1245 Atlanta, GA 30303 Direct Dial: (404) 835-1712 Main: (404) 324-4500 Fax: (404) 324-4501 rmolden@moldenlaw.com topearson@moldenlaw.com

Bernard H. Bronner, derivatively and on behalf of Rainforest Production Holdings, Inc. and directly on behalf of himself v. Robert E. Hardy, II, William E. Packer, Jr. TRF Productions and Rainforest Production Holdings, Inc.,
Fulton County Superior Court | Metro Atlanta Business Case Division
Civil Action File No. 2014CV248023
Order on Third Set of Cross Motions for Summary Judgment