

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE CITY OF NEW YORK

Index No. 453930/2021

Plaintiff,

vs.

CORE SERVICES GROUP, INC., CORE
COMPANIES, INC., CORE FACILITIES
MANAGEMENT, LLC, FLAVOR FOODS, LLC,
PROCORE, LLC, and JACK BROWN,

Defendants.

JOINT MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

TABLE OF CONTENTS

	Page
I. PRELIMINARY STATEMENT	1
II. FACTUAL BACKGROUND.....	3
A. CORE Has An Exceptional Track Record Of Providing Services To Homeless New Yorkers	3
B. CORE Fully Disclosed Its Operational Structure To DHS, Which Happily Accepted CORE’s Services	4
1. CORE Disclosed All Salient Facts In August 2017	4
2. Documents Definitively Show DHS Knew All Relevant Facts Prior To Its Alleged Discovery Of Them In 2019	6
C. The De Blasio Administration Repeatedly Relied On CORE To Shelter Homeless New Yorkers And Then Failed To Compensate CORE For Providing Those Services	8
D. The De Blasio Administration’s History Of Non-Payment Necessitated The Creation Of CORE’s Subsidiaries	8
E. The Use Of The Subsidiaries Has Cost DHS Nothing	9
III. ARGUMENT.....	11
POINT I ALL OF THE CLAIMS SHOULD BE DISMISSED UNDER THE DOCTRINES OF WAIVER, ACQUIESCENCE, AND RATIFICATION.....	12
A. DHS’s Own Written Words, Along With CORE’s Clear Disclosures, Establish Knowledge And Acceptance.....	12
B. After DHS’s Review Allegedly Discovered The Breaches At Issue, DHS Agreed Nonetheless To Move Forward With CORE	13
POINT II THE CITY FAILS TO PLEAD THE PERFORMANCE, BREACH, AND DAMAGES ELEMENTS OF ITS BREACH OF CONTRACT CLAIM.....	14
A. The City Fails To Plead That It Fulfilled Its Obligations To CORE.....	15
B. The City Fails To Allege Breach	15
C. The City Fails To Adequately Plead Damages	16
POINT III DHS’S UNJUST ENRICHMENT CLAIM IS UNTETHERED TO THE LAW AND FRIVOLOUS IN LIGHT OF THE CONTRACTS IN PLACE.....	18
POINT IV THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE BECAUSE AMENDMENT WOULD BE FUTILE.....	22
IV. CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Barone v. Barone</i> , 54 N.Y.S.3d 609 (N.Y. Sup. Cty. Feb. 17, 2017)	20
<i>Bravo v. MERSCORP, Inc.</i> , No. 12-CV-884 (LB), 2013 WL 1652325 (E.D.N.Y. Apr. 16, 2013)	15, 16
<i>Bronxville Knolls, Inc. v. Webster Town Ctr. P'ship</i> , 221 A.D.2d 248 (1st Dep't 1995)	11
<i>CDO Plus Master Fund Ltd. v. Wachovia Bank</i> , N.A., No. 07 Civ. 11078 (LTS)(AJP), 2009 WL 2033048 (S.D.N.Y. July 13, 2009)	12, 13
<i>Chambers v. Weinstein</i> , 997 N.Y.S.2d 668 (N.Y. Sup. Ct. Aug. 22, 2014)	20
<i>Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.</i> , 70 N.Y.2d 382 (1987)	20
<i>Corsello v. Verizon New York, Inc.</i> , 18 N.Y.3d 777 (Ct. App. 2012)	19
<i>Cortec Industries, Inc v. Sum Holding L.P.</i> , 949 F.2d 42 (2d Cir. 1991).....	11
<i>Crescimanni v. Trovato</i> , 162 A.D.3d 849 (2d Dep't 2018)	20
<i>Davis v. Clearway Mortg., LLC</i> , No. 08-CV-6492L, 2009 WL 2843255 (W.D.N.Y. Aug. 31, 2009).....	16
<i>ERE LLP v. Spanierman Gallery, LLC</i> , 94 A.D.3d 492 (1st Dep't 2012)	16
<i>Georgia Malone & Co. v. Rieder</i> , 19 N.Y.3d 511 (2012)	19, 20, 21
<i>Givoldi, Inc. v. United Parcel Serv.</i> , 286 A.D.2d 220 (1st Dep't 2001)	12, 13
<i>Gordon v. Dino De Laurentiis Corp.</i> , 141 A.D.2d 435 (1st Dep't 1988)	16

Harris v. Seward Park Hous. Corp.,
79 A.D.3d 425 (1st Dep’t 2010)14

Mandarin Trading Ltd. v. Wildenstein,
16 N.Y.3d 173 (Ct. App. 2011)19

Miller v. HSBC Bank U.S.A.,
N.A., No. 13 Civ. 7500, 2015 WL 585589 (S.D.N.Y. Feb. 11, 2015)16

Miller v. Walters,
46 Misc. 3d 417 (N.Y. Sup. Ct. 2014)19

New York Tel. Co. v. Jamestown Tel. Corp.,
282 N.Y. 365 (1940)12, 13

Rite Aid of New York, Inc. v. Chalfonte Realty Corp.,
39 Misc. 3d 1230(A), 971 N.Y.S.2d 74 (N.Y. Sup. Ct. Aug. 14, 2012).....21

Scott v. Bell Atlantic Corp.,
726 N.Y.S.2d 60 (1st Dep’t 2001)11

Sud v. Sud,
621 N.Y.S.2d 37 (1st Dep’t 1995)11

VCG Special Opportunities Master Fund Ltd. v. Citibank, N.A.,
594 F. Supp. 2d 334 (S.D.N.Y. 2008).....12, 13

Vista Food Exch., Inc. v. BenefitMall,
138 A.D.3d 535 (1st Dep’t 2016)16

Other Authorities

CPLR 3211(a)(1)11, 14, 23

Defendants CORE Services Group, Inc. (“CORE”), CORE Companies, Inc., CORE Facilities Management, LLC, Flavor Foods, LLC, PROCORE, LLC, and Jack Brown (“Mr. Brown”) (collectively, “CORE”) respectfully submit this Memorandum of Law in support of its Motion to Dismiss with prejudice Plaintiff’s (the “City’s”) Complaint.

I. PRELIMINARY STATEMENT

This lawsuit was brought in the waning days of the de Blasio Administration. While the lawsuit attacks CORE, the real story here is about how the de Blasio Administration knowingly used the services of CORE, a minority-founded not-for-profit, to provide tens of millions of dollars in services to homeless New Yorkers and then failed to pay CORE for the contracted services. Although the Complaint baselessly suggests that CORE hid its organizational structure and use of subsidiaries from the City’s Department of Homeless Services (“DHS”), overwhelming documentary evidence—including documents referenced in the Complaint—show that CORE repeatedly made detailed disclosures to the City, that DHS was well aware that CORE was obtaining essential services and supplies from CORE’s wholly-owned subsidiaries within budget, and that rather than complaining about CORE’s use of subsidiaries, DHS approved them, relied on CORE and its subsidiaries for emergency interventions and rated CORE as one of its best service providers. The about-face reflected in this lawsuit is not predicated on anything CORE did wrong or failed to do, but is, rather, a desperate effort to deflect *The NY Times* criticism of the de Blasio Administration’s handling of the City’s homelessness crisis.

The de Blasio Administration’s lawsuit cannot survive a motion to dismiss. The Complaint is facially deficient, and material allegations are contradicted by the documentary evidence. Specifically, the documentary evidence shows that CORE provided essential housing and other critical services to New York’s homeless and otherwise vulnerable populations for

years pursuant to contracts with DHS. CORE held up its end of the bargain: DHS does not, and cannot, deny that CORE provided each and every one of the contracted-for services to thousands of vulnerable New Yorkers for more than seven years, including shelter, food, maintenance, security, social services, financial planning, employment placement and permanent housing transition services. Indeed, DHS repeatedly highly ranked CORE for providing excellent services to the homeless and those in need.

The documentary evidence also shows that DHS did not hold up the end of its bargain. DHS routinely and consistently failed to pay CORE for services. The City currently owes CORE more than \$33,000,000.

The City's constant payment delinquencies made it difficult for CORE to contract with vendors, including food providers and security services. So, CORE created subsidiaries to provide food, security and other essential services, using the vertical integration model that many other organizations have proven is effective and efficient. CORE disclosed this structure and identified the subsidiaries in detail to DHS beginning in 2017, and DHS continued to contract with CORE. This went on for years, and DHS was more than satisfied with CORE's contractual performance—it named CORE “provider of the Year” in 2019.

However, in the face of a series of poorly researched and anonymously sourced news reports alleging improprieties at CORE and, perhaps more pointedly, criticizing the de Blasio Administration for its handling and oversight of how it provides homeless services, the de Blasio Administration claimed that it was ignorant of CORE's use of its subsidiaries, and then abruptly filed this lawsuit. These claims, filed in the waning days of a mayoral administration that can charitably be described as unpopular and ineffective, is replete with unsupported rhetoric and false and misleading factual representations. The de Blasio Administration purported to cite

documentary evidence in the Complaint, but chose not to attach the referenced documents which, on even cursory review, entirely undermine the Complaint's allegations.

Notwithstanding these undocumented and conclusory claims, the truth is that in all relevant respects, CORE's house is in order, but the de Blasio Administration's house was not. CORE was transparent with DHS regarding CORE's structure, leadership and operations, and DHS understood and accepted the salient facts of how CORE was operating. In fact, the de Blasio Administration repeatedly asked CORE to open and run shelters under emergency circumstances—something it was able to do only because of CORE's vertically integrated model—thereby helping save de Blasio from even further media scrutiny over his failed record on homelessness. After years of this knowing acquiescence and reliance, the de Blasio Administration feigned surprise in response to political and media pressure, ultimately filing a baseless and misleading Complaint that fails even to meet the most basic of pleading standards.

In short, the former administration's case is groundless and should be dismissed in its entirety. DHS's litigation tactics targeted at a sought-after provider of services to the homeless only hurts the community, especially considering the ongoing pandemic, and the record number of homeless on the streets of New York City.

II. FACTUAL BACKGROUND

A. CORE Has An Exceptional Track Record Of Providing Services To Homeless New Yorkers

As of 2021, CORE and its more than 1,300 dedicated employees provided shelter and related services for over 3,000 clients across 30 programs on any given night. While DHS makes the incendiary allegation that money intended to “benefit vulnerable New Yorkers” is being “siphoned” from the city coffers by CORE, Compl. ¶ 1, it does not and cannot allege that CORE failed to deliver required services to those New Yorkers in need every single day. Indeed, DHS

has repeatedly recognized CORE for its effective provision of homeless services through awards, report cards, and routine correspondence. *See* Weingart Aff. ¶ 11. In late 2017, DHS Assistant Commissioner Sonya Russell wrote to CORE: “[Y]ou are the most responsive of my portfolio and I can always count on you.” *See* Ex. 2.¹ More recently still, in 2019, DHS named CORE its “Provider of the Year.” Weingart Aff. ¶ 11. CORE has continued to meet and exceed these standards.

B. CORE Fully Disclosed Its Operational Structure To DHS, Which Happily Accepted CORE’s Services

DHS has gone to great lengths to claim that it did not know until September of 2019 that wholly-owned subsidiaries of CORE—CORE Facilities Management, LLC, Flavor Foods, LLC, and PROCORE, LLC (the “Subsidiaries”)—were providing services to DHS’s clients as third-party vendors to CORE. *See, e.g.*, Compl. ¶ 36; (DHS learned of Subsidiaries as part of September 2019 review); Pullo Aff. ¶ 17 (As of 2019, “CORE had not disclosed that it intended to use these entities as subcontractors in connection with DHS contracts.”). In fact, as the documents described below make patently clear, this fundamental premise of DHS’s Complaint is simply and demonstrably false.

1. CORE Disclosed All Salient Facts In August 2017

The City *admits* that CORE disclosed in its August 23, 2017, letter to DHS not only the existence of the Subsidiaries but also that: 1) Mr. Brown was CEO of each of the entities, 2) that the entities were each for-profit; and 3) that CORE owned and founded these entities. Compl. ¶¶ 33–34; Pullo Aff. 13. Nevertheless, DHS somehow claims ignorance that the Subsidiaries were to provide services under contracts with the department, pleading that it did not know that the

¹ “Ex.” refers to Exhibits annexed to the Affidavit of Wendy S. Weingart filed simultaneously herewith.

Subsidiaries were being disclosed “in connection with the contracts [CORE] was *then entering* into with DHS.” Pullo Aff. ¶ 14 (emphasis added). This is disingenuous at best. These disclosures were made, as Pullo admits, “after DHS awarded CORE the Bergen Street Shelter Contract,” *id.* ¶¶ 7, 13, and CORE explicitly disclosed that the entities had been “formed to respond to a request for a proposal by a *city*, state, or federal agency,” Compl. ¶ 33 (emphasis added); Pullo Aff. ¶ 14.

Notably, although the pleadings purport fairly to summarize CORE’s August 2017 disclosures, the Complaint omits the following passage from the August 23, 2017 disclosures:

“Flavor Foods, LLC, CORE Facilities, LLC, PROCORE, LLC and Secure CORE LLC, are all wholly owned subsidiaries of CORE Companies, Inc. which itself is a wholly owned subsidiary of CORE Services Group, Inc. The limited liability companies are part of a *recently formed* corporate structure that will enable CORE to further its mission. Through these social enterprise entities CORE will be able to provide livable wage jobs *to the clients CORE serves, as well as the greater New York community.*”

Ex. 3 at 4. Thus, contrary to the De Blasio Administration’s allegations, CORE went to great lengths to draw attention to, and provide additional relevant information about, the particular Subsidiaries at issue here, including the fact that they were “recently formed” to serve the “New York community.”

Nevertheless, the City counterintuitively (and nonsensically) claims the following:

“Because CORE was providing all of this information in connection with CORE’s contracting with the City, the clear implication of CORE’s response was that CORE did not intend to utilize the For-Profit Subsidiaries as subcontractors in connection with DHS contracts.”

Compl. ¶ 37. Of course, the opposite is true. CORE was “providing all of this information” *precisely because* the disclosure was “in connection with CORE’s contracting with the City.” In every respect—timing, substance, and audience—the disclosures relate to services provided under contracts “with DHS” that CORE was “then entering.” Pullo Aff. ¶ 14. Notably, when information contained in the disclosures did not relate to existing DHS contracts—but rather was

provided in an abundance of caution to ensure that its answers were complete—CORE explicitly noted as much.² The de Blasio Administration’s claims of ignorance regarding Jack Brown’s compensation are similarly disingenuous. DHS admits that it knew that Brown was the CEO of the Subsidiaries, that they were for-profit entities, and that, by at least 2019 (according to the DHS’s own allegations), it knew that the Subsidiaries were doing work for DHS. Given the foregoing, DHS cannot reasonably have believed that the CEO of a for-profit company was working for free until it learned otherwise from a CORE disclosure in February 2021. Compl. ¶ 52.³

2. *Documents Definitively Show DHS Knew All Relevant Facts Prior To Its Alleged Discovery Of Them In 2019*

DHS’s real-time understanding of the 2017 disclosures is demonstrated by correspondence in 2018 in which DHS officials express clear knowledge of the Subsidiaries, their structure, their for-profit status, and their roles providing services under DHS contracts. The documents also show that DHS acknowledged and approved the arrangement, including with knowledge that in certain circumstances the Subsidiary in question was not the lowest bidder, well before the September 2019 review, contrary to its claims. Compl. ¶¶ 7, 9-11, 36; Pullo Aff.

² CORE’s August 2017 letter simultaneously disclosed entities other than the Subsidiaries such as companies formed to respond to requests for proposals in other states, and explained their lack of relevance. Ex. 3 at 4. (e.g., “The Justice Group, LLC (single purpose entity *formed to respond to Justice Department RFPs in states other than NY*)” (emphasis added).

³ The City implies that Mr. Brown improperly completed a 2017 conflict of interest disclosure form because the disclosure allegedly did not list the Subsidiaries and CORE policy required that any organization in which he had a “compensation arrangement” be disclosed. Compl. ¶¶ 38-39. This argument is fundamentally misleading: the City does not plead, nor can it, that Mr. Brown had a compensation arrangement with any of these entities *at the time of the disclosures* in 2017. The City deliberately ignores that its own allegations regarding when Mr. Brown received compensation from the Subsidiaries begin in 2018. Compl. ¶ 53. The City engages in such “artful pleading” elsewhere, including its feckless claim that CORE should have disclosed Brown’s salary—an expense—as “profits” of the Subsidiaries. Compl. ¶¶ 22, 24.

¶ 14

For example, Mr. Brown wrote the following to Assistant DHS Commissioner Sonya Russell on April 30, 2018:

“Flavor Foods, a subsidiary of CORE is the current food service provider for CORE’s Beach House, Bergen House and commercial hotels sites. Flavor Foods was established after recognizing the meals being provided by both Preferred Meals (at Beach House) and Whitson’s Food Services (serviced the CORE’s commercial hotels) was seldom eaten and mostly discharged by our clients.

...

Preferred Meals charges \$9.10 a day per client while Whitson’s is \$7.87 a day per client (please see attached). Flavor Foods cost \$9.00 a day per client. Flavor Foods may not be the lowest price but we believe the quality of the food, customer satisfaction and less waste are as equally as important to price.”

Ex. 16 (emphasis added).

Rather than object to this detailed disclosure, Assistant Commissioner Russell responded:

“Thank you for your submission, and I am extremely pleased to hear that the feedback has been positive at all locations and that are clients are enjoying the food. ***The information will be kept on file.***”

Id; see also Ex. 17 (May 2018 email to Assistant DHS Commissioner Russell, providing “food service permits for Flavor Foods covering all locations serving meals to our DHS clients.”); Ex. 18. (July 2018 email confirming to DHS Operations Manager that “Flavor Foods” provides food services at a number of listed sites). In March 2019, a DHS Administrative Nutritionist asked two DHS Assistant Commissioners how “flavor food (***for profit*** food service establishment)” should apply for food permits at various shelters. Ex. 19 (emphasis added).

Likewise, in a series of July 2018 emails to Assistant Commissioner Russell, CORE outlined that PROCORE had started providing security at certain shelters while unequivocally referring to PROCORE as “a CORE company.” Ex. 20. There is myriad of additional invoices, financial documents, and disclosure documents relating to proposals to run additional sites

disclosing the arrangements with the Subsidiaries prior to September 2019. Exs. 21-24.

In short, the documentary record demonstrates that DHS's serious allegation that CORE "siphoned" money through secret entities is utterly spurious.

C. The De Blasio Administration Repeatedly Relied On CORE To Shelter Homeless New Yorkers And Then Failed To Compensate CORE For Providing Those Services

As DHS acknowledges, when it learned about these alleged contractual breaches, supposedly in 2019, it did not sue CORE or terminate the relationship. Compl. ¶¶ 43–49. Instead, it entered into a Certification Agreement that read: "[T]he continued operation of CORE as a service provider funded by DSS *remains in the best interests of the City and in the best interests of the clients CORE serves on behalf of the City.*" Weingart Aff. ¶¶ 39–40; Ex. 28 at 1 (emphasis added).

Both before and after the 2019 disclosures, DHS has time and again turned to CORE to address capacity needs, asking CORE to open or take over operations of numerous new shelters for DHS, often at a moment's notice. Weingart Aff. ¶¶ 35–38, 41–42; Exs. 25-27; *see also* Compl. ¶ 21 (admitting DHS agreed to a new contract for the Beach Street shelter last year). And CORE, while struggling to operate because of consistently late or nonexistent payments from DHS, repeatedly rose to the occasion. As a result of these efforts at the de Blasio Administration's continuing request, DHS now owes CORE more than \$33 million for services that CORE has provided to DHS's homeless clients. *See* Weingart Aff. ¶¶ 42–45; Ex. 30.

D. The De Blasio Administration's History Of Non-Payment Necessitated The Creation Of CORE's Subsidiaries

While DHS attempts to paint CORE's Subsidiaries as part of a nefarious plot to "siphon" City funds, the reality is that these entities would not exist but for DHS's indisputable history of late or nonexistent payments to CORE and other shelter providers. In June 2017, in response to

the difficulty of paying its third-party vendors and financing its operation in the face of the de Blasio Administration's payment failures, CORE determined that a vertical integration model—used by peers in both the nonprofit and for-profit sector—would provide the needed flexibility to meet CORE's mission. *See, e.g.*, Weingart Aff. ¶¶ 20-25; Ex. 14. This model and the creation of the Subsidiaries was also unanimously approved by CORE's Board. *Id.* ¶ 24; Ex. 15. CORE was right. Just one year into its expanded operations with DHS, non-payment had left CORE unable to pay its third-party vendors who, in turn, expressed mounting frustrations and ultimately threatened to stop providing services to CORE's clients altogether. *See, e.g.*, Weingart Aff. ¶ 25; Ex. 20. CORE's newly-adopted model allowed it to continue providing services to homeless New Yorkers despite the inordinate delays in payments for services and related out-of-pocket expenses long since rendered and incurred, including services that CORE provided to homeless New Yorkers in additional locations that DHS begged CORE to serve on an emergency basis. *See* Weingart Aff. ¶¶ 35–42; Exs. 25-27.

E. The Use Of The Subsidiaries Has Cost DHS Nothing

DHS's theory of harm consists of the conclusory claims that it has been “overcharged” due to a lack of competitive bidding for vendor services, which has in turn permitted excessive salaries to flow to CORE executives. *See, e.g.*, Compl. ¶¶ 73–75. But, after reviewing this issue for nearly three years, the Complaint does not include a single allegation that the arrangements that CORE entered with the Subsidiaries cost DHS a penny more than was appropriate to compensate for the services provided.

Affiant Pullo offers a conclusory opinion in his affidavit that because “it appears that CORE continued to choose the For-Profit Subsidiaries whether or not they were the lowest bidder” in 2020 and 2021, competitive bidding would have produced a lower bidder than the Subsidiaries years earlier, in 2018. Pullo Aff. ¶¶ 37-38. Pullo makes numerous logical leaps

without any substantiation whatsoever. He does not explain, for example, what third-party bids he is referencing or what the difference in pricing may have been between the theoretical third-party bids and the Subsidiary bids. Nor does he allege the existence of a suitable third-party vendor in 2017 and 2018 willing to bid despite DHS's ongoing failure to pay.

Worse, Pullo's allegations that DHS was "overcharged" are fatally undermined by DHS's own documents, which yet again are not attached to the Complaint. For example, DHS relies on the results of an independent "Forensic Audit" commissioned by CORE at the behest of DHS⁴ to plead that CORE did not conduct competitive bidding with, or obtain formal approval of, its Subsidiaries in 2018. Compl. ¶¶ 56–58. Yet DHS failed to disclose the essential finding of that same Forensic Audit: the pricing offered by the Subsidiaries was consistent with what third-party bidders were charging:

- "We observed that the prices per meal charged under contracts with Flavor Foods LLC are reasonably consistent with the pricing in the unrelated entities' contracts and bids."
- "We observed that ProCORE LLC's pricing under the contracts in place during the Period and the pricing in ProCORE LLC's 2020 proposals are reasonably consistent with the bids from unrelated entities."
- "While maintenance charges vary significantly across program locations based on facility square footage and other considerations, the CORE Facilities Management LLC monthly maintenance charges do not appear to be unreasonable when compared to proposals from unrelated companies."

Ex. 32 at 8. In making its findings, the Audit Firm—approved by Pullo—compared unrelated entity bids from 2017, 2019, and 2020, with the rates charged by the Subsidiaries from 2017 onward (the "Period"). *Id.* It found no harm to DHS from the alleged lack of competitive

⁴ The Certification Agreement required the independent Forensic Audit and provided DHS the right to approve the Audit Firm. Ex. 28 at 2.

bidding. Pullo's vague and conclusory allegations are fatally contradicted by the same Forensic Audit that he repeatedly relies upon in his affidavit. Pullo Aff. ¶¶ 29-31.

Worse still, the Complaint ignores the fact that DHS and the City's Office of Management and Budget sets an annual budget for what it determines to be the reasonable costs for the services provided by its shelter operators, and DHS will not pay a penny over those budgetary figures. The gaping hole in the Complaint is not an oversight. All of the CORE entities have remained within the budget at all times. *See Weingart Aff.* ¶ 46; Ex. 31.

The fact is that DHS was neither overcharged nor harmed. To illustrate this point, CORE Services could simply have provided the services it contracted to its Subsidiaries—at the same cost, and paid Brown the same aggregate compensation that he received from all of the entities combined – and it would not have violated any contractual provision regarding competitive bidding or any restriction on executive salary (the City has plead none).

III. ARGUMENT

On a motion to dismiss pursuant to CPLR 3211(1), the well-pleaded allegations in a complaint are presumed true. *Scott v. Bell Atlantic Corp.*, 726 N.Y.S.2d 60, 63 (1st Dep't 2001). “[B]are legal conclusions . . . are not entitled to such consideration.” *Sud v. Sud*, 621 N.Y.S.2d 37, 38 (1st Dep't 1995). The Court may consider documents that are incorporated in the Complaint by reference. *See Cortec Industries, Inc v. Sum Holding L.P.*, 949 F.2d 42, 47-48, (2d Cir. 1991). Moreover, a motion to dismiss may be granted based on a defense “founded upon documentary evidence,” see CPLR 3211(1), where the “documents relied upon . . . definitively dispose of plaintiff's claim.” *Bronxville Knolls, Inc. v. Webster Town Ctr. P'ship*, 221 A.D.2d 248, 248 (1st Dep't 1995).

POINT I
ALL OF THE CLAIMS SHOULD BE DISMISSED UNDER THE DOCTRINES OF
WAIVER, ACQUIESCENCE, AND RATIFICATION

The Court of Appeals has long held that the “[a]cceptance of benefit under the contract with knowledge of the wrong constitutes a waiver of the wrong.” *New York Tel. Co. v. Jamestown Tel. Corp.*, 282 N.Y. 365, 372 (1940); *see also VCG Special Opportunities Master Fund Ltd. v. Citibank, N.A.*, 594 F. Supp. 2d 334, 342 (S.D.N.Y. 2008), *aff’d*, 355 F. App’x 507 (2d Cir. 2009) (“It is well-established that where a party to an agreement has actual knowledge of another party’s breach and continues to perform under and accepts the benefits of the contract, such continuing performance constitutes a waiver of the breach.”); *Givoldi, Inc. v. United Parcel Serv.*, 286 A.D.2d 220, 220 (1st Dep’t 2001) (accepting conditions different than those agreed upon in the contract “ratifies” the conduct and “waives any claim”). Where a party directly responds to and engages with the defendant under conditions that it later alleges constitute a breach, it has acquiesced in the breach. *See CDO Plus Master Fund Ltd. v. Wachovia Bank, N.A.*, No. 07 Civ. 11078 (LTS)(AJP), 2009 WL 2033048, at *6 (S.D.N.Y. July 13, 2009).

A. DHS’s Own Written Words, Along With CORE’s Clear Disclosures, Establish Knowledge And Acceptance

As set forth above, in 2018, the same year that DHS alleges that 1) the Subsidiaries’ work on behalf of DHS was not disclosed; 2) DHS’s approval was not granted, and 3) competitive bids were not obtained allegedly resulting in harm to DHS, Compl. ¶¶ 36, 40, 58, the CEO of CORE told a DHS Assistant Commissioner that Flavor Foods, a “subsidiary of CORE,” was providing meals to various DHS shelters and disclosed that its meals cost about \$1.10 per client more per day than another vendor. Weingart Aff. at ¶¶ 27–28; Ex. 16; *see supra* section II.B.2. The Assistant Commissioner’s response was not an objection but rather an express approval: “extremely pleased to hear that the feedback has been positive at all locations and that the clients

are enjoying the food.” *Id.*

Nor is it a surprise that DHS knew that the Subsidiaries were working for CORE in 2018 given that CORE clearly disclosed those facts to DHS in 2017. Not only did CORE specifically identify the Subsidiaries by listing them in its disclosures, it also specifically called out each one of them in a paragraph devoted to explaining how and why they had been “recently formed.” *See supra* section II.B.1. Tellingly, despite purporting to offer an accurate summary of the disclosures to this Court, DHS failed to note these specific disclosures and three additional references to New York that also undermine DHS’s claims. DHS’s claim that it somehow did not know that Mr. Brown would be earning a salary as a CEO of a for-profit entity is also implausible on its face.

DHS cannot now claim a breach by CORE Services given its prompt and thorough disclosure of the facts that DHS attempts to invoke in support of its claims. DHS’ continued acceptance of services from CORE and the Subsidiaries after the disclosures is fatal to the de Blasio Administration’s belated claims. Compl. ¶¶ 19, 29; *New York Tel. Co.*, 282 N.Y. at 372; *VCG Special Opportunities Master Fund Ltd.*, 594 F. Supp. 2d at 342; *Givoldi, Inc.*, 286 A.D.2d at 220; *CDO Plus Master Fund Ltd.*, 2009 WL 2033048, at *6.

B. After DHS’s Review Allegedly Discovered The Breaches At Issue, DHS Agreed Nonetheless To Move Forward With CORE

DHS’s waiver, ratification, and acquiescence from 2017 to 2019 of the facts and circumstances at the center of its defective Complaint is just the beginning. Once DHS took issue—belatedly—in 2019 with the third-party arrangements CORE disclosed in 2017, it found as part of the Certification Agreement that the “continued operation of CORE as a service provider funded by DSS *remains in the best interests of the City and in the best interests of the clients CORE serves on behalf of the City.*” Ex. 28 (emphasis added). By DHS’s admission,

the Certification Agreement, signed in April 2020, addressed the alleged breaches now being raised nearly two years later, and also addressed questions regarding salaries earned by executives of the Subsidiaries. Compl. ¶¶ 48. Notably, DHS has failed to allege a single violation of the Certification Agreement, only alleging that it disagrees with the Board’s decision to continue using the Subsidiaries, which the Forensic Audit expressly found offered market-rate pricing. Compl. ¶¶ 61–62; Ex. 32 at 8.

DHS cannot fairly induce CORE—on the premise that DHS was willing to move forward—to sign a Certification Agreement and to incur costly reviews and undertakings, and then later claim a breach based on the same facts and issues that were addressed and resolved by the Certification Agreement. Indeed, DHS not only ignores the significance of entering into the Certification Agreement but also attempts to mischaracterize documents emanating from the Certification Agreement to plead its case.

DHS has knowingly forfeited again and again the right to sue for the conduct at the heart of its Complaint. It may not sue for years-old alleged breaches in which it has clearly acquiesced now that relations have broken down between the parties. All of DHS’s claims should be dismissed in their entirety pursuant to CPLR 3211(a)(1).

POINT II
THE CITY FAILS TO PLEAD THE PERFORMANCE, BREACH, AND DAMAGES
ELEMENTS OF ITS BREACH OF CONTRACT CLAIM

A breach of contract claim requires the “existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep’t 2010). The City’s pleadings fail on three of these four elements.

A. The City Fails To Plead That It Fulfilled Its Obligations To CORE

The City alleges in completely conclusory fashion that it has “fulfilled its obligation to CORE under the CORE Agreements,” Compl. ¶ 71, but “fails to plead *facts* demonstrating [plaintiff’s] own adequate performance.” *Bravo v. MERSCORP, Inc.*, No. 12-CV-884 (ENVV) (LB), 2013 WL 1652325, at *5 (E.D.N.Y. Apr. 16, 2013) (dismissing complaint for pleading performance in only conclusory fashion) (emphasis added).

In fact, DHS has repeatedly abandoned its contractual obligations by consistently failing to pay CORE for services rendered. *See supra* section II.C. As of November 2021, CORE was due approximately \$33 million for services provided to DHS, either for work on registered contracts or for work under agreements that DHS requested but failed to register as formal contracts. For the past four years, DHS has punted its financial obligations to CORE, placing greater and greater strain on an organization that has been providing services to DHS clients without payment. *See supra* section II.C.

B. The City Fails To Allege Breach

In addition to its failure adequately to allege its own performance, the City also “fails to allege an actual breach.” *Bravo*, 2013 WL 1652325, at *5. The City’s Complaint is replete with conclusory assertions and light on specific factual allegations. For example, the City’s primary allegation regarding breach of the competitive bidding provision is: “DHS determined that CORE had not solicited three bids for the services provided by the For-Profit Subsidiaries.” Compl. ¶ 46. This claim is premised on the allegation that the Subsidiaries operated as “subcontractors.” Compl. ¶¶ 72–73. But DHS offers no contractual language supporting that point or distinguishing between a “vendor” and a “subcontractor.”

More specifically, the City has failed to plead that CORE breached the agreement by

failing to disclose the Subsidiaries to DHS, Compl. ¶ 72, for many of the same reasons addressed above. *See supra* section II.B. DHS's tortured rendering of the facts ignores the context of the disclosure and the *four separate references to New York* in those disclosures and the correspondence between 2017 and 2019 clearly reflecting DHS's understanding of those disclosures. *See supra* section II.B.2.

The Complaint also fails to account for the lack of any provision in the contracts that requires selecting the lowest bidder. Indeed, in 2018, DHS's Assistant Commissioner clearly approved of CORE using Flavor Foods after specifically learning that it was charging more than another vendor. *See supra* section II.B.2.

C. The City Fails To Adequately Plead Damages

“A claim for breach of contract must rest on more than a conclusory allegation that the defendant's breach caused damages.” *Bravo*, 2013 WL 1652325, at *6 (quotations and citations omitted) (dismissing claim for failure to allege “causally connected damages”); *see also Davis v. Clearway Mortg., LLC*, No. 08-CV-6492L, 2009 WL 2843255, at *2 (W.D.N.Y. Aug. 31, 2009) (dismissing claim for failure to “proffer[] allegations of actual damages”); *Miller v. HSBC Bank U.S.A., N.A.*, No. 13 Civ. 7500, 2015 WL 585589, at *4 (S.D.N.Y. Feb. 11, 2015) (similar). Critically, the First Department has held that a complaint is “fatally deficient” when it “does not demonstrate how the defendant's alleged breach [] caused plaintiffs any injury.” *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 (1st Dep't 1988); *ERE LLP v. Spanierman Gallery, LLC*, 94 A.D.3d 492, 493 (1st Dep't 2012) (quoting and reiterating the holding in *Gordon*); *see also Vista Food Exch., Inc. v. BenefitMall*, 138 A.D.3d 535, 536 (1st Dep't 2016) (plaintiff must plead facts sufficient to show that damages are the “natural and probable consequence” of the breach).

The Complaint appears to contend that DHS was “overcharged” in breach of relevant contracts based on two interrelated theories: that a lack of competitive bidding led CORE to direct work exclusively to its Subsidiaries and to agree to pay the Subsidiaries above market rate, and that this arrangement permitted the Subsidiaries to pay excessive salaries to certain executives, namely Mr. Brown.

DHS’s theory is that competitive bidding disciplines administrative and overhead costs—such as executive salaries—by ensuring that such costs settle at a market rate. That is why it pleads no factual allegations that any City contractual provisions or other policies limit or cap the salaries of executives employed by the City’s contractors, let alone the salaries of executives of subcontractors or vendors. The City also pleads no factual allegations that CORE or any of the Subsidiaries failed to provide the services they were required to provide to vulnerable New Yorkers at the rates set forth in the budgets that were approved by both DHS and OMB. Most fundamentally, the City fails to plead or explain how it is harmed, or could be harmed, in circumstances where the required services are being provided under the contract at the contracted rate, irrespective of the allocation of the provider’s overhead costs to administrative salary expense or something else.

Since the City admits that CORE was actually providing these services, and continues to provide them to this day, *see* Compl. ¶¶ 17-30, the only way DHS plausibly could have been “overcharged” is if CORE was charging beyond an appropriate and reasonable market rate for them. But the City cannot plead such an allegation with any factual basis. To the contrary, the independent Forensic Audit that DHS required as part of the Certification Agreement and then relied on to plead this Complaint concluded that CORE’s financial arrangements with the Subsidiaries were *consistent with third-party bids* and contemplated that CORE would continue

to use its affiliated vendors so long as they continue to charge a fair price. *See supra* section II.E; Ex. 32 at 8. The City’s conclusory claims that it has been “overcharged” are thus fatally deficient.

Even if the Court accepts the invocation of allegedly “excessive” salaries as pleadings relating to damages,⁵ there is nothing to support the notion that Brown’s salaries were excessive under the circumstances. The de Blasio Administration’s feigned outrage that an African-American social entrepreneur responsible for overseeing the provision of needed services to more than three thousand vulnerable New Yorkers over a four-year period made “in excess of \$1.5 million in compensation from the For-Profit Subsidiaries from 2018-2021,” Pullo Aff. ¶ 33, is nothing but an attempt to divert attention from the \$33 million that DHS owes CORE.⁶

DHS offers no further analysis, no executive salary limits, no proper comparisons to other executives, or anything else that would put Mr. Brown’s alleged compensation in any kind of context. Likewise, DHS’s claim of harm based on excessive salaries finds no support in any contract or anywhere else.

POINT III
DHS’S UNJUST ENRICHMENT CLAIM IS UNTETHERED TO THE LAW AND
FRIVOLOUS IN LIGHT OF THE CONTRACTS IN PLACE

DHS apparently contends that it has an extra-contractual right to veto the salary paid to any employee who works for any entity that receives funds from DHS, however indirectly,

⁵ The Court should not accept such an invocation independent of the competitive bidding allegations because the only tie that DHS has alleged between excessive salaries and any contractual right flow through the competitive bidding allegations.

⁶ This breaks down to less than \$100,000 per year, per entity. As DHS would have it, third-party vendors rather than CORE subsidiaries would provide each of these services. However, DHS does not and cannot allege that any CEO of a third-party vendor would be willing to take on the immense responsibility of providing these services to vulnerable New Yorkers for that level of pay, especially given the history of non-payment during the de Blasio administration.

wherever it decides that the salary is “excessive” under some notion of “equity and good conscience.” This novel claim is utterly without legal basis.

A claim for unjust enrichment is a quasi-contract theory “available only in unusual situations” and “not a catchall cause of action to be used when others fail.” *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (Ct. App. 2012). Its essential elements include that 1) a benefit was conferred to the defendant; 2) at the plaintiff’s expense; and 3) that equity and good conscience require the benefit to be returned. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (Ct. App. 2011). An unjust enrichment claim fails, however, “if the connection between the parties is too attenuated.” *Id.* at 174. “Mere knowledge” of the other party is insufficient; rather the relationship must be one that is sufficiently direct “to cause reliance or inducement” as it relates to the conferring of the benefit. *See Miller v. Walters*, 46 Misc. 3d 417, 425 (N.Y. Sup. Ct. 2014) (finding that where parties were inherently at odds with each other, there could have been no reliance or inducement in conferring a benefit on the other party); *see also id.* (relationship must be one that “could cause” reliance or inducement).

The Court of Appeals has found on multiple occasions that a relationship that flows through another entity, such as a relationship between a purchaser, supplier, and a supplier’s vendor or subcontractor, is insufficiently direct. *See Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 519 (2012) (rejecting an unjust enrichment claim that links a business “with whom [plaintiffs] contract” with “other entities tangentially involved but with whom they have no direct connection” because that “would impose a burdensome obligation in commercial transactions”). In *Sperry v. Crompton Corp.*, the Court considered allegations that a purchaser of tires was “overcharge[d] by producers of chemicals used in the rubber-making process” due to collusion. 8 N.Y.3d 204, 205, 216 (Ct. App. 2007). The Court dismissed the claim finding that

the “connection between the purchaser of the tires” and the “producers of th[ose] chemicals” is simply too attenuated where a manufacturer stood in between the parties. *Id.* at 215-16; *see also Chambers v. Weinstein*, 997 N.Y.S.2d 668 (N.Y. Sup. Ct. Aug. 22, 2014), *aff’d*, 21 N.Y.S.3d 892 (2016) (holding that there is no direct relationship where the benefit to the defendant was conveyed by the plaintiff through another party).⁷

Courts are particularly quick to dismiss unjust enrichment claims involving an intermediary where the intermediary party has a contractual relationship that covers the same subject matter. *See Georgia Malone*, 19 N.Y.3d at 519. This principle is consistent with the long-established rule that the “existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987).

In *Robinson v. Oz Master Fund, Ltd.*, Justice Scarpulla dismissed an unjust enrichment claim against the defendant signatories to an agreement that covered the dispute and then went on to dismiss the claims as to the defendants who were not “signatories.” No. 654009/13, 2015 WL 6126956, at *5 (N.Y. Sup. Ct. Oct. 16, 2015). There, plaintiffs sued two non-signatory entities that were “allegedly created to enter into [a contract].” *Id.* The Court ruled that the entities have “too weak a connection to plaintiffs to sustain a claim for unjust enrichment . . . [t]hat is, their only connection to plaintiffs is through entities whose relationship with plaintiffs is governed by contract.” *Id.*

⁷ *See also Barone v. Barone*, 54 N.Y.S.3d 609, at *8 (N.Y. Sup. Ct. Feb. 17, 2017) (dismissing complaint for failure to plead a “partnership relationship” between the parties); *Crescimanni v. Trovato*, 162 A.D.3d 849, 851-52 (2d Dep’t 2018) (unjust enrichment cause of action “devoid of merit” because “plaintiff did not allege a relationship upon which an unjust enrichment cause of action could be based).

The facts here are similar. As CORE disclosed, the Subsidiaries were created in anticipation of potential contracts with government agencies, including DHS, and their “only connection to plaintiffs” is through CORE and its contract with the DHS. Indeed, according to DHS, the relationship between the Subsidiaries and DHS are CORE’s obligations as to either vendors or subcontractors within the applicable agreement. If there was any question as to whether DHS’s unjust enrichment claim is duplicative of their contractual one, the fact that they copied verbatim paragraphs between their two causes of action ought to be dispositive. *Compare* Compl. ¶¶ 74-75 with ¶¶ 78-79; *Rite Aid of New York, Inc. v. Chalfonte Realty Corp.*, 39 Misc.3d 1230(A), 971 N.Y.S.2d 74 (N.Y. Sup. Ct. Aug. 14, 2012), *aff’d*, 105 A.D.3d 470 (2013) (holding that, where plaintiff asserted that it had been “overcharged” through “misrepresent[at]ions” in breach of a contract, the corresponding unjust enrichment claim is duplicative). DHS’s relationship with Mr. Brown is even further attenuated, as it flows from him, through the Subsidiaries that DHS alleges paid him excessively,⁸ through CORE, and then—by way of contract—to DHS. *See Robinson*, 2015 WL 6126956, at *5 (2015). In any event, DHS’s claim that it was “overcharged” as a purchaser of services by a vendor whose relationship to DHS flows through an intermediary fails under *Sperry*. 8 N.Y.3d at 215–16.

The City also does not even attempt to plead a relationship with the Subsidiaries or Mr. Brown that induced their reliance in conferring the alleged benefits. *See, e.g., Georgia Malone*, 19 N.Y.3d at 519 (Ct. App. 2012). Quite to the contrary, DHS claims (disingenuously) that it had no idea that these entities were providing services in connection with DHS contracts, that it would not have approved or relied on these entities due to their related-entity status, and that

⁸ Even if the City claimed that it was suing Mr. Brown in reference to his role as CEO of CORE, Mr. Brown’s “only connection with [the City]” is still through an entity, CORE, whose “only connection to the City is . . . is governed by contract.”

when it found out about their provision of services to New Yorkers, it took action including ultimately terminating CORE's contracts. As such, the City's unjust enrichment claim is doomed by its own pleadings.

POINT IV
THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE BECAUSE
AMENDMENT WOULD BE FUTILE

DHS claims that it has been reviewing these issues for three years and referred these issues for formal investigation approximately two years ago. Compl. ¶¶ 40, 49. Its papers demonstrate it has long been aware of and had access to numerous relevant documents putting it on notice of these issues. These documents include the August 23, 2017, disclosures and the independent Forensic Audit regarding these issues – documents which DHS purported to summarize but failed to attach to its Complaint because they fundamentally undermine DHS's case. *See generally supra, Compl.*

The Court may infer that the de Blasio Administration's offering of an utterly insufficient and misleading Complaint under these circumstances demonstrates that it has nothing left to offer and amendment would be futile. The Court should dismiss the Complaint with prejudice.

IV. CONCLUSION

For all the foregoing reasons, this Court should dismiss the Complaint with prejudice pursuant to Rules 3211(a)(1) and 3211(a)(7) of the CPLR.

Dated: New York, New York
February 3, 2022

KOSTELANETZ & FINK, LLP

Attorneys for Defendants CORE Services Group, Inc., CORE Companies, Inc., CORE Facilities Management, LLC, Flavor Foods, LLC, PROCORE, LLC
7 World Trade Center
250 Greenwich Street, 34th Floor
New York, New York 10007
(212) 808-8100
cmillman@kflaw.com

By: /s/ Claude M. Millman
Claude M. Millman

DECHERT, LLP

Attorneys for Defendant Jack Brown
Three Bryant Part
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3683
andrew.levander@dechert.com

By: /s/ Andrew J. Levander
Andrew J. Levander

cc: Sabita Krishnan, Esq. (via NYSCEF)
Assistant Corporation Counsel to The City of New York

Joseph Pepe, Esq. (via NYSCEF)
Assistant Corporation Counsel to The City of New York

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 202.8-b of the Rules of this Court, I certify that the accompanying Joint Memorandum of Law in Support of the Motion to Dismiss contains 6972 words, excluding the parts of the document that are exempted from Rule 202.8-b. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this document.

KOSTELANETZ & FINK, LLP

Attorneys for Defendants CORE Services
Group, Inc., CORE Companies, Inc., CORE
Facilities Management, LLC, Flavor Foods,
LLC, PROCORE, LLC
7 World Trade Center
250 Greenwich Street, 34th Floor
New York, New York 10007
(212) 808-8100
cmillman@kflaw.com

By: /s/ Claude M. Millman
Claude M. Millman