

00-7687

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

RANDALL I. RACKSON,

Plaintiff-Appellee,

v.

HOWARD B. SOSIN,

Defendant-Appellant.

**On Appeal from the United States District Court
for the Southern District of New York**

**REPLY BRIEF FOR DEFENDANT-APPELLANT
HOWARD B. SOSIN**

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**REPLY BRIEF
FOR DEFENDANT-APPELLANT HOWARD B. SOSIN**

INTRODUCTION

1. Appellee Randall Rackson's brief is most notable for what it fails to address. Nowhere does Rackson acknowledge the extraordinary nature of the claims he must defend to sustain his judgment. Nowhere does he dispute that holding supervisory corporate officers *personally* liable for unpaid bonuses would radically alter the settled expectations of corporate employers, executives, and employees throughout the financial services industry in which he worked.

Rackson asserts that his relationship with Sosin was unique. But he never offers a principled way to distinguish his claims from the identical arguments that could be made by thousands of other employees, especially in the financial services industry, where the bulk of a professional's compensation traditionally depends on annual bonuses paid at the discretion of a senior manager.

Indeed, Rackson's own evidence shows that his relationship with Sosin was conventional. As president of AIG-FP, Sosin exercised broad discretion over the bonuses payable to all 140 employees in the company, including Rackson. As with every other employee, Rackson's bonuses were paid by their corporate employer, AIG-FP. In every instance, the annual bonuses were reported as W-2 *wages* paid for

corporate services. Never did Sosin pay the AIG-FP employees, including Rackson, anything from his personal funds. Rackson himself concedes that the same arrangement had existed when Sosin was his manager at Drexel Burnham.

In this customary employment scenario, a disgruntled employee who claims he was wrongfully denied a bonus payment may pursue a “breach of contract” claim against his corporate employer, but not against his corporate manager *personally*.

Beyond his claim of Sosin’s personal *contractual* obligation, Rackson also contends that, because he and his manager had also become friends, the manager assumed the heavy responsibilities of a “fiduciary” and incurred *personal* financial liability for paying his bonus compensation. But nowhere does Rackson deny that treating a corporate officer as the “fiduciary” of his subordinate — with the attendant obligation to act for the benefit of the subordinate, even at the expense of the corporate employer’s business interests — would radically transform thousands of business relationships. Moreover, Rackson never mentions that the jury rejected his claim that he and Sosin were “partners” in a joint venture and, in so doing, repudiated the main argument for imposing a “fiduciary duty” on Sosin.

Glaringly missing from Rackson’s brief is any attempt to constrain the revolutionary import of his legal theories. If his claims were upheld, thousands of managers would stand exposed to *personal* financial liability for satisfying the bonus

claims of disappointed subordinates. There are, no doubt, tens of thousands of employees working within the boundaries of this Circuit who could say — as Rackson does — that they understood that their bosses had assured them, or encouraged them to believe, that they would be paid large bonuses in the future. Thousands of these employees have worked under the same managers for eight or ten years — as Rackson did under Sosin at Drexel and AIG-FP — and have developed parallel personal relationships illustrated by social dinners, household visits, or family picnics.

2. Bedrock legal doctrines militate against sustaining claims like Rackson's, most relevantly the rules that:

(a) a corporate agent has no personal liability for any contract made about corporate compensation,

(b) the terms of any purported "contract," including especially the amount to be paid for employment services, must be defined with reasonable precision,

(c) under the Statute of Frauds, oral promises not performable within a year must be in a subscribed writing, and

(d) “fiduciary” relationships rarely are imposed outside limited and customary settings, and the relationship of an employer/manager with an employee does not impose fiduciary duties, even if the two are friends.

3. Rackson seeks to sidestep these issues, framing the questions as matters of “sufficiency of evidence.” Indeed, erroneously declaring that this Court lacks the power to review several dispositive issues of law, Rackson does not even address them. This strategy of calculated avoidance should not divert the Court from deciding the questions framed in our opening brief, every one of which is properly before this Court, subject to *de novo* review.

The argument that, as an agent for a disclosed principal (AIG-FP), Sosin cannot be held personally liable for any alleged breach of contract presents a purely legal issue that this Court can and should decide on the record before it.

We assume *arguendo* that the jury credited Rackson’s version of their discussions, and thus do not challenge any of the jury’s implicit “findings.” But the issue whether there was a legally enforceable contract between Rackson and Sosin poses a matter for *de novo* judicial review.

Finally, the fiduciary duty claim is also reviewed *de novo*: Do the assumed facts satisfy the demanding standards for establishing this special relationship? The Court must reach the issue, despite Rackson’s assertion that it must affirm the damage

award if it upholds the jury's conclusions on either contract claim. The jury awarded a single undifferentiated sum after receiving instructions giving two different standards for measuring damages, one for the contract claims, another one for the fiduciary duty claim. There is no way to discern whether the jury applied the contract-breach measure or the fiduciary-duty measure. Thus, if the Court finds the verdict tainted on any theory, a retrial is necessary.

ARGUMENT

I. As AIG-FP's Agent, Sosin Cannot Be Held Personally Liable For Any Alleged Breach of Contract.

A. This Court Can and Should Decide This Legal Issue.

Rackson seeks to bar this Court from reviewing Sosin's defense that, acting as an agent of a disclosed principal (AIG-FP), he is not personally liable for breach of alleged contractual commitments. Rackson invokes the general practice not to consider issues first raised on appeal. (Br.46n.20,44). This practice exists to ensure that parties have a fair opportunity to offer all relevant evidence bearing on an issue. See *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

This Court, however, has recognized several pertinent exceptions to this practice. One is where the issue is purely legal and requires no additional fact-

finding. *E.g.*, *Baker v. Dorfman*, ___ F.3d ___, 2000 WL 1233349,*4 (2dCir.Sept.1,2000) (deciding first-time issue because it “presents a pure question of law”); *Mildred Cotler Trust v. United States*, 184 F.3d 168, 173 (2dCir.1999) (issue could be decided on the record below); *Coogan v. Smyers*, 134 F.3d 479, 487 (2dCir.1998) (“purely legal issue that is easily resolved”). The cases Rackson cites (Br.44) merely present instances in which the exceptions did not apply and the Court declined to exercise its discretion to consider the questions.

Sosin’s argument that, as AIG-FP’s manifestly disclosed agent, he is not personally liable for any alleged breach of a promise relating to bonus compensation fits squarely within the recognized exceptions. This issue is “purely legal.” (SosinBr.37-39). Moreover, no additional evidentiary development is necessary. Rackson knew that it was crucial to establish that Sosin was “personally” responsible for any promise about his annual bonus. Both sides extensively described their understanding of the facts underlying their relationship. They also submitted all the documents concerning Rackson’s employment relationship — including the relevant employment contracts — and showing the source of his bonus payments over the years.

Indeed, Rackson’s brief does not suggest that he had *any other* evidence bearing on the capacity in which Sosin is legally presumed to have acted. Thus,

Rackson makes no claim of “prejudice” from having to confront this legal doctrine — except, of course, to his ability to retain a judgment that runs afoul of well-settled law.

Furthermore, Sosin’s argument that, under agency law, a manager is not personally liable for the alleged breach of a compensation agreement presents a question of “sufficient public importance” that this Court should address it, regardless of whether it was raised below. *Baker v. David Alan Dorfman, P.L.L.C.*, ___ F.3d ___, 2000 WL 1664447,*2 (2dCir.Nov.7,2000); *Cohen v. West Haven Bd. of Police Comm’rs*, 638 F.2d 496, 500 & n.6 (2dCir.1980). Failure to consider this issue would upset settled commercial expectations regarding responsibility for paying bonuses. As explained *infra*, the judgment holding Sosin personally liable for breach of a promise to pay bonus compensation is “not in accordance with law.” *Hormel*, 312 U.S. at 559. Addressing this issue thus implements the “philosophy underlying the exceptions to the general practice” governing issues first raised on appeal. *Id.*

B. Rackson Ignores the Legal Doctrines and Facts That Preclude Holding Sosin Personally Liable.

Rackson does not contest the legal doctrines on which we rely. (SosinBr.37-46). An agent for a disclosed principal is not personally liable for any contractual obligation he may create for his corporate principal. Furthermore, N.Y. General

Obligations Law §5-701(a)(2) and prevailing case law establish that an agent cannot be found to have personally assumed or guaranteed an obligation absent “clear and unequivocal evidence” manifested in a personally subscribed writing.

Attempting to block the Court from considering Sosin’s agency argument, Rackson says that Sosin “expressly disavowed” any argument that Rackson’s “release” of claims against the corporate principal, AIG-FP, “bars this litigation.” (Br.21,46n.20). But Sosin’s decision not to rely on the release is irrelevant. Sosin’s agency defense (SosinBr.37-49) does not rest on the release. We argue simply that Rackson’s release of claims against AIG-FP did not *create* a right to sue Sosin in his personal capacity (although it may explain why Rackson chose this path).

Rackson does not suggest that he was being compensated for rendering services to Sosin *personally* rather than working for Sosin as President of AIG-FP. The important issue of law, therefore, is whether, in light of settled principal/agent doctrine and N.Y.Gen.Oblig.L. §5-701, the allegedly promised allocation of corporate profits created a *personal* contractual liability.

Rackson simply declares that Sosin was acting “personally,” pointing to his testimony (addressed in SosinBr.40) that employees’ bonuses, including his own, were to come “out of Howard’s personal share of the joint venture profits.” (RacksonBr.47n.20). But characterizing the bonuses as coming from Sosin’s

“personal share” of the profit pool did not transform — from corporate to personal — the actual nature or source of the funds or any related obligation to pay them.

The Joint Venture Agreement itself, to which Rackson’s cited testimony referred, conclusively defined the bonus funds at issue as *corporate*, not personal:

“For services rendered in operating the business, Sosin and such full-time employees . . . as he elects shall be entitled to receive as Incentive Compensation an aggregate amount, with respect to each year, equal to the sum of . . . 38% of [AIG-FP’s profits] with respect to such year. Sosin shall be entitled (following consultation with the Chairman [of AIG-FP]) to retain for his own services such portions of Incentive Compensation as he shall in his sole discretion determine . . . Sosin shall likewise be entitled (following consultation with the Chairman) to select full-time employees . . . who will receive a portion of such Incentive Compensation and to determine the amount thereof any such employee shall receive.” (A1079-A1080) (emphasis added).

The Agreement made no mention of any “personal share” of AIG-FP’s profits as the source of bonus payments to employees such as Rackson. Instead, it provided that some of the corporate profit pool would be allocated to Sosin himself and some to selected employees (such as Rackson).

Rackson’s written employment contract unambiguously recognized that, in making this allocation, Sosin was allocating corporate funds in his capacity as *President* of Rackson’s corporate employer. Rackson’s contract entitled him to

“such incentive compensation . . . in respect of his employment hereunder during the prior year as shall be determined by the President of the Company.” (A760) (emphasis added).

Thus, it is simply a misleading semantic gambit for Rackson to characterize the amount of the bonus pool Sosin allocated to other employees rather than to himself as Sosin’s “personal” share of the joint venture profits. Only the amount Sosin ultimately allocated to himself became his “personal” share, and only when AIG-FP paid it to him. AIG-FP treated only that allocated *portion* of the pool as Sosin’s wages for services to AIG-FP, and Sosin paid personal income taxes only on that portion. (A780-A833; A1067-A1068).^{1/} Similarly, the amounts Sosin allocated to other employees *as President of AIG-FP* flowed directly from AIG-FP to them as their corporate wages.

Throughout the period covered by his alleged understandings with Sosin, Rackson admits that “AIG would actually pay [money] directly to those people according to the distribution that Howard mandated for his portion of the distributable amount.” (Br.7-8). He also concedes that this system at AIG-FP continued the earlier practice when Sosin was Rackson’s manager at Drexel. (Br.29). He does not dispute our characterization of the bonus allocation system at Drexel as the conventional one in the financial services industry. (SosinBr.42-43).

^{1/} By contrast, if Rackson performed “personal” services for Sosin — acting, for example, as a gardener or architect — he would have expected (and would have received) payment from Sosin’s “personal” (and after-tax) income, and any commitment to pay him would have been “personal.”

Most critically, Rackson admits that exactly this same conventional procedure was used in allocating and disbursing the corporate funds made available under the 1993 settlement, which were the focus of his claim:

“The pool received by Sosin in the Settlement Agreement was no different. Sosin made allocations from that pool to former AIG-FP employees and *everyone received W-2s from AIG-FP.*” (Br.47n.20) (emphasis added).

Finally, there is another basic flaw belying Rackson’s theory that Sosin’s actions involved personal obligations to pay money out his own “personal” funds. The JV Agreement expressly conditioned Sosin’s power to allocate portions of the profit pool — both to other employees *and to himself*. Any allocation decisions had to be made “following consultation” with AIG-FP’s chairman (Hank Greenberg), who also was chairman of majority shareholder AIG. (A1079-A1080). Rackson’s quotation of the Agreement (Br.5) selectively elides both references to these required “consulation[s].” Thus, the allocation process was structured to underscore that Sosin’s allocation of *corporate* profits had to consider the *corporation’s* interest in appropriate treatment of its employees. Accordingly, it is too facile, and simply false, for Rackson to assert (Br.5) that Sosin could have allocated all of the bonus compensation to himself and thus to declare that it was all Sosin’s “personal” money, subjecting him to *personal* liability for its allocation.

The money to which Rackson lays claim was corporate money. Sosin’s power as AIG-FP’s President to allocate it was a corporate function. Therefore, as a matter of law, any claim relating to the proper allocation of the money lay only against the corporation.

II. The Alleged Conversations Did Not Constitute a Legally Enforceable “Oral” or “Implied” Contract.

A. This Court Need Not Reconsider Any Factual Finding.

Contrary to Rackson’s assertion (Br.19-23), Sosin is not asking the Court to reexamine the jury’s assessment of “credibility” or any implicit finding of *fact*. Rather, our brief accepts *arguendo* Rackson’s version of the underlying events — including his narrative of the three conversations that formed the basis of his claim (RacksonBr.20). But as a matter of law, the conversations related by Rackson are too vague and indefinite to constitute a legally enforceable contract.

Whether a *legally* enforceable contract exists ultimately poses a question of law. “The Court decides if the terms of the agreement are sufficiently described.” *Scholastic Inc. v. Harris*, 80 F. Supp.2d 139, 147 (S.D.N.Y.1999); see also *Merrit-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 961 (5thCir.1999); *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1515 (10thCir.1995). While the jury’s findings

regarding credibility and weight of the evidence are factual determinations entitled to deference on review, the jury's use of those facts to draw ultimate conclusions frames a legal determination subject to *de novo* review. See, e.g., *Thomson v. Larson*, 147 F.3d 195, 199 (2dCir.1998); *Banker v. Nighswander, Martin & Mitchell*, 37 F.3d 866, 870 (2dCir.1994).

B. The Material Terms of the Agreement Cannot Be Ascertained With Any “Reasonable Degree of Certainty.”

Rackson agrees that the test for definiteness of a contract is whether the parties' intent regarding all essential terms can be ascertained with a “reasonable degree of certainty.” (Br.26). He agrees that price (or compensation) is an “essential term” of any contract for services. See *id.*; *Cooper Square Realty, Inc. v. A.R.S. Mgmt., Ltd.*, 581 N.Y.S.2d 50 (App.Div.1992). But none of the evidence Rackson presented at trial — including his description of three conversations with Sosin and the actual pattern of bonus compensation paid to him in prior years — furnished any “reasonable certainty” about the size of the bonus (*i.e.*, price term) Rackson would be paid in any year.

Rackson argues that his three conversations with Sosin establish that his bonus payment initially was “fixed” at a minimum of 20% of whatever Sosin retained; in 1990, it changed to somewhere between 33% to 50% of Sosin's compensation; and

in 1992, he and Sosin agreed to “probably use going forward on a year-by-year basis,” a ratio of either 40% (“2¹/₂ times what I made”) (A284) or 67% (“pretty much a 40-60 . . . split”) (A317). (Br.8-9). Far from establishing a clear or “reasonably ascertainable” price term, however, these numbers illustrate merely a loose range of compensation projections, capable of wide fluctuation in any given year.

Moreover, even under the terms described by Rackson, the amount of any bonus compensation Rackson *would* receive in a particular year depended on Sosin’s discretionary assessment of what Rackson’s “contribution” for the year was worth. As Rackson himself concedes, “Sosin *alone* would make the final decision what to pay Rackson.” (Br.27).

Nor can the pattern of actual bonus payments Rackson received from 1987-1992 supply any reasonably definite price term. Rackson contends (Br.30n.8) — based on convoluted mathematical “deductions” involving taxes and reinvestments — that the *actual* ratio of his compensation to Sosin’s for the relevant years was “37%, 22%, 22%, 32%, 41%, 41%” [for 1987-1992] rather than the figures Rackson’s counsel presented to the jury in summation and termed “pretty close” to the alleged agreement: “27%, 18%, 18%, 24%” [for 1987-1990]. (A720). But Rackson never has claimed that any of his loose, year-end conversations with Sosin concerning these

“going-forward” compensation ratios addressed such vagaries of calculation, even though millions of dollars might turn on alternative computations.

Nor does Rackson dispute the fact that both sets of numbers — as well as the set we cited (SosinBr.21) from another of Rackson’s exhibits (“74.3%, 5.7%, 40%, 30.5%, 20.7%, 51.5%” [for1987-1992]) — were before the jury. Thus, Rackson showed the jury three different sets of calculations about how much he already had been paid, allegedly in accordance with his “contract.” No two sets were identical or even close to one another. This evidence simply underscored that the price term in any discussion was unenforceably indefinite.

But even if this Court were to accept the “37, 22, 22, 32, 41, 41” ratios as the sole “correct” version credited by the jury, these prior bonuses would not supply a sufficiently definite price term otherwise missing from the alleged agreement. Even by these numbers, the ratio of Rackson’s bonus compensation fluctuated up and down quite dramatically over the prior period. Such wide fluctuations in the ratios offered to supply the missing price term of an oral contract — corresponding to differences of millions of dollars — simply cannot be said to reflect a “definite” or “reasonably certain” agreement.

Indeed, Rackson cannot cite a single case suggesting that a bonus agreement for a fluctuating amount (within a manager’s discretion) above some “minimum

floor” constitutes a sufficiently “definite,” legally enforceable contract. Rather, New York case law (see SosinBr.19-20) establishes that compensation terms similar to the ones advanced here are unenforceably indefinite. See, e.g., *Alter v. Bogoricin*, 1997 WL 691332,*1 (S.D.N.Y.Nov. 6,1997) (promise of “at least a 10 percent share of any increase in the value” of company held unenforceable); *Lumet v. SMH (U.S.), Inc.*, 1992 WL 380004,*9 (S.D.N.Y.Dec.4,1992) (bonus agreement providing for compensation ranging between .5% to 1% of profits fails the “reasonable certainty” test). Rackson attempts in vain to distinguish these cases as presenting “clear” uncertainty. In *Alter*, for example, Rackson objects that the actual “profit sharing” was to be calculated according “to a future formula yet to be developed.” (Br.26). But he ignores the identical problem here: The *actual* amount of any payment he might receive in any year was to rest on Sosin’s discretionary assessment, in consultation with AIG-FP’s chairman, of Rackson’s “relative contribution” to the company during each preceding year. Cf. *Freedman v. Pearlman*, 706 N.Y.S.2d 405, 407 (App.Div.2000) (oral bonus promise, which “left the amount of that compensation in [defendant’s] discretion,” unenforceably indefinite).

The jury was clearly confused: Rackson does not — and cannot — claim that the damage award bears any relationship to *any* “specified percentage” (RacksonBr.21) advanced by Rackson. The jury’s evident uncertainty reflected the

trial judge's confessed inability to describe to the jury the alleged terms of the oral agreement. Rackson asserts that "it was entirely within her discretion not to characterize the alleged agreement between Rackson and Sosin." (Br.34). But Judge Preska did not claim to be exercising any "discretion." Instead, candidly expressing her exasperation, she simply despaired: "I think we — there is no way we can characterize it." (A607).

C. The Agreement Would Constitute an Improper Oral Modification of Rackson's Written Employment Contract.

Rackson declares that Sosin "waived" any right to rely on the terms of the written contracts to foreclose Rackson's "oral" and "implied" contract claims. (Br.21,44,46n.19). But the terms of these contracts were placed into the record. As noted above, the JV Agreement stated that Sosin, "following consultation with [AIG-FP's] Chairman," had "sole discretion" to allocate bonus compensation. (A1079). Rackson's employment contract provided that he would receive "incentive compensation . . . as shall be determined by the President of the Company." (A760;A515). His contract explicitly barred any oral modification. (A766).

Rackson attempts to evade this obstacle, asserting the "Rackson-Sosin oral agreement was formed *before* Rackson entered into his employment agreement with AIG-FP." (Br.45). That assertion suffers from two decisive flaws.

First, as pointed out in our opening brief (Br.26), Rackson's written contract with AIG-FP had an "integration" clause barring enforcement of any *prior* oral agreement. (A764).

Second, Rackson's own brief (Br.23) characterizes his contract claim as resting on "three specific discussions that resulted in one basic agreement, twice modified." By his account, two of those "modifications" allegedly occurred in 1990 and 1992, *after* he signed his written employment contract rendering unenforceable any oral modification to the terms of his employment, including his compensation rights. And it was the third conversation, when Rackson received his 1992 year-end evaluation, that supposedly established a new ratio "we should probably use going forward . . . in terms of dividing the pool." (A284). That open-ended conversation formed the basis of his claim that he was entitled to share *anything* Sosin received in 1993.

Thus, his claims of "oral" or implied contract ran headlong into the explicit barriers in his written contract superseding any prior understandings and prohibiting modifications except "by a written instrument signed by both the Company and the Executive." (A766). Rackson cannot blink away these impenetrable barriers erected by the cases and N.Y.Gen.Oblig.L. §15-301(1). (SosinBr.27-28).

D. The Statute of Frauds Bars Enforcing the Alleged Agreement.

Rackson does not deny that the Statute of Frauds recognizes “the serious risk that alleged oral arrangements calling for long-term performance, especially where substantial sums are involved, are too easily ‘susceptible to deception, mistake and perjury.’” (SosinBr.29). Instead, he tries to avoid the Statute and its underlying policy by asserting that the jury accepted his recollection of the conversations rather than Sosin’s. But the whole point of the Statute is to avoid putting a jury in the position of speculating years after the events — here as much as 12 years later — whether the tone and terms used in oral conversations about supposedly continuing relationships constituted a “contract” with clear enough terms.

We explained (Br.29-36) why the alleged agreement here ran afoul of the Statute. Most basically, Rackson testified (A284) that he and Sosin would meet in mid-December to decide on a range for his bonus for working to the end of the following calendar year, beginning January 1. Thus, the alleged mid-December “agreement” could not be *performed* within “one year from the making thereof,” N.Y.Gen.Oblig.L. §5-701(a)(1). See, *e.g.*, *Maiman v. Luftek, Inc.*, 451 N.Y.S.2d 183, 184 (App.Div.1982) (oral agreement entered into on December 8, for year-long employment beginning January 12 barred by Statute).

In addition, Rackson's bonus could not have been "fixed and earned" within one year. The ability to decide within a year how much an employee is entitled to be paid for working that year is an essential feature of an employer's ability to "perform" a contract within a year. Here, however, AIG-FP structured the compensation packages of all employees so that their compensation for any year would *not* be "fixed and earned" for several years hence. A sizeable portion of the bonus pool for a given year was carried forward and was subject to adjustment (based on business losses or other needs) during the ensuing one- to two-year carry-over period, when it would be distributed. And an employee forfeited any interest in the carry-over if he was no longer employed by AIG-FP in those later years. This approach, sometimes referred to as "golden handcuffs," discouraged senior employees (including Rackson) from abandoning the company. Thus, there was no way to determine what compensation any employee actually would receive for a particular year until several years hence.

Quite simply, Rackson's bonus compensation for any given year was neither "earned" nor "fixed" within a year after any oral "agreement" with Sosin about the ratio that should "probably" be used "going forward." (A284). The Statute of Frauds thus barred its enforcement.

Rackson’s response to these obstacles is remarkable. He concedes that a major portion of any year’s bonus was to be carried forward for several years and was subject to a revised allocation. At trial his counsel similarly acknowledged that carry-over compensation was “subject to, if you will, to one o[r] two years hence agreements.” (A152). But, to avoid the Statute, Rackson says that he “***had no claim to those future distributions unless he was there when Sosin got to allocate them.***” (Br.42-43) (emphasis added). He adds that “the oral agreement was a year-to-year agreement and provided that ***either party could chose to end it at any time.***” (Br.38n.12) (emphasis added). He also declares that “the Rackson-Sosin oral agreement would necessarily be ended [immediately] upon the exercise of certain termination options,” including AIG-FP’s exercise of “its right to terminate him at will” within a year. (Br.37,39n.13).

These attempts to avoid the Statute of Frauds are bizarre. First, as we explained in our opening brief (Br. 35), AIG-FP had no contractual right to terminate Rackson “at will.” Rackson had a written employment contract protecting him against discharge except “for cause.” (A759-A762). If AIG-FP improperly terminated him, such a termination would be a breach — not “performance” — of his contract.

Second, Rackson’s contentions about immediate termination of his right to further compensation for periods already worked present a puzzling concession. If true, they mean that, once he left AIG-FP in 1993, he had no remaining contractual right to *any* future payment or profit pool that might thereafter become available for Sosin to allocate. It is hard to square this newly contrived theory with Rackson’s claim that he retained a contractual right to a share of any money Sosin was able to allocate as part of settling his arbitration with AIG at the end of 1993, four months *after* Rackson left AIG-FP.

Rackson cannot have it both ways. Either the Statute of Frauds barred his oral bonus agreement or the contract claim itself for a share of the 1993 settlement proceeds evaporates.

III. The “Fiduciary Duty” Claim Cannot Be Sustained.

A. The Claim Is Subject to *De Novo* Review.

Our argument that Rackson’s “fiduciary duty” claim cannot be sustained does not challenge any evidence Rackson presented or “the reasonable inferences to which it is entitled.” (SosinBr.50). Rather, Rackson’s version of the facts fails as a matter of law to establish a fiduciary duty. As explained above (SectionIIA), this Court decides that issue *de novo*.

B. The Facts Do Not Establish a Fiduciary Relationship.

Resorting to vague generalities, Rackson's brief fails to come to grips with the important principle that "fiduciary" relationships are special, because they are so severe. Courts are reluctant to impose a fiduciary relationship outside any context in which a person has fair notice of the special obligations he may be undertaking. It makes no sense to import such a duty — traditionally reserved for well-circumscribed categories such as guardian/ward or trustee/beneficiary — into the workplace relationship between manager and subordinate.

Rackson's response ignores the practical consequences of his position: a jury cannot be allowed to classify the Rackson/Sosin relationship as "fiduciary," with all its attendant obligations, without also implying fiduciary relationships between thousands of other managers and their employees, with whom they have overlapping personal and professional relationships.

In this case alone, where Sosin was allocating bonus compensation among approximately 140 employees worldwide, many employees whose situation was similar to Rackson's would suddenly acquire "fiduciary" rights. Take, for example, Barry Goldman (whose name is conspicuously absent from Rackson's brief). Like Rackson, he was a Senior Vice-President under Sosin's management, as well as a close, trusted friend to Sosin and his family, and godparent to one of Sosin's children.

Like Rackson, he received no bonus compensation for 1993. To imply some special relationship between Rackson and Sosin, Rackson describes how Sosin's lawyer sought out Rackson to "help persuade Howard to accept the settlement proposal." (Br.13). But counsel also sought out Goldman, Sosin's equally trusted business associate and friend. (A483). The same could be said for other long-time colleagues and friends, Litzenberger (also a godparent to one of Sosin's children) and Kau. (SosinBr.55-56).

Moreover, as discussed above (*supra*, p.11), Sosin's allocation of bonus compensation, in consultation with AIG-FP Chairman Greenberg, had to consider AIG-FP's interests in treating all employees appropriately. As AIG-FP's President, Sosin unquestionably had fiduciary responsibilities to the company, with a duty to act in *its* best interest. Imposing an additional fiduciary duty between Sosin and individual AIG-FP employees would create conflicting fiduciary duties to act at all times in the best interest of both the employer and particular employees.

Rackson's approach would dramatically multiply the creation of "fiduciary" relationships, which would spring up throughout the business world, unbeknownst to the men and women on whom these burdens would be saddled. The rule he advocates would perversely affect these relationships. If a manager develops a personal and social relationship with an employee he supervises and whose bonus

compensation he controls, the manager would risk becoming liable as a “fiduciary” to act for the benefit of his “ward.” Moreover, he would become subject to *personal* liability for failing to allocate “enough” bonus compensation. Rackson’s brief is embarrassingly silent about our showing that New York law does not support such an extravagant theory.

Rather, a fiduciary relationship only exists between two persons “when one of them is under a duty to act for or to give advice for the benefit of another upon matters *within the scope of the relation.*” *Mandelblatt v. Devon Stores, Inc.*, 521 N.Y.S.2d 672, 676 (App.Div.1987) (emphasis added). (SosinBr.53-54). This case involves a commercial dispute over bonus compensation, which Sosin had discretion to allocate as president of the corporation. Therefore, the relevant relationship between Rackson and Sosin, for purposes of deciding the fiduciary claim, is that of an employee and his corporate manager. As we explained (Br.51,53), New York law refuses to impose fiduciary obligations in the employment context, even when there are also close personal ties.

Rackson argues that “none of [the cases cited by Sosin] addresses the scenario where more than simply a friendship or more than a typical business relationship or contract *alone* is the basis for the plaintiff’s fiduciary duty claim.” (Br.50). That charge is demonstrably false. See, e.g., *Van Brunt v. Rauschenberg*, 799 F.Supp.

1467, 1474 (S.D.N.Y.1992) (where artist allegedly hired personal friend, with whom he had “spent substantial amounts of time together [for the past 22 years] for the purposes of business and pleasure,” existence of “close relationship between an employer and employee [was] not enough” to create fiduciary duty); *Prado v. De Latorre*, 599 N.Y.S.2d 124, 125 (App.Div.1993) (“confidential relationship was not demonstrated merely by evidence of a friendship” between parties who had gone into restaurant business together); *Johnston v. De Haan*, 325 N.Y.S.2d 762, 765 (App.Div.1971) (“[f]riendship alone does not establish a confidential relationship” between parties to mortgage loan).

Rackson disparages several of these cases, arguing that they discuss the requirements for establishing fiduciary duty in deciding whether to impose a constructive trust. (Br.51n.22). But New York courts (and federal courts applying New York law) have not limited this analysis to cases formally seeking a “constructive trust.” In *Burian v. Kurtz*, for example, plaintiff alleged both constructive trust and fiduciary-duty claims. After disposing of the former claim, the court held that the “claim for breach of fiduciary duty, predicated on the existence of a trust relationship, must be also dismissed.” 1990 WL 74549,*9 (S.D.N.Y.May30,1990).

Rackson suggests that “the very fact that year after year Rackson would entrust over 95% of his compensation to Sosin without a written agreement is the strongest possible evidence of the trust he placed in him.” (Br.50). The same argument could be made by thousands of employees in the financial services industry, for whom annual bonuses dramatically affect their total compensation.

Moreover, Rackson simply ignores the fact that, like many other executives and employees, he *did* have a written contract governing his compensation. He voluntarily agreed to a written compensation agreement that expressly left the amount of his bonus, if any, to the discretion of his supervisor. It would stand the law on its head to infer the existence of a “fiduciary” entitlement under these circumstances.

Rackson strains to find support for his counterintuitive position in *Sinclair v. Purdy*, 139 N.E. 255, 258 (N.Y.1923), which involved

“a man transferring to his sister the only property he had in the world. . . . He was doing this, as she admits, in reliance upon her honor.”

This unique situation of family land held in constructive trust by the transferor’s sister could not be further from this case. Here we have a highly sophisticated businessman who wishes, in retrospect, he had been able to negotiate a better employment contract than he did and was “only” paid \$50 million for his services.

_____C. The Trial Court’s Erroneous Exclusion of Sosin’s State-of-Mind Evidence Requires a New Trial.

Rackson argues that Judge Preska “properly exercised” her “discretion in excluding testimony proffered by Sosin because the testimony was cumulative” (Br.52-56). But Judge Preska did not exclude this testimony as cumulative. Rather, Rackson led her into error, urging her to exclude Sosin’s explanation as “irrelevant” and “prejudicial”:

“As to his state of mind, that is, why he did what he did, it is not relevant and to the extent that there might be some slight relevance, which I do not see, the prejudicial value is so overwhelming that it is not — it is not admissible; 403.” (A547-A548).

Rackson does not even attempt to defend her actual ruling. His abandonment of the “relevance” and “prejudice” objections is understandable, since these grounds are indefensible. (SosinBr.57-59).

The erroneous exclusion of Sosin’s testimony tainted the verdict. Sosin was prevented from providing, on direct examination, the substance of his conversations with Goldman, Litzenberger and Kau in which he explained his reasons for treating each of them as he did in allocating 1993 compensation. The judge even cut off Sosin’s testimony about Goldman, whose situation precisely paralleled Rackson’s. (A539,A553-A555).

Rackson nevertheless claims that Sosin's conversation with him about his decision was already before the jury, as was evidence about payment or non-payment to some others. (Br.54-55). Yet Rackson points only to snippets from isolated parts of the record to reconstruct part of what Sosin wished to explain. It is not sufficient that the jury heard Sosin say that he "felt this was the fair arrangement." (Br.54). Sosin was entitled to explain *why* that was so.

Nor was it sufficient that Sosin had a limited opportunity to testify on re-direct about his conversation with Litzenberger. Sosin was the primary defense witness, the only one competent to testify about the reasons for his differential treatment of Rackson, Goldman, Kau and Litzenberger. His "good faith" was central to his defense. It is difficult even to imagine a proper exercise of "discretion" preventing a jury from hearing the defendant present the full version of the relevant events coherently, on direct examination, with assistance from his own counsel.

Furthermore, over Sosin's objection (A211-A219), Rackson relied on the payments to Litzenberger and Kau to support one of his proposed benchmarks for calculating damages (A314-A315). (SosinBr.59). Thus, the excluded testimony not only tainted the liability determination against Sosin, but it could have rebutted Rackson's approach to damages, which related the amount due to Rackson to payments made to Kau and Litzenberger.

The judge instructed the jury that Rackson only had to prove his fiduciary duty claim by a preponderance of the evidence. (A728-A729). Sosin's wrongly excluded testimony about why he made the challenged decisions could well have affected that balance.

IV. Sosin Is Entitled To a New Trial if Any of the Claims Is Tainted.

The verdict in this case cannot stand, if error infected any of the claims. For this reason, this Court must consider *each* of the separate claims. Rackson's contrary view rests on the fact that the jury "made a single damage award." (Br.20). But that is precisely why this Court cannot merely affirm on the basis of any one legally sufficient claim. The jury was instructed to use a *different standard* for calculating damages on the various claims, and there is no way to tell which theory of liability it used to calculate damages:

- (1) for the breach of contract claims: "a portion of certain monies retained by Sosin as compensation in connection with [AIG-FP]" (A730); and
- (2) for the breach of fiduciary duty claim: "a percentage of the proceeds of the settlement of Sosin's arbitration with AIG" (A737).

The latter measure concededly used a larger base, since the "proceeds of the settlement" included several elements in addition to the "monies retained by Sosin as

compensation,” such as “Sosin’s shares of stock of AIG-FP” and “Sosin’s subordinated debt obligation of AIG-FP.” (RacksonBr.14).

After instructing the jury to use two distinct measures of damages for the different claims, Judge Preska then required the jury to return a single undifferentiated award. (A205). She rejected Sosin’s request for separate lines on the verdict form for damages attributable to each claim. (A701; RacksonBr.31n.9). It thus is impossible to determine whether the damages awarded were based on the claims of breach of contract or breach of fiduciary duty. Accordingly, there must be a retrial if any of the claims was deficient.

Moreover, since “the question of damages . . . is so interwoven with that of liability,” *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931), it would not be permissible to retry solely on the issue of damages. In *Gasoline Products*, the Supreme Court rejected a partial retrial of a contract claim limited to damages:

“The verdict on the [contract claim] may be taken to have established the existence of a contract and its breach. Nevertheless, upon the new trial, the jury cannot fix the amount of damages unless also advised of the terms of the contract; and the dates of formation and breach may be material But it is impossible from an inspection of the present record to say precisely what were the dates of formation and breach of contract found by the jury, or its terms” *Id.* at 499.

Since the issues of liability and damages were “interwoven,” partial retrial solely on damages would deny the defendant his Seventh Amendment right to a jury trial.

Following *Gasoline Products*, this Court repeatedly has held that a new trial must be ordered as to all issues where the amount of the damages may not be determined without reexamining the facts underlying liability. *E.g.*, *Brooks v. Brattleboro Mem’l Hosp.*, 958 F.2d 525, 531 (2dCir.1992); *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 709 (2dCir.1983); *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 95 (2dCir.1981). This is particularly required in contract cases, where “it might be necessary for the jury to re-find the terms of the contract.” See 6A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 59.06 (2d ed. 1996).

As in *Gasoline Products*, the damages awarded by the jury do not conclusively establish what facts the jury found, since the verdict does not correspond with any of the various percentages claimed by Rackson, either applied to “monies retained by Sosin” (A730) or gross “proceeds of the settlement” (A737). Indeed, the damage award confirms that the jury rejected Rackson’s theories that he was contractually entitled to 20%, 33%, or 40% (or even 67%) of Sosin’s recovery. Thus, consistent with the Seventh Amendment, there must be a *de novo* jury determination of the terms of any contract in order to calculate an appropriate damage award.

Moreover, any attempt to calculate damages would, as a practical matter, require a new jury to hear all of the evidence about the extensive relationships and actual and alleged agreements, so there would be no “judicial economy” in trying artificially to divide the issues of liability and damages.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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