4-28-2021

Spring et al., v. McMillin et al., Order on Pending Motions, Granting Temporary Stay and Requiring Certain Status Reports

John J. Goger
Senior Judge, Fulton County Superior Court

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

FRANKLIN J. SPRING, individually, and d/b/a SPRING TRADING GROUP, LLC, ROBERT BRETHERTON, MARTIN MEEKS, and BTEC ENTERPRISES, INC., Plaintiffs, v. JAMES L. McMILLIN, individually, and d/b/a BLOK INDUSTRIES, INC., KAREN McMILLIN, BOYD BARROW, 24-7 PRODUCTS, LLC, McM COMPANIES, INC., BRW COMPANIES, INC., PLANET LIQUIDATIONS, INC, PLANET RESOURES LLC, 1515 E. HEWETT LLC, REDFISH M2 229 LLC, 180 GLENN DRIVE LLC, and STONYBROOK JORDAN LAND LLC, Defendants. BLOK INDUSTRIES, INC., Counterclaim Plaintiff, v. FRANKLIN J. SPRING, ROBERT BRETHERTON, MARTIN MEEKS, and BTEC ENTERPRISES, INC., Counterclaim Defendants.	Civil Action File No. 2020CV339777 Business Case Division No. 4

ORDER ON PENDING MOTIONS, GRANTING TEMPORARY STAY AND REQUIRING CERTAIN STATUS REPORTS

This matter comes before the Court on the Blok Defendants' Motion to Dismiss and Plea in Abatement or in the Alternative to Stay Proceedings, Defendant Boyd Barrow's Motion to Dismiss Plaintiffs' Complaint (as Amended) for Failure to State a Claim, and the Blok Defendant' Motion to Strike. Having reviewed the record and heard the argument of counsel during a March 31, 2021 hearing, the Court enters the following order.

1. INTRODUCTION

This case has two separate sets of Plaintiffs, but the basis of their claims is the same, a large supply of unused hazmat suits leftover from efforts to clean the Deepwater Horizon oil spill in the Gulf of Mexico. These suits, stored in an Alabama warehouse, were essentially worthless until the pandemic caused their value to unexpectedly and dramatically rise. Generally, both sets of Plaintiffs claim Defendant James L. McMillin -- aided by business associates and entities he created and/or controlled -- reneged on promises he made to Plaintiffs so as to claim an unfair portion of the profits received from the sale of these suits and then deceptively hid those proceeds. By contrast, Defendants assert it is the Plaintiffs who seek to take advantage of the increased value of these hazmat suits with one Plaintiff alleging oral partnership deals that never existed and the other Plaintiffs urging an oral agreement to pay sales commissions that is contrary to the written agreement they signed.

2. FACTUAL ALLEGATIONS

2.1 McMillin, his Associates, and the Alabama Warehouse filled with Hazmat Suits.

McMillin is the key individual Defendant. Defendant Karen Davidson married McMillin on March 21, 2020.[1] (FAC, ¶ 8; Blok Defs. Answer to FAC, ¶ 8.) Plaintiffs assert McMillin created Defendant Blok Industries, Inc. ("Blok"), a Georgia company, in Davidson's name so as to shield himself from personal liability for his misconduct. (FAC, ¶¶ 7, 59, 294-295.) Defendants allege Davidson is Blok's founder and serves as its sole shareholder, officer and director. (Blok Counterclaim, ¶¶ 6-7.) Defendant Boyd Barrow is claimed to be an associate of McMillin. (FAC, ¶ 56.)

Plaintiffs assert that in April of 2019, Blok, McMillin and Davidson entered into a lease for warehouse space in Theodore, Alabama that contained millions of abandoned hazmat suits (the "Hazmat Suits"). (FAC, ¶ 30-31.) Blok contends it took title to the Hazmat Suits as part of the consideration for entering the lease and occupying the warehouse premises. (FAC, ¶¶ 30-31; Blok Defs. Answer to FAC, ¶¶ 30-31; Blok Counterclaim, ¶ 8.) Defendants McMillin and Davidson deny being parties to the lease. (Blok Defs. Answer, ¶ 30.)

2.2 Spring and McMillin enter into a Business Relationship but Disagree as to its Nature and Terms.

[1] Plaintiffs identify this particular Defendant as "Karen McMillin (formerly Karen Davidson)," but she denies that Karen McMillin is her correct name. (FAC, ¶ 8; Blok Defs. Answer to FAC, ¶ 8.) To prevent any confusion arising from the McMillin surname, the Court will refer to this Defendant by the Davidson surname.

According to Defendants, McMillin and Spring were high school acquaintances in the early 1980s. (Blok Counterclaim, ¶ 9.) Spring and McMillin agree they had a meeting on May 29, 2019 where they discussed prospective business opportunities. (FAC, ¶ 32; Blok Defs. Answer to FAC, ¶ 32; Blok Counterclaim, ¶ 2.) However, these two parties differ as to the agreement they reached concerning their joint efforts to sell this large inventory of Hazmat Suits.

Spring's Allegations Regarding the Business Relationship. Spring claims McMillin asked for help in selling "$40 million worth of stuff" stored in an Alabama warehouse. (FAC, ¶ 32.) Spring alleges McMillin, acting as the alter ego for Blok, entered into an oral partnership agreement with him to sell the Hazmat Suits. (FAC, ¶¶ 32-33.) Pursuant to this alleged oral partnership agreement, McMillin was to contribute the inventory of Hazmat Suits while Spring would contribute capital, procure investors, operate the warehouse, and close sales with the two sharing equally in the profits and losses. (FAC, ¶ 33.)

According to Spring, he re-located to Alabama where he operated the warehouse for six to seven months and claims he performed the following acts in support of the partnership -- paying warehouse rent and other expenses, putting together a sales team for the Hazmat Suits, personally locating purchasers as well as negotiating and closing sales. (FAC, ¶¶ 37; 46-49.) Attached to the original complaint are various checks written on the account of his company, Spring Trading

Group, LLC, that Spring contends were used to pay warehouse-related expenses. (Complaint, ¶¶ 47-48, Ex. F, G.)[2]

Spring also alleges the partnership enterprise expanded and that he either invested or procured investment capital for five "other partnership deals set up by McMillin involving the purchase and sale of large quantities of consumer products." (FAC, ¶ 38.) These other deals involved skin products, rain boots, shoes, and women's shapewear. (Id. ¶¶ 38-42.) Spring claims he personally contributed approximately $124,000 to these other deals and also secured investors such that he was responsible for $356,000 in total investment in these other deals and was wrongfully denied a partner's equal share of profits which he estimates to be at least $189,000. (FAC, ¶¶ 43-44.)

Defendants' Allegations Regarding the Business Relationship. Defendants paint a different picture of the business relationship between Spring, McMillin and Blok. They claim McMillin suffered from a near terminal illness that resulted in him receiving a liver transplant in late 2018. (Blok Counterclaim, ¶ 3.) They further claim McMillin had neglected his business dealings for two years preceding the transplant and was facing numerous business and financial challenges "including

[2] Exhibits were attached to the original complaint, filed August 26, 2020. These exhibits were also referenced in the First Amended Complaint, filed November 23, 2020, and the subsequent Verified First Amended Complaint, filed January 12, 2021; however, neither of these amended pleadings contains attachments.

two legal judgments that he'd been unable to defend because of the illness and its detrimental effect on his financial condition." (Id., ¶ 4.)

Defendants claim Blok was formed by Davidson in July of 2018 and began doing business while McMillin was seriously ill. (Id., ¶ 6.) At the time of the May 29, 2019 meeting, Defendants contend McMillin was working with Davidson to position Blok as a wholesale provider of disaster relief supplies, apparently relying on the inventory found in the Alabama warehouse which, in addition to the Hazmat Suits, contained 565,000 safety hats and other goods. (Id., ¶¶ 5; 8.)

Defendants allege during their May 2019 meeting, Spring and McMillin discussed business opportunities involving the Hazmat Suits. Spring purportedly represented to McMillin he could assist Blok by: (1) providing it with $2 million in working capital, (2) introducing Blok to buyers interested in the Hazmat Suits, and (3) managing the warehouse as Spring lived in Dothan, Alabama, which was only two hours away. (Id., ¶ 9.)

Defendants contend Spring did not fully deliver on any of these representations. First, Blok claims Spring failed to provide it with $2 million in working capital; rather, Blok claims Spring loaned it $124,000 which it fully repaid. (Id., ¶ 15.) According to Blok, the only investor secured by Spring, Rami Attari, loaned Blok approximately $200,000 which was used to purchase and sell some of the consumer goods that were the subject of the "other partnership deals" described

in Spring's complaint, and Blok alleges it fully repaid Attari's loan with interest. (Id., ¶ 12.) As concerns the Hazmat Suits, Blok claims Spring did not introduce it to any buyers who would purchase the suits. (Id., ¶ 11.) Blok admits Spring could have a "valid entitlement" to some compensation for working at the warehouse and trying to find buyers for the Hazmat Suits (Id., ¶ 16.) In this regard, Defendants describe Spring as an independent contractor. (Id., ¶ 32) However, Defendants further contend Spring, "did not succeed in brokering any sales of any hazmat suits and. . . his work at the warehouse was not worthy of any compensation; instead, his malfeasance" caused damages to both the warehouse and some of the Hazmat Suits stored there. (Id., ¶¶ 16; 31-32.) Defendants also allege after Spring's departure from the warehouse, discussed below, an inventory revealed a discrepancy of 300,000 Hazmat Suits. (Id., ¶ 28.) Upon information and belief, they assert Spring sold some Hazmat Suits independently and pocketed the proceeds for his sole benefit. (Id., ¶ 29.)

Defendants disclaim any agreement to create a partnership with Spring of any kind. (Id., ¶ 14.) Defendants note Spring claimed no entitlement to money and never acknowledged his responsibility to share in any losses arising from the Hazmat Suit business during late 2019 and early 2020. (Id., ¶ 19.)

2.3 Covid-19 Dramatically Alters the Market for Hazmat Suits.

It is undisputed there was no substantial market for the Hazmat Suits until the advent of Covid-19. (FAC, ¶ 50; Blok Counterclaim, ¶ 17.) Spring generally alleges the demand for and value of the suits "skyrocketed" around the time the new strain of coronavirus began surging in China while Blok acknowledges the market "exploded" in late January of 2020 when the virus began to appear in the United States. (FAC, ¶ 51; Blok Counterclaim, ¶ 18.) Spring alleges this change in the market caused McMillin to wrongfully oust Spring from the partnership so he could avoid sharing the sale proceeds whereas Blok contends this change in the market spurred Spring to falsely claim a partnership agreement existed so he could lay claim to some of these unanticipated profits. (FAC, ¶ 53; Blok Counterclaim, ¶18.)

As Spring describes his removal from the alleged partnership, McMillin first began diverting some sale proceeds to his personal bank account with the intent of hiding them from Spring and converting them to McMillin's personal use. (FAC, ¶ 54.) Second, Spring alleges McMillin recruited Barrow to help with the wrongful dissolution of the partnership, and Barrow "began to insert himself into the partnership's business dealings." (Id., ¶¶ 55-56.) Third, Spring claims McMillin directed Davidson to use her authority as Blok's agent to have Spring removed from the warehouse which she did on February 21, 2020. (Id., ¶¶ 59-61.) Shortly thereafter, Spring was given a legal warning not to return to the warehouse. (Id., ¶ 62.) As a result, Spring alleges he was deprived of the ability to complete existing

sales negotiations regarding large quantities of Hazmat Suits, including some deals that were near completion. (Id., ¶ 64.) In total, Spring contends he was denied his partnership share of more than $20 million in proceeds from the sale of the Hazmat Suits. (Id., ¶ 66.)

2.4 BTEC Plaintiffs Claim an Oral Commission Agreement with McMillin regarding their Sale of Hazmat Suits.

Around the time the demand for the Hazmat Suits began to escalate, Plaintiffs Robert Bretherton and Martin Meeks, who own and operate Plaintiff BTEC Enterprises, Inc. ("BTEC"), started brokering deals with McMillin to sell Hazmat Suits. (Id., ¶ 70.) Bretherton had known McMillin for over ten years. (Id., ¶ 71.) The BTEC Plaintiffs allege that in early February of 2020 they entered into an oral contract whereby they would broker sales for large quantities of Hazmat Suits with a 25% commission factored in to the purchase price that customers would pay to McMillin, and McMillin would transfer to the BTEC Plaintiffs post-sale. (Id., ¶ 72.)

In the first transaction, the BTEC Plaintiffs allege their client purchased one million suits for $6 million which the client wired directly to McMillin thereby triggering the obligation for McMillin to pay the BTEC Plaintiffs a $1.5 million commission. (Id., ¶¶ 74-76.) According to the BTEC Plaintiffs, McMillin represented the commission would be placed in "escrow" referring to the IOLTA trust account of McMillin's attorney, Robert Arkin. (Id., ¶ 75.) About two months

later, the BTEC Plaintiffs claim they secured a second deal with the same client who wired McMillin $1.3 million for additional Hazmat Suits giving rise to a $325,000 commission, and, again, McMillin accepted the purchase funds and represented to the BTEC Plaintiffs their sales commission would be held in "escrow" with Arkin. (Id., ¶¶ 77- 79.)

According to the BTEC Plaintiffs, after they had fully performed their obligations under the terms of the oral contract, Defendants refused to pay the $1.825 million they were owed in commissions unless the BTEC Plaintiffs signed a one-sided sales agency agreement ("SAA") prepared by Arkin. (Id., ¶¶ 84-87.) As they describe the SAA, (the contract is not attached to their pleadings), it conditioned the payment of the commissions already owed to the BTEC Plaintiffs upon their first securing $20 million in Hazmat Suit sales. (Id., ¶ 85.)

The Blok Defendants deny the purported oral commission agreement with the BTEC Plaintiffs and the specific allegations the BTEC Plaintiffs make regarding these two transactions. (Id., ¶¶ 72-76; Blok Defs. Answer to FAC, ¶¶ 72-76.) Blok has filed a counterclaim against the BTEC Plaintiffs claiming they breached a Nondisclosure and Noncircumvention Agreement, dated February 27, 2020 ("NNA") that was signed by Bretherton on behalf of himself and unnamed "affiliates" which Blok claims would extend to Meeks and BTEC. (Blok Counterclaim, ¶ 37; Ex. 1.) Blok asserts the NNA was breached when the BTEC

Plaintiffs improperly disclosed confidential information to Spring, allowing him to gain a tactical advantage in negotiating with potential buyers and substantially reducing the number of Hazmat Suits sold by Blok. (Id., ¶ 39.) Additionally, Blok asserts the NNA was breached when the BTEC Plaintiffs failed to obey its dispute resolution procedures prior to commencing this lawsuit. (Id., ¶ 40).

In addition to their claims for commissions, the BTEC Plaintiffs make allegations relevant to other aspects of the lawsuit. Bretherton claims that as part of his sale efforts, he met Spring at the warehouse and "was aware that Mr. Spring was an ***equal partner*** with Defendant McMillin in the common enterprise of selling the Hazmat Suits located in the Warehouse (emphasis in original)." (FAC, ¶ 91.)

During this same time period, Bretherton claims McMillin represented he had deposited $1.3 million in proceeds received from the sale of the Hazmat Suits into his personal bank account. (Id., ¶ 96) McMillin is also alleged to have directed the BTEC Plaintiffs to give his personal bank account wiring instructions to a customer who was purchasing Hazmat Suits. (Id., ¶ 97; Ex. L.)

Finally, Meeks claims he received a May 1, 2020 email from the president of a holdings company purporting to offer a "FRAUD ALERT" about McMillin and Blok, urging anyone who had been defrauded by McMillin to contact the FBI. (Id., ¶ 92; Ex. I.)

Other than admitting Bretherton and Spring met at the warehouse, the Blok Defendants either deny or indicate they lack the knowledge to admit or deny these additional allegations made by the BTEC Plaintiffs. (Id., ¶¶ 91-92, 96-97; Blok Defs. Ans. to FAC, ¶¶ 91-92, 96-97.)

2.5 Blok Commences Alabama Action seeking Declaratory Relief Proclaiming its Ownership in the Hazmat Suits.

After the pandemic began and the demand the Hazmat Suits unexpectedly increased, other parties who claimed to have ownership interests in the Hazmat Suits (dating back to a 2014 loan transaction unrelated to this dispute) began contesting Blok's ownership. (See generally, Blok Defs. Reply ISO MTD, Ex. 1.) On April 20, 2020, Blok commenced an action in Alabama against these parties, Barry and Peggy Goldwater Foundation, Inc. and Blok Industries, Inc.. v. Sensible Loans, Inc., Roy Hutcheson, Natures Way Safety Solutions, LLC, Natures Way Marine, LLC and Rumpelstiltskin Deal, LLC, Circuit Court of Mobile Alabama, CAFN 02CV-2020-900860.00 ("Alabama Action"). (Id.) Blok sought declaratory relief, arguing that these Alabama Action defendants either had no or had abandoned any interest they may have previously held in the Hazmat Suits. (Id.)

As it was initially lodged, the Alabama Action did not name Spring as a party. (Id.) However, on June 24, 2020, Blok amended its complaint adding Spring d/b/a Spring Trading as a Defendant. (Id., Ex. 2.) On August 14, 2020, Spring filed a Special Appearance Answer in the Alabama Action, twelve days before

commencing the present action. (Blok Defs. Reply ISO MTD, Ex. 1.)[3] Spring's responsive pleading to the Alabama Action did not include any counterclaims against Blok regarding the Hazmat Suits, but it did allege, "both Blok and Mr. Spring obtained possessory and actual title to the Hazmat Suits . . ." (Id., Ex. 1, ¶ 32.)

2.6 Plaintiffs Claim Arkin and his Affiliates helped the Blok Defendants Divert Proceeds Received from the Sale of Hazmat Suits.

Plaintiffs allege Arkin, legal counsel for Blok and McMillin, used various methods to assist his clients in diverting Hazmat Sale Proceeds.

Arkin's Promise to Put Hazmat Suit Sale Proceeds into his Firm's Trust Account. In late February of 2020, shortly after Spring was removed from the warehouse, lawyers for the parties attempted to resolve the dispute with Plaintiffs. (FAC, ¶ 67.) Arkin and his law firm represented Blok and McMillin in these negotiations. On February 28, 2020, Plaintiffs allege Arkin "represented in writing to Plaintiffs' counsel that all future payments to Defendants Blok/McMillin for the sale of the Hazmat Suits would be directly deposited/wired to [Arkin's law firm] IOLTA Trust Account where the funds would be held until the resolution of this dispute." (Id., 93.) In a March 30, 2020 email, counsel for Blok acknowledged

[3] The copy of Spring's Special Appearance Answer in the Alabama Action that was attached to the Blok Defendants' Motion to Dismiss and Plea in Abatement or in the Alternative to Stay Proceedings as Ex. 5 was inadvertently missing a page. A complete copy was attached as Ex. 1 to the reply brief they offered in support of the motion, filed March 26, 2021.

some Hazmat Suits had been sold but not all proceeds were deposited into the trust account. (Complaint, ¶ 94; Ex. J.)

Inventory of Hazmat Suits Transferred to Corporate Entity Arkin Created at Direction of Blok Defendants. On July 15, 2020, McMillin informed the BTEC Plaintiffs via email that another company had purchased Blok's remaining inventory of Hazmat Suits and desired to continue selling them. (FAC, ¶ 99.) McMillin offered to introduce the BTEC Plaintiffs to this company "when your (sic) ready to buy." (Complaint, ¶ 99, Ex. N.) As part of this same email chain, the administrator of Arkin's law firm then informed the BTEC Plaintiffs that Blok no longer owned the Hazmat Suits and any offers to purchase the Hazmat Suits should be directed to Defendant 24-7 Products, LLC ("24-7 Products") at an Atlanta, Georgia address. (Complaint, ¶¶ 99, Ex. N; FAC, ¶ 99; Blok Defs. Answer to FAC, ¶ 99.) The Blok Defendants admit the Atlanta address for 24-7 products supplied to the BTEC Plaintffs was a virtual office, not a physical location for 24-7 Products. (FAC, ¶ 101; Blok Defs. Answer, ¶ 101.)

Construed liberally, Plaintiffs' pleadings suggest McMillin, acting individually and through Arkin's law firm, was attempting to mislead the BTEC Plaintiffs to believe that 24-7 Products, had purchased the remaining inventory of Hazmat Suits in an arm's length transaction even though he knew 24-7 Products was a Georgia limited liability company Arkin had organized at McMillin's direction

less than two weeks earlier. (FAC, ¶¶ 98-101; Blok Defs. Ans. to FAC, ¶¶ 98-101.) Plaintiffs assert 24-7 Products is the alter ego of Blok and McMillin and there was nefarious intent behind this transfer as the Blok Defendants sold the suits to an entity they controlled at an extremely discounted price, attempting to defraud Plaintiffs and hide assets. (FAC, ¶¶ 100; 103-104.)

The Blok Defendants do not dispute the remaining Hazmat Suits were marketed for sale on a website related to 24-7 Products. (FAC, ¶ 102; Blok Defs. Answer to FAC, ¶ 102.) However, in recent motion briefing, the Blok Defendants maintain the Hazmat Suits are still owned by Blok, asserting they were simply marketed through 24-7. (Reply ISO Blok Defs. MTD, p. 2.) The record suggests possible reasons for this marketing ploy. As outlined above, other parties named in the Alabama Action were contesting Blok's ownership. Also, the Blok counterclaim alleges Spring poisoned the marketplace against Blok and McMillin, attempting to convince potential buyers that Blok lacked title to the Hazmat Suits or that Blok and McMillin were engaged in criminal activity. (Blok Counterclaim, ¶¶ 22, 24.)

Arkin Oganizes a Number of Limited Liability Companies that Plaintiffs Claim were used to Divert Proceeds from Hazmat Suit Sales. Plaintiffs allege that Arkin organized a number of companies, primarily in June and July of 2020, that

were used to hide proceeds from the sale of Hazmat Suits ("Shell Companies").[4] Defendants admit that Arkin or his law firm organized all of these Shell Companies. (FAC and Blok Defs. Ans. to FAC, ¶¶ 105, 109, 112, 117, 121, 123, 125, 127.) Defendants also admit three of these Shell Companies were used to purchase three different parcels of real property at a total price exceeding $1.6 million and proceeds from sale of Hazmat Suits may have been used to fund these purchases.[5]

3. PROCEDURAL POSTURE

Plaintiffs filed their Complaint for Injunctive Relief and Damages on August 26, 2021, naming numerous Defendants including McMillin, Blok, Davidson, Barrow, 24-7 Products and the Shell Companies created by Arkin. Two of the Shell Companies, 19721 Bethel Church Road, LLC and Family Office Group, LLC, filed separate answers. They were recently dismissed from this action without prejudice

[4] These Shell Companies include: (1) 1515 E. Hewlett LLC, organized on July 23, 2020; (2) Redfish M2 229 LLC, organized on June 26, 2020; (3) 180 Glenn Drive LLC, organized on June 4, 2020; (4) BRW Companies, Inc. organized on July 6, 2020; (5) McM Companies, Inc., organized on July 6, 2020; (6) Planet Liquidation, Inc., organized on February 10, 2020; (7) Planet Resources, LLC, organized July 20, 2020, and (8) Stonybrook Jordan Land LLC, organized July 1, 2020. (FAC, ¶¶ 105, 109, 112, 117, 121, 123, 125, 127.) All of the Shell Companies were named as Defendants in this action. Initially, Plaintiffs also named 19721 Bethel Church Road, LLC and Family Office Group, LLC as Defendants, but both were recently dismissed without prejudice. (Ord. Gr. Cons. Mot. to Drop Certain Defs. Without Prejudice, entered April 1, 2021.)

[5] The parties agree 1515 E. Hewlett LLC was organized to buy a house in Santa Rosa, Florida with a purchase of $900,000 which sale closed on July 30, 2020, and proceeds from the sale of the Hazmat Suits may have been used to make the purchase. (FAC & Blok Defs. Answer to FAC, ¶¶ 105-106, 108.) The Blok Defendants dispute Plaintiffs' description of this property as a beach house for McMillin and Davidson, claiming the home is their sole residence. (Id., ¶ 106.)

The parties agree Redfish M2 229 LLC was organized to purchase a condominium unit in Santa Rosa, Florida with a purchase price of $521,000 which sale closed on July 1, 2020, and proceeds from sale of the Hazmat Suits may have been used to make the purchase. (Id., ¶¶ 109-111). The Blok Defendants deny Plaintiffs' allegation that the purchase was closed by Barrow. (Id., ¶ 110.)

The parties agree 180 Glenn Drive LLC was organized to purchase a home located in Mount Holly, North Carolina with a purchase price of $225,000, and proceeds from the sale of Hazmat Suits may have been used for the purchase. (Id., ¶¶ 112-114.) The Blok Defendants deny Plaintiffs' allegation that the children of McMillin and Davison closed on this home. (Id., ¶ 113.)

pursuant to a consent motion. (Ord. Gr. Cons. Mot. to Drop Certain Defs. Without Prejudice, entered April 1, 2021.) Additionally, Arkin, his law firm, his firm administrator were named as Defendants, but they were also dismissed from the action without prejudice pursuant to that same consent motion. (Id.)

On the answer date, Plaintiffs filed a First Amended Complaint ("FAC"). Whereas the original complaint's request for injunctive relief was very generally stated, the FAC's request for injunctive relief is specifically rooted under the authority of the Georgia Voidable Transaction Act ("the UFTA"). O.C.G.A. § 18-2-70, *et seq*. (Compare Complaint, Count I; FAC, Count I.) Together with their FAC, Plaintiffs also filed an Emergency Motion for Injunctive Relief. At that time, the parties stipulated the FAC was the operative pleading, and Defendants were excused from answering the original complaint and given a December 11, 2020 deadline for filing their answers to the FAC.

On December 11, 2020, Defendants McMillin, Blok, Davidson, Barrow, 24-7 Products and those Shell Companies that remain in the case (collectively, the "Blok Defendants") filed a joint answer. Additionally, the Blok Defendants filed a Motion to Dismiss and Plea in Abatement or in the Alternative to Stay Proceedings based upon the Alabama Action. They also filed a Motion to Strike under O.C.G.A. § 9-11-12(f). Barrow filed a separate Motion to Dismiss, arguing Plaintiffs failed to state a claim against him upon which relief could be granted.

On January 12, 2020, Plaintiffs filed a Verified FAC.[6] It appears that the pleading fully restates the FAC and simply adds the verifications of Spring, Bretherton and Meeks. Blok is the only Defendant who asserted any counterclaims.[7]

On November 25, 2020, the Defendants filed a Consent Motion to Transfer to the Business Case Division. The transfer motion drew no objection from the Plaintiffs, and the case was officially transferred on January 19, 2021. Plaintiffs' Emergency Motion for Injunctive Relief was heard on February 3, 2021 and orally denied. A written order was subsequently entered on February 9, 2021.

On March 31, 2021, the Court heard argument on the remaining motions. During the course of that argument, counsel announced the BTEC Plaintiffs and the Blok Defendants had reached agreement to mediate their dispute. The parties are ordered to provide the Court with more detailed information regarding their plans to mediate as outlined below.

4. LEGAL ANALYSIS

4.1 Blok Defendants' Motion to Dismiss and Plea in Abatement or in the Alternative to Stay Proceedings.

[6] Plaintiffs' Verified FAC asserts the following claims: (1) UFTA / Injunctive Relief; (2) Fraud; (3) Georgia RICO; (4) Civil Conspiracy; (5) Unjust Enrichment; (6) Breach of Fiduciary Duty; (7) Wrongful Dissolution of Partnership; (8) Breach of Contract; (9) Intentional Interference with Contractual Relationships; (10) Intentional Interference with Business Relationships; (11) Respondeat Superior and/or Vicarious Liability, (12) Alter Ego (McMillin was the alter ego of Blok and 24-7); (13) Accounting; (14) Punitive Damages, and (15) Attorney's Fees.

[7] Blok counterclaims include: (1) Tortious Interference with Business Relationships against Spring; (2) Conversion against Spring; (3) Injury to Personalty against Spring; (4) Breach of Contract against Spring; (5) Breach of Contract (NNA) against BTEC Plaintiffs; (6) Attorney's Fees against all Counterclaim Defendants, and (7) Punitive Damages against all Counterclaim Defendants.

The Blok Defendants' abatement motion concerns the Alabama Action. The Blok Defendants argue that the present action should be dismissed pursuant to the prior pending action doctrine, citing O.C.G.A. §§ 9-2-44(a) and O.C.G.A. 9-2-5(a). However, the Blok Defendants offered a persuasive rebuttal, arguing Georgia law expressly forbids abatement based on prior-filed actions pending in other states. Indeed, O.C.G.A. § 9-2-45 unambiguously provides, "[t]he pendency of a prior action in another state shall not abate an action between the same parties for the same cause in this state." A similar situation was addressed in Flagg Energy Dev. Corp. v. Gen. Motors Corp., 223 Ga. App. 259 (1996) where the trial court dismissed certain parties from a Georgia action based on a prior pending action in Connecticut. Based upon the clear mandate of O.C.G.A. § 9-2-45, the appellate court determined "[d]ismissal of appellants' claim on the basis of a prior pending action in the courts of another jurisdiction was inappropriate." See also Atl. Wood Indus., Inc. v. Lumbermen's Underwriting All., 196 Ga. App. 503, 504 (1990) ("the initial pendency of the Virginia declaratory judgment action did not serve to abate the instant Georgia action" which was filed thereafter).

In their reply brief and during oral argument, the Blok Defendants appear to abandon their position that the present action should be dismissed or abated because of the Alabama Action and, instead, urge the Court to use its discretionary authority to stay the present action.

As Georgia law has long recognized,

> [t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Bloomfield v. Liggett & Myers, Inc., 230 Ga. 484, 484 (1973) (Citation omitted); see also Flagg (Georgia trial court "certainly had the discretion to stay" a proceeding while awaiting the disposition of a prior action pending in another jurisdiction).[8]

The Court is convinced that a stay would be appropriate for a variety of reasons. The Alabama Action was filed first. Further, as represented during the hearing, discovery is currently proceeding in the Alabama Action such that it has progressed further than the present action. Thus, the stay would serve the interests of comity, it would preserve the resources of the litigants, and it would provide for judicial economy. Additionally, the Court agrees with the Blok Defendants that there are some practical concerns with this case moving in a parallel fashion with the Alabama Action. While Plaintiffs attempt to emphasize the many ways in which

[8] In U-Haul Co. of Arizona v. Rutland, 348 Ga. App. 738, 752 (2019), the Court of Appeals was reviewing the trial court's decision to stay a civil case based upon pending criminal litigation and outlined some factors that might guide a trial court's discretion:

> the trial court should consider whether the action should be stayed based on the particular facts before it and the extent to which such a stay would work a hardship, inequity, or injustice to a party, the public or the court...." (Citation and punctuation omitted.)

While the request for a stay in U-Haul was based on different circumstances, the Court finds these factors helpful in evaluating the Blok Defendants' request for a stay.

the two actions differ, a key question in both matters concerns ownership of the Hazmat Suits. Spring is requesting 50% of the profits generated from their sale. (FAC, ¶ 221.) Questions regarding ownership of the Hazmat Suits should be resolved before the Court might properly evaluate what profits Spring might be entitled to receive. To proceed with both cases could run the risk of inconsistent results and could leave this Court in an uncertain position as to the relief it could offer Spring should he prevail.

While the Court finds it wise to enter a stay, the record gives rise to serious concerns about the dissipation of assets and suggest this dispute should be resolved without undue delay. Also, should the parties fail to resolve the dispute with the BTEC Plaintiffs in mediation, questions remain as to how the stay would impact their claims. Accordingly, the stay will be limited and closely monitored on the terms outlined below.

4.2 Defendant Boyd Barrow's Motion to Dismiss.

Barrow's motion to dismiss is based upon O.C.G.A. § 9-11-12(b)(6). According to the well-established standard,

> a motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant, the complaint is sufficient and a

> motion to dismiss should be denied. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.

Glob. Payments, Inc. v. InComm Fin. Servs., Inc., 308 Ga. 842, 842–843 (2020) (Citation and punctuation omitted).

Barrow's motion notes there is a, "paucity of specific factual allegations against him." (Barrow MTD, p. 2.) Indeed, other than some introductory paragraphs, the following allegations are the only ones found in the body of the Verified FAC that specifically address Mr. Barrow.

> Around this time [early 2020], and shortly after his release from federal prison, Defendant Barrow began to insert himself into the partnership's business dealings.
>
> Unbeknownst to Mr. Spring, Mr. McMillin brought Barrow in to replace Mr. Spring in his partnership role. From the beginning, Barrow knew of Mr. Spring's rights as an equal partner, and knew of McMillin's plan to oust Mr. Spring. Despite this, Barrow intentionally interfered with Mr. Spring's business and contractual relationships by knowingly participating in Mr. McMillin's plot to wrongfully oust Mr. Spring for the purpose of denying Mr. Spring his equal partnership share of the profits.

(FAC, ¶¶ 55-56.) Further, as outlined in n. 5, above, the parties agree Defendant Redfish M2 229 LLC was organized and used to purchase a condominium unit costing $521,000 and proceeds from the sale of the Hazmat Suits may have been used to fund the purchase. Defendants dispute Plaintiff's allegation that Barrow "closed" on the purchase, but granting Plaintiff's pleadings every liberal inference, they suggest this one-half million dollar condominium unit was purchased using

proceeds from the sale of the Hazmat Suits with Barrow's knowledge and for his benefit. (FAC and Blok Defs. Answer to FAC, ¶¶ 110, 157.)

While the specific references to Barrow in the FAC are sparse, the Plaintiffs defined the Blok Defendants as a group that included Barrow. (FAC, ¶ 10.) Thus, while they may not be making numerous specific references to Barrow, by virtue of this defined group he was referenced throughout the Complaint. For example, with regard to the fraud claim, Plaintiff allege the Blok Defendants, "frequently represented to Mr. Spring that he would receive an equal partnership share of the profits on all deals and sales of the Hazmat Suits" knowing these misrepresentations were false, intentionally attempting to deceive Spring and induce his continued investment in the purported partnership. (Id., ¶¶ 170-173.) As concerns the RICO claim, Plaintiffs allege the Blok Defendants conspired to keep misappropriated profits and assets hidden from Plaintiffs through a pattern of fraudulent practices and transfers. (FAC, ¶¶ 196-216.)

Considering the liberal standard that applies to motions made under O.C.G.A. § 9-11-12(b) and considering the interwoven nature of the allegations found in the pleadings as well as the duplicitous conduct they describe which may hamper the Plaintiffs' ability to offer more specific allegations, the Court finds Plaintiffs could offer evidence within the framework of their complaint, that would support the grant of relief on their claims. Glob. Payments, Inc.

4.3 Motion to Strike.

The Blok Defendants have filed motions to strike certain allegations made by Plaintiffs. O.C.G.A. § 9-11-12(f) provides,

> [u]pon motion made by a party within 30 days after the service of the pleading upon him . . . the court may order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter.

An allegation is either impertinent or immaterial "when it is neither responsive nor relevant to the issues involved in the action." Chappuis v. Ortho Sport & Spine Physicians Savannah, LLC, 305 Ga. 401, n. 5 (2019)(Citation omitted). Federal courts have developed a body of law on what constitutes a scandalous allegation under Rule 12(f) which Chappius favorably cited. "[L]eading federal practice treatises define scandalous matter as 'that which improperly casts a derogatory light on someone." Id. citing 5C Arthur R. Miller et al., Federal Practice and Procedure – Civil § 1382 (3d ed. 2018).

In Chappius, the Georgia Supreme Court, noted it had not previously addressed how trial courts should evaluate motions to strike under O.C.G.A. § 9-11-12(f) and established a more formal framework for considering such motions. Id. at 404. Despite the new analysis it establishes, Chappius is consistent with earlier case law, holding motions to strike are not generally favored. Id. at 406.

Chappius provides two guideposts for a trial court to evaluate matter that is subject to being stricken, relevance and prejudice. The first element, relevance, should be considered expansively.

> Matter in pleadings will not be stricken unless it is clear that it can have no possible bearing upon the subject matter of the litigation, and if there is any doubt as to whether under any contingency the matter may raise an issue, the motion should be denied.

Id. at 407 citing Northwestern Mut. Life Ins. Co., v. McGivern, 132 Ga. App. 297, 302 (1974). However, the test for prejudice appears less strict as the Supreme Court urges trial courts to consider not only what prejudice has resulted but what prejudice could result to the movant from the allegations subject to being stricken, particularly when the allegations are challenged as being scandalous. Id. at 408.[9]

The Blok Defendants move to strike allegations found in six different paragraphs. First, they seek to strike an allegation that generally states McMillin has a "long history of fraud, deceit, and misappropriation of investor and partnership assets." (FAC, ¶ 27.) They also seek to strike citations two other lawsuits where courts have made unflattering statements or inferences about McMillin. One such allegation concerned an 11th Circuit decision that described McMillin as a "serial bankruptcy filer" who used a corporation he did not own as his "alter ego." (FAC,

[9] The Supreme Court reasoned because of the public nature of pleadings and the legal privilege O.C.G.A. § 51-5-8 bestows upon pleadings, even when false, "the disfavored character of Rule 12 (f) motions is relaxed somewhat in the context of scandalous allegations and matter of this type often will be stricken from the pleadings in order to purge the court's files and protect the person who is the subject of the allegations (Citation and punctuation omitted.)" Id. at 408-409.

¶ 28.) See In re McMillin, 482 F. App'x. 454, 455 (11th Cir. 2012) Another allegation concerns a different federal court decision where a default judgment was entered against McMillin and a company he was alleged to use as an his alter ego for conducting his personal business. (FAC, ¶ 29.) Barrow seeks to strike an allegation that refers to his recent "release from federal prison." (FAC, ¶ 55.) Defendants also seek to strike an allegation that "profits" paid to Spring for one of the partnership deals were actually funds obtained from other investors such that, "Defendants were conducting an illegal [P]onzi scheme." (FAC, ¶ 167.) Finally, the Blok Defendants seek to strike allegations that Meeks received an email purportedly providing a "FRAUD ALERT" about McMillin and Blok and urging any party who had been defrauded by either of them to contact the FBI. (FAC, ¶¶ 92, 184.)

Considering the two-pronged test for striking pleadings, the Court finds none of these allegations should be stricken. The Blok Defendants do not challenge the accuracy of allegations regarding the prior lawsuits involving McMillin. From these lawsuits, one could determine McMillin had a history of misconduct in his business dealings. Considered expansively, these allegations could be relevant to the UFTA claim as it suggests McMillin was facing legal problems and may have had a motive to fraudulently conceal his assets. Moreover, these lawsuits would be a matter of

public record, so the prejudice of allowing them to remain in a publicly-filed court document would be minimal.

Similarly, Barrow does not object to the accuracy of the statement that he had recently been released from federal prison at the time he began his affiliation with Blok. It is difficult to divine just how Barrow's release from federal prison is relevant to the present dispute. However, again, this information is publicly available, so the Court does not find great prejudice in allowing this information to remain in a publicly-filed court pleading.

As for the allegation that Defendants were conducting an illegal Ponzi scheme, the conduct alleged by Plaintiffs has earmarks of what is generally referred to as a Ponzi scheme where money obtained from later investors is used to pay earlier investors, erroneously leading them to believe they have invested money in a profitable venture. (FAC, ¶¶ 166-168.) See generally Branan v. State, 285 Ga. App. 717, 718 (2007) ("Ponzi scheme" described as one "in which no legitimate business exists and, instead, money taken from new investors is used to pay off previous investors.") In light of the conduct described by Plaintiffs, this particular allegation does not seem so irrelevant or unduly prejudicial as to merit it being stricken.

Finally, with regard to the email alerting Meeks to potentially fraudulent activity of McMillin and Blok, considered expansively, it may be relevant to the UFTA claim as it suggests Blok and McMillin were being investigated by law

enforcement or may be facing seriously disgruntled customers, both of which could lead to legal problems and would thus suggest a motive for hiding assets.

4. CONCLUSION

In light of the foregoing, it is hereby **ORDERED**:

(1) with regard to the announced plan for the BTEC Plaintiffs and the Blok Defendants to mediate their dispute, counsel should provide a joint written report to the Court as to the status of the mediation **no later than June 30, 2021**. If the mediation has not been completed by that time, their report should identify the mediator they have selected and the date upon which their mediation efforts will conclude;

(2) the Blok Defendants' Motion to Dismiss and Plea in Abatement is **DENIED**;

(3) the Blok Defendants' Motion to Stay Proceedings is **GRANTED** on a temporary basis and will continue until **August 31, 2021**. Counsel for the parties should present the Court with a joint written report detailing the progress of the Alabama Action no later than **August 17, 2021**, so that the Court may consider whether to extend the stay and the terms of any such extension;

(4) Defendant Boyd Barrow's Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim is **DENIED**, and

(5) the Blok Defendants' Motion to Strike is **DENIED**.

SO ORDERED this 28th day of April, 2021.

/s/ John J. Goger
JOHN J. GOGER, SENIOR JUDGE
Metro Atlanta Business Case Division
Superior Court of Fulton County
Atlanta Judicial Circuit

Spring et al v. McMillin et al, CAFN 2020CV339777
Superior Court of Fulton County | Metro Atlanta Business Case Division
Order on Pending Motions, Granting Temporary Stay, and Requiring Certain Status Reports

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