Business Litigation Session of Superior Court
Docket: **2084CV00254-BLS2**
Date: **June 8, 2020**
Parties: **CRASHFUND LLC, WAYNE CHANG, JEFFREY SEIBERT, AND MICHAEL WINTER v FAZE CLAN, INC., WANDERSET, INC., GREGORY SELKOE, AND PHILIP GORDON**
Judge: **/s/Kenneth W. Salinger Justice of the Superior Court**

MEMORANDUM AND ORDER ON MOTION TO DISMISS BY DEFENDANTS FAZE CLAN, SELKOE, AND GORDON

Plaintiffs invested in Wanderset LLC, which then merged into defendant Wanderset, Inc. In exchange for Plaintiff's cash investments, Wanderset granted Plaintiffs some conditional rights, including the right to obtain specified shares of capital stock if there was a change of control of Wanderset.

Plaintiffs contend that such a change of control occurred because Defendants functionally merged Wanderset into FaZe Clan, Inc. The individual defendants are alleged to have acted as corporate officials. Gregory Selkoe was the founder and CEO of Wanderset and is now president of FaZe Clan. Philip Gordon was chief legal officer of Wanderset and now serves in the same role for FaZe Clan.

Plaintiffs assert that FaZe Clan is liable for breach of contract under two alternative theories, alleging that: (a) as Wanderset's successor in interest, FaZe Clan is contractually obligated to issue FaZe Clan stock to the Plaintiffs; or (b) if Plaintiffs had received Wanderset stock as promised they could have converted it to FaZe Clan stock, like other Wanderset investors were allowed to do, and FaZe Clan has successor liability for those consequential damages. Plaintiffs also assert claims against FaZe Clan for breach of the implied covenant of good faith and fair dealing, declaratory judgment, and an equitable accounting. And they assert claims against FaZe Clan as well as Selkoe and Gordon for intentional interference with contractual relations and unjust enrichment.

FaZe Clan, Selkoe, and Gordon have moved to dismiss all claims against them under Mass. R. Civ. P. 12(b)(6). The Court will allow the motion in part as to so much of the contract claim that asserts Plaintiffs have a right to obtain FaZe Clan stock, the tortious interference claim against Selkoe and Gordon, the claim for declaratory judgment against FaZe Clan, and the claim that FaZe Clan should undertake an equitable accounting. It will deny the motion in part as

to Plaintiffs' alternative theory of contractual liability based on consequential damages, rather than any right to obtain FaZe Clan stock, and as to the other claims. The facts alleged plausibly suggest that FaZe Clan may have successor liability for Wanderset's alleged breach of contract, that FaZe Clan may be liable for tortious interference, and that Plaintiffs may be entitled to recover against all three of these defendants for unjust enrichment.[1]

1. Contract Claim—Two Theories. In Count I of the amended complaint, Plaintiffs assert claims for breach of contract against Wanderset and FaZe Clan.

Plaintiffs' contractual rights are set forth in similar investment instruments that each Plaintiff entered into with Wanderset. Each contract is called a Simple Agreement for Future Equity. The parties refer to these contracts as "SAFEs."

The SAFEs gave Plaintiffs conditional rights to have their investment repaid in full or to obtain specified amounts of Wanderset stock, that would ripen if particular circumstance arose.

Most relevant here is the provision that Plaintiffs would have the right to obtain an amount of Wanderset stock proportionate to their investment if Wanderset were to experience a "Liquidity Event." The SAFEs define that term to mean either a "Change of Control" or an "Initial Public Offering." In turn, "Change of Control" is defined to include any merger of Wanderset in which the holders of the voting securities in the company do not retain a majority of the total voting power of the surviving or resulting entity. It also includes any sale or other disposition of all or substantially all of Wanderset's assets.

Plaintiffs' claim for breach of contract is based on several allegations. Plaintiffs allege that in April 2019 there was a "Change of Control" because "Wanderset functionally merged with FaZe Claim." They allege that FaZe Clan assumed Wanderset's business operations and absorbed most of its management team and staff. Plaintiffs assert that some of Wanderset's shareholders, including management and staff, were allowed to replace their Wanderset stock with FaZe Clan stock. And they allege that other holders of Wanderset notes, who like Plaintiffs had conditional rights to obtain Wanderset stock, were allowed to convert their rights against Wanderset into rights against FaZe Clan. Finally,

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[1] To survive a Rule 12(b)(6) motion to dismiss, a complaint must allege facts that, if true, would "plausibly suggest[] ... an entitlement to relief." Lopez v. Commonwealth, 463 Mass. 696, 701 (2012), quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), and Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

Plaintiffs further allege that, unlike other similarly situated Wanderset investors, they have been denied any chance to obtain FaZe Clan stock proportionate to their Wanderset investment.

As noted above, the amended complaint can be read as asserting a claim for breach of contract against FaZe Clan under two alternative theories. One of these theories must be dismissed under Rule 12(b)(6). The other, factually distinct contract claim survives the motion to dismiss.

1.1. FaZe Clan Stock as Contractual Right. Plaintiffs claim in part that, as a result of the alleged de facto merger, they have a contractual right under their SAFEs not only to obtain Wanderset stock but also to convert those shares into FaZe Clan stock.

This version of the contract claim fails as a matter of law. The unambiguous language of the SAFEs makes clear that Plaintiffs only had a conditional right to obtain shares of Wanderset stock. The SAFEs do not give Plaintiffs any right to obtain FaZe Clan stock, or to convert any rights that Plaintiffs had against Wanderset into rights against FaZe Clan.[2]

When they entered into the SAFEs, Plaintiffs and Wanderset evidently anticipated that if Wanderset were to be legally merged with or into another company, and the Plaintiffs were to exercise their contractual right to obtain Wanderset stock in light of the coming change of control, then Plaintiffs' new

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[2] The interpretation of the parties' unambiguous written contracts "is a question of law" that the court may resolve when deciding whether a party has asserted a viable contract claim. See, e.g., Eigerman v. Putnam Investments, Inc., 450 Mass. 281, 287 (2007) (affirming dismissal of complaint for failure to state a viable claim for breach of contract). Similarly, whether language used in a contract "is ambiguous is also a question of law for the court." Berkowitz v. President &

Fellows of Harvard College, 58 Mass. App. Ct. 262, 270, rev. denied, 440 Mass. 1101 (2003) (ordering dismissal of complaint for failure to state a viable claim for breach of contract).

Where the material provisions of a contract are unambiguous, as they are here, a court "cannot accept the bare assertion in the plaintiff's complaint" that the opposing party is liable for breach of the contract, when that assertion is based on a misreading of the contract. Eigerman, 450 Mass. at 287; accord Flomenbaum v. Commonwealth, 451 Mass. 740, 751-752 & n.12 (2008) (granting motion to dismiss because plain language of contract made clear that Commonwealth could terminate chief medical examiner before completion of five year term).

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ownership interest in Wanderset would result in some ownership interest in the merged entity by virtue of the legal merger.

Plaintiffs do not allege that Wanderset was legally merged with or into FaZe Clan, however. They allege instead that there was a de facto merger between the two companies. In this context the difference is significant.

Accepting as true the allegation that there was a de facto merger, that means FaZe Clan is liable as the successor entity for all of Wanderset's prior liabilities. See generally Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 556 (2008).

But the alleged de facto merger would not give Plaintiffs any right to obtain FaZe Clan stock, or to convert shares of Wanderset stock into FaZe Clan shares. The facts alleged do not plausibly suggest that FaZe Clan has any actual or implied contractual obligation to issue stock to the Plaintiffs. Since Plaintiffs do not allege that they had any contract with FaZe Clan, and their SAFEs only gave them conditional rights to obtain Wanderset stock, the claim that Plaintiffs have a contractual right to obtain FaZe Clan stock fails as a matter of law.

1.2. FaZe Clan Stock as Consequential Damages. As Plaintiffs point out in their motion papers, however, Count I of the amended complaint can also be read as asserting that FaZe Clan has successor liability for Wanderset's alleged breach of contract even if Plaintiffs have no contractual right to convert any Wanderset stock into FaZe Clan stock. Under this alternative theory, Plaintiffs allege that (i) Wanderset breached its obligation to issue Wanderset stock to the Plaintiffs, (ii) if Wanderset had issued stock to Plaintiffs then FaZe Clan would have allowed Plaintiffs to convert their interests into FaZe Clan stock, just as it did for other investors in or owners of Wanderset, and (iii) that FaZe Clan has successor liability for these alleged consequential damages

FaZe Clan contests the factual basis for this claim. It argues that other Wanderset investors or owners who received FaZe Clan stock were in materially different circumstances than Plaintiffs, and Plaintiffs would not have been able to obtain FaZe Clan stock even if they had received Wanderset stock.

But FaZe Clan's disagreement with the facts alleged in the complaint or the inferences that Plaintiffs draw from those facts provides no basis for dismissing this version of Plaintiffs' contract claim. At this stage of the case, the Court must assume that the factual allegations in the complaint are true and must draw "every reasonable inference in favor of the plaintiff[s]" from those allegations. Rafferty v. Merck & Co., Inc., 479 Mass. 141, 147 (2018).

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Plaintiffs' theory of consequential damages appears to be viable, assuming they can prove the facts they have alleged. Where one party to a bilateral contract breaches its contractual obligations, the other party is entitled to recover all reasonably foreseeable consequential damages caused by the

breach. See Pierce v. Clark, 66 Mass. App. Ct. 912, 914 (2006). Consequential damages for breach of contract are damages "that cannot be reasonably prevented and arise naturally from the breach, or which are reasonably contemplated by the parties." Selmark Assocs., Inc. v. Ehrlich, 467 Mass. 525, 545 (2014), quoting Polaroid Corp. v. Travelers Indem. Co., 414 Mass. 747, 762 (1993).

And the facts alleged in the complaint also plausibly suggest that FaZe Clan may be liable to compensate Plaintiffs pursuant to their SAFE's with Wanderset under a "de facto merger" theory of successor liability. See generally Milliken & Co., 451 Mass. at 557 (summarizing factors characterizing de facto mergers). This is not an issue that can be resolved on a motion to dismiss.

2. Implied Covenant Claim. The facts alleged in the complaint also plausibly suggest that Wanderset violated the implied covenant of good faith and fair dealing, and that FaZe Clan has successor liable for any resulting damages.

Like all contracts in Massachusetts, the SAFEs entered into by Wanderset include an implied covenant of good faith and fair dealing. See, e.g., Weiler v. PortfolioScope, Inc., 469 Mass. 75, 82 (2014). This implied covenant provides "that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract...." Id., quoting Druker v. Roland Wm. Jutras Assocs., Inc., 370 Mass. 383, 385 (1976).

Plaintiffs need not allege that Wanderset acted in bad faith in order to state a claim for breach of the implied covenant; this claim is made out if one party to a contract failed to act in good faith and thereby deprived the other party of at least some of what it bargained for. See, e.g., A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. 419, 434 (2018).

The Court recognizes, as FaZe Clan correctly notes, that the implied covenant "does not create rights or duties beyond those the parties agreed to when they entered into the contract." Boston Med. Ctr. Corp. v. Secretary of Executive Office of Health & Human Servs., 463 Mass. 447, 460 (2012) (affirming dismissal of claim), quoting Curtis v. Herb Chambers 1-95, Inc., 458 Mass. 674, 680 (2011).

And it appears that Wanderset retained the discretion to transfer its business to FaZe Clan in a manner that made good business sense.

But the implied covenant requires that such discretion be exercised in good faith and not in a manner that unfairly deprives Plaintiffs of their contractual rights, including their right to obtain Wanderset stock if there was a change of control of the company. See generally S.M. v. M.P., 91 Mass. App. Ct. 775, 782783 (2017) (implied covenant requires that when party exercises discretionary right it must do so in good faith); see also Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 473 (1991) (use of discretionary right as pretext can violate implied covenant).

Since the SAFEs gave Plaintiffs conditional rights they could exercise under certain circumstances, Wanderset had an obligation under the implied covenant to protect Plaintiffs' ability to exercise those rights "in an effective manner." See Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 381 (2004) (addressing interplay of implied covenant and conditional right of first refusal). In other words, Wanderset "was prohibited from obstructing" Plaintiffs' conditional rights. Id. at 384.

Plaintiffs allege that the parties controlling Wanderset decided to merge the company with FaZe Clan and deliberately structured the transaction as a de facto rather than a legal merger because they did not want Plaintiffs to obtain Wanderset stock that would have converted to FaZe Clan stock if there had been a legal merger. These allegations plausibly suggest that Wanderset violated the implied covenant, and that as a result of the alleged

de facto merger FaZe Clan can be held liable (as Wanderset's successor) for the alleged resulting harm suffered by the Plaintiffs.

3. Interference Claim. In Count III, Plaintiffs allege that they "have valid and enforceable agreements with Wanderset and FaZe Clan pursuant to the SAFEs," and that all Defendants intentionally and unlawfully interfered with Plaintiffs' rights under those contracts.

Though Plaintiffs assert that Defendants tortiously interfered with a "contractual and advantageous relationship," the facts alleged only state a claim for interference with contractual relations. The only business relationship that Plaintiffs allege they had with Wanderset or FaZe Clan was defined by contract. Plaintiffs do not allege that Defendants interfered with any other advantageous relationship. As result any claim for intentional interference must be for tortiously inducing a breach of contract, not for interfering with a non-contractual advantageous business relationship. Cachopa v. Town of Stoughton, 72 Mass. App. Ct. 657, 658 n.3 (2008).

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To state a claim for intentional interference with contractual relations, a party must allege facts plausibly suggesting that: "(1) [it] had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." Weiler, 469 Mass. at 84, quoting G.S. Enters., Inc. v. Falmouth Marine, Inc., 410 Mass. 262, 272 (1991).

3.1. FaZe Clan's Alleged Interference. Plaintiffs appear to allege that FaZe Clan interfered with two different contractual relationships—one between FaZe and the Plaintiffs, and the other between Wanderset and the Plaintiffs.

The complaint fails to state any viable claim that FaZe Clan interfered with its own purported contract with the Plaintiffs. As discussed above, the facts do not plausibly suggest that Plaintiffs ever had any contract with FaZe Clan. In any case, FaZe Clan could not be held liable in tort for interfering with its own contract. See Psy-Ed Corp. v. Klein, 459 Mass. 697, 716-717 (2011).

Nonetheless, the facts alleged plausibly suggest that FaZe Clan induced Wanderset to breach its contractual obligation to issue stock to the Plaintiffs, that FaZe Clan did so with the improper motive that it wanted avoid structuring its merger with Wanderset in a way that would give Plaintiffs any right to become part owners of FaZe Clan, and that Plaintiffs suffered injury as a result. That states a viable claim for tortious interference against FaZe Clan.

3.2. Selkoe's and Gordon's Alleged Interference. In contrast, the Court will dismiss the interference claims against Selkoe and Gordon because "actual malice" is a necessary element of these claims and the facts alleged do not plausibly suggest that Selkoe or Gordon acted with "actual malice."

Plaintiffs contend that Selkoe and Gordon engaged in tortious interference through actions they took as corporate officials of Wanderset and FaZe Clan.

As a result, "actual malice" is an additional part of the interference claim against Selkoe and Gordon. Where, as here, "the defendant is a corporate official acting in the scope of his corporate responsibilities, a plaintiff has a heightened burden of" alleging and later proving that "the improper motive or means constituted 'actual malice,' that is, 'a spiteful, malignant purpose, unrelated to the legitimate corporate interest.' " Psy-Ed Corp., 459 Mass. at 716, quoting Blackstone v. Cashman, 448 Mass. 255, 260-261 (2007), and Wright v. Shriners Hosp. for Crippled Children, 412 Mass. 469, 476 (1992). In other words, to

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state a claim for intentional interference that satisfies the actual malice element, a plaintiff must allege facts plausibly suggesting that a corporate official "was personally hostile or harbored ill will toward the plaintiff." Sklar v. Beth Israel Deaconess Med. Ctr., 59 Mass. App. Ct. 550, 554 (2003).

"[T]he 'actual malice' standard for proving improper motive or means on the part of a corporate official is a heightened burden placed on the plaintiff, not a defense that must be proved by a defendant." Blackstone, 448 Mass. at 261 n.10.

The facts alleged in the complaint do not plausibly suggest that Selkoe or Gordon acted with "actual malice." Plaintiffs allege that Selkoe and Gordon induced Wanderset to violate the SAFEs because they did not want to dilute their personal ownership interests in Wanderset or their anticipated ownership interest in FaZe Clan. But an alleged motivation of personal, financial gain, standing alone, does not rise to the level of "actual malice" as a matter of law. King v. Driscoll, 418 Mass. 576, 587 (1994) (evidence that employee was terminated so that company could buy back his stock and defendant employees could benefit financially held insufficient to establish actual malice and improper interference); see also United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 817 (1990) (desire to obtain personal financial gain is not "improper motive" for purpose of proving intentional interference claim).

The Court will therefore dismiss this claim against Selkoe and Gordon.

4. Unjust Enrichment Claim. In contrast, the facts alleged the complaint plausibly suggest that Plaintiffs may be able to recover against FaZe Clan, Selkoe, and Gordon under an "unjust enrichment" theory.

"Unjust enrichment occurs when a party retains the property of another 'against the fundamental principles of justice or equity and good conscience.' " Bonina v. Sheppard, 91 Mass. App. Ct. 622, 625 (2017), quoting Santagate v. Tower, 64 Mass. App. Ct. 324, 329 (2005). Whether retention of money or some other benefit is unjust "turns on the reasonable expectations of the parties." Id., quoting Metropolitan Life Ins. Co. v. Cotter, 464 Mass. 623, 644 (2013).

As explained above, Plaintiffs allege that Selkoe and Gordon engineered a de facto merger of the two corporate defendants in a deliberate attempt to deprive Plaintiffs of an ownership stake in the combined companies. If Plaintiffs can prove what they allege, they may be able to show that these three Defendants have unjustly held onto property rights that would have gone to Plaintiffs if Wanderset had been legally merged with FaZe Clan.

That is enough to state a claim for unjust enrichment. Unlike for the claim of tortious interference, Plaintiffs need not allege that Selkoe and Gordon acted with actual malice to state a claim for unjust enrichment against them.

Furthermore, this claim may proceed against FaZe Clan, Selkoe, and Gordon even though Plaintiffs had entered into express contracts with Wanderset.

"Ordinarily, a claim of unjust enrichment will not lie 'where there is a valid contract that defines the obligations of the parties.' "Metropolitan Life Ins. Co. v. Cotter, 464 Mass. 623, 641 (2013), quoting Boston Med. Ctr. Corp. v. Secretary of Executive Office of Health & Human Servs., 463 Mass. 447, 467 (2012). That is because "[a] valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment." Boston Med. Ctr. Corp., 463 Mass. at 467, quoting Restatement (Third) of Restitution and Unjust Enrichment § 2 (2011).

But Plaintiffs had no contract with FaZe Clan, Selkoe, or Gordon. And the contracts they entered into with Wanderset did not contemplate that the Defendants would engineer a de facto merger to undermine Plaintiffs' contractual rights under the SAFEs, as alleged in the amended complaint.

Since the complaint alleges facts plausibly suggesting that Plaintiffs are entitled to quasi-contractual compensation based on circumstances not addressed or contemplated in their contracts with Wanderset, it states a viable claim for unjust enrichment. See Kennedy v. B.A. Gardetto, Inc., 306 Mass. 212, 216-217 (1940) (existence of express contract does not bar implied contract claim concerning "distinct and independent matters") (quoting Gage v. Tirrell, 91 Mass. (9 Allen) 299, 306 (1864)).

5. Declaratory Judgment Claim. In Count V, Plaintiffs seek a judgment declaring that they are shareholders of FaZe Clan. This claim fails because Plaintiffs have no right to obtain FaZe Clan stock, as discussed in § 1.1 above. The Court will therefore dismiss this claim as against FaZe Clan.

The Supreme Judicial Court recently clarified the analysis that a judge should undertake when evaluating a motion to dismiss a claim for declaratory relief under Rule 12(b)(6), and held that a claim for declaratory relief may properly be dismissed without declaring the rights of the parties. See Buffalo-Water 1, LLC v. Fidelity Real Estate Co., LLC, 481 Mass. 13, 17-22 (2018).

The judge must first determine whether the claim was properly brought, meaning that there is an actual controversy that could be resolved by a

declaration of rights, the plaintiff has standing, and all necessary parties have been joined. If these requirements are not met, the claim must be dismissed. Id. at 17-18.

But even if the claim was properly brought, the judge should still dismiss the claim if the facts alleged in the complaint do not plausibly suggest that the plaintiff is entitled to declaratory relief in its favor. Id. at 18-20 & 22. As the SJC explained, "[i]f the plaintiff is not entitled to the declaratory judgment sought even if all of the factual allegations in the complaint are true, there can be no justification for allowing the claim to proceed or for permitting further discovery." Id. at 20.

Plaintiffs easily get over the first of these two hurdles. This claim was properly brought because there is an actual controversy over whether Plaintiffs have a right to be shareholders of FaZe Clan, Plaintiffs have standing to seek such a declaratory, and no necessary parties are missing from the case.

But this claim against FaZe Clan still fails because the facts alleged do not plausibly suggest that Plaintiffs are, or are entitled to become, FaZe Clan shareholders. As discussed above, the SAFEs gave Plaintiffs a conditional right to obtain Wanderset stock, but no right to become shareholders in FaZe Clan. FaZe Clan was not a party to the SAFEs. The facts alleged do not suggest that Wanderset had actual or apparent authority to bind FaZe Clan to anything. Nor do the factual allegations plausibly suggest that Plaintiffs are entitled to obtain shares of FaZe Clan stock on any other basis. The Court will therefore dismiss the claim for declaratory relief against FaZe Clan.

6. Accounting Claim. Finally, the complaint does not plausibly suggest that Plaintiffs will be entitled to an equitable accounting from FaZe Clan.

"In order to maintain a bill in equity for an account, it must appear from the specific allegations that there was a fiduciary relation between the parties ... or that the account is so complicated that it cannot be conveniently taken in an action at law. The general allegation that the account is of such a character is not sufficient" to state a claim for an accounting. Kaufman v. Buckley, 285 Mass. 83, 85 (1933), quoting Badger v. McNamara, 123 Mass. 117, 119 (1877).

The facts alleged make clear that Plaintiffs cannot satisfy this standard. Plaintiffs do not allege that they were in a fiduciary relationship with FaZe Clan. And, on the face of the complaint, there is no reason to believe that ordinary discovery will be insufficient to establish the facts needed to resolve

all of Plaintiffs' claims against these defendants. The Court will therefore dismiss the claim for an accounting against FaZe Clan.

ORDER

Defendants' motion to dismiss is allowed in part with respect to so much of Count I that claims Plaintiffs have or had a contractual right to obtain shares in FaZe Clan, Inc., the portion of Count III that asserts a claim for intentional interference with contractual relations against Gregory Selkoe and Philip Gordon, the claim in Count V for declaratory judgment against FaZe Clan, and the claim in Count VI for an accounting by FaZe Clan. The motion is denied in part with respect to so much of Count I that claims Wanderset, Inc., breached a contractual obligation to issue shares in that company to the Plaintiffs and that FaZe Clan has successor liability for all consequential damages that allegedly flowed from that breach, the claim in Count II that FaZe Clan is similarly liable Wanderset's alleged breach of the implied covenant of good faith and fair dealing, so much of Count III that asserts a claim for tortious interference against FaZe Clan, and the claim in Count IV for unjust enrichment.

/s/Kenneth W. Salinger Justice of the Superior Court