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Majority Opinion >

SUPREME COURT OF NEW YORK, ALBANY COUNTY

Jeffrey L. Rockmore and JEFFREY L. ROCKMORE, M.D., P.C., Plaintiffs, against Plastic Surgery Associates, LLP; DOUGLAS M. HARGRAVE, M.D., P.C.; DOUGLAS M. HARGRAVE, individually and as a trustee of the PLASTIC SURGERY ASSOCIATES, LLP DEFINED BENEFIT PLAN; SUSAN M. GANNON, M.D., P.C.; SUSAN M. GANNON, individually and as a trustee of the PLASTIC SURGERY ASSOCIATES, LLP DEFINED BENEFIT PLAN; and PLASTIC SURGERY ASSOCIATES, LLP, as Administrator for the PLASTIC SURGERY ASSOCIATES, LLP DEFINED BENEFIT PLAN, Defendants.

909263-19

December 2, 2020, Decided

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Torts—Breach of Fiduciary Duty—Defendants' motion seeking dismissal of claim for breach of fiduciary duty as duplicative of plaintiffs' contractual claim was granted. Employment Relationships—Retirement and Pension Benefits—Federal Employee Retirement Income Security Act—Preemption of State Law Cause of Action.

For Plaintiffs: (James T. Potter and Jennie L. Shufelt, of counsel), Hinman Straub, P.C., Albany, New York.

For Defendants: (James E. Hacker, Rosemary W. McKenna and Thomas J. Higgs, of counsel), E. Stewart Jones Hacker Murphy, LLP, Troy, New York.

RICHARD M. PLATKIN, A.J.S.C.

RICHARD M. PLATKIN

Richard M. Platkin, J.

Defendants Plastic Surgery Associates, LLP ("PSA"), Douglas M. Hargrave, M.D., P.C. ("DMH-PC"), Douglas M. Hargrave, Susan M. Gannon, M.D., P.C. ("SMG-PC") and Susan M. Gannon move pursuant to CPLR 3211 (a) (1) , (7) and (8) for the dismissal of the second through fifth causes of action alleged in the amended verified complaint (*see* NYSCEF Doc No. 21 ["Amended Complaint" or "AC"]) filed by plaintiffs Jeffrey L. Rockmore and Jeffrey L. Rockmore, M.D., P.C. ("JLR-PC"). Plaintiffs oppose the motion.

BACKGROUND

A. The Parties and Their Relationship

PSA is a limited liability partnership located in Albany, New York that is the successor to several earlier partnerships (*see* AC, ¶ 1).

Each of the partners of PSA is a professional corporation owned by a physician specializing in plastic and/or reconstructive surgery (*see id.*, ¶ 2). At times pertinent to this action, the partners of PSA consisted of JLR-PC, DMH-PC, SMG-PC and the professional corporation of nonparty Steven M. Lynch, M.D. (*see id.*).

On or about March 8, 2012, the corporate partners of PSA entered into a Limited Liability Partnership Agreement (*see* NYSCEF Doc No. 22 ["Partnership Agreement"]). The term "partner" is defined in the Partnership Agreement to include, as appropriate, the individual physician-shareholders of the corporate partners, who are referred to as "shareholder-employees" (*id.*, § 5; *see also* AC, ¶ 3).

Upon succeeding to the interest of a predecessor partnership in 2012, "PSA maintained, as the Sponsoring Employer, a single-employer defined benefit plan within the meaning of Section 3 (35) of the Employee Retirement Income Security Act of 1974 , as amended ('ERISA'), 29 U.S.C. § 1002 (35) , known as 'The Plastic Surgery Group, LLP Defined Benefit Pension Plan' (hereinafter, the 'Plan')" (AC, ¶ 4; *see also* NYSCEF Doc No. 24). As a result, JLR-PC, DMH-PC and SMG-PC each became "Participating Employers" in the Plan (AC, ¶ 4).

On January 24, 2018, plaintiff JLR-PC gave written notice of its intention to withdraw as a partner of PSA due to growing disagreements among the shareholder-employees (*see id.*, ¶ 5). "Pursuant to the Partnership Agreement, . . . JLR-PC was required to remain a partner for one year following the provision of notice, or until such other mutually agreed-upon date of withdrawal" (*id.*).

Plaintiffs allege **[*2]** that from the time that JLR-PC gave written notice of its intention to withdraw until the date of withdrawal, "Defendants excluded Plaintiffs from the business and affairs of Defendant PSA, including decisions about its management, finances and liabilities, and from decisions about the Plan. During this period, Defendants engaged in a deliberate and continuous effort to shift the burden of future practice liabilities and expenses to Plaintiff JLR-PC . . . and excluded Plaintiffs from the management, business and affairs of PSA so that Defendants could conceal those efforts from Plaintiffs" (*id.*, ¶ 6).

"As part of Defendants' calculated and bad faith effort to maximize the financial liabilities imposed on Plaintiffs, during the partners meetings from which Plaintiffs were intentionally excluded by Defendants, Defendants voted to terminate the Plan immediately after December 31, 2018" (*id.*, ¶ 8). "In or around November 2018, without the knowledge or consent of Plaintiffs, and at the direction of Defendants, PSA's Practice Administrator executed a Terminating Amendment which amended the Plan to provide that the Plan would terminate 'after December 31[,] 2018'" (*id.*, quoting NYSCEF Doc No. 26).

Plaintiffs complain that the termination of the Plan created new and immediate financial liabilities that were not their responsibility (*see* AC, ¶¶ 9-12). PSA was the sponsoring employer of the Plan and the employer of all of the practice's professional and non-professional staff ("Staff"), other than the shareholder-employees (*see id.*, ¶ 10). "As such, PSA was responsible for funding the Plan benefits of its participating employees through contributions to the Plan. PSA's contributions were charged to the existing partners of PSA at the time such contributions were made, as practice expenses deducted from monthly revenue distributions" (*id.*). In addition, the corporate partners of PSA participated in the Plan as "participating employers" and were responsible for funding the benefits of their shareholder-employees (*see id.*).

According to plaintiffs, ERISA treats PSA and its corporate partners as a single employer, and, as such, it does not govern the allocation of responsibility for funding the Plan (*see* NYSCEF Doc No. 40 ["Opp Mem"], pp. 2-3). To address this, PSA and its partners entered into a Benefit Reconciliation Agreement on or about December 4, 2004, as amended on December 12, 2012 (*see* NYSCEF Doc No. 25 ["BRA"]; *see also* AC, ¶ 74). "Pursuant to that arrangement, PSA was responsible for funding the benefits of [its] professional and non-professional staff who were employed by PSA, and the [corporate partners] were each responsible for funding the benefits earned by their respective shareholder-employees" (Opp Mem, p. 3; *see* AC, ¶¶ 75-79).

Plaintiffs allege that defendants' termination of the Plan "created a new and immediate liability with respect to the Plan . . . as a result of ERISA's standard termination requirement that the present value of the Plan's benefit liabilities as of the termination date be fully funded and paid out less than a year after the termination date" (AC, ¶ 12). **[*3]** According to plaintiffs, the bulk of the liabilities associated with termination of the Plan ("Plan Termination Liability") consisted of the shortfall in PSA's contributions toward the benefits of its Staff, as well as the shortfall in contributions from defendants DMH-PC and SMG-PC (*see id.*).

In December 2018, the parties agreed to allow JLR-PC to withdraw from PSA effective December 31, 2018 (*see id.*, ¶ 13). However, plaintiffs assert that PSA refuses to pay JLR-PC the redemption value of its partnership interest unless JLR-PC agrees to pay a portion of the "Staff Funding Shortfall" (*id.*, ¶¶ 15-16). Plaintiffs also take issue with other aspects of the redemption value as calculated by defendants (*see id.*, ¶ 17).

B. This Litigation

This action was commenced through the filing of a summons with notice on December 31, 2019 (*see* NYSCEF Doc No. 1). Plaintiffs' original complaint (*see* NYSCEF Doc No. 8 ["Original Complaint"]) pleaded four causes of action. The first cause of action alleged that PSA breached the Partnership Agreement by failing to timely and properly calculate and pay the redemption value (*see id.*, ¶¶ 118-124), failing to comply with certain obligations with respect to patient relationships (*see id.*, ¶¶ 125-129) and excluding plaintiffs from partnership business (*see id.*, ¶¶ 130-132). The second cause of action alleged that Drs. Hargrave and Gannon and their

professional corporations breached fiduciary duties owed to plaintiffs by (i) making false and disparaging statements, (ii) refusing to consider the addition of new partners, (iii) taking actions without plaintiffs' consent and (iv) failing to give plaintiffs notice of partner meetings (*see id.*, ¶¶ 139-140). The third cause of action alleged that Drs. Hargrave and Gannon aided and abetted breaches of fiduciary duty committed by their professional corporations (*see id.*, ¶¶ 145-148), and the fourth cause of action sought a declaration of rights (*see id.*, ¶¶ 156-157).

On March 19, 2020, defendants served a motion to dismiss the second through fourth causes of action of the Original Complaint (*see* NYSCEF Doc Nos. 6-16). Plaintiffs served opposition to the motion on June 23, 2020 (*see* NYSCEF Doc No. 29) and simultaneously filed the Amended Complaint.

The Amended Complaint removed the cause of action for declaratory relief and recast the claim for breach of fiduciary duty to allege that defendants (i) excluded plaintiffs "from partners meetings of Defendant PSA and the business and affairs of the trustees of the Plan"; (ii) took actions without plaintiffs' participation or consent; (iii) "misappropriate[ed]" JLR-PC's "revenues"; and (iv) failed to provide plaintiffs with notice of, or the minutes from, partners meetings (AC, ¶ 318).

The Amended Complaint also added two new causes of action. The second cause of action alleges that PSA, DMH-PC and SMG-PC breached their obligations under the Plan and BRA by (i) failing to make sufficient contributions (*see id.*, ¶ 311), and (ii) diverting contributions to the Plan made by JLR-PC for their own benefit (*see id.*, ¶ 312). The fifth cause of action alleges conversion "of the revenues generated by Plaintiffs through Plaintiff **[*4]** JLR-PC's partnership in Defendant PSA, after deduction for JLR-PC's equal share of partnership expenses" (*id.*, ¶ 335).

By notice of motion dated July 15, 2020, defendants moved against the Amended Complaint for dismissal of the claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of the Plan and BRA, and conversion (*see* NYSCEF Doc No. 32). The motion was returnable on September 21, 2020 (*see* NYSCEF Doc No. 46), and this Decision & Order follows.

LEGAL FRAMEWORK

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7) , a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83 , 87-88 , 638 N.E.2d 511 , 614 N.Y.S.2d 972 [1994]). "Dismissal of the complaint is 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 , 53 N.Y.S.3d 598 , 75 N.E.3d 1159 [2017] [citations omitted]).

"[A] motion pursuant to CPLR 3211 (a) (1) must be granted where the documentary evidence 'conclusively refutes plaintiff's factual allegations' and establishes a defense as a matter of law" (*Doller v Prescott*, 167 AD3d 1298 , 1299 , 91 N.Y.S.3d 533 [3d Dept 2018], quoting *Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100 , 106 , 73 N.Y.S.3d 519 , 96 N.E.3d 784 [2018]).

Dismissal under CPLR 3211 (a) (2) is warranted where the court lacks subject matter jurisdiction over one or more causes of action.[1]

ANALYSIS

A. Breach of Fiduciary Duty

Defendants move for dismissal of the third cause of action, alleging breach of fiduciary duty, on the ground that it is duplicative of the first cause of action, alleging breaches of the Partnership Agreement. Defendants further contend that the claim for breach of fiduciary duty is not pleaded with the particularity required by CPLR 3016 (b) and that the claim otherwise lacks merit.[2]

1. Allegations of the Amended Complaint

The Amended Complaint alleges that DMH-PC, SMG-PC and Drs. Hargrave and Gannon (collectively, "the Partners")[3] breached fiduciary duties owed to plaintiffs by: (i) excluding plaintiffs "from partners meetings of Defendant PSA and the business and affairs of the trustees of the Plan"; (ii) "taking actions without Plaintiff JLR-PC's participation, vote, consent or approval"; (iii) "misappropriating . . . JLR-PC's revenues"; and (iv) "failing to provide . . . JLR-PC with notice of partners meetings and meeting minutes" in order to conceal partnership activities from plaintiffs (AC, ¶ 318).

The Amended Complaint further alleges that PSA breached fiduciary duties owed to plaintiffs in its role as Plan administrator by using JLR-PC's contributions for purposes other than providing a benefit to Dr. Rockmore and by failing to require sufficient contributions to the Plan to satisfy PSA's funding obligations (*see id.*, ¶ 320).

Finally, Drs. Hargrave and Gannon are alleged to have breached fiduciary duties owed to plaintiffs as trustees of the Plan by allowing PSA to misuse JLR-PC's contributions in order to avoid their own funding obligations to the Plan (*see id.*, ¶¶ 321-322**[*5]**)

2. The Parties' Contentions

According to defendants, plaintiffs' claim that they were excluded from partners and trustees meetings stems from allegations that PSA violated section 13 of the Partnership Agreement, entitled "Management, Duties and Restrictions." In this regard, the Amended Complaint alleges that defendants breached the Partnership Agreement by "convening partnership meetings without notifying Plaintiffs of such meetings, permitting Plaintiffs to participate . . . or vote . . ., or providing Plaintiffs with copies of agendas and minutes" (AC, ¶ 299; *see also id.*, ¶¶ 116-129). On that basis, defendants contend that the claim for breach of fiduciary duty "fail[s] to allege conduct by Defendants in a breach of duty other than — or independent of — that of contract" (NYSCEF Doc No. 16, p. 7).

Similarly, plaintiffs' allegations that partnership actions were taken without "JLR-PC's participation, vote, consent or approval" (AC, ¶ 318) are said to be encompassed within the claim that defendants breached the Partnership Agreement by "taking actions that require the consent of Plaintiffs, without obtaining the consent of Plaintiffs" (*id.*, ¶ 298; *see also id.*, ¶¶ 129-145).

And defendants observe that the allegations that they misused and/or misappropriated plaintiffs' contributions to the Plan by assigning JLR-PC financial responsibility for the Staffing Funding Shortfall and termination liabilities feature prominently in plaintiffs' contractual claim, which is directed at obtaining the redemption value allegedly prescribed by the Partnership Agreement (*see id.*, ¶¶ 284-292).

Plaintiffs respond that the primary inquiry here is whether "an independent legal duty has been violated by Defendants' conduct, not whether the alleged tortious conduct is separate and distinct from the conduct constituting a contractual breach" (Opp Mem, p. 5). In that regard, plaintiffs cite the Partners' fiduciary obligations as well as PSA's fiduciary duties as the Plan's administrator (*see id.*, pp. 5-6).

Plaintiffs acknowledge "some overlap" between their contract and tort claims, but argue that "the factual and legal theories underlying the claims are plainly distinct" (*id.*, p. 6). In particular, while the breach of contract claim is said to identify discrete actions on the part of defendants that were taken in contravention of the Partnership Agreement, the "gravamen" of the breach of fiduciary duty claim is that, "from the time that Plaintiff JLR-PC provided notice of intention to withdraw, [the Partners], as partners and fiduciaries of Plaintiffs, engaged in concerted efforts to (1) exclude Plaintiffs from participating in the management, business and affairs of PSA; (2) shift future liabilities of the practice to JLR-PC; and (3) misappropriate JLR's contributions to the Plan to further their own financial interests" (*id.*, pp. 6-7 [internal citations omitted]).

Plaintiffs also emphasize that the breach of fiduciary duty claim is predicated, in part, on allegations of defendants' concealment of material information that go beyond the alleged breaches of the notice and **[*6]** participation provisions of the Partnership Agreement.

Finally, plaintiffs argue that the damages sought on the breach of fiduciary duty claim are distinct from the contractual damages that are the subject of the first cause of action. In this regard, plaintiffs stress that the contractual claim may be limited to JLR-PC's recovery of damages against PSA, whereas the tort claims also are directed at the Partners (*see id.*, pp. 8-9). Plaintiffs additionally argue that the tort claim may allow the recovery of lost profits and lost appreciation of the allegedly misappropriated funds (*see id.*).

3. Analysis

"It is well established that 'the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself'" (*Centerline/Fleet Hous. P'ship., L.P. v Hopkins Court Apts.*, 176 AD3d 1596 , 1597-1598 , 111 N.Y.S.3d 761 [4th Dept 2019], quoting *Mandelblatt v Devon Stores*, 132 AD2d 162 , 167-168 , 521 N.Y.S.2d 672 [1st Dept 1987]). The Court's "focus" when presented with parallel claims for breach of contract and breach of fiduciary duty must be "on whether a noncontractual duty was violated . . . as opposed to those imposed consensually as a matter of contractual agreement" (*Apple Records v Capitol Records*, 137 AD2d 50 , 55 , 529 N.Y.S.2d 279 [1st Dept 1998], quoted in Opp Mem, p. 5).

Plaintiffs allege that the other partners of PSA owed fiduciary duties to JLR-PC independent of the specific terms of the Partnership Agreement, and defendants do not dispute this contention (*see Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180 , 184 , 710 N.Y.S.2d 578 [1st Dept 2000] ["The members of a partnership owe each other a duty of loyalty and good faith, and as a fiduciary, a partner must consider his or her partners' welfare,

and refrain from acting for purely private gain" (internal quotation marks and citation omitted)]; *see also Birnbaum v Birnbaum*, 73 NY2d 461 , 467 , 539 N.E.2d 574 , 541 N.Y.S.2d 746 [1989]; *cf. New Media Holding Co., LLC v Kagalovsky*, 118 AD3d 68 , 78 , 985 N.Y.S.2d 216 [1st Dept 2014] ["the partnership agreement expressly rendered the parties subject to the fiduciary obligations set forth in (Delaware Revised Uniform Partnership Act)"]).

Nonetheless, "[a] cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand" (*William Kaufman Org. v Graham & James*, 269 AD2d 171 , 173 , 703 N.Y.S.2d 439 [1st Dept 2000]). Thus, in *Brooks v Key Trust Co. Natl. Assn* . (26 AD3d 628 , 809 N.Y.S.2d 270 [3d Dept 2006], *lv dismissed* 6 N.Y.3d 891 , 850 N.E.2d 672 , 817 N.Y.S.2d 625 [2006]), the Third Department upheld the dismissal of a claim for breach of fiduciary duty as duplicative, explaining:

> [P]laintiff's claim is based upon the same facts and theories as his breach of contract claim and . . . [t]he allegations underlying plaintiff's fiduciary duty claim . . . are either expressly raised in plaintiff's breach of contract claim or encompassed within the contractual relationship by the requirement implicit in all contracts of fair dealings and good faith.
>
> As such, plaintiff has not set forth allegations that, apart from the terms of the contract, the parties created a relationship of higher trust than would arise from their contracts alone so as to permit a cause of action for breach of a fiduciary duty independent **[*7]** of the contractual duties (*id.* at 630 [internal quotation marks, citations and alterations omitted]).

Accordingly, a claim for breach of fiduciary duty must be dismissed where it "fails to allege conduct by defendants in breach of a duty other than, and independent of, that contractually established between the parties" (*Kaminsky v FSP Inc.*, 5 AD3d 251 , 252 , 773 N.Y.S.2d 292 [1st Dept 2004]; *see NYAHSA Servs., Inc., Self-Ins. Trust v People Care Inc.*, 141 AD3d 785 , 788 , 36 N.Y.S.3d 252 [3d Dept 2016] ["defendant's counterclaim for breach of fiduciary duty alleges virtually identical facts and theories and requests the same damages as set forth in defendant's counterclaim for breach of contract"]; *Mawere v Landau*, 130 AD3d 986 , 990 , 15 N.Y.S.3d 120 [2d Dept 2015]; *see also Solomatina v Mikelic*, 370 F Supp 3d 420 , 434 [SD NY 2019] ["the alleged breach was merely a failure to abide to perform under the (pertinent contract) and not a distinct breach of duty"]; *cf. Centerline/Fleet*, 176 AD3d at 1597-1598 [although arising "out of the same underlying transaction as the breach of contract causes of action, . . . the fiduciary duty causes of action are based on distinct factual theories and allegations"]; *XpresSpa Holdings, LLC v Cordial Endeavor Concessions of Atlanta, LLC*, 171 AD3d 511 , 514 , 98 N.Y.S.3d 567 [1st Dept 2019]; *Andersen v Weinroth*, 48 AD3d 121 , 136 , 849 N.Y.S.2d 210 [1st Dept 2007] ["(defendant's) liability . . . arose not only out of his status as a contracting party, but in connection with the fiduciary duty he undisputedly owed"]; *Mandelblatt*, 132 AD2d at 167-168).

The issue therefore becomes whether the Amended Complaint pleads any breaches of fiduciary duty that are independent of, and distinct from, the alleged breaches of the Partnership Agreement. While recognizing that there "is some overlap," plaintiffs insist that "the factual and legal theories underlying the claims are plainly distinct" (Opp Mem, p. 6).

According to plaintiffs, the contractual claim "is based on violations of the procedural consent, meeting and notice requirements of the Partnership Agreement, unauthorized deduction of $10,000 from JLR-PC's

December distribution and the deduction of expenses for January 2019, the improper reduction in JLR-PC's Adjusted Basis under the BRA, which improperly increased JLR-PC's . . . liability for additional pension contributions, and the failure to pay JLR-PC the redemption value of [its] partnership interest" (*id.* [internal citations omitted]).

"In contrast, the gravamen of Plaintiffs' breach of fiduciary duty claim is that from the time that Plaintiff JLR-PC provided notice of intention to withdraw, Defendants DMH-PC, SMG-PC, Hargrave and Gannon . . . engaged in an intentional, concerted effort to (1) exclude Plaintiffs from participating in the management, business and affairs of PSA, (2) manage the business and affairs of PSA such that they shifted future practice liabilities to JLR-PC . . . and (3) misappropriate JLR-PC's revenues and contributions to the Plan for their own benefit and use, through distribution of such revenues to themselves or diversion of such revenues to satisfy their own obligations" (*id.*, pp. 6-7 [internal citations omitted]).

The Court is unconvinced by plaintiffs' efforts to distinguish the factual underpinnings of their breach of fiduciary duty claim from **[*8]** the claim for breach of contract. Plaintiffs assert that the Partnership Agreement "governs only the procedures to be followed in making partnership decisions" whereas the claim for breach of fiduciary duty encompasses the "substantive business and management decisions and actions taken by the other partners of PSA" (*id.*, p. 7), but close review of the Amended Complaint shows that plaintiffs are, in fact, challenging PSA's "substantive decisions" and the financial responsibility for those decisions through their claim that defendants breached the Partnership Agreement.

Thus, while the cause of action for breach of fiduciary duty pleads that defendants "misappropriate[ed] Plaintiff JLR-PC's revenues" (*id.*, ¶ 318) and "misus[ed] the contributions [JLR-PC] made for the purpose of funding [Dr. Rockmore's] benefits" (*id.*, ¶ 320), it is apparent that these allegations stem from: (i) defendants' alleged "unilateral termination of the Plan" (*id.*, ¶ 230); (ii) defendants' "demand[for] payment from JLR-PC for obligations arising from the actions of the Partners taken without the consent or participation of Plaintiffs" (*id.*, ¶ 301); and (iii) defendants' "refus[al] to pay Plaintiff JLR-PC's liquidated partnership interest" without reduction for the Staff Funding Shortfall and other expenses for which plaintiffs improperly were assigned responsibility (*id.*, ¶¶ 285-286). And each of these underlying wrongs is alleged to constitute a breach of the Partnership Agreement for which monetary recovery is sought via the first cause of action (*see id.*, ¶¶ 284 [defendants breached Partnership Agreement by demanding payment for expenses for which plaintiffs are not responsible]; 285 [defendants breached Partnership Agreement by demanding payment for Staff Funding Shortfall]; 286-292 [defendants breached Partnership Agreement by failing to pay JLR-PC the redemption value it was due under Section 15 of the agreement]; and 299-301 [defendants breached Partnership Agreement by demanding payment for obligations arising from actions taken without plaintiffs' participation and consent, including "approval and execution of the Termination Amendment"]).[4]

Similarly, while plaintiffs' claim for breach of fiduciary duty is cast in terms of an overarching scheme to exclude them "from participating in the management, business and affairs of PSA" (Opp Mem, pp. 6-7; *see* AC, ¶ 318), the Amended Complaint specifically cites and relies upon plaintiffs' rights under the Partnership Agreement to receive notice of partnership meetings (*see* AC, ¶ 119), receive an agenda and meeting minutes in advance of meetings (*see id.*, ¶ 120), vote at partners meetings (*see id.*, ¶ 121) and consent to partnership actions that would subject a partner to individual liability or responsibility (*see id.*, ¶¶ 122-123). And defendants' alleged

failure to accord plaintiffs these rights is said to constitute a breach of the Partnership Agreement (*see id.*, ¶¶ 126-129). Further, the substantive actions taken by defendants at meetings from which plaintiffs allegedly were excluded are challenged as breaches of the Partnership Agreement **[*9]** (*see id.*, ¶¶ 132-133, 299-301).

The same is true of plaintiffs' allegation that "defendants engaged in a deliberate and continuous effort to shift the burden of future practice liabilities and expenses to Plaintiff JLR-PC . . . and excluded Plaintiffs . . . so that Defendants could conceal those efforts" (*id.*, ¶ 6). In this connection, the Amended Complaint cites and discusses defendants' decision to place one of PSA's "biggest ever [medical] supply orders during December of 2018," which is said to have been a "blatant effort on the part of Defendants to stock up on supplies and charge Plaintiffs for [their] future, post-withdrawal, long-term supply needs" (*id.*). However, plaintiffs dispute their financial responsibility for these obligations on a contractual theory, alleging that defendants violated Section 14 and Schedule A of the Partnership Agreement by imposing excessive deductions against JLR-PC's distributions on account of expenses that were improperly assigned to them (*see id.*, ¶¶ 224-227, 284-292).

It bears emphasis that a claim for breach of fiduciary duty must be pleaded with particularity (*see* CPLR 3016 [b]). Contrary to defendants' contention, the Court is satisfied that the allegations supporting the claim for breach of fiduciary duty "are specific enough to satisfy the pleading requirement of CPLR 3016 (b) , which is intended to 'inform a defendant with respect to the incidents complained of'" (*New York State Workers' Compensation Bd. v SGRisk, LLC*, 116 AD3d 1148 , 1154 , 983 N.Y.S.2d 642 [3d Dept 2014], quoting *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 , 491 , 890 N.E.2d 184 , 860 N.Y.S.2d 422 [2008]). Nonetheless, it follows from CPLR 3016 (b) that, in attempting to distinguish their tort claim from the contractual claim, plaintiffs necessarily are limited to the specific breaches of fiduciary duty alleged with particularity in the Amended Complaint.

For the reasons stated above, the Court concludes that the breaches of fiduciary duties pleaded with particularity in the Amended Complaint arise out of the parties' contractual relationship, as opposed to their fiduciary relationship. Thus, while conduct falling short of a breach of contract may constitute a breach of fiduciary duty in some cases (*see Sally Lou Fashions Corp. v Camhe-Marcille*, 300 AD2d 224 , 225 , 755 N.Y.S.2d 67 [1st Dept 2002]; *see also New Media Holding*, 118 AD3d at 78), plaintiffs have not pleaded any such breaches with particularity. At best, the Amended Complaint offers conclusory allegations that extra-contractual duties were breached.

Inasmuch as the allegations underlying plaintiffs' breach of fiduciary duty claim "are either expressly raised in plaintiff[s'] breach of contract claim or encompassed within the contractual relationship by the requirement . . . of fair dealings and good faith" (*Brooks*, 26 AD3d at 630), and the damages sought on both claims are essentially the same,[5] the branch of defendants' motion seeking dismissal of claim for breach of fiduciary duty as duplicative of plaintiffs' contractual claim must be granted.

B. ERISA Preemption

Defendants argue that the entire second cause of action, alleging breaches of the Plan and BRA, is preempted by ERISA (*see* AC, ¶¶ 307-315). Defendants further contend that the cause **[*10]** of action for breach of fiduciary duty is preempted by ERISA to the extent that it relies on allegations that defendants misused Plan contributions, failed to sufficiently fund the Plan or permitted such misconduct to occur (*see id.*, ¶¶ 320-322).

"Congress enacted ERISA to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans and to 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts'" (*Aetna Health Inc. v Davila*, 542 US 200 , 208 , 124 S. Ct. 2488 , 159 L. Ed. 2d 312 [2004], quoting 29 USC § 1001 [b]). ERISA is intended "to provide a uniform regulatory regime over employee benefit plans" (*id.*).

"To this end, ERISA includes expansive pre-emption provisions . . ., which are intended to ensure that employee benefit plan regulation would be exclusively a federal concern" (*id.* [internal quotation marks and citation omitted]). In particular, the provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" (29 USC § 1144 [a]). Additional preemptive force is found in ERISA's "'comprehensive legislative scheme,'" which "includes 'an integrated system of procedures for enforcement'" (*Davila*, 542 US at 208 , quoting *Massachusetts Mut. Life Ins. Co. v Russell*, 473 US 134 , 147 , 105 S. Ct. 3085 , 87 L. Ed. 2d 96 [1985]). ERISA preemption "is deliberately expansive, and designed 'to establish pension plan regulation as exclusively a federal concern'" (*Pilot Life Ins. Co. v Dedeaux*, 481 US 41 , 45-46 , 107 S. Ct. 1549 , 95 L. Ed. 2d 39 [1987], quoting *Alessi v Raybestos-Manhattan, Inc.*, 451 US 504 , 523 , 101 S. Ct. 1895 , 68 L. Ed. 2d 402 [1981]).

"[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted" (*Davila*, 542 US at 209). Indeed, "the ERISA civil enforcement mechanism is one of those provisions with such 'extraordinary pre-emptive power' that it 'converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule'" (*id.* at 209 , quoting *Metropolitan Life Ins. Co. v Taylor*, 481 US 58 , 65-66 , 107 S. Ct. 1542 , 95 L. Ed. 2d 55 [1987]). This is referred to as complete preemption.

There is a two-prong test for assessing whether a state-law claim is completely preempted by ERISA. Complete preemption will be found if (1) the person suing could have brought the claim under ERISA, *and* (2) no legal duty independent of the ERISA or the plan is alleged to have been violated (*see id.* at 210). In applying the first prong, courts must "consider whether the plaintiff is the *type* of party that can bring a claim pursuant to [ERISA]; and second, . . . whether the *actual claim* that the plaintiff asserts can be construed as a colorable claim for benefits pursuant to [ERISA]" (*Montefiore Med. Ctr. v Teamsters Local 272*, 642 F3d 321 , 328 [2d Cir 2011]).

The second form of ERISA preemption is known as conflict preemption. Under this doctrine, a state-law claim is preempted insofar as it "relate[s] to any employee benefit plan" subject to ERISA (29 USC § 1144 [a]). "[U]nder the doctrine of conflict preemption, state laws that conflict with federal laws are preempted, and preemption is asserted as a federal defense to the . . . suit" (*Montefiore* ***[*11]*** *Med. Ctr. v Local 272 Welfare Fund*, [2018 BL 58295], 2018 WL 1665645 , *9 , [2018 BL 58295], 2018 U.S. Dist. LEXIS 28019 , *28 [SD NY, Feb. 20, 2018, No. 09-CV-3096 (RA/SN)] [internal quotation marks and citations omitted]).

"A state law relates to an employee benefit plan . . . if the law 'acts immediately and exclusively upon ERISA plans,' 'the existence of ERISA plans is essential to the law's operation,' the law 'mandate[s] employee benefit structures or their administration,' or the law 'provide[s] alternative enforcement mechanisms'" (*id.* , quoting

Plumbing Indus. Bd., Plumbing Local Union No. 1 v E. W. Howell Co., 126 F3d 61 , 67 [2d Cir 1997]; *see also Paneccasio v Unisource Worldwide, Inc.*, 532 F3d 101 , 114 [2d Cir 2008]). "[S]tate laws having only an indirect economic effect on ERISA plans lack sufficient connection with or reference to an ERISA plan to trigger ERISA preemption" (*Liberty Mut. Ins. Co. v Donegan*, 746 F3d 497 , 507 [2d Cir 2014] [internal quotation marks omitted], *affd sub nom. Gobeille v Liberty Mut. Ins. Co.*, US , 136 S Ct 936 , 194 L. Ed. 2d 20 [2016]).

Even assuming that the claims at issue are not completely preempted by ERISA, it is apparent that the claims bear a strong and substantial relationship to the Plan, which is an "employee benefit plan" subject to ERISA (29 USC § 1144 [a]). While the Court is mindful of the presumption against preemption and that contract law is a field traditionally left to the States, this plainly is not a case where the challenged claims only "tangentially relate[] to an ERISA plan" (*Greenbrier Hotel Corp. v Unite Here Health*, 719 Fed Appx 168 , 179-180 [4th Cir 2018]).

As defendants observe, the challenged claims "focus on the core ERISA entities: beneficiaries, participants, administrators, employers, trustees . . ., and the plan itself . . . and the relationships among these groups" (*Gerosa v Savasta & Co.*, 329 F3d 317 , 324 [2d Cir 2003], *cert denied* 540 US 967 , 124 S. Ct. 435 , 157 L. Ed. 2d 312 , 1074 , 124 S. Ct. 929 , 157 L. Ed. 2d 744 [2003]; *see Varela v Barnum Fin. Grp.*, 644 Fed Appx 30 , 31 [2d Cir 2016]). The claims also "affect[] the determination of eligibility for benefits [under an ERISA plan and] amounts of benefits" (*Varela*, 644 Fed Appx at 31 [internal quotation marks and citation omitted]). "In addition, [plaintiffs'] state law claims 'premised' on the termination of the Plan 'would require reference to the Plan in the calculation of any recovery'" (*Murphy v First Unum Life Ins. Co.*, [2016 BL 35439], 2016 WL 526243 , *3 , [2016 BL 35439], 2016 US Dist LEXIS 15525 , *7 [SD NY, Feb. 9, 2016, No. 15-CV-820 (SJF/SIL)], quoting *Paneccasio*, 532 F3d at 114 [finding conflict preemption where state law claims purport to provide remedy for violation of rights protected by ERISA]).

The Court therefore concludes that enforcing the terms of the Plan and BRA through the second cause of action would "implicate the regulation of, administration of, or benefits provided under [an] ERISA plan[]" and "implicate other relationships regulated by ERISA or overlap with ERISA's remedial scheme" (*Greenbrier Hotel*, 719 Fed Appx at 180 ; *see Paneccasio*, 532 F3d at 114 ; *Murphy*, [2016 BL 35439], 2016 WL 526243 , *2 , [2016 BL 35439], 2016 U.S. Dist. LEXIS 15525 , *6 ; *Amron v Yardain Inc. Pension Plan*, [2019 BL 465976], 2019 US Dist LEXIS 210096 , *20 , [2019 BL 465976], 2019 WL 6619107 , *7 [SD NY, Dec. 5, 2019, No. 18 Civ 11336 (LGS)] ["As the contract claim is premised on the Plan itself and the denial of benefits that is the basis for Plaintiff's claim under ERISA § 502 (a) (1) (B), the contract claim is . . . preempted by ERISA."]; *Trundle & Co. Pension Plan v Emanuel*, [2019 BL 366578], 2019 US Dist LEXIS 167065 , *15-16 , [2019 BL 366578], 2019 WL 4735380 , *5 [SD NY, Sept. 27, 2019, No. 18 Civ 07290 (ER)]; *cf. Abernethy v EmblemHealth, Inc.*, 790 Fed Appx 250 , 256 [2d Cir 2019]).

Based on the foregoing, the Court concludes that the second cause of action must be dismissed in **[*12]** its entirety. Further, ERISA preemption provides an alternative basis for dismissal of the third cause of action to the extent that it is predicated on allegations that (i) defendants breached fiduciary duties owed to plaintiffs by misusing JLR-PC's Plan contributions and failing to sufficiently fund the Plan (*see* AC, ¶ 320); and (ii) Drs. Hargrave and Gannon breached fiduciary duties as Plan trustees by allowing the alleged misconduct to occur (

see id., ¶¶ 321-322).

C. Aiding and Abetting Breach of Fiduciary Duty

Defendants argue that dismissal of the claim for breach of fiduciary duty compels the dismissal of the aiding and abetting claim. Plaintiffs do not dispute that a claim for aiding and abetting a breach of fiduciary duty cannot be maintained in the absence of an underlying cause of action for breach of fiduciary duty. Inasmuch as the claim for breach of fiduciary duty has been dismissed, the aiding and abetting claim must also be dismissed (*see Fiala v Metropolitan Life Ins. Co.*, 6 AD3d 320 , 323 , 776 N.Y.S.2d 29 [1st Dept 2004]).

D. Conversion

Defendants offer three grounds for the dismissal of the fifth cause of action, alleging conversion. First, they argue that the subject matter of the claim is money, and the only specifically identifiable sum alleged in the Amended Complaint is the withholding of $10,000 from JLR-PC's December 2018 partnership distribution (*see* AC, ¶ 338). Defendants further contend that certain aspects of the conversion claim are duplicative of the claim for breach of the Partnership Agreement, and the remainder of the claim is preempted by ERISA.

The Amended Complaint alleges that plaintiffs "had title to or a right to possession of property consisting of the revenues generated by Plaintiffs through . . . JLR-PC's partnership in . . . PSA, after deduction for JLR-PC's equal share of partnership expenses" (*id.*, ¶ 335). Defendants allegedly exercised dominion and control over this property without authorization by: (i) withholding $10,000 from JLR-PC's December 2018 distribution (*see id.*, ¶ 338); (ii) permitting deductions for certain business supplies for which plaintiffs are not responsible (*see id.*, ¶¶ 339-341); and (iii) misusing plaintiffs' contribution to the Plan and the PSA Funding Escrow (*see id.*, ¶¶ 342-346).

"Conversion is any unauthorized exercise of dominion or control over property by one who is not the owner of the property which interferes with and is in defiance of a superior possessory right of another in the property" (*Hart v City of Albany*, 272 AD2d 668 , 668 , 706 N.Y.S.2d 535 [3d Dept 2000] [internal quotation marks and citation omitted]). "Where, as here, the property is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (*Salatino v Salatino*, 64 AD3d 923 , 924 , 881 N.Y.S.2d 721 [3d Dept 2009] [internal quotation marks and citation omitted], *lv denied* 13 N.Y.3d 710 , 918 N.E.2d 963 , 890 N.Y.S.2d 448 [2009]; *see Markov v Spectrum Group Intl. Inc.*, 136 AD3d 413 , 414 , 25 N.Y.S.3d 133 [2d Dept 2016], *lv dismissed and denied* 27 N.Y.3d 1033 , 33 N.Y.S.3d 868 , 53 N.E.3d 746 [2016]).

The Court concludes that plaintiffs' first two allegations, concerning the December 2018 partnership distribution and the expensing of business supplies, constitute **[*13]** a *mere restatement* of their claim for breach of the Partnership Agreement. Specifically, the Amended Complaint alleges that defendants violated Section 14 and Schedule A of the Partnership Agreement by, among other things, withholding $10,000 from the December 2018 partnership distribution (*see* AC, ¶¶ 217-218) and wrongfully demanding/retaining funds to pay for the challenged supply purchases (*see id.*, ¶¶ 224-228, 284).

"A cause of action for conversion cannot be predicated on a mere breach of contract," and "plaintiffs'

conversion claim[] allege[s] no [relevant] facts independent of the facts supporting their breach of contract claim[]" (*Jeffers v American Univ of Antigua*, 125 AD3d 440 , 443 , 3 N.Y.S.3d 335 [1st Dept 2015]). Nor does the conversion claim plead facts establishing "the existence of a duty separate from the parties' agreement" (*City of New York v Shellbank Rest. Corp.*, 169 AD3d 581 , 582 , 95 N.Y.S.3d 60 [1st Dept 2019], *lv dismissed* 33 N.Y.3d 1061 , 103 N.Y.S.3d 354 , 127 N.E.3d 312 [2019]).

Further, for essentially the reasons stated previously, the Court concludes that plaintiffs' allegations concerning the misuse of Plan contributions are preempted by ERISA (*see LoPresti v Terwilliger*, 126 F3d 34 , 41 [2d Cir 1997]; *Bricklayers Ins. & Welfare Fund v Mastercraft Masonry I, Inc.*, [2020 BL 4511], 2020 US Dist LEXIS 2430 , *12 , 2020 WL 70843 , *4 [ED NY, Jan. 7, 2020, No. 18-cv-6599 (BMC)]; *Cooney v Trustees of the Will County Carpenters, Local 174, Pension Fund*, [2016 BL 386271], 2016 WL 6833908 , *4 , [2016 BL 386271], 2016 U.S. Dist. LEXIS 160603 , *11 [ED IL, Nov. 21, 2016, No. 13-cv-8819 (JRB)]).

Accordingly, the fifth cause of action, alleging conversion, is dismissed in all respects.

CONCLUSION

Based on the foregoing, it is

ORDERED that defendants' motion is granted, and the second, third, fourth and fifth causes of action are dismissed; and it is further

ORDERED that, within **twenty (20) days** from the date of this Decision & Order, defendants shall file and serve an answer to the Amended Complaint; and finally it is

ORDERED that a remote preliminary conference shall be scheduled, and the parties are directed to confer in advance of the conference regarding the matters set forth in Commercial Division Rule 8, as well as the use of mediation or other forms of alternative dispute resolution to bring about an early resolution of this action.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for defendants shall promptly serve notice of entry on all parties entitled to such notice (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: Albany, New York

December 2, 2020

RICHARD M. PLATKIN

A.J.S.C.

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fn 1

Defendants' moving papers cite CPLR 3211 (a) (8) , which provides for dismissal where "the court has not jurisdiction of the person of the defendant," but the arguments made by defendants concern subject matter jurisdiction. The Court will disregard this non-prejudicial defect (*see* CPLR 2001 ; *see also D'Agostino v Harding*, 217 AD2d 835 , 837 , 629 N.Y.S.2d 524 n [3d Dept 1995]).

fn 2

Additionally, defendants contend that certain aspects of the claim (*see* AC, ¶¶ 320-322) are preempted by ERISA. These arguments are discussed below in connection with defendants' argument that the entire second cause of action, alleging breaches of the Plan and BRA, is preempted.

fn 3

The Court's use of the term "Partners" should not be understood as expressing any view as to the legal status of shareholder-employers relative to PSA. The term simply is used for convenience.

fn 4

Certain of the alleged breaches of duty also are said to constitute a breach of the Plan and BRA (*see id.*, ¶¶ 170-174).

fn 5

The Court recognizes that plaintiffs seek a more expansive measure of damages under their claim for breach of fiduciary duty. Nonetheless, both causes of action are directed at the recovery of monetary damages for the same wrongs. Indeed, if the mere availability of tort damages were enough to avoid dismissal, as argued by plaintiffs, parallel tort claims could rarely, if ever, be dismissed as duplicative of contractual claims.