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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

EDWARD D. AMOROSI et al., Plaintiffs and Appellants, v. DONALD KAISERMAN et al., Defendants and Respondents	B226627 (Los Angeles County Super. Ct. No. KC055416)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter J. Meeka, Judge. Affirmed.

Voss, Silverman & Braybrooke, Adrienne R. Hahn; Law Offices of Christopher E. Dwyer and Christopher E. Dwyer for Plaintiffs and Appellants.

Theodora Oringher, Richard J. Decker and Stacey L. Zill for Defendants and Respondents.

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INTRODUCTION

This is a dispute among partners. Plaintiffs Edward D. Amorosi, M.D., Donald Leigler, M.D., Mack R. Rogers, M.D., Ken Philip Wong, M.D., and David E. Zinke, M.D. are limited partners of Valley Imaging Medical Group, L.P. (VIP). Defendant Sunrise Medical Imaging, Inc. (Sunrise), previously known as Sunset Medical Group, Inc. (Sunset), is the general partner of VIP.[1] Defendant Donald Kaiserman, M.D., is a limited partner of VIP, VIP's medical director, and the president of Sunrise. Plaintiffs contend Kaiserman is the alter ego of Sunrise.

The gravamen of plaintiffs' suit is that defendants allegedly misappropriated partnership funds by paying the general partner excessive management fees, concealing accounting practices, improperly reimbursing Kaiserman for litigation costs associated with sexual harassment claims, and improperly using partnership funds for personal expenses.

The trial court entered judgment in defendants' favor after granting defendants' motion for summary judgment (MSJ). We affirm.

FACTS

1. *VIP's Business*

VIP is in the business of providing an out-patient magnetic resonance imaging (MRI) and computerized tomography (CT) facility at Queen of the Valley Hospital (Hospital) in West Covina. VIP owns MRI, CT and related equipment (Equipment), which it leases to Hospital. VIP also enters into agreements with radiologists, neuroradiologists and other specialists to interpret MRI and CT images, and contracts with Hospital to provide imaging services to Hospital's in-patients.

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[1] VIP is a nominal defendant. Plaintiffs assert derivative claims for the benefit of VIP. "Like a shareholder's derivative action, a limited partner's derivative suit is filed in the name of a limited partner, and the partnership is named as a defendant. Although a limited partner is named as the plaintiff, it is the limited partnership which derives the benefits of the action." (*Wallner v. Parry Professional Bldg., Ltd.* (1994) 22 Cal.App.4th 1446, 1449; accord *Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 425.)

2. *Original Limited Partnership Agreement*

In 1989, VIP was formed under the name of San Gabriel VIP, dba Valley Imaging Partnership (San Gabriel). Kaiserman, plaintiffs and others were limited partners in San Gabriel under San Gabriel's limited partnership agreement, dated June 30, 1989 (Original LPA). Hospital was the general partner of San Gabriel. Kaiserman was San Gabriel's medical director.

3. *Limited Partnership Agreement*

In 1993, Kaiserman, plaintiffs, Hospital, Sunset and others entered into a limited partnership agreement (LPA), the operative contract among the parties in this case. Under the LPA, Sunset, later known as Sunrise, became the general partner and plaintiffs and Kaiserman remained limited partners.

a. *Section 8.01*

At the heart of this litigation is the parties' dispute about the meaning of section 8.01 of the LPA, which provides: "The General Partner shall be paid a management fee equal to two percent (2%) of the gross charges billed to or with respect to patients by Hospital for services performed on the Equipment." The LPA does not define "gross charges billed." Defendants contend "gross charges billed" means the amount VIP billed patients for its services, whether or not the patients were required to pay the entire amount. Plaintiffs contend "gross charges billed" means the amount VIP actually collects from third-party insurance companies and patients.

b. *Other Provisions of the LPA*

The parties also dispute the meaning of other provisions of the LPA. We shall describe the most relevant sections.

Section 4.01 provides the limited partners are entitled to receive 99 percent of the net proceeds of the partnership, divided among them in accordance with their respective capital contributions. The remaining one percent of net proceeds is paid to the general partner.

Section 5.01 provides partnership expenses shall include, but are not limited to "costs incurred in connection with any litigation in which the Partnership is involved . . . ."

Section 5.03 provides VIP shall reimburse the general partner "for the actual cost of goods, services and materials used for or by" VIP. It also provides, however, the general partner shall not be reimbursed by VIP for "personal expenses."

Section 7.03 provides "[t]he financial books and records of the Partnership shall be maintained in accordance with generally accepted accounting principles, consistently applied on the cash basis."

Section 7.04 requires the partnership to maintain certain books and records, including financial statements for the partnership for the six most recent years. Section 7.05, in turn, provides each limited partner has the right, upon reasonable request, to inspect and copy during normal business hours the records required to be maintained by section 7.04.

Section 8.02 details the powers and authorities of the general partner to manage VIP. The general partner has numerous enumerated rights, including the right to manage assets, compromise and settle claims, and enter into contracts.

Finally, section 15.01 provides: "All claims, disputes and other matters in question arising out of or relating to this Agreement or the breach thereof shall be decided by arbitration. Notice of demand for arbitration by a Partner shall be filed in writing with the other Partners. The demand for arbitration shall be made within sixty (60) days after the claim, dispute or other matter in question has arisen."

4. *Billing Practices*

Before defendants filed their MSJ, the parties entered into a stipulation regarding billing methodology. The stipulation provided: "At all times from January1, 1989, Plaintiffs, and each of them, and VIP invoiced their patients and/or their patients' insurance companies in the same format, manner and substance as reflected on the sample Explanation of Benefits form attached hereto."

The Explanation of Benefits attached to the stipulation was a document produced by Anthem Blue Cross (Anthem), an insurance carrier, regarding certain services rendered by VIP. The document provided the following:

BILLED AMOUNT	ALLOWED AMOUNT	NOT ALLOWED AMOUNT	DEDUCTIBLE AMOUNT	COINSURANCE COPAYMENT AMOUNT	CLAIMS PAYMENT
800.00	106.95	693.05	106.95		0.00

Kaiserman stated in his declaration in support of the MSJ that "[t]he amount billed by VIP [i.e. $800] is equal to its customary charges for the particular service. The customary charges billed by VIP are set based on a determination of the reasonable amount charged by others for the same or similar services within the geographic area where the services are provided."

Kaiserman testified in his deposition that the allowed amount—$106.95—was "probably" the "contract rate" determined by the agreement negotiated between VIP and Anthem. The "not allowed amount" of $693.05 was the amount Anthem would not pay.

In the example provided above, Anthem paid $0 to VIP and the patient because the allowed amount was applied to the patient's deductible. Under VIP's contract with Anthem, VIP was permitted to collect $106.95 directly from the patient.

5. *Management Fees*

It is undisputed that the general partner of VIP was entitled to management fees pursuant to section 8.01 of the LPA. From the founding of VIP in 1989, under both the Original LPA and the LPA, Kaiserman calculated management fees in the same manner. He multiplied the "billed amount" for each invoice by two percent. In the example provided above, Kaiserman would have calculated a management fee of $16 ($800 x 0.02). In other words, Kaiserman assumed that the "billed amount" in invoices was the same thing as "gross charges billed" in section 8.01 of the LPA.

Although plaintiffs now contend management fees should have been calculated as two percent of the collected amounts of the invoices, they did not raise any objection to the manner in which Kaiserman calculated management fees until shortly before the initiation of this lawsuit. Plaintiffs did not raise any objections despite receiving annual financial statements which stated the amount of VIP's actual revenue, as well as the management fees paid to the general partner.

6. *The Gabrileson Report Regarding Management Fees*

On February 13, 2009, Steven C. Gabrielson, CPA, of Haynie & Company, sent a report to plaintiffs' counsel regarding the calculation of management fees by the general partner of VIP. In the report, Gabrielson discussed the term "gross charges billed" in section 8.01 of the LPA, which he referred to as "gross billings." Gabrielson opined that "gross billings" meant the maximum amount allowed by the contract between VIP and third parties (e.g. insurance companies), plus any sums collected directly from patients. He further stated: "In my opinion, when a company has no contractual right to collect a portion of the amount shown on a bill it produces, that amount should not be included in the definition of 'gross billings' for accounting purposes." Based on his definition of gross billings, Gabrielson concluded that for the period from October 1, 2005 through September 30, 2008, VIP's general partner was overpaid approximately $2,603,895 in management fees.

7. *Plaintiffs' Demand for Arbitration*

On March 9, 2009, plaintiffs' attorneys sent a letter to Kaiserman and VIP demanding arbitration pursuant to section 15.01 of the LPA. After defendants retained counsel, the attorneys for both sides engaged in written and oral communications regarding arbitration. By the end of March 2009, defendants took the position that plaintiffs' claims against Kaiserman were "non-arbitrable." Defendants refused to participate in the selection of an arbitrator.

8. *First Amended Complaint*

On April 8, 2009, plaintiffs commenced this action by filing a complaint in the superior court. On June 4, 2009, plaintiffs filed their first amended complaint (FAC), the operative pleading. We shall discuss the allegations in the FAC in some detail because they frame the issues for defendants' MSJ. (*Baptist v. Robinson* (2008) 143 Cal.App.4th 151, 159 (*Baptist*).)

The FAC attaches Gabrielson's report and alleges: "For the reasons stated in the report, Mr. Gabrielson's expert opinion is that the General Partner was overpaid management fees in the sum of $2,603,895.00 during the period October 1, 2005 through September 30, 2008."

The FAC sets forth six causes of action. The first three causes of action are for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) breach of fiduciary duties. Each of these causes of action is based on precisely the same set of allegations. (See FAC, pars. 25, 40, 44.)

The operative allegations in the first three causes of action include allegations that defendants engaged in "self-dealing," "gross misconduct," "bad faith," "misappropriation" of partnership funds, and "co-mingling" of partnership and personal funds. These statements are based on four factual claims, namely that defendants breached the LPA, breached the implied covenant of good faith and fair dealing, and breached their fiduciary duties to VIP by engaging in the following acts:

1. Paying the general manager excessive management fees, as set forth in Gabrielson's report;

2. Concealing and failing to disclose accounting practices (e.g. the definition of "gross charges billed" in section 8.01);

3. Improperly using partnership funds to pay for legal fees and expenses arising from sexual harassment claims against Kaiserman; and

4. Improperly using partnership funds to pay for unauthorized personal expenses.

The fourth cause of action is for conversion. This cause of action is based on the same factual allegations asserted in the first three causes of action. The FAC alleges that "[b]y means of the actions complained of herein," defendants wrongfully exercised dominion and control over plaintiffs' funds. It further alleges plaintiffs suffered damages in a sum no less than $2,603,895—the amount of alleged excessive management fees stated in the Gabrielson report.

The fifth cause of action is for an accounting and the imposition of a constructive trust. This cause of action is also based on the same alleged wrongdoing asserted in the first three causes of action. The FAC alleges defendants "have become involuntary trustees of the money wrongfully acquired and misappropriated by" defendants. It further alleges an accounting is necessary and appropriate for the six-year period prior to December 31, 2008, and from January 1, 2009 until the accounting is completed, so that the court can impose a constructive trust on money wrongfully held, diverted or taken by defendants.

The sixth cause of action is for an order to arbitrate claims. In this cause of action the FAC repeats, virtually word-for-word, the operative allegations in the first three causes of action. (See FAC pars. 25, 40, 44, 72.) Additionally, based on section 15.01 of the LPA and the communications between counsel for both sides in March of 2009, the FAC alleges defendants "waived" their right to arbitrate but plaintiffs have preserved their right to compel arbitration. Plaintiffs pray for an order compelling arbitration upon their "election" to seek arbitration.

9. *Motion for Summary Judgment*

On February 19, 2010, defendants filed their MSJ. The court granted the MSJ in an order dated May 7, 2010.

The order addressed plaintiffs' allegations that (1) the general partner was paid excessive management fees and (2) defendants concealed their accounting practices in the same discussion. The order stated: "Defendants contend that the court need only look at the express language of the LPA to determine that it means what it says, i.e. '2% of gross charges billed.' The language is clear on its face, and does not lend itself to

plaintiff's argument that it actually means '2% of the net revenue collected,' or '2% of gross billings-allowable amounts,' as Mr. Gabrileson opines. To adopt plaintiffs' interpretation would require rewriting the LPA."

The order further stated defendants' position was supported by the fact that management fees had been calculated on two percent of the gross charges billed without objection for 20 years, "even though each limited partner was provided with VIP's financial information annually, including a specific disclosure of the management fees paid. [The financial statements] clearly show the amount of revenues, and the amounts of management fees charged. A simple calculation would show that the management fee was not based on 2% of revenue collected, as plaintiffs' claim it should have been. Further, the limited partners always had the right to inspect books and records of VIP, yet they never chose to do so."

With respect to plaintiffs' allegation that defendants paid for personal expenses of Sunrise and Kaiserman, the order stated: "Defendants have met their initial burden of demonstrating that VIP money was not used to pay Sunrise or Kaiserman for personal expenses, via the declaration of Kaiserman to that effect. In opposition plaintiffs merely speculate that $180,651.00 of undocumented expenses may have been for personal expenses. However, plaintiffs must produce evidence, not mere speculation, to support their claim that defendants were reimbursed for personal expenses. While plaintiffs complain that they have not been provided all accounting records, they fail to identify what records they need, and also fail to request a discovery continuance."

With respect to plaintiffs' allegation that Kaiserman was improperly reimbursed for expenses related to sexual harassment lawsuits, the order stated: "The Court agrees with defendants that the litigation fees were properly paid pursuant to paragraph 5.01 of the LPA which states in pertinent part that the Partnership shall pay (1) costs incurred in connection with any litigation in which the Partnership is involved[.] It is undisputed that VIP was a defendant in each of the employee lawsuits."

The order concluded by stating that plaintiffs failed to offer any evidence sufficient to create a triable issue of fact as to any of the claims asserted in the FAC.

10. *Judgment and Appeal*

On June 9, 2010, judgment was entered in favor of defendants and against plaintiffs. Plaintiffs filed a timely appeal of the judgment.

CONTENTIONS

Plaintiffs do *not* seek to reverse the trial court's ruling as to first cause of action for breach of contract.[2] Rather, they challenge the trial court's ruling on the second, third, fourth, fifth and sixth causes of action.

Plaintiffs make two main arguments. They contend the trial court erroneously assumed all causes of action in the FAC rise or fall with plaintiffs' first cause of action for breach of contract. Plaintiffs also argue the trial court erroneously granted the MSJ when there were triable issues of material fact.

DISCUSSION

"A motion for summary judgment 'shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' [Citation.] A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action in question cannot be established or that there is a complete defense thereto. [Citations.] The moving defendant also bears the initial burden of producing evidence to make a prima facie showing of the nonexistence of any triable issue of material fact. [Citation.] If the defendant meets his or her burden of production, the burden shifts to the plaintiff to produce evidence showing the existence of a triable issue of material fact. [Citation.]

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[2] Plaintiffs state in their reply brief that they "concede that their trial counsel did not adequately address the issues raised by [defendants'] summary judgment motion as to this claim under governing legal standards of care and have filed a malpractice action against trial counsel."

"This court reviews an order granting a motion for summary judgment de novo. [Citation.] 'We apply the same three-step analysis required of the trial court. We begin by identifying the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine whether the moving party's showing has established facts which justify a judgment in movant's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.' [Citation.]" (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 931-932 (*Gutierrez*).)

1. *The Trial Court Correctly Addressed the Issues as Framed by the Pleadings*

The issues on a motion for summary judgment are framed by the pleadings. (*Gutierrez, supra,* 194 Cal.App.4th at p. 931; *Baptist, supra,* 143 Cal.App.4th at p. 159.) As discussed *ante,* all six causes of action in the FAC are based on four underlying factual allegations: (1) defendants paid the general manager excessive management fees, as set forth in Gabrielson's report; (2) defendants concealed accounting practices, such as the way they calculated "gross charges billed"; (3) defendants improperly used partnership funds to pay for legal fees and expenses arising from sexual harassment claims against Kaiserman; and (4) defendants improperly used partnership funds to pay for unauthorized personal expenses and entertainment by the general partner and Kaiserman.

Contrary to plaintiffs' contention, the other factual allegations in the FAC all relate to one or more of these four principal claims. For example, the FAC alleges defendants "[d]isregarded the 'cash basis' of accounting used by Valley Imaging Partnership as the basis for determining Dr. Kaiserman's 2% Management Fees." (FAC, pars. 25(b), 40(b), 44(b), 68(b).) This allegation is not a separate claim of wrongdoing. Rather, it is an argument in support of plaintiffs' first claim that defendants paid the general manager excessive management fees.

Plaintiffs argue the trial court "ignored the fact that the rates used to determine the management fee and raise revenue for the partnership were both established by and manipulated by Kaiserman, to his benefit and the partnership's detriment." However, plaintiffs did not make this factual assertion in the FAC or in their opposition to the MSJ. Plaintiffs thus forfeited the issue on appeal. (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591 [" '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court' "].)

Moreover, the evidence plaintiffs cite to support their "manipulation" claim—Kaiserman's deposition at pages 2091 to 2109 of the Clerk's Transcript—does not support their position. Kaiserman testified he signed the contract between VIP and Anthem and the contract between VIP and Blue Shield of California. He did not, however, testify he established or manipulated the "gross charges amount" on VIP's bills. We thus reject plaintiffs' argument that the trial court erroneously failed to consider plaintiffs' claim that Kaiserman manipulated the amount of gross charges billed.

Defendants make an additional argument regarding this issue. They ask this court to take judicial notice of a complaint for professional negligence and breach of contract filed by plaintiffs against their former counsel, Michael J. Lancaster and Stocker & Lancaster, LLP (Malpractice Complaint). (*Amorosi v. Lancaster* (Super. Ct. L.A. County, 2011, No. BC461072.) The Malpractice Complaint alleges: "All of the causes of action in the First Amended Complaint [in this action] were premised on the Breach of Contract claim over [the] method of accounting to be employed under the Limited Partnership Agreement. Defendants [Stocker and his law firm] failed to plead factual allegations independent of Breach of Contract to support the other causes of action pleaded."

Defendants argue that plaintiffs are bound by the "judicial admissions" in the Malpractice Complaint. We exercise our discretion to take judicial notice of the Malpractice Complaint. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) We do not, however, reach the merits of defendants' argument because we hold, for the reasons

stated herein, that all six of the causes of action in the FAC are based on the same factual assertions, and that the trial court correctly addressed the issues as framed by the pleadings.

2. *Defendants Are Entitled to Judgment as a Matter of Law with Respect to Plaintiffs' Claim That They Paid Excessive Management Fees to Themselves*

a. *Breach of Contract*

A major issue in the trial court was whether defendants' interpretation of section 8.01 of the LPA was correct. Defendants argued the term "gross charges billed" referred to the actual amount billed by VIP for services rendered. Plaintiffs argued "gross charges billed" referred to the amount allowed under VIP's contracts with insurance companies, or the actual amount collected from insurance companies and patients. The trial court agreed with defendants' interpretation and ruled that their payment of management fees did not breach the LPA, as plaintiffs argued. Because plaintiffs do not challenge that ruling on appeal, we assume for purposes of our analysis that defendants did not breach the LPA by paying excessive management fees.

b. *Breach of the Implied Covenant of Good Faith and Fair Dealing*

"It has long been recognized in California every contract contains an implied covenant of good faith and fair dealing that ' "neither party will do anything which will injure the right of the other to receive the benefits of the agreement." ' [Citations.] This covenant is 'read into contracts "in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose." ' " (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1120 (*Wolf*).)

The implied covenant cannot vary the express terms of the contract (*Carma Developers (Cal.) Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374 (*Carma*)) or impose duties or limits beyond the express terms. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 (*Guz*).) The parties to a contract " 'may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing. . . .' " (*Carma*, at p. 374.) The implied covenant "will only be recognized to further the contract's purpose; it will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself." (*Wolf, supra*, 162 Cal.App.4th at p. 1120.)

The implied covenant cannot be imposed on a subject that is completely covered by the contract's express terms. (*Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 804 (*Third Story Music*).) Thus, to the extent an implied covenant claim "seeks simply to invoke terms to which the parties *did* agree, it is superfluous." (*Guz, supra*, 24 Cal.4th at p. 352.) In other words, if the allegations supporting a breach of the implied covenant claim "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 (*Careau*); accord *Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 240 (*Aragon-Haas*) [holding that a breach of the implied covenant claim "adds nothing because the same conduct on defendant's part is alleged to constitute breach of both the employment contract and the covenant"].)

Here, plaintiffs alleged in the FAC and argued in their opposition to the MSJ that defendants' calculation of the management fee based on the amount VIP billed was a breach of *both* the LPA and the implied covenant of good faith and fair dealing. Further, plaintiffs sought the same damages for both causes of action. Accordingly, to the extent plaintiffs' breach of the implied covenant cause of action is based on an alleged excessive

payment of management fees, it is superfluous and should be disregarded. (*Guz*, *supra*, 24 Cal.4th at p. 352; *Careau*, *supra*, 222 Cal.App.3d at p. 1395; *Aragon-Haas*, *supra*, 231 Cal.App.3d at p. 240; *Third Story Music*, *supra*, 41 Cal.App.4th at p. 804.)

Plaintiffs argue that defendants breached the implied covenant because "[o]ver the years, the disparity between the gross billed amount on invoices and the contract rates with third party payors grew. As a result, Kaiserman's management fee continued to increase, while the partnership revenues, and distributions, decreased."

We reject this argument. " 'The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably. It is not enough to say that without the proposed implied covenant, the contract would be improvident or unwise or would operate unjustly. Parties have the right to make such agreements. The law refuses to read into contracts anything by way of implication except upon grounds of obvious necessity.' [Citation.]" (*Third Story Music*, *supra*, 41 Cal.App.4th at p. 809; see also *Wolf*, *supra*, 162 Cal.App.4th at pp. 1121-1122.)

We cannot rewrite the LPA even if it results in "unfair" management fees, as plaintiffs contend. The implied covenant cannot change the express terms of the LPA.

c. *Remaining Causes of Action*

The third and fourth causes of action in the FAC are for breach of fiduciary duties and conversion. In the trial court, the sole basis for plaintiffs' contention defendants' payment of management fees was wrongful, that is, tortious, was defendants' alleged breach of section 8.01 the LPA. The trial court, however, rejected that argument, and plaintiffs do not challenge it here.[3]

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[3] Plaintiffs contend Kaiserman owed them fiduciary duties as the general partner of VIP. Under the LPA, however, Sunrise is the general partner. Kaiserman thus did not have any fiduciary duties to plaintiffs unless, as plaintiffs contend, he is Sunrise's alter ego. But the trial court found "no evidence of alter ego exists." The only evidence plaintiffs cite on appeal is Kaiserman's deposition testimony that he is the sole shareholder and chief executive officer of Sunrise. This falls far short of establishing alter ego. (*Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1072 ["There are two

Plaintiffs argue for the first time on appeal a new basis for their breach of fiduciary duties and conversion causes of action, namely defendants' alleged manipulation of gross billings. As stated *ante*, however, plaintiffs forfeited this claim and, in any case, do not cite any evidence to support their position.

The fifth cause of action in the FAC is for an accounting and a constructive trust. The imposition of a constructive trust and an accounting are remedies, not independent causes of action. (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82.) Because plaintiffs cannot maintain an independent cause of action based on defendants' alleged payment of excessive management fees, they also cannot obtain the remedies of an accounting and a constructive trust based on that claim.

Finally, the sixth cause of action in the FAC is for an order to arbitrate claims. This too is not an independent cause of action. Moreover, as we shall explain *post*, plaintiffs have waived this claim.

3. *Defendants Are Entitled to Judgment as a Matter of Law with Respect to Plaintiffs' Claim That Defendants Concealed Accounting Practices*

a. *Defendants Met Their Initial Burden*

In Kaiserman's declaration in support of defendants' MSJ, he described and attached annual financial statements distributed to limited partners. The statements set forth VIP's revenues and management fees. Kaiserman stated in his declaration: "A simple review of the financial statement entries shows that the management fees do not equal two-percent (2%) of the medical fees collected." Kaiserman further stated that prior to this litigation plaintiffs never objected to management fees or inquired about the calculation of such fees.

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requirements for disregarding the corporate entity: first, that there is a sufficient unity of interest and ownership between the corporation and the individual or organization controlling it that the separate personalities of the individual and the corporation no longer exist; and second, that treating the acts as those of the corporation alone will sanction a fraud, promote injustice, or cause an inequitable result."].)

Additionally, Kaiserman stated that plaintiffs Zinke, Amorosi and Wong served on VIP's Advisory Committee for several years. During that time period these plaintiffs received financial statements four times a year and met with VIP's accountant on a quarterly basis to discuss VIP's finances. Nonetheless, "these plaintiffs did not object to the method for calculating or the amount of management fees paid to Sunrise."

This evidence refutes plaintiffs' claim that defendants concealed their accounting practices, in particular the method by which they calculated management fees.

b. *Plaintiffs Did Not Raise a Triable Issue of Material Fact*

Each of the plaintiffs filed declarations in support of their opposition to the MSJ. In their declarations, plaintiffs conceded that at annual meetings Kaiserman circulated financial statements and made a presentation regarding VIP's finances. However, plaintiffs claimed that "[a]t the conclusion of the presentation, all financial statements were collected. No Limited Partners were allowed to take any financial statements to their attorneys or financial advisors."

Plaintiffs do not allege they *requested* to inspect and copy VIP's financial statements during normal business hours pursuant to their rights under section 7.05(b)(1) of the LPA, and that the general partner refused such a request. They also do not contend they were suspicious of any alleged wrongdoing by defendants for a period of two decades. Indeed, plaintiffs contend they had no knowledge of the way management fees were calculated until they received Gabrielson's report dated February 13, 2009. At most, therefore, plaintiffs' statements indicate that for 20 years plaintiffs and defendants had a different view about how management fees should be calculated and that the two sides did not discuss the matter. This does not raise a triable issue of material fact regarding whether defendants *concealed* their accounting practices, including the way they calculated management fees.

Plaintiffs further stated in their declarations: "The non-disclosures by the Defendants have been extensive and continue to this day. Numerous demands have been made to see the books and records and financial information by Plaintiffs in 2008, 2009 and 2010, all of which were objected to by Defendants. Questions have been asked and

not answered. Defendants took six months to get basic partnership and accounting documents to Plaintiffs under threat of Motions." (Boldface omitted.)

Plaintiffs' allegations about defendants' failure to provide information about VIP, both before and after this action commenced, do not raise a triable issue of material fact regarding whether defendants concealed the manner in which they calculated management fees. Plaintiffs did not present any evidence indicating defendants made false statements about the way management fees were calculated, that plaintiffs asked defendants about the calculation of management fees before commencing this action, or that defendants had any reason to believe plaintiffs disputed the way they calculated management fees before the Gabrielson report.

4. *Defendants Are Entitled to Judgment as a Matter of Law with Respect to Plaintiffs' Claim That They Improperly Used Partnership Funds to Pay for Legal Fees and Expenses Arising From Sexual Harassment Claims Against Kaiserman*

In their opening brief plaintiffs argue: "Kaiserman . . . engaged in repeated sexual harassment of employees, which resulted in numerous lawsuits against VIP. Kaiserman's defense of and settlement of these lawsuits were paid from VIP funds, significantly reducing the profits paid to the limited partners, including appellants."

Plaintiffs, however, do not cite any evidence in the record to support their argument. Instead, they cite their own allegations in the unverified FAC. This is not evidence. (*Redante v. Yockelson* (2003) 112 Cal.App.4th 1351, 1355 ["The plaintiff may not rely on the mere allegations or denials of the pleadings to show a triable issue of material fact exists"].) Plaintiffs therefore forfeited the argument. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 (*Guthrey*) [failure to cite evidence in record results in forfeiture of issue].)

We nonetheless reviewed the separate statements filed in the trial court and the evidence cited therein. Our review of these documents leads us to conclude that plaintiffs did not raise a triable issue of material fact in the trial court regarding the sexual harassment suits against Kaiserman.

a. *Defendants Met Their Initial Burden*

In their separate statement, defendants cited portions of Kaiserman's declaration and deposition. Kaiserman stated in his declaration: "Since January 2001, I have been named as a co-defendant with VIP in several lawsuits brought by individuals who were employed by or provided services to VIP. In each of the actions, both intentional and negligence based claims were asserted against me and VIP arising out of and/or relating to the discharge and performance of my duties and obligations as the Medical Director of VIP. In no action have I ever been adjudicated by a Court or arbitrator to be personally liable for any of the wrongdoing alleged in the complaints filed in those actions." Kaiserman further stated: "I have denied, and continue to deny, the allegations of wrongful contact asserted by the plaintiffs in the lawsuits in which I have been named as a defendant with VIP." Likewise, in his deposition, Kaiserman testified that he did not harass anyone and that there has never been a specific finding against Kaiserman on a sexual harassment claim by any judge or arbitrator. This shifted the burden.

b. *Plaintiffs Did Not Raise a Triable Issue of Material Fact*

In their separate statements, plaintiffs did not cite any evidence regarding the sexual harassment suits. Instead, they cited their own declarations, which in turn merely discussed Kaiserman's declaration. Each of the plaintiffs stated: "This [Kaiserman's explanation of the sexual harassment suits] is a poor attempt to summarize all of the lawsuits that have been filed against Dr. Kaiserman, the results of those lawsuits and claims. Plaintiffs are still investigating the lawsuits." This statement does not constitute evidence of wrongdoing by defendants or raise a triable issue of material fact.

5. *Defendants Are Entitled to Judgment as a Matter of Law with Respect to Plaintiffs' Claim That They Improperly Used Partnership Funs to Pay for Unauthorized Personal Expenses*

In their opening brief plaintiffs argue that Kaiserman improperly reimbursed himself for personal expenses. Plaintiffs, however, do not cite any evidence to support this claim. Instead, they merely cite the FAC, which is not evidence. Plaintiffs thus forfeited this argument on appeal. (*Guthrey*, *supra*, 63 Cal.App.4th at p. 1115.)

Moreover, our review of the separate statements filed in the trial court indicates plaintiffs did not raise a triable issue of material fact regarding defendants' alleged improper payment of personal expenses.

a. *Defendants Met Their Initial Burden*

Fact 26 in defendants' separate statement stated: "The only expenses Kaiserman submitted to VIP for reimbursement were business expenses incurred as a result of his position as the Medical Director of VIP."

In support of this assertion, Kaiserman cited his own declaration. There, Kaiserman denied the allegations in the FAC that he improperly used partnership funds to pay for his own personal expenses. Kaiserman also stated that in his capacity as medical director of VIP, he was reimbursed for expenses such as attending seminars and for meals at meetings with VIP personnel. He denied, however, requesting "reimbursement from VIP for any of my personal expenses unrelated to my employment with VIP."

With respect to the rental box VIP had at the Staples Center, Kaiserman stated that "[t]his expense was not a personal expenses of mine, and it was not incurred on behalf of Sunrise. To the contrary, it was an expense of VIP incurred for the purpose of marketing."

Additionally, in their separate statement, defendants cited deposition testimony by plaintiffs Leigler, Wong, and Amorosi, which indicated these plaintiffs did not have personal knowledge of Kaiserman's alleged improper reimbursement of personal expenses.

This evidence shifted the burden to plaintiffs to show some evidence that defendants were improperly paid for personal expenses.

b. *Plaintiffs Did Not Raise a Triable Issue of Material Fact*

In their declarations in opposition to the MSJ, plaintiffs Zinke, Amorosi, Leigler and Wong each made a statement about a report from Haynie & Company allegedly attached to the FAC, unidentified "financial statements" of VIP, and unspecified

deposition testimony of Kaiserman.[4] Defendants objected to this statement on, among other grounds, "No Foundation/No Personal Knowledge" and the "documents speak for themselves."

The trial court summarily overruled all of defendants' objections to the declarations filed in opposition to defendants' separate statement. There is a split in authority about whether a trial court's rulings on evidentiary objections based on papers alone in a summary judgment proceeding is reviewed for abuse of discretion or reviewed de novo. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255, fn. 4.) We hold that under either standard, the trial court incorrectly overruled the objections.

Plaintiffs did not establish a foundation for their personal knowledge, if any, of the facts they testified about. (Evid. Code, § 702.) As the trial court correctly noted in its order granting the MSJ, plaintiffs merely speculated that certain alleged undocumented expenses may have been personal expenses. Moreover, plaintiffs did not attach the report, financial statements or deposition transcript to the declarations, nor did they indicate the documents were not in their possession or were not reasonably procurable by use of the court's process or by other available means. Defendants thus cannot testify about the contents of the documents. (Evid. Code, § 1523.)

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[4] Plaintiffs each stated the following: "The preliminary report from Haynie & Company attached to the FAC also describes the failure of Dr. Kaiserman/the General Partner to account for expenses. There are numerous pages of expense entries with no explanation totaling over $200,000.00. During the deposition of Dr. Kaiserman, he was only able to identify two (2) of the expense items. Coffee and the Staples box seats. Until and unless Dr. Kaiserman/the General Partner can justify money taken from VIP as legitimate business expenses, they are unauthorized expenses. In addition, the unsigned Medical Director Agreement expired in 2000. The financial statements of VIP do not show any expenses paid to Dr. Kaiserman as Medical Director. They do show Dr. Kaiserman receiving a duplicate salary for the same management duties he is required to perform as General Partner, according to his deposition testimony, and money being paid to his son and others to perform the duties of Medical Director." (Boldface omitted.)

Because plaintiffs did not file admissible evidence to support their claim that defendants improperly used partnership funds to pay for personal expenses, they did not raise a triable issue of material fact.

6. *Plaintiffs Waived Their Demand for Arbitration*

Defendants argue plaintiffs waived their right to demand arbitration. We agree.

" 'In determining waiver, a court can consider "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party." ' " (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.)

Here, plaintiffs did not file a petition to compel arbitration. Although they alleged in the FAC that they preserved their right to arbitration if and when they made an "election" to do so, they never made the election. Plaintiffs did not file a motion or otherwise request the trial court to compel defendants to arbitrate. Instead, plaintiffs vigorously pursued their action in the superior court by, inter alia, propounding discovery and demanding a jury trial. Plaintiffs cannot initiate and pursue litigation in the superior court over a period of more than a year and still claim they have preserved their right to "elect" arbitration. That ship long since sailed. Plaintiffs waived their right to arbitrate their claims against defendants. The trial court thus correctly granted defendants summary judgment with respect to plaintiffs' sixth cause of action for an order to compel arbitration.

DISPOSITION

The judgment dated June 9, 2010, is affirmed. Defendants are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.