U.S. BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re **NAMWEST, LLC,** **Debtor.**	In Chapter 11 proceedings Case No.: 08-13935 Adversary No. 08-860
NAMWEST, LLC; NAMWEST-TOWN LAKES II, LLC, **Plaintiffs,** v. **NAMWEST-TOWN LAKES, LLC; THEODORE KOHAH; ARIZONA TEMPE TOWN LAKE, LLC; and BUSINESS TO BUSINESS MARKETS, INC.**, **Defendants.**	**UNDER ADVISEMENT DECISION:** **1) DENYING THE KOHAN PARTIES MOTION FOR SUMMARY JUDGMENT;** **and** **2) GRANTING THE NAMWEST PARTIES MOTION FOR SUMMARY JUDGMENT**

Theodore Kohan believes he's been wronged. In his view, his former business partner and friend Ezri Namvar broke a promise. That promise, according to Kohan, must be honored. The Court has been asked to determine if the promise was made and, if it was, can it be honored?

I. Background

Most of the matters in the underlying bankruptcy have been resolved. Aside from Namwest, LLC, the ten other jointly administered bankruptcies have been dismissed; out of the five adversary proceedings in this case, this one alone is still open; and even this

adversary proceeding has been dismissed with prejudice except for the counterclaims brought by the defendants. Therefore, the remaining parties in these proceedings are the counterclaim plaintiffs: Theodore Kohan ("Kohan"), Business to Business Markets, Inc. ("B2B"), and Arizona Tempe Town Lake ("ATTL") (collectively "Kohan Parties"); and the counterclaim defendants: Namwest, LLC ("Namwest"), Namwest-Town Lakes II, LLC ("NTL II"), and Namwest-Town Lakes, LLC ("NTL") (collectively "Namwest Parties"). In their counterclaim the Kohan Parties allege Breach of Contract; Bad Faith (Contract); Unjust Enrichment; Fraud; Negligent Misrepresentation; Constructive Fraud/Breach of Fiduciary Duty; Aiding and Abetting Breach of Fiduciary Duty; Constructive Trust; Conversion; and Equitable Subordination.

II. Facts

A. Facts According to the Kohan Parties

Kohan and Ezri Namvar ("Ezri"), both members of the closely knit Persian Jewish community in Los Angeles, met in the 1980s. Ezri was a "hard money" lender who operated through the umbrella of Namco Capital Group ("Namco")/Namco Financial.[1] Kohan first used Ezri as a hard money lender in the late 1980s or early 1990s to fund a transaction in El Monte, California which was successful for both Kohan and Ezri. Throughout the 1990s and into the 2000s Ezri and Kohan continued amicable business dealings, both as competitors and partners on various real estate transactions in Southern California.

In August 2004, Triyar Capital, LLC ("Triyar") obtained the right to purchase approximately 10 acres of real property known as the "Club Rio Property" ("Club Rio Option").[2] In October 2004, Triyar assigned the Club Rio Option to B2B.[3] Before obtaining the Club Rio Option, Kohan met with Ezri, over the phone and in person, to discuss purchase of the Club Rio Property on terms similar to those in their prior business dealings. During the first face to face meeting, Kohan showed Ezri details of the

[1] It is unclear to the Court whether the Kohan Parties believe Namco Capital/Namco Financial were a single entity or separate. Regardless, their structure is irrelevant to deciding this matter.
[2] Club Rio was, until it closed, a popular dance club for students at nearby Arizona State University.
[3] Kohan is the president of B2B.

proposed project which included five to seven high rise offices and condominiums. Meetings between the two continued into December 2004.

According to the Kohan Parties, these continued meetings ultimately culminated in an oral agreement between Ezri and Kohan in early December 2004 under which:

> (a) Ezri Namvar or an entity owned or controlled by Ezri Namvar would provide 100% of the financing to purchase the Club Rio Property and any other properties in the vicinity of the Club Rio Property;
>
> (b) Kohan, or an entity owned or controlled by Kohan, would receive a 27% membership interest in the newly formed entity that would acquire B2B's rights under the Club Rio Option Agreement;
>
> (c) Kohan, or an entity owned or controlled by Kohan, would receive a 27% membership interest in any other newly formed entity that acquired real property in the vicinity of the Club Rio Property;
>
> (d) Kohan would be one of no more than two managers of the newly formed entity or entities; and
>
> (e) the newly formed entity or entities would timely entitle, develop and sell the Club Rio Property and any other neighboring property subsequently acquired.

("Club Rio Oral Agreement"). Kohan Declaration (Docket #174) ¶ 14.

Having reached this agreement, Kohan contends, he and Ezri began the process of creating the entities that would carry out their agreement. NTL was formed on December 8, 2004 with Namwest and ATTL as members. On December 21, 2004, Kohan caused B2B to assign the Club Rio Option to NTL. On December 22, 2004, before escrow closed on the Club Rio Property, Ezri advised Kohan that he wanted to transfer Namwest's interest in NTL to Woodman Partners, LLC ("Woodman") and asked that Kohan also transfer ATTL's interest in NTL to Woodman. In exchange, Ezri promised that he would transfer ATTL's 27% interest back to Kohan or a Kohan controlled entity within 12 months. Based on this understanding, Kohan agreed to transfer ATTL's interest in NTL to Woodman. On December 22, 2004, NTL filed a first amendment to its articles of organization removing Namwest and ATTL as members of NTL and replacing them with Woodman. On December 23, 2004, NTL purchased the Club Rio Property.

Soon after the purchase of the Club Rio Property, Kohan began negotiations to purchase property adjacent to the Club Rio Property. On May 2, 2005, NTL II was

formed, according to Kohan Parties, for the purpose of purchasing these parcels adjacent to and in the vicinity of the Club Rio Property. Namwest is NTL II's sole member. Kohan did not complete the negotiations to purchase the properties. Instead, he claims that he let Ezri, Steven M. Skarphol, and/or Namwest complete the negotiations. NTL II did purchase three properties:

> (a) .74 acres of real property located on Scottsdale Road just north of State Route 202 in Tempe, Arizona on August 26, 2005 ("Wilde I Property");
>
> (b) 5.84 acres of real property located near 59th Avenue and Elliot Road, Laveen, Arizona ("Wilde II Property") and;
>
> (c) 4.88 acres adjacent to the Club Rio Property on January 31, 2006 ("Wilde III Property") (Wilde I, Wilde II, and III collectively "Wilde Properties").

Kohan agreed to let Ezri complete negotiations, according to Kohan, because Ezri promised Kohan that:

> (a) Kohan, or an entity owned or controlled by Kohan, would receive a 27% ownership interest in the newly formed entity that would acquire title to the Wilde I, II, and III Properties (defined below);
>
> (b) Kohan would be one of no more than two managers of the newly formed entity;
>
> (c) the titleholder of record would timely entitle, develop and sell the Wilde I, II, and III Properties.

("Wilde Oral Agreement"; together with Club Rio Oral Agreement, "Oral Agreements"). Kohan Declaration (Docket #174) ¶ 25.

After the Club Rio Property purchase, Kohan declares, he purchased several other properties where Ezri and his entities paid 100% of the purchase price and Kohan was also provided his percentage interest. According to Kohan, these purchases led him to believe that Ezri and his entities were operating in good faith and in accord with their agreements.

Between December 2004 and December 2007, the business relationship turned sour. Over this time the Namwest Parties and Kohan Parties sporadically exchanged proposed operating agreements, emails, and other communications in an attempt to

formalize the Oral Agreements between Kohan and Ezri. No formal agreement occurred by the time Namwest filed for bankruptcy.

B. Facts According to Namwest Parties

NTL purchased the Club Rio Property for $6,100,000 on December 24, 2004, with no monetary contributions from Kohan. NTL II purchased the Wilde III Property in January 2006 for $5,750,000 without monetary contributions from Kohan. The Namwest Parties claim that between 2004 and 2008, Ezri and Namwest spent millions on the "Project"[4] while Kohan contributed no money. The Namwest Parties argue that Kohan acknowledges in his depositions that: (1) part of the alleged agreement between he and Ezri was that an operating agreement would be prepared; (2) he had no agreement with Namwest; and (3) that any alleged agreement was with Ezri—not the Namwest Parties.

According to the Namwest Parties, prior to the close of escrow for the Club Rio Property, neither Kohan nor any other party signed an agreement setting forth what Kohan's prospective rights might be in NTL, NTL II (which had yet to be formed), the Club Rio Property, or the Wilde Properties. In January 2005, David Shein, Kohan, Ezri, and Michael McBride, Namwest's President, began 18 months of communications and document exchange regarding an operating agreement for NTL II. These communications include:

- January 2005 – conference call with Shein, Kohan, Ezri, and McBride;
- February 25, 2005 – Shein provided McBride, Jim Henrie, and David Cutler (all of Namwest) a Memorandum, Ownership Structure Chart, and draft Operating Agreement for NTL II based on the "detailed notes" he took during the earlier conference call;
- May 9, 2005 – email from Kohan to Ezri, "To reassure you I will respect the system you want to put in place for my 27%";
- June 27, 2005 – Shein provided a draft Operating Agreement for NTL II to Kohan

[4] The Project is undefined in NTL II's Statement of Fact. Contextually, it appears that NTL II is referencing the Wilde III and Club Rio Projects. The precise nature of the Project is immaterial to the Court's decision.

- November 9, 2005 – Kohan emailed a revised, redlined draft Operating Agreement for NTL II to Ezri;
- January 13, 2006 – Kohan conveyed a cover email and revised, redlined draft NTL II Operating Agreement, which contained a number of suggested changes to the terms of the draft Shein had sent to Kohan on June 27, 2005;
- March 28 and May 29, 2006 – Shein conveyed more draft Operating Agreements for NTL II to Kohan;
- June 12, 2006 – Kohan responded that "as part of these negotiations I will insist that we have an agreement that includes Brade Wild's [sic] piece which is already in Namwest's name and the Scotts deal [yet another adjacent property to the Club Rio Property] that is being negotiated";
- June 12, 2006 – Kohan's new attorney, Rhonda Beckerleg, conveyed a cover email and revised, redlined draft to Shein. Beckerleg's draft operating agreement, sent on behalf of Kohan, was not only different from Shein's most recent draft, it was different from Kohan's own January 13, 2006 draft. Shein rejected the draft agreement because it contained material changes.

C. Background of Foreclosure of Wilde Property

While discussions over the NTL II's operating agreements continued, it was encumbering the Wilde III Property. Between May 2006 and September 2007, NTL II issued promissory notes and deeds of trust, secured by the Wilde III Property, totaling $13,000,000 ("Loans") in favor of Namco. Namco assigned the loans to Roya Boucherian as collateral for its $9,500,000 obligation to her. On December 10, 2008, NTL II and Namwest filed an adversary complaint against Boucherian and Namco alleging that the Loans were invalid and they owed no money to Namco or Boucherian. Kohan, pursuant to this Court's order, was added as a plaintiff intervenor in adversary proceeding 08-926. In December 2008, Namco became the subject of an involuntary bankruptcy petition in California. On March 19, 2009, over the Kohan Parties' Objections, this Court approved a settlement agreement between Namwest, NTL II,

Namco, and others, under which NTL II admitted that the Loans were valid in the principal amount of $9,500,000 ("February 2009 Agreement").[5]

In November 2009, the Namco bankruptcy trustee and Boucherian entered a settlement whereby the Namco bankruptcy trustee assigned all beneficial interest in the Loans to Boucherian ("Namco Settlement"). Kohan opposed the settlement because, as he explained in his declaration, his alleged 27% interest in NTL II is worthless if the Boucherian liens are deemed valid. The Central District of California Bankruptcy Court approved the Namco Settlement on February 21, 2010.[6]

Also in November 2009, Namwest, NTL II, and Boucherian entered into a second settlement agreement, under which the Loans were once again admitted to be valid in the amount of $9,500,000 and Boucherian agreed to purchase Namwest's membership interest in NTL II, subject to § 363, free and clear of Kohan's membership interest claim in NTL II. ("November 2009 Agreement"). This Court approved the November 2009 Agreement in March 2010, but made the sale of the membership interest subject to Kohan's claim that he is a 27% member of NTL II.[7] As part of its decision denying the Kohan Parties' appeal of the Namco Settlement, the BAP concluded "the $13 million all-inclusive note that was collaterally assigned to Boucherian became unassailable as a result of the February 2009 and the November 2009 Agreement." *In re Namco Capital Grp.*, 2010 WL 3259977, at *10, n.24 (9th Cir. BAP October 27, 2010)

Boucherian began foreclosure proceedings on the Wilde III Property in May 2010, a foreclosure sale took place on August 17, 2010, and El Fenix II, LLC became the owner of the Wilde III Property, having successfully entered a credit bid in the amount of $4,500,000.

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[5] No party appealed the February 2009 Agreement. It is final.

[6] The Kohan Parties filed a motion for reconsideration of the order approving settlement with the Central District of California Bankruptcy Court. The Court denied the motion. The Kohan Parties then appealed this denial of reconsideration to the Bankruptcy Appellate Panel. The BAP ruled that the appeal was moot and, to the extent that it wasn't moot, affirmed the order denying reconsideration. Citing to *U.S. v. Vongxay*, 594 F.3d 1111(9th Cir. 2010) (citing Black's Law Dictionary 1100 (7th ed.1999)), the Kohan parties claim that the statements by the BAP as to the merits are therefore dicta and lack precedential value. The Kohan Parties have appealed the BAP ruling to the 9th Circuit Court of Appeals. This Court agrees with the BAP's analysis.

[7] This Court's order approving the November 2009 Agreement is final as it has never been appealed.

III. Position of the Parties

A. Kohan Parties

According to the Kohan Parties, Kohan and Ezri formed an enforceable partnership contract via the Oral Agreements. Under the terms of the Oral Agreements, Kohan, or an entity controlled by him, had a 27% membership interest in a new entity that would purchase the Club Rio property (i.e. NTL), and Kohan, or an entity controlled by him, had a 27% membership interest in any related entities that acquired real estate in the vicinity of the Club Rio property (i.e., the Wilde III Property purchased by NTL II). Further, the Kohan Parties claim that, much like the parties in *Ellingson v. Sloan*, 527 P.2d 1100, 1105 (Ariz. App. 1975), Ezri acted with apparent authority to bind both NTL and NTL II to the Oral Agreements. According to the Kohan Parties, evidence of the Oral Agreements is found both in Kohan's uncontroverted declaration and the communications between Kohan and the Namwest Parties. Kohan asserts he did not need to make monetary contributions to the partnership because he contributed the valuable Club Rio Option.

Specific damages need not be alleged, according to Kohan, because "the law of this State is quite clear that the measure of damages is the value of the property wrongfully taken and held, plus damages for wrongful detention." *Phelps v. Melton*, 482 P.2d 905, 906 (Ariz. App. 1971). Evidence of these damages includes the original purchase price, the liens against the property, and interests from potential buyers.

B. Namwest Parties

Simply put, allege the Namwest Parties, there was no partnership agreement. Instead, at best, there may have been an agreement to agree which is unenforceable. *See Peer v. Hughes*, 213 P. 691 (Ariz. 1923); *see also Tucson Police & Firefighters Ass'n v. City of Tucson*, 574 P. 2d 850, 851 (Ariz. App. 1977); *Chu v. Ronstadt*, 498 P.2d 560, 563 (Ariz. App. 1972). Foremost, according to the Namwest Parties, the lack of details regarding the Oral Agreements makes finding an enforceable contract impossible. Further, the Namwest Parties claim that the existence of a "partnership" is a recent

invention of Kohan: to wit, over two days of depositions Kohan never mentioned a partnership agreement and in past pleadings Kohan claimed to have a membership interest in NTL II.

Moreover, according to the Namwest Parties, even if a partnership agreement could be found, membership in NTL II is impossible because Kohan was not identified as a member in NTL II's initial articles of organization, no operating agreement was signed, and there is no certified written statement identifying Kohan as a member. *See* A.R.S. § 29-731(A).[8] Additionally, even if Kohan and Ezri formed a partnership under § 29-1014 property is partnership property only if acquired in the name of the partnership or one or more of the partners. Thus, conclude the Namwest Parties, because the Wilde III Property was acquired by NTL II, the partnership never had an interest in it.

As to Kohan's agency theory, the Namwest Parties dismiss it as misguided using Kohan's own standard: "the touchstone of apparent authority is conduct of a principal that allows a third party reasonably to conclude that an agent is authorized to make certain representations or act in a particular way." *Miller v. Mason-McDuffie Co. of S. Cal.*, 739 P.2d 806, 811 (Ariz. 1987). Here, the Namwest Parties characterize Kohan's theory as hopelessly flawed because it is the conduct of the principal (NTL II) that is germane to the analysis, and Kohan admitted in deposition that he knew that Ezri was not a manager of Namwest.

The rest of the relief requested by Kohan also fails because it relies on the existence of a contract, or is a legal impossibility:

- *Rescission*[9] – A prerequisite to rescission is that all of the contracting parties be restored to their status quo prior to the contract. *Jerger v. Rubin*,

[8] A.R.S. § 29-731(A) reads:

> A. At the time the limited liability company is formed, a person becomes a member by either of the following:
> 1. Being identified as a member in the initial articles of organization.
> 2. If the members are not identified in the initial articles of organization, being identified as a member in and signing in person or by an attorney-in fact an operating agreement that exists at the time the initial articles of organization are filed or being identified as a member in a written statement certified, before or after the filing of the initial articles of organization, by each of the managers identified in the initial articles of organization.

[9] Kohan admits in his response that the right of pure rescission has been taken away.

471 P.2d 726 (Ariz. 1970); *Jennings v. Lee*, 461 P.2d 161 (Ariz. 1969); *Young v. Lujan*, 461 P.2d 691 (Ariz. App. 1969).

- *Good Faith and Fair Dealing* – One must have a contract in order to assert a claim for breach of the covenant of good faith and fair dealing. Because no contract exists, there can be no breach.
- *Constructive Fraud/Breach of Fiduciary Duty, Aiding and Abetting Breach of Fiduciary Duty, Constructive Trust, and Equitable Subordination* – These claims can only be maintained if Kohan was a member of NTL II; because he was not, they necessarily fail.
- *Fraud and Negligent Misrepresentation* – Kohan cannot show fraud by the Defendants because Ezri made the alleged representations, not Namwest. Fraud or negligent misrepresentation cannot be shown because both theories require an agreement.
- *Conversion* – Kohan's conversion claim is meritless for the simple reason that NTL II did not take or convert the Wilde III Property from Kohan. Rather, NTL II bought the property from a third party.
- *Unjust Enrichment* – Kohan meets none of the elements for this claim.

IV. Analysis

Summary judgment shall be granted where no genuine dispute of material fact exists and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056(c). "[T]he mere existence of some alleged factual dispute . . . will not defeat [a] . . . motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis omitted). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. The moving party bears the initial burden of demonstrating to the court that no genuine issue of material fact exists and to further show that the moving party is entitled to judgment in their favor as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-

23 (1986). The burden then shifts to the nonmoving party to show that there are specific facts creating a genuine issue for trial. *Id.* at 324. When the nonmoving party bears the burden of proof, however, "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

A. Kohan's Motion

The Kohan Parties ask the Court to find that Kohan and Ezri entered into an oral contract regarding the Club Rio Option and subsequent purchase of the Wilde Properties. "The question of the existence of an oral contract is one of fact, unless the evidence is undisputed and incapable of supporting more than one inference." 17B C.J.S. *Contracts* § 1012 (2011). Here there are sufficient disputed facts to deny the Kohan Parties' motion. "The party asserting the existence of [an] oral contract has the burden of proof." *Tabler v. Indus. Comm'n of Ariz.*, 47 P.3d 1156, 1159 (Ariz. App. 2002). An enforceable contract requires an offer, acceptance, and consideration. *Id.* at 1158. "The parties must intend to be bound." *Id.* at 1159. "In circumstances in which the parties contemplate the execution of a written document incorporating the terms of their oral agreement, determining whether there was an intent to be bound by the oral contract may be particularly challenging." *Id.*

Here, the repeated exchange of operating agreements creates a clear question of material fact as to whether Kohan and Ezri had a meeting of the minds regarding the Club Rio Option and Wilde Parties. Further, finding the existence of an oral agreement necessitates the finding of intent by both Kohan and Ezri. The Court, on this record, does not find the requisite intent between Kohan and Ezri to determine that an oral contract exists as a matter of law. The Kohan Parties' motion is denied.

B. Agreement to Agree?

Having found that the Kohan Parties, for purposes of summary judgment, have not shown the existence of a contract between Kohan and Ezri, the Court must now

determine if the Namwest Parties have shown that there is no contract between Kohan and Ezri.

The parties' anticipation of a written agreement does not preclude a finding that an oral contract was made. *AROK Constr. Co. v. Indian Constr. Servs.*, 848 P.2d 870, 878 (Ariz. App. 1993). In such cases, "the fact-finder must resolve whether the parties intended the written document to be a mere memorialization of an already binding oral agreement, or whether they intended to be bound only upon execution of a formal, written instrument." *Tabler*, 47 P.3d at 1159. While "[t]he interpretation of the contract is a question of law for the court," *Hadley v. Sw. Props., Inc.*, 570 P.2d 190, 193 (Ariz. 1977), the "determination of intent is a factual question" which "must be based on objective evidence, not the hidden intent of the parties." *Tabler*, 47 P.3d at 1159. Here, determining that intent is especially challenging because "[t]he fact that one of [the parties], with the knowledge and approval of the other, has begun performance is nearly always evidence that they regard the contract as consummated and intend to be bound thereby." *Schade v. Dietrich*, 760 P.2d 1050, 1059 (Ariz. 1988) (citations and emphasis omitted). It is undisputed that Kohan transferred the Club Rio Option to NTL, thus performing a key component of the alleged oral agreement. What, then, of the remaining terms?[10]

Kohan asks the Court to rely, practically exclusively, on his declaration to find the material facts on which the Court should deny summary judgment. Courts have held, however, that "self-serving affidavits are cognizable to establish a genuine issue of

[10] As a refresher, the key terms of the Club Rio Oral Agreement are:

(a) Ezri Namvar or an entity owned or controlled by Ezri Namvar would provide 100% of the financing to purchase the Club Rio Property and any other properties in the vicinity of the Club Rio Property;
(b) Kohan, or an entity owned or controlled by Kohan, would receive a 27% membership interest in the newly formed entity that would acquire B2B's rights under the Club Rio Option Agreement;
(c) Kohan, or an entity owned or controlled by Kohan, would receive a 27% membership interest in any other newly formed entity that acquired real property in the vicinity of the Club Rio Property;
(d) Kohan would be one of no more than two managers of the newly formed entity or entities; and
(e) the newly formed entity or entities would timely entitle, develop, and sell the Club Rio Property and any other neighboring property subsequently acquired.

material fact so long as they state facts based on personal knowledge and are not too conclusory." *Rodriguez v. Airborne Express*, 265 F.3d 890, 902 (9th Cir. 2001) (citing *United States v. Shumway*, 199 F.3d 1093 (9th Cir. 1999)). Any affidavit that is worth submitting is probably self-serving. Nevertheless, "[a] conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997); *see also In Re Caneva*, 550 F.3d 755 (9th Cir. 2008); *Nillson v. City of Mesa*, 503 F.3d 947 (9th Cir. 2007). Remember, the Kohan Parties bear the burden of showing the existence of the Oral Agreements.

Here, relying solely on Kohan's declaration is problematic because the terms of the alleged Oral Agreements have been fluid. According to the counterclaim, there are ten representations made to Kohan "in exchange for an assignment of the Club Rio Purchase Agreement."[11] These key representations were repeated in Kohan's declaration in opposition to the February 2009 Agreement, but were allegedly made by Ezri and

[11] The ten representations as stated in the Answer and Counterclaim:

> (a) Kohan, or an entity controlled by Kohan, would receive a 27% ownership interest in a new entity that would hold the Club Rio Purchase Agreement;
> (b) Kohan, or an entity controlled by Kohan, would receive a 27% ownership interest in any related entities that acquired real estate in the vicinity of the property secured by the Club Rio Purchase Agreement;
> (c) Kohan would be one of no more than two managers of in the new entities;
> (d) Namwest had the expertise, experience, and financial capability to develop, finance, and construct high-rise condominiums and that it would use this expertise, experience, and financial capability to construct high-rise condominiums on the Club Rio Property;
> (e) Namwest would cause the preparation of a final executable operating agreement detailing the respective rights and responsibilities of Kohan and Defendants with regard to the Club Rio Property;
> (f) Namwest would cause the titleholder of record to execute the Club Rio Purchase Agreement under the most competitive terms and conditions then achievable;
> (g) After the Club Rio Purchase Agreement was executed, Namwest would cause the titleholder of record to prepare and distribute an operating agreement acceptable to Kohan;
> (h) After the Club Rio Purchase Agreement was executed, Namwest would cause the titleholder of record to develop and sell the Club Rio Property;
> (i) Interest on any indebtedness incurred in connection with the acquisition, development, and sale of the Club Rio Property, and adjacent properties, would be at or below market rates; and
> (j) Namwest would not take any act, or assist in any act, that increased, or would increase, the debt interest, management fees, or other project costs or fees incurred by Namwest, or any entity related to Namwest, with respect to the Club Rio Property, or adjacent property subsequently acquired. Answer and Counterclaim (Docket #20) at ¶ 4.

McBride and also included references to the Wilde Property.[12] Kohan now alleges only five terms in the oral agreement.

The key terms of the Wilde Oral Agreement are equally fluid.[13] In the Answer and Counterclaim, Kohan lists seven representations made by Ezri, Mr. Henrie, and Mr. McBride for which he "agreed to step aside and let Namwest complete negotiations for the purchase of the Wilde I, II, and III Properties."[14] In his declaration in support of an

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[12] The ten representations as stated in the declaration:

> a. I, or an entity that I controlled, would receive a 27% ownership interest in a new entity that would hold the right to purchase the Club Rio Property;
> b. I, or an entity I controlled, would receive a 27% ownership interest in any related entities that acquired real estate in the vicinity of the property secured by the Club Rio Property, including, but not limited to the Wilde Property;
> c. I would be one of no more than two managers of the new entities;
> d. Namwest had the expertise, experience, and financial capability to develop, finance, and construct high-rise condominiums and that it would use this expertise, experience, and financial capability to construct high-rise condominiums on the Club Rio and Wilde Properties;
> e. Namwest would cause the preparation of a final executable operating agreement(s) detailing the respective rights and responsibilities of the members of the new entities with regard to the Club Rio and Wilde Properties;
> f. Namwest would cause the titleholder of record to execute the right to purchase the Club Rio Property under the most competitive terms and conditions then achievable;
> g. After the Club Rio Property was acquired, Namwest would cause the titleholder of record to prepare and distribute an operating agreement acceptable to me;
> h. Namwest would cause the titleholder of record to develop and sell the Club Rio and Wilde Properties;
> i. Interest on any indebtedness incurred in connection with the acquisition, development, and sale of the Club Rio and Wilde Properties would be at or below market rates; and
> j. Namwest would not take any act, or assist in any act, that increased, or would increase, the debt interest, management fees, or other project costs or fees incurred by Namwest, or any entity related to Namwest, with respect to the Club Rio or Wilde Properties (collectively, the "Club Rio Representations"). Kohan Declaration (Docket #449 in the administrative case 08-13935) ¶ 10.

[13] As a refresher, the three terms of the alleged Wilde Oral Agreement are:

> (a) Kohan, or an entity owned or controlled by Kohan, would receive a 27% ownership interest in the newly formed entity that would acquire title to the Wilde I, II, and III Properties (defined below);
> (b) Kohan would be one of no more than two managers of the newly formed entity;
> (c) the titleholder of record would timely entitle, develop and sell the Wilde I, II, and III Properties.

[14] The seven representations as stated in the Complaint and Counterclaim:

> (a) Title to the Wilde I, II, and III Properties would be held by Newco or another entity in which Kohan, or a Kohan controlled entity held a 27% ownership interest;
> (b) Kohan would be one of no more than two managers of the entity;
> (c) Namwest would cause the titleholder of record to timely finance and refinance the Wilde I, II, and III Properties under the most competitive terms and conditions then achievable;

application for temporary restraining order, Kohan recites six representations by Ezri.[15] Now, however, there are only three alleged contract terms. These are not merely retelling the same story in different ways, as counsel for Kohan suggests, instead it is indicative of a witness who can't remember exactly what he was promised by who or when. The Court simply does not trust that Kohan's declaration in the motion for summary judgment accurately sets forth the salient facts.

In a November 2010 deposition, Kohan stated that the operating agreements were prepared in an effort to memorialize an oral agreement.[16] It follows that drafts of the operating agreements, especially the redlined versions prepared on behalf of the Kohan

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(d) Namwest would cause the titleholder of record to prepare and distribute an operating agreement for the entities owning the Wilde I, II, and III properties that was acceptable to Kohan;
(e) Namwest would cause the titleholder of record to entitle, develop, and sell the Wilde I, II, and III Properties;
(f) Interest and other charges on any indebtedness incurred in connection with the acquisition, entitlement, development, and sale of the Wilde I, II, and III Properties would be minimized at or below market rates; and
(g) Namwest would not engage in any conduct that increased the interest, management fees, or other project costs or fees incurred by Namwest or any entity owned or controlled by Namwest's members with respect to the Wilde I, II, and III Properties. Answer and Counterclaim (Docket #20) ¶ 19.

[15] The six representations are:
(a) I, or an entity owned or controlled by me, would receive a 27% ownership interest in the newly formed entity that would acquire title to the Wilde Property;
(b) I would be one of no more than two managers of the newly formed entity;
(c) the titleholder of record would timely finance and refinance the Wilde Property under the most competitive terms and conditions then achievable;
(d) the titleholder of record would timely entitle, develop and sell the Wilde Property;
(e) interest and other charges on any indebtedness incurred in connection with the acquisition, entitlement, development, and sale of the Wilde Property would be minimized at or below market rates; and
(f) Ezri Namvar and any entity owned or controlled by Ezri Namvar and/or members of his family would not engage in any conduct that increased the interest, management fees, or other project costs or fees with respect to the Wilde Property. Kohan Declaration (Docket #113) ¶ 16.

[16] Deposition of Kohan, November 30, 2010 (Docket #192) 102:16 – 103:2.
Q. When was the alleged agreement entered into?
A. The agreement was—we had a telephone conversation before we closed escrow and before I assigned the property to NTL I that included everybody on the phone, all the parties, including David Shein. That was—that had the marching order to prepare the Operating Agreement, based on that discussion. So we entered into that agreement, you know, before we closed escrow on the Club Rio.
Q. And the agreement was verbal; correct?
A. Correct.

Parties, are evidence of the alleged Oral Agreements.[17] If the operating agreements prepared by the Namwest Parties contained the terms as alleged by the Kohan Parties, then Kohan's various changes were material, and any agreement between Ezri and Kohan was, at best, an agreement to agree. Similarly, if Kohan and Ezri reached an agreement, any operating agreement prepared by Kohan should contain those terms. Conversely, if the redlined operating agreements prepared by the Kohan Parties memorialize the alleged terms, but the Namwest Operating Agreements do not, this raises a question of material fact as to whether the Oral Agreements exist.

The Court will first consider the key terms of the alleged Club Rio Oral Agreement.

i. Transfer of the Club Rio Option

Kohan transferred the Club Rio Option to NTL. This term is implied in each of the agreements.

ii. Kohan's 27% Interest

The December 2004 (Namwest) and February 2005 (Namwest) Operating Agreements both reflect ATTL holding a 25% interest in NTL and NTL II respectively. The June 2005 (Namwest), January 2006 (Kohan), March 2006 (Namwest), and May 2006 (Kohan) Operating Agreements all show ATTL holding a 27% interest in NTL II.[18] Kohan's 27% interest is buttressed by the various emails from counsel for the Namwest Parties referencing Kohan's 27% interest. Though not originally present, by June 27, 2005, this term was in the operating agreements.

[17] The Kohan Parties object to the Namwest Parties' submission of the operating agreements, claiming lack of relevance, lack of foundation, improper authentication, hearsay, and assumes facts not in evidence. The Court overrules the objections. The Court finds it particularly curious that the Kohan Parties would object to the Namwest Parties' Exhibit 15, since they used the same operating agreement as Exhibit 1 to *their* Response to the Motion to Dismiss their counterclaims (Docket #25) and as Exhibit 3 in Kohan's declaration in opposition to the November 2009 Settlement in the administrative case (Docket #449). Ironically, if the Court were to sustain the objections and not consider the operating agreements, the Kohan Parties would lose, as the Court has found that Kohan's Declaration alone does not create a triable issue of material fact.

[18] *See* Section 1.7 and Schedule 1 of each of the Operating Agreements

iii. Market and Sell Club Rio Property

The "only purpose" of the company in all the Operating Agreements is to develop, operate, and sell property described on Exhibit B.[19] Generally, Exhibit B lists the Club Rio, with two exceptions: the December 2010 (Namwest) Operating Agreement lists Town Lakes, and the March 2006 (Namwest) Operating Agreement lists a property's legal description.[20] This term was present in all Operating Agreements.

iv. Kohan is One of Two Managers

The December 2004 (Namwest) Operating Agreement lists Namwest as the sole manager.[21] Thereafter, each of the Operating Agreements list McBride and Kohan as members of the "Management Group" who will manage the company via unanimous consent, and state that if the Management Group cannot reach a consensus, Ezri is to break the tie. Both of Kohan's proposed operating agreements also list McBride and Kohan as one of two managers with Ezri as the tiebreaker, but contain additional language referring to Kohan and requiring that both members be fully informed and involved with management.

v. 100% Financing by Ezri

None of the operating agreements clearly identifies this provision. At the time the operating agreements were prepared, however, the Club Rio Property had already been purchased; thus Ezri clearly provided 100% of the financing to purchase it. The question, then, is what of financing the purchase of properties in the vicinity of the Club Rio Property? This too was a fait accompli by the time the parties exchanged the March 2006 (Namwest) and May 2006 (Kohan) Operating Agreements, because the Wilde I, II, and III Properties were all purchased by January 31, 2006.

While the parties did not agree on language regarding the ongoing financing of NTL II—Sections 2.1 and 6.2 of the Operating Agreements—these are issues for *ongoing* financing, not financing of the purchase of the properties.

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[19] Section 1.6.

[20] The legal description may be that of the Club Rio Property. For purposes of this decision, whether the legal description is the Club Rio Property is immaterial.

[21] Article III generally and Section 3.1 specifically of each Operating Agreement.

What then of the alleged terms in the Wilde Property Oral Agreement?

Two of the three terms (27% ownership and Kohan's position as one of two managers) are clearly present in the agreements beginning in February 2005. The final provision (development of the Wilde I, II, and III Properties) is absent in both of Kohan's redlined versions. If this provision was truly important to Kohan, there is no excuse for its absence, as NTL II purchased the Wilde I and II Properties in August 2005, more than four months before Kohan prepared the January 2006 (Kohan) Redlined Operating agreement, and purchased the Wilde III Property in January 2006, two months before Kohan prepared the March 2006 (Kohan) Redlined Operating Agreement.

As the above shows, each of the alleged contract terms regarding the Club Rio Property are contained in the June 2005 (Namwest) Operating Agreement. If these were the five terms agreed to, with no material terms yet to be negotiated, then Kohan should have signed the agreement. He did not.

The same logic holds true for the Wilde Oral Agreement. Despite the opportunity include it, Kohan omitted, from his own proposed drafts, one of the key terms of his alleged agreement. At best, these alleged agreements were merely agreements to agree. This conclusion is buttressed by Kohan's redlined versions of the operating agreements, in which he also includes has the key terms, but yet makes extensive changes elsewhere.

C. Disposition of Claims

Each of the claims is dependent, in no small part, on Kohan showing the existence of the Oral Agreements. Some claims fail on additional, independent grounds and warrant further comment.

i . Breach of Contract; Bad Faith (Contract).

No contract exists. Thus, there was no breach of contract or bad faith.

ii. Unjust Enrichment

"To recover under a theory of unjust enrichment, a plaintiff must demonstrate five elements: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and

impoverishment, and (5) the absence of a remedy provided by law." *Freeman v. Sorchych*, 245 P.3d 927, 936 (Ariz. App. 2011). First, the Court is unconvinced that the Namwest Parties have been enriched. The Club Rio Property and the Wilde Properties are gone. But for this case, they are conducting no business. More importantly, there is no evidence demonstrating the Kohan Parties' impoverishment. The mere claim that they will prove damages at trial is not enough.

iii. Fraud; Negligent Misrepresentation.

A showing of fraud requires a showing of all of nine elements:

> (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.

Peery v. Hansen, 585 P.2d 574, 577 (Ariz. App. 1978). "Fraud must be proven by clear and convincing evidence. In ruling on a motion for summary judgment, the trial judge views the evidence in light of the substantive evidentiary burden." *Enyart v. Transamerica Ins. Co.*, 985 P.2d 556, 562 (Ariz. App. 1998) (citations omitted).

A showing of negligent representation requires:

> 1. Defendant provided plaintiff or others with false information;
> 2. Defendant intended that plaintiff or others rely on the information and provided the information for that purpose;
> 3. Defendant failed to exercise reasonable care or competence in obtaining or communicating the information;
> 4. Plaintiff relied on the information;
> 5. Plaintiff's reliance was justified; and
> 6. As a result, plaintiff was damaged.

9A Ariz. Prac., Business Law Deskbook § 33:12 (2011-2012 ed.). "Negligent misrepresentation requires a misrepresentation or omission of a *fact*. A promise of future conduct is not a statement of fact capable of supporting a claim of negligent misrepresentation." *McAlister v. Citibank (Ariz.)*, 829 P.2d 1253, 1261 (Ariz. App. 1992).

Common elements to both claims are justifiable reliance and damage to the Kohan Parties. Taking the facts as alleged by the Kohan Parties as true, the Court does not believe they were justified in relying on Ezri's alleged representations. Keep in mind, this was a multi-million dollar land transaction involving several properties. Transferring

the Club Rio Option—supposedly an extremely valuable right—without a written contract was simply unreasonable. Moreover, the Kohan Parties have not presented any evidence of their damages. Under such circumstances, judgment in favor of the defendants is appropriate.

In addition to failing to meet the common elements, each claim fails on separate grounds. The Kohan Parties' fraud claim must fail because, even when cast in the most favorable light, they have not provided clear and convincing evidence that Ezri or others made a material representation. As discussed above, the Court does not and cannot rely on Kohan's declaration alone.

The Kohan Parties' Negligent Misrepresentation claim fails because the evidence does not show a misrepresentation or omission of fact. Promises of future conduct do not state facts, and cannot support a claim of negligent misrepresentation. *McAlister*, 829 P.2d at 1261. Here, the Kohan Parties' entire concept of the case rests on a future promise. The claim fails.

iv. Constructive Fraud; Breach of Fiduciary Duty

The Kohan Parties' claim for constructive fraud/breach of fiduciary duty is misplaced. Ezri is the alleged co-promoter. While co-promoters of a corporation have a duty to each other,[22] *see Malisewski v. Singer*, 598 P.2d 1014 (Ariz. App. 1979), the alleged co-promoter, Ezri, is not a defendant in this action.

v. Aiding and Abetting Breach of Fiduciary Duty

"A claim for aiding and abetting a tort requires proof that (1) the primary tortfeasor has committed a tort causing injury to the plaintiff; (2) the defendant knew the primary tortfeasor breached a duty; (3) the defendant substantially assisted or encouraged the primary tortfeasor in the breach; and (4) a causal relationship exists between the assistance or encouragement and [primary tortfeasors]'s breach." *Security Title Agency, Inc. v. Pope*, 200 P.3d 977, 988 (Ariz. App. 2008). "Substantial assistance means more than a little aid." 38 P.3d 12, 26 (Ariz. 2002).

[22] Arizona law does not impose express fiduciary duties on members of an LLC, absent an agreement to the contrary. *See* Arizona Limited Liability Company Act, A.R.S. § 29-601 through § 29-857.

As discussed, the claim for breach of fiduciary duty—the underlying tort required by the first factor—is misplaced and therefore fails. Even if the Court assumes, for the sake of argument, that Ezri breached a duty as co-promoter, the claim for aiding and abetting must fail, as the facts negate the third and fourth factors. The Namwest Parties negotiated with Kohan at length in an attempt to produce a written agreement. At one point, the exchanged drafts included terms reflecting all the representations Kohan alleges Ezri and others made to him. It can hardly be said that the Namwest Parties assisted or encouraged a breach, or that they induced Ezri or any other party to violate a fiduciary duty, when they were willing to discuss and include Kohan's requested terms. The negotiations indicate that the Namwest Parties were actively seeking a resolution favorable to all. Moreover, the fact that no agreement was signed does not indicate duplicity; it merely indicates that the negotiations were unsuccessful.

vi. Conversion.

"Conversion is . . . an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *Mobile Disc. Corp. v. Schumacher*, 676 P.2d 649, 651 (Ariz. App. 1983). Kohan claims that it was his potential membership interest that was converted. Kohan's Response (Docket #192) 14:1-24. Kohan cannot show a potential membership interest. Therefore, his conversion claim fails.

vii. Constructive Trust; Equitable Subordination

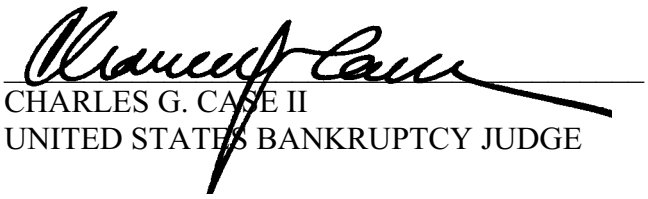
The Kohan Parties admit that the constructive trust and equitable subordination claims are in fact remedy requests. Kohan's Response (Docket #192) 12:15-21. Because the Court has found no basis for recovery, there can be no remedies.

V. Conclusion

The Court is left with little doubt that promises were made and broken by *both* parties. However, in the end, Kohan does not have enough evidence to show that NTL II made an *enforceable* promise to him.

The Kohan Parties' motion for summary judgment is denied. The Namwest Parties' motions for summary judgment are granted. Counsel for NTL II is to upload a form of judgment.

Dated: January 27, 2012



CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

COPY of the foregoing mailed by the BNC and/or
sent by auto-generated mail to:

All interested parties