

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X

RICHARD C. LITMAN,

Plaintiff,

-against-

JOSHUA B. GOLDBERG,

Defendant.

-----X

Index No.: 524343/2025

Motion Sequence No.: 2

**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO
DISMISS PLAINTIFF’S COMPLAINT**

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PRELIMINARY STATEMENT

Plaintiff Richard C. Litman (“Plaintiff” or “Litman”) in his Second Amended Complaint seeks recovery from Defendant Joshua B. Goldberg (“Defendant” or “Goldberg”) for claims that are not cognizable and that have already been determined in a three-day arbitration in June of 2023. Specifically, Litman in 2017 sold his law practice to Nath & Associates, PLLC, d/b/a Nath, Goldberg and Meyer (“NGM”). Goldberg is the Co-Managing Partner of NGM. To effectuate the sale of Litman’s law practice to NGM, a Combination Agreement was executed that entitled Litman to be paid compensation as a Senior Counsel – not a Partner – based on the percentage of revenue generated by clients he originated. Moreover, the Combination Agreement provides that it can be terminated by either convenience or the death/disqualification to practice law of Litman. An Amended Combination Agreement was ultimately executed which included a provision that extended the period in which Litman would be entitled to continue sharing in NGM’s revenue earned from his originated clients from three (3) years to five (5) years.

In 2020, Litman suffered a disability that rendered him incapable of acting as a Senior Counsel at NGM. Because the Combination Agreement included a broad arbitration provision, Litman filed an arbitration demand in 2022 against NGM, Goldberg and others claiming that he was not paid amounts owed pursuant to the Combination Agreement. The arbitration demand included claims against Goldberg personally for equitable accounting and for breach of fiduciary duty for failing to pay amounts owed under the Combination Agreement. The arbitrator determined that no fiduciary relationship between Litman and Goldberg existed, and that Goldberg owed no independent duty to Litman. Moreover, the Arbitration Award determined that the law of contracts – not tort, equity or quasi contract – defines the duties owed to Litman. Further, the arbitrator determined that Goldberg is not a party to the Combination Agreements and cannot be personally liable for any alleged breach. Lastly, the arbitrator enforced an agreement between NGM and

Litman to treat Litman's disability as the equivalent of death under the Combination Agreements, which initiated a five-year continued revenue sharing commencing on June 15, 2020, the date of Litman's disability.

Despite the arbitration – which provided Litman a full and fair opportunity to litigate the underlying issues – Litman filed the instant complaint against Goldberg seeking personal liability for NGM's alleged failures to make full revenue sharing payments under the Arbitration Award. However, because Litman's contract is with NGM, he cannot seek relief against Goldberg. Indeed, the arbitrator already determined after three-days of testimony that Goldberg cannot be personally liable to Litman because he is not a party to the Combination Agreements, and he is not a fiduciary to Litman. Accordingly, Litman's instant Complaint against Goldberg is barred by the doctrines of res judicata and collateral estoppel, which prevent Litman from relitigating claims and issues that were already fairly decided in arbitration.

Moreover, even without the Arbitration Award, the Second Amended Complaint has no legal merit. Goldberg, as the Co-Managing Partner of NGM, is not personally liable for deferred compensation allegedly owed to Litman by NGM. And the Combination Agreements make clear that Litman joined NGM as an employee and not a partner, so Goldberg has no fiduciary relationship with him. Lastly, because Litman's claims sound in contract, Litman is not entitled to equitable remedies such as an equitable accounting, a constructive trust or unjust enrichment.

At bottom, Litman's claims must be dismissed pursuant to both CPLR §§ 3211(a)(5) and (7) because they are precluded by res judicata and collateral estoppel and fail to state any basis for relief.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Combination Agreement Between the Parties

On March 29, 2017, Plaintiff entered into a written contract to combine his law practice

with NGM (the “Combination Agreement”).¹ (See Plaintiff’s Second Amended Complaint (the “Complaint”) at ¶1; *see also* the Affirmation of Joshua B. Goldberg, Esq. in Support of Defendant’s Motion to Dismiss (“Goldberg Aff.”) Exhibit E). NGM is a professional limited liability company (“PLLC”) formed in Virginia. And Goldberg is the Co-Managing Partner of NGM. (*See* Goldberg Aff. Exhibit E at ¶1).

Pursuant to the Combination Agreement, Plaintiff was entitled to be paid compensation as a Senior Counsel at NGM based on the percentage of revenue generated by clients he originated either before or during his employment by NGM and based on a percentage of revenue from his time billed. (Goldberg Aff. Exhibit A at ¶¶5 and 7). The Combination Agreement provides that it can be terminated either by convenience or based on the death of Plaintiff or his disqualification to practice law. (*Id.* at ¶2). Further, the Combination Agreement includes a broad arbitration provision that requires any claim of any kind arising out of or connected with the Combination Agreement to be determined in arbitration. (*Id.* at ¶15). Moreover, on May 7, 2017, the Combination Agreement was amended (the “Amended Combination Agreement”). (Goldberg Aff. at Exhibit B). The Amended Combination Agreement includes a provision extending the period in which Plaintiff would be entitled to continue sharing in NGM’s revenue earned from his originated clients from three (3) years to five (5) years and transferred all stock ownership in Plaintiff’s prior law practice to NGM, including all title to all telephone numbers and website URLs used by the practice. (*Id.*) All other terms of the Combination Agreement were left in full force and effect. (*Id.*)

¹ The Combination Agreement, Amended Combination Agreement and Arbitration Award are subject to a request to seal. Accordingly, the documents are merely summarized herein and not quoted.

B. Plaintiff Suffers a Disability that Prevents him from Working as Senior Counsel at NGM and the Subsequent Arbitration and Award

In June of 2020, Plaintiff suffered a disability that prevented him from continuing his employment with NGM as a Senior Counsel. (*See* Goldberg Aff. Exhibit E at ¶39). Both the Combination Agreement and Amended Combination Agreement were silent regarding how to treat continuing payments to Plaintiff in the event of his disability. (*See* Goldberg Aff. Exhibit C at Pages 2-3). Despite that, Plaintiff and NGM agreed that Plaintiff's position as a Senior Counsel terminated on June 15, 2020, and that Plaintiff would receive twenty percent (20%) of the revenue from clients – after payment of costs and disbursements – Plaintiff originated for five years beginning on the date of the commencement of Plaintiff's disability – June 15, 2020. (*Id.* at Page 4). But Plaintiff initially disputed the existence of this agreement.

Accordingly, in or around the end of 2022, Plaintiff filed an arbitration demand asserting claims against NGM and Goldberg for failing to continue all payments set forth in the Combination Agreement. (*See* Goldberg Aff. at Exhibit C). NGM asserted in the arbitration that the parties had orally agreed that they would treat Plaintiff's disability as a termination for death under the Combination and Amended Combination Agreements in order to provide Plaintiff with certain benefits, such as the entitlement to a percentage of the revenue from his originated clients for a period of five (5) years commencing from June 15, 2020. (*Id.* at Page 7). Indeed, it was agreed that Plaintiff – being unable to work – would be treated as if he had died for purposes of entitlement to certain benefits. (*Id.*) Thereafter, on June 14, 2023, an arbitration award (the "Award") was entered finding that the parties had orally agreed that Plaintiff's disability would be treated as the equivalent of death under the Combination Agreements, thereby terminating the employment of Plaintiff and entitling him to a percentage of revenue from his originated clients for a period of five (5) years commencing from June 15, 2020. (*Id.* at Page 9).

Moreover, the Award makes plain that the contracts were between Plaintiff and NGM and not between Plaintiff and Goldberg. (*Id.* at Page 7). The Award states that the identification of Goldberg as an affiliate of NGM does not make Goldberg bound by the contract nor does it afford Plaintiff the right to seek relief against Goldberg personally. (*Id.*) Further, the Award expresses that because Litman can seek and obtain complete and adequate relief by way of damages for the alleged breach of contract, there is no need for equitable or tort relief. (*Id.* at Page 6). And the Award makes clear that no fiduciary or special relationship between Litman and Goldberg exists. (*Id.* at Page 5). It was expressly determined that the Combination Agreement did not create a fiduciary duty to Litman. (*Id.* at Page 6). Thus, the arbitrator denied Litman relief on his claims against Goldberg for equitable accounting and breach of fiduciary duty, which are claims that are improperly asserted again here. (*Id.* at Pages 5-6).

C. Procedural History

On July 21, 2025, Plaintiff filed a Complaint against Goldberg in this action. (Goldberg Aff. Exhibit F). The Complaint included nine (9) claims: common law unfair competition, violation of New York Civil Rights Law §§ 50-51, defamation, tortious interference, unjust enrichment, constructive trust, equitable accounting, prima facie tort and violation of New York City Human Rights Law. On August 12, 2025, Plaintiff filed an Amended Complaint against Goldberg as a matter of right. (Goldberg Aff. Exhibit G). The Amended Complaint included eleven (11) claims. Specifically, it added breach of fiduciary duty and negligence. And on August 20, 2025, Plaintiff moved for an order directing an equitable accounting and the imposition of a constructive trust. Plaintiff withdrew his motion on October 9, 2025. On October 3, 2025, with Goldberg's consent, Plaintiff filed a Second Amended Complaint against Goldberg alleging five (5) claims: equitable accounting, constructive trust, breach of fiduciary duty, unjust enrichment

and misappropriation. (Goldberg Aff. Exhibit E).

Goldberg's instant motion to dismiss pursuant to CPLR § 3211 follows.

STANDARD OF REVIEW

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, “the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and according the plaintiff the benefit of every possible inference.” (*Avgush v. Town of Yorktown*, 303 AD2d 340, 341 [2d Dept 2003]). Dismissal of the complaint is thereby warranted “if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” (*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). “[A]llegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.” (*Simkin v. Blank*, 19 NY3d 46, 52 [2012]).

CPLR § 3211(a)(7) permits a court to dismiss a complaint that fails to allege facts that fit any cognizable legal theory. Pursuant to the provision, a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action. *Id.* Where the complaint does not contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory, the case should be dismissed. (*Chipotle*, 29 NY3d at 141-42; *Eurycleia Partners v. Seward & Kissel, LLP*, 12 NY3d 553, 561-62 [2009]). Courts are permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR § 3211(a)(1) and (7). (*See E & D Group, LLC v. Violet*, 134 AD3d 981, 982 [2d Dept 2015]; *Sokol v. Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]; *Mawere v. Landau*, 130 AD3d 986, 988 [2d Dept 2015]; *see also* CPLR § 3211(1)).

“When documentary evidence is submitted by a defendant the standard morphs from

whether the plaintiff stated a cause of action to whether it has one.” (*Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citations omitted]). “Where documentary evidence definitively contradicts the plaintiff’s factual allegations and conclusively disposes of the plaintiff’s claim, dismissal pursuant to CPLR 3211(a)(1) is warranted.” (*Berardino v. Ochlan*, 2 AD3d 556, 557 [2d Dept 2003]).

LEGAL ARGUMENT

POINT I

PLAINTIFF’S CLAIM FOR AN EQUITABLE ACCOUNTING (COUNT ONE) MUST BE DISMISSED PURSUANT TO CPLR §§ 3211(A)(5) AND (7)

The elements of an equitable accounting claim are (1) a fiduciary relationship, (2) money or property entrusted to the defendant imposing the burden of an accounting, (3) the absence of a legal remedy and (4) in some cases, a demand and a refusal. (*Metro. Bank & Trust Co. v. Lopez*, 189 AD3d 443, 446 [1st Dept 2020]). Regarding the first element, “equitable relief of an accounting is not available [if] no fiduciary relationship existed between the parties.” (*Bettan v. Geico Gen. Ins. Co.*, 296 AD2d 469, 470 [2d Dept 2002]). And in relation to the third element – the absence of a legal remedy – “an equitable accounting claim cannot coexist with a breach of contract claim covering the same subject matter.” (*Curtis v. Berutti*, 77 Misc 3d 327, 340 [Sup Ct, Orange County 2022]).

Here, no fiduciary relationship exists between Litman and Goldberg. Goldberg is a Co-Managing Partner of NGM and Litman is a former contract employee of NGM, who is expressly not a partner. (*See, e.g.*, Goldberg Aff. Exhibits A and B.) And “[a]n employer-employee relationship providing for the division of profits will not give rise to a fiduciary obligation on the part of the employer absent an agreement to also share losses.” (*Vitale v. Steinberg*, 307 AD2d 107, 108 [1st Dept 2003]; *Lawrence v. Kennedy*, 95 AD3d 955, 958 [2d Dept 2012]). Litman’s

employment and contractual agreement entitling him to receive revenue based upon his originated clients does not establish a fiduciary relationship between Litman and Goldberg. Accordingly, because no fiduciary relationship exists here, Litman is not entitled to an equitable accounting from Goldberg and the claim must be dismissed.

The Second Amended Complaint alleges that Litman has not received payments due under his deferred revenue sharing agreement with NGM. But even if that were true – which it is not – that would only entitle Litman to pursue a contract claim against NGM in arbitration in Virginia. This is Plaintiff’s sole available legal remedy for an alleged failure to pay amounts due pursuant to the Combination Agreements or Arbitration Award. At bottom, Litman has a legal remedy available to him for alleged breach of the contract by NGM, which would require arbitration in Virginia. Accordingly, Litman’s claim for an equitable accounting in New York must be dismissed because this equitable relief is not permissible where a legal remedy exists.

Moreover, because Litman’s contracts are with NGM – not Goldberg personally – claims against Goldberg that sound in contract cannot be maintained. Litman’s claims related to alleged failures by NGM to pay amounts allegedly owed to him are not cognizable against Goldberg. As a co-managing member of NGM, Goldberg is not liable for the alleged breaches of contract committed by NGM. Specifically, the laws under which a foreign limited liability company is formed govern the liability of its members and managers. (NY Limited Liability Company Law § 801; *see also* NY LLC Law § 1305 [applying the provisions of the LLCL to professional service limited liability companies, unless otherwise provided by the LLCL]). Because NGM is a PLLC formed in Virginia, the liability of its members and managers is governed by Section 13.1-1109 of the Virginia Limited Liability Company Act.² That statute states that “[a] member, manager, agent

² This provision generally mirrors that of NY LLC Law §§ 609(a) and (b).

or employee of a professional limited liability company shall not, by reason of being any member, manager, agent or employee of a professional limited liability company, be personally liable for any debts or claims against, or the acts or omissions of the professional limited liability company” (Va. Code § 13.1-1109).

It is clear therefore that, like a corporation, a limited liability company shields its members from personal liability for actions taken by the limited liability company. (*See Gowin v. Granite Depot, LLC*, 272 Va. 246, 255 [2006] [“A limited liability company is an entity that, like a corporation, shields its members from personal liability based on actions of the entity.”]). Thus, “[g]enerally, when a plaintiff has a claim against a limited liability company, the plaintiff may only pursue that claim against the limited liability company itself and not its members.” (*A.G. Dillard, Inc. v. Stonehaus Constr., LLC*, No. 151182, 2016 Va. Unpub. LEXIS 16, at *5-6 [June 2, 2016]).

Further, likewise under New York law, “individual defendants are not liable for a breach of agreement made with the [c]orporation.” (*Tannenbaum v. Reichenbaum & Silberstein, P.C.*, 226 AD2d 700, 701 [2d Dept 1996]; *see also San Diego Cty. Employees Ret. Ass’n v. Mauonis*, 749 F. Supp. 2d 104, 128 [SDNY 2010] [citations omitted] [“[u]nder New York law, it is well-settled that an individual who signs a contract on behalf of a corporation, indicates her representative capacity on the contract, and exhibits no intention to assume personal liability for the corporation’s breaches is not subject to personal liability”]; *Oviedo v. Weinstein*, 102 AD3d 844, 847 [2d Dept 2013] [“[a] shareholder, employee, or officer of a limited liability company [pursuant to NY LLC Law § 1205] is liable only for negligent or wrongful acts ‘committed by him or her or by any person under his or her direct supervision and control . . . in his or her capacity as

a member, manager, employee or agent of such professional service limited liability company.”)]).

Accordingly, Litman’s claim for an equitable accounting against Goldberg – for an alleged breach of contract committed by NGM – cannot be maintained. Indeed, Goldberg is not personally liable for any purported breach committed by NGM.

In any event, Litman’s claim for an equitable accounting is barred pursuant to CPLR § 3211(a)(5) because the underlying Arbitration Award already decided that Goldberg is not a fiduciary of Litman’s and there is no special relationship that could justify an equitable accounting. And the arbitrator has already dismissed Litman’s claim for equitable accounting against Goldberg for that reason. (*See* Goldberg Aff. Exhibit C at Page 5). Thus, the equitable accounting claim is barred by the doctrines of collateral estoppel and res judicata. Specifically, the doctrine of collateral estoppel “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunals or causes of action are the same.” (*PNMAC Mtge. Co., LLC v. Friedman*, 189 AD3d 1289, 1291-92 [2d Dept 2020], quoting *Ryan v. New York Tel. Co.*, 62 NY2d 494, 500 [1984]). “The party seeking to invoke collateral estoppel has the burden to show the identity of the issues, while the party trying to avoid application of the doctrine must establish the lack of a full and fair opportunity to litigate.” (*Id.* at 1292, quoting *In re Dunn*, 24 NY3d 699, 704 [2015]).

Moreover, “[i]n New York, res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was.” (*In re People v. Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008] [citations omitted]). “The underlying purpose of the doctrines of res judicata and collateral estoppel is to ‘prevent[] repetitious litigation

of disputes which are essentially the same.” (*In re Anonymous v. New York State Justice Ctr.*, 174 AD3d 1007, 1009-10 [3d Dept 2019] [alteration in original], quoting *D’Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 666 [1990]). A claim will be precluded under res judicata principles if it falls “within the scope of the judgment, regardless of whether or not [the] claim [was] in fact litigated.” (*Cook v. Estate of Achzet*, 214 AD3d 1369, 1372 [4th Dept 2023]). The doctrine of res judicata “*appl[ies] to arbitration awards with the same force and effect as [it] appl[ies] to judgments of the court.*” (*Ippolito v. TJC Dev., LLC*, 83 AD3d 57, 72 [2d Dept 2011], quoting *Mahler v. Campagna*, 60 AD3d 1009, 101 [2d Dept 2009] [emphasis added]). Under *Ippolito*, the doctrines of both res judicata and collateral estoppel apply to arbitration awards. (83 AD3d at 72).

Here, the arbitrator – in deciding the same claim by Litman for an equitable accounting against Goldberg – found that no fiduciary or otherwise special relationship existed between the parties that justified an equitable accounting. The arbitrator determined that because the claims arose from the Combination Agreement, Amended Combination Agreement and subsequent oral agreements, Litman’s claims for unpaid revenue sharing sound in contract for which the law provides an adequate remedy. And Litman had a full and fair opportunity to litigate his cause of action for equitable accounting for unpaid amounts under the revenue share at arbitration as the arbitrator addressed his various claims across a three (3) day arbitration hearing before reducing his decision into an Arbitration Award. Again, if Litman believes that NGM has not made required payments based on the parameters of the Arbitration Award and his contracts, then his remedy is a breach of contract action in arbitration in Virginia. Accordingly, Litman’s claim for an equitable accounting is barred by the doctrines of res judicata and collateral estoppel pursuant to the

Arbitration Award.

Based on the foregoing, the Court should dismiss Count One of Litman's Second Amended Complaint pursuant to both CPLR §§ 3211(a)(5) and (7).

POINT II

PLAINTIFF'S CLAIM FOR A CONSTRUCTIVE TRUST (COUNT TWO) MUST BE DISMISSED PURSUANT TO CPLR §§ 3211(A)(5) AND (7)

For a constructive trust to be established, "there must be provided: (1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment." (*Bankers Sec. Life Ins. Soc'y v. Shakerdge*, 49 NY2d 939, 940 [1980]). Moreover, a claim for a constructive trust is properly dismissed when "it does not otherwise appear that the legal remedy of damages will be inadequate." (*See Evans v. Winston & Strawn*, 303 AD2d 331, 333 [1st Dept 2003]). "When the remedy sought is money damages, dismissal of a claim for a constructive trust is proper." (*See 4501 Amj, LLC v. Babaev*, 2025 NY Slip Op 32922(U) at *8-9 [Sup. Ct. 2025, NY County], citing *Basal Trading & Sons Ltd. V. M&G Diamonds, Inc.*, 212 AD3d 551, 553 [1st Dept 2023]).

For the same reasons stated in Point I, *supra*, Litman cannot establish a *prima facie* case for a constructive trust. Pursuant to the Combination Agreements, Goldberg is not a fiduciary of Litman, a former employee of NGM who is receiving deferred compensation pursuant to contract. (*Vitale*, 307 AD2d at 108; *Kennedy*, 95 AD3d at 958). And a fiduciary relationship is a necessary pre-requisite to a constructive trust claim. (*Shakerdge*, 49 NY2d at 940). Further, the doctrine of collateral estoppel precludes Litman from establishing that a fiduciary relationship exists between himself and Goldberg because the arbitrator already decided this issue after a three-day arbitration. The arbitrator expressly decided Goldberg is not a fiduciary of Litman. (*See Goldberg Aff. Exhibit*

C at Pages 5-6).

Moreover, Plaintiff's claims arise from an alleged failure to pay amounts due to him pursuant to his contracts with NGM as determined by the Arbitration Award. Accordingly, this claim is based on express contracts and thus there is no unjust enrichment. (*See Norcast S.ar.I. v. Castle Harlan, Inc.*, 147 AD3d 666, 668 [1st Dept 2017] [holding that when an express contract governs the subject matter of the claim quasi-contract claims are barred]). And the Arbitration Award confirms that Litman's cause of action for amounts due under the revenue share are contractual in nature and can only be brought against NGM. (*See Goldberg Aff. Exhibit C*). Accordingly, Litman is not entitled to relief that sounds in tort, quasi-contract or equity.

Accordingly, pursuant to CPLR § 3211(a)(7), Litman cannot establish a *prima facie* cause of action for a constructive trust and thus Litman has failed to state a claim upon which relief can be granted. And because the issue of whether Goldberg is a fiduciary to Litman and whether equitable relief is available was previously litigated to conclusion in favor of Goldberg, Litman's claim for a constructive trust must be dismissed pursuant to CPLR § 3211(a)(5).

POINT III

PLAINTIFF'S CLAIM FOR BREACH OF FIDUCIARY DUTY (COUNT THREE) MUST BE DISMISSED PURSUANT TO CPLR §§ 3211(A)(5) AND (7)

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant and damages that were directly caused by the defendant's misconduct. (*Kurtzman v. Bergstol*, 40 AD3d 588, 590 [2d Dept 2008]; *see also Ozelkan v. Tyree Bros. Env'tl. Servs., Inc.*, 29 AD3d 877, 879 [2d Dept 2006]).

Here, for the reasons previously stated in Points I and II, *supra*, Litman cannot establish the existence of a fiduciary relationship between himself and Goldberg. Indeed, "[a]n employer-employee relationship providing for the division of profits will not give rise to a fiduciary

obligation on the part of the employer absent an agreement to also share losses.” (*Vitale*, 307 AD2d at 108; *Kennedy*, 95 AD3d at 958). NGM purchased Litman’s legal practice and in return Litman was employed as a Senior Counsel with the entitlement to a percentage of revenue brought in from clients that he originated. The contractual agreements do not provide for the sharing of losses between Litman, Goldberg and NGM and Litman was not a Partner. Accordingly, Goldberg is not and never was a fiduciary to Litman. Moreover, Litman already brought a fiduciary duty claim against Goldberg in arbitration. The arbitrator expressly held that there was no fiduciary or otherwise special relationship between Litman and Goldberg and denied any recovery for the claim. (*See Goldberg Aff. Exhibit C at Page 6*). Instead, the arbitrator determined that Litman’s claims arise solely from the alleged breaches of contract by NGM. Litman cannot relitigate a breach of fiduciary claim against Goldberg here after having that same claim dismissed after a full arbitration.

Accordingly, the Court should dismiss Litman’s claim against Goldberg for the breach of fiduciary duty pursuant to CPLR §§ 3211(a)(5) and (7).

POINT IV

PLAINTIFF’S CLAIM FOR UNJUST ENRICHMENT (COUNT FOUR) MUST BE DISMISSED PURSUANT TO CPLR §§ 3211(A)(5) AND (7)

It is well established that when there is an express contract governing a particular subject matter, no recovery can be had on a theory of implied or quasi contract arising out of the same subject matter. (*Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]). Indeed, unjust enrichment “is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff.” (*Corsello v. Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). Moreover, when an express contract governs the actions complained of, quasi-contract

claims are barred. (*Castle Harlan, Inc.*, 147 AD3d at 668; *see also A.N.L.Y.H. Invs. LP v. JDS Principal Highline LLC*, 231 AD3d 570, 572 [1st Dept 2024] [holding that “quasi-contractual claims based on the same subject matter will not lie”]).

Here, Litman argues that Goldberg “benefited from revenues generated by [Litman’s] originated clients and from goodwill created by continued use of [Litman’s] identity.” (*See Goldberg Aff. Exhibit E at ¶68*). However, this matter is expressly governed by the Combination Agreement, Amended Combination Agreement and subsequent oral agreements made by and between Litman and NGM – as confirmed by the Arbitration Award. The Arbitration Award provides that post-commencement of Litman’s disability, Litman receives twenty percent (20%) of the net revenues generated by his originated clients for the five (5) years following June 15, 2020. And Litman’s entitlement to these amounts is from NGM and not Goldberg. Indeed, Litman’s claim of unjust enrichment is just a misstatement of his contractual relationship with NGM, to which Goldberg is not a party. Any revenue Litman is entitled to receive is pursuant to that contractual arrangement with NGM. Thus, there is no basis to impose quasi-contractual liability upon Goldberg for amounts allegedly owed by NGM. (*See Point I, supra*). Because an unjust enrichment claim cannot lie when an express contract governs the subject matter, Litman’s unjust enrichment claims should be dismissed.

Moreover, because the Arbitration Award already held – post a full and fair litigation process – that Litman’s claims are based solely on his contracts with NGM, Litman is collaterally estopped from asserting quasi-contractual claims here. The issue of whether only express contracts govern the subject matter of the parties’ claims was already determined by the arbitrator. And the decision was Litman’s claims sound only in contract. Thus, the Court should dismiss Litman’s claims for unjust enrichment pursuant to CPLR §§ 3211 (a)(5) and (7).

POINT V

PLAINTIFF'S CLAIM FOR MISAPPROPRIATION (COUNT FIVE) MUST BE DISMISSED PURSUANT TO CPLR § 3211(A)(7)

Sections 50 and 51 of the Civil Rights Law “embody a recognition of the fact that a person has the right to be left alone – to be free of commercial exploitation of his personality.” (*Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 AD2d 620, 621 [2d Dept 1977]; *see also* NY Civil Rights Law § 51). Moreover, § 51 provides that “any person whose *name, portrait or picture* is used within this State for advertising purposes, or for the purposes of trade, without the prior written consent of such person, may maintain an equitable action to prevent and restrain the use thereof and to recover damages by reason of such unlawful use.” (*Lombardo*, 58 AD2d at 620 [emphasis in original]).

Here, there is no allegation that Goldberg personally used Litman’s name or likeness outside of NGM’s business. On the contrary, Litman’s claims are based on the purported conduct of NGM continuing to list Litman as an attorney of record on patents and NGM’s website. And Goldberg is only implicated because he is the Co-Managing Partner of NGM. There is no basis to assert that Goldberg should be personally liable for alleged use of Litman’s name by NGM. Goldberg, the Co-Managing Partner of a company, is not personally liable for acts taken by the company. (*See* Va. Code § 13.1-1109).

In any event, Litman agreed in writing to have his name associated with NGM and is still receiving deferred compensation related to this agreement. This is not a colorable action under Sections 50 and 51 of the Civil Rights Law because there is a contract providing for Litman’s association with NGM for a “royalty.” (*See* Goldberg Aff. Exhibit C at Page 8). And even when conduct “may . . . give rise to an action for breach of contract . . . any such breach of contract would not, of itself, also give rise to a cause of action under section 51 of the Civil Rights Law.”

(*Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 361 [1952]). Accordingly, Litman cannot satisfy a *prima facie* case of misappropriation of name and likeness under NY CLS Civ R § 51 against Goldberg and the Court should dismiss his claim.

CONCLUSION

For the reasons set forth herein, Defendant Joshua B. Goldberg, Esq. respectfully requests that this Court grant his motion to dismiss Plaintiff Richard C. Litman's Second Amended Complaint in its entirety.

Dated: New York, New York
October 23, 2025

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