SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 650150/2015
ESTATE OF ALEXANDER
vs.
ACE GROUP INTERNATIONAL LLC
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE 11/16/15
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 22-32
Answering Affidavits — Exhibits _____ | No(s). 38-42
Replying Affidavits _____ | No(s). 47

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/29/16

_____, J.S.C.
SHIRLEY WERNER KORNREICH J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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THE ESTATE OF ALEXANDER CALDERWOOD, by its personal representative, Thomas B. Calderwood,

Plaintiff,

-against-

ACE GROUP INTERNATIONAL LLC, ECOPLACE LLC, and STEFANOS ECONOMOU,

Defendants.

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Index No.: 650150/2015

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 002 and 004 are consolidated for disposition.

Defendants Ace Group International LLC (AGI or the Company), Ecoplace LLC (Ecoplace), and Stefanos Economou move, pursuant to CPLR 3211, to dismiss the Amended Complaint (the AC). Seq. 002. Plaintiff, the Estate of Alexander Calderwood (the Estate), opposes the motion and moves for leave to amend the AC with a "Supplemental Amended Complaint." Seq. 004. Defendants oppose the proposed amendment. For the reasons that follow, the motions are granted in part and denied in part.

I. Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the AC (Dkt. 5)[1] and the documentary evidence submitted by the parties.

A. Ace, AGI, and the Governing LLC Agreement

On November 14, 2013, Alexander Calderwood (Alex), who was 47 years old, died intestate. His father, Thomas Calderwood, is the executor of his Estate, the plaintiff in this

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

action.[2] During his lifetime, Alex apparently had great success with a number of business ventures. This case concerns one of his ventures – the Ace brand of boutique hotels, which began in Seattle and expanded to places such as New York, Palm Springs, and London. Alex began working on Ace in 1999 with a number of business partners. In 2011, Alex bought out two of his partners using the proceeds of a $10 million investment from defendant Stefanos Economou. In conjunction with this investment, a new Delaware LLC, AGI, was formed. AGI is a management company whose primary assets are the management contracts it has with the Ace hotels.[3]

AGI is governed by an LLC Agreement dated September 16, 2011. *See* Dkt. 56 (the Agreement). The Agreement is governed by Delaware law, but provides for jurisdiction in this court. *See id.* at 66. The Agreement generally refers to the holders of AGI's equity as "Members". Alex, on the other hand, is specifically referred to as "Calderwood". *See id.* at 5. Ecoplace is referred to as "Investor". *See id.* As further discussed, the Agreement defines different types of membership interests, such as Members, Withdrawing Members, Non-Funding Members and Contributing Members. *See* Dkt. 56 at 8.

The Agreement provides that AGI originally had two Members – Alex and Ecoplace. Alex owned a 66.67% membership interest. Ecoplace, Economou's company, owned the remaining 33.33%. Section 3.1(b) memorializes the reason for Ecoplace's equity allocation as

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[2] Probate proceedings are occurring in state court in King County, Washington. By order of that court dated November 18, 2013, Thomas Calderwood was appointed the Personal Representative and Administrator of the Estate. *See* Dkt. 26. On April 21, 2014, he signed a Confidentiality Agreement in which he agreed to be bound by the confidentiality requirements of section 7.10 of AGI's operating agreement. *See* Dkt. 27.

[3] AGI apparently also owns the rights to the Ace brand and its intellectual property, but AGI does not own the hotels.

its $10 million investment. *See id.* at 8.[4] The Agreement generally prohibits members from transferring their interest, but permits Alex to transfer minority interests to certain AGI employees. Alex did so, reducing his total equity in AGI to 51.74%. Ecoplace still owns the remaining 33.33%

Section 7.1 provides that AGI is to be managed by a three member board (the Board). *See id.* at 20. Section 7.1(b)(i) states that Alex is entitled to designate two of the Board members (defined by the Agreement and referred to herein as "Managers"), the first two of which would be Alex and an individual named Kelly Sawdon. Section 7.1(b)(ii) provides that the third board member is to be designated by Ecoplace and that its initial designee is Economou. Section 7.1(d) explains what happens to the Board upon the death of a Member or Manager:

> Each Manager shall hold office until his or her death, resignation or removal at the pleasure of the Member that appointed him or her. If a vacancy occurs on the Board, the Person with the right to appoint and remove such vacating Manager shall appoint his or her successor. **A Member shall lose its right to have Managers serve on the Board, and its designated Managers on the Board shall be deemed to be automatically removed, as of the date on which such Member ceases to be a Member or as otherwise provided in this Agreement.** From and after the date on which a Member shall lose its right to have Managers serve on the Board, all of the provisions of this Agreement referring to Managers and the Board shall be read as if such Member's Managers do not exist and all quorum requirements and decisions of the Board shall be satisfied and made, as applicable, solely by the Managers designated by the Member whose Managers still serve on the Board.

See Dkt. 56 at 20-21 (bold added).

Section 9.7(b) then explains:

> Upon **the death** or disability of a Member (in the case of a Member who is an individual), winding up and termination of a Member (in the case of a Member

[4] Despite Ecoplace having a minority equity stake, it is entitled to a preferred return, i.e., its initial investment and additional capital contributions, before Alex (or the Estate) can begin receiving distributions. No distributions have been made to date. As discussed further herein, Ecoplace's right to a preferred return was one of its proffered reasons for only offering $200,000 to the Estate for its majority equity stake.

> that is a partnership or a limited liability company), dissolution and termination of a Member (in the case of a Member that is a corporation), or withdrawal in contravention of Section 9.7(a) of a Member, or the occurrence of a Bankruptcy/Dissolution Event with respect to a Member (the "Withdrawing Member"), **the Withdrawing Member shall cease to be a Member of the Company** and the other Members and the Board shall, subject to this Section, have the right to treat such successor(s)-in-interest as assignee(s) of the Interest of the Withdrawing Member, **with only such rights of an assignee of a limited liability company interest under the Act as are consistent with the other terms and provisions of this Agreement and with no other rights under this Agreement.** Without limiting the generality of the foregoing, the successor(s)-in-interest of **the Withdrawing Member shall only have the rights to Distributions** provided in Sections 4 and 10.3, unless otherwise waived by the other Members in their sole discretion. For purposes of this Section, if the Withdrawing Member's Interest is held by more than one Person (for purposes of this subparagraph, the "Assignees"), the Assignees shall appoint one Person with full authority to accept notices and Distributions with respect to such Interest on behalf of the Assignees and to bind them with respect to all matters in connection with the Company or this Agreement.

See id. at 55 (bold added; underline in original).

Finally, as noted, Ecoplace acquired its equity in AGI in consideration for Economou's $10 million investment. Section 9.4 grants Alex the option of purchasing some (the Partial Call Right) or all (the Full Call Right) of Ecoplace's membership interest. *See id.* at 49-50. The option expires on the fifth anniversary of the Agreement's Effective Date, i.e., September 15, 2016. The Full Call Right, which the Estate claims to be interested in exercising, is the greater of $20 million (i.e., two times Economou's original investment) or the fair market value of Ecoplace's interest as defined by section 9.4. *See id.* at 50. Importantly – but not at issue on this motion – section 9.4(e) provides that "[t]he Partial Call Right and Full Call Right described in this Section 9.4 are personal to Calderwood and cannot be Transferred to any other Person." *See id.* at 52 (underline original).

B. Pre-Litigation Disputes

By letter dated April 14, 2014, Ecoplace demanded that the Estate sell its interest in AGI to Ecoplace for $200,000:

> We are writing on behalf of [Ecoplace] to provide [the Estate] a final opportunity to accept [Ecoplace's] offer to buy the Estate's entire ownership interest in [Company] for $200,000.
>
> Your client's refusal to accept [Ecoplace's] previous offer is based on an erroneous understanding of the value of the Company's business (the "Business"). The Company is likely to shortly require a substantial infusion of capital in order to (i) properly operate the Business and (ii) remedy certain disruptions to the Business resulting from Alex's unfortunate passing.
>
> As the sole voting member and Manager, if [Ecoplace] elects to continue the Business, it expects to make a call for additional capital which will require your client to make a sizable financial investment. If the Estate refuses to make such investment, [Ecoplace's] capital contribution will immediately and considerably dilute the Estate's interest.
>
> Although the Estate is entitled to distributions from the Company in certain circumstances, given the current financial position of the Company and, more importantly, the fact that [Ecoplace] is entitled to receive its initial investment amount of $10,000,000 (plus any additional capital contributions made pursuant to the above) before the Estate receives any such distributions, we do not believe that the Estate will realize any sort of financial benefit from its ownership interest in the foreseeable future (if ever).
>
> Further, the Estate has no ability to sell its interests in the open marketplace as it is expressly prohibited from doing so pursuant to the terms of the [Agreement] and, frankly, if the Estate continues to own half the Company, we think it unlikely that [Ecoplace] would make any further investment therein (both from a time and financial perspective).
>
> Therefore, we kindly request that you reconsider the offer and confirm with the undersigned the Estate's acceptance of [Ecoplace] offer within 10 days of the date of this letter. Should I not receive such an acceptance by such time, the offer will be deemed withdrawn and [Ecoplace] will pursue other alternatives under the [Agreement] and applicable law, including the possible sale of the Company which would invariably result in the Estate receiving nothing.

See Dkt. 41.

The Estate responded with its own letter (*see* Dkt. 40), and telephone negotiations followed. The Estate summarized its positions in a letter dated December 18, 2014:

> As you know, our firm represents [the Estate] in its dispute with [AGI, Ecoplace, and Economou]. Following our calls with you on November 17 and December 10, 2014, we thought it prudent to (1) state the Estate's position in writing, (2) clarify Mr. Sondland's role,[5] and (3) notify you of actions the Estate is contemplating taking.
>
> **First**, as we explained in our first call with you, we believe the Estate is a member of AGI and has all of [Alex's] rights under the [Agreement]. We are aware that you read section 9.7 of that agreement to mean that the Estate is merely an assignee with limited rights. We believe section 9.7 is at least ambiguous and that examination of the drafting history will show that the parties did not intend it to apply to Alex's death (and, indeed, that the parties failed to consider the consequences of Alex's death generally).
>
> But Delaware law resolves this ambiguity: Section 18-705 of the Delaware Limited Liability Company Act (the "Act") provides that the personal representative of a deceased member "may exercise all of the member's rights for the purpose of settling the member's estate or administering the member's property...." The Estate may therefore exercise all of Alex's powers under the [Agreement]. Moreover, section 18-705 of the Act is mandatory: it contains no language empowering parties to contract around it, unlike similar sections of the Act, which explicitly allow themselves to be circumvented (*see, e.g.*, sections 18-702, 18-704). As a mandatory provision of the Act, section 18-705 would apply even if section 9.7 of the AGI agreement were not ambiguous.
>
> In short, the Estate is a member of AGI and should be treated as such.
>
> **Second**, during our first phone call you asked us about the role of Gordon Sondland and the role of the recently created Aspen Ace, LLC. As you know, Tom Calderwood has asked Gordon Sondland to advise him with respect to understanding and valuing the Estate's interest in AGI. To that end, Mr. Calderwood has designated Mr. Sondland to represent the Estate in the Estate's dealings with AGI, Ecoplace, and Mr. Economou. To the extent any clarification is needed, Mr. Calderwood has designated Aspen Ace, LLC, acting through its President, Mr. Sondland, to represent the Estate in these dealings. It is in this capacity (and not his individual capacity) that Mr. Sondland has agreed to represent the Estate.

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[5] As discussed further herein, while defendants now recognize they must provide the Estate with AGI's records, they object to Sondland having access to AGI's records because he allegedly is a competitor.

> **Third**, Mr. Calderwood, as the personal representative of the Estate, has been very disappointed by Ecoplace's and AGI's failure to respond timely and meaningfully to his requests for information and proposals. He is frustrated that AGI has not been transparent about its current negotiations and business plans, and that he has been forced to rely on second-hand information to get a glimpse of the current state of affairs at AGI. As a result, Mr. Calderwood is seriously considering exercising the Estate's powers under section 7.1(d) of the AGI agreement and designating himself and Gordon Sondland as the "Calderwood Managers" of AGI (replacing Kelly Sawdon and any other Calderwood Managers).
>
> Were Mr. Calderwood to take these actions, AGI would be informed to direct all notices and other manager-related communications to me to pass along to Messrs. Calderwood and Sondland. Please also note that, if these actions were taken, then Mr. Economou would no longer be in the majority of the managers, and Mr. Economou would therefore lack the ability to act on behalf of AGI under sections 7.2(c) and 7.3 of the [Agreement]. Finally, were these actions to be taken, AGI would be directed to inform all parties with whom AGI is negotiating that future communications and negotiations with AGI would need to include Messrs. Calderwood and Sondland. To avoid having Mr. Calderwood take these actions, your clients will need to act with much greater transparency immediately.

See Dkt. 29 (bold and italics in original).

The parties did not resolve their disputes. This litigation followed.

C. Procedural History

The Estate commenced this action by filing a summons and its original complaint on January 16, 2015. On March 6, 2015, the Estate filed the AC, which contains six causes of action: (1) declaratory judgment/injunction regarding the Estate's status as a Member of AGI; (2) declaratory judgment regarding the fiduciary duties owed to the Estate; (3) declaratory judgment regarding the limitations on the Estate's right to provide AGI's records to third parties (i.e., Sondland) under section 7.10 of the Agreement; (4) a statutory demand for access to AGI's books and records under the Delaware Limited Liability Company Act; (5) an accounting; and (6) a constructive trust. *See* Dkt. 5. On March 26, 2015, defendants filed an answer with two counterclaims: (1) a declaratory judgment that the Estate is not a Member of AGI, but only a

Withdrawing Member with distribution rights; and (2) a declaratory judgment that the Estate cannot share AGI's confidential information with competitors, including Sondland. *See* Dkt. 9.

On June 8, 2015, defendants filed the instant motion to dismiss the AC. The court reserved on the motion after oral argument. *See* Dkt. 67 (10/29/15 Tr.). Despite reserving on the motion, the court held that, regardless of the Estate's status as a member, it was necessarily entitled to financial disclosure because of its need to value its assets, which is true even if all the Estate has is a right to distributions. Discovery is ongoing.

In the interim, on October 23, 2015, prior to oral argument, the Estate moved for leave to file a second amended complaint (which it titles "Supplemental Amended Complaint"). *See* Dkt. 55 (the PSAC); *see also* Dkt. 62 (redline). That motion has since been fully submitted and is decided herein.

II. The Estate's Motion for Leave To Amend (Seq. 004)

The PSAC's first two causes of action are essentially identical to those in the AC, i.e., declaratory judgments regarding the Estate's status as a Member of AGI and the fiduciary duties owed to the Estate. The third cause of action seeks a declaratory judgment that Ecoplace owes the Estate fiduciary duties even if the Estate is not a Member of AGI. The fourth cause of action is for breach of fiduciary duty. The fifth cause of action is for express and implied duty of good faith breaches of the Agreement for failure to pay distributions. The sixth cause of action is for express and implied duty of good faith breaches of the Agreement for failure to honor the Estate's call option under section 9.4.[6] The seventh and eighth causes of action, respectively, for

[6] The Estate is respectfully urged to review the contours of the implied covenant under Delaware law, which is inapplicable when the Agreement expressly governs the parties' rights. *See Lazard Tech. Partners, LLC v Qinetiq N Am. Operations LLC*, 114 A3d 193, 196 n.12 (Del 2015) (collecting cases). Delaware does not recognize the implied covenant as a means of rewriting a

books and records and for an accounting, are substantially identical to the fourth and fifth causes of action in the AC. The ninth cause of action is similar to the AC's third cause of action regarding the Estate's rights to share AGI's records under section 7.10. The tenth cause of action is the constructive trust claim pleaded in the AC as the sixth cause of action.

While defendants oppose granting the Estate leave to amend, their opposition does not contain meaningful argument as to whether the Estate has met its burden under CPLR 3025(b). *See McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) ("Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law.") (citations and quotation marks omitted). Instead, defendants argue, without supporting case law, that the court should exercise its discretion to summarily refuse to consider the Estate's motion for leave to amend until it rules on defendants' pending motion to dismiss. To the extent the court has such discretion, it declines defendants' invitation to exercise it. Rather than conserve judicial resources, as defendants suggest, further motion practice would only delay the case. Defendants' terse, four-page opposition memorandum of law does not demonstrate the claims in the PSAC to be clearly without merit. To the extent defendants take the position that the PSAC is improperly pleaded or fails to state a claim, they, of course, may move to dismiss under CPLR 3211.

That said, the court will not permit the Estate to plead its proposed fourth cause of action for breach of fiduciary duty. *See Tirpack v 125 N. 10, LLC*, 130 AD3d 917, 919 (2d Dept 2015) (leave to amend should be denied if amendment is "palpably insufficient or patently devoid of merit"); *McGhee*, 96 AD3d at 550. Notwithstanding the fact, explained below, that it is

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contract to include rights which the parties could have negotiated and included in the contract in the first instance. *Id.*

premature to reach the issue of the existence and scope of the fiduciary duties owed by defendants to the Estate, the PSAC does not validly plead a claim for breach of fiduciary duty. It fails to plead facts showing defendants committed any malfeasance. The purported fiduciary breaches are failure to comply with the Agreement (a breach of contract claim) and that a potential buyer thinks the Company would be worth more if managed by someone other than defendants.[7] A conclusory and speculative allegation that the Company being managed by

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[7] Paragraphs 57-63 of the PSAC allege:

> Eight months after this suit was filed, the Estate received a letter from a minority member of AGI—Tungsten Partners LLC. Tungsten sought the Estate's permission to sell its 4% interest in AGI to an undisclosed third party based on a $30,000,000 valuation of AGI. Tungsten's August 25, 2015 letter also offered to acquire the Estate's interest based on this same $30,000,000 valuation. Based on this valuation, Ecoplace would receive roughly $16.7 million, and the Estate would receive roughly $10.4 million ... Tungsten stated that it was seeking to sell its interest because of intractable conflicts of interest with and complaints about AGI's Board, which Ecoplace now claims to control. Tungsten asserted its belief that if AGI were properly managed—i.e., by somebody other than Ecoplace and its appointees—AGI could be worth "in excess of one hundred million ($100,000,000)." ... The only rational explanation for Ecoplace's refusal to sell is that it believes AGI is worth more than $30,000,000.

See Dkt. 55 at 12-13 (paragraph breaks and numbering omitted). In similar conclusory fashion, paragraphs 91-97 of the PSAC allege:

> Ecoplace owes fiduciary duties to the Estate—irrespective of whether the Estate is a member of AGI or the owner of 51.74% of AGI's equity with economic or profit rights. Ecoplace has breached its fiduciary duties by failing to make distributions to the Estate and by refusing to be transparent about its operations, including the reasons for not making such distributions. **On information and belief, Ecoplace has breached its fiduciary duties by wasting corporate assets and mismanaging AGI such that it is worth far less than it would be worth if managed properly.** As a result of Ecoplace's breach, the Estate has been damaged in an amount to be proven at trial. Ecoplace is presently in exclusive control over the accounts of AGI. The Estate is therefore entitled to an accounting to determine the amount by which it has been damaged by Ecoplace's breaches of fiduciary duty. As a result of Ecoplace's ongoing inequitable and improper conduct, Ecoplace has been unjustly enriched. Ecoplace will be further unjustly

another investor would result in a higher corporate valuation does not raise a reasonable inference that the Company's current management has breached a fiduciary duty. At most, it suggests a disagreement about how the Company's Board is exercising its business judgment, which ordinarily cannot be second-guessed by the court. *See In re MFW Shareholders Lit.*, 67 A3d 496, 526 (Del Ch 2013) ("when no fiduciary has a personal self-interest adverse to that of the company and its other stockholders, the fiduciary is well-informed, and there is no statutory requirement for a vote, the business judgment rule standard of review applies and precludes judicial second-guessing so long as the board's decision can be attributed to any rational business purpose") (citations and quotation marks omitted), *aff'd sub nom. Kahn v M & F Worldwide Corp.*, 88 A3d 635 (Del 2014). Leave to assert a breach of fiduciary duty claim, therefore, is denied without prejudice. To the extent the Estate can plead specific allegations of malfeasance that do not amount to mere breaches of the Agreement, it may seek further leave to amend. With respect to the balance of the PSAC, leave to amend is granted in accordance with the ordering language at the end of this decision.[8]

> enriched if permitted to continue its management and control of AGI without regard to the Estate's majority ownership interest and to the Estate's detriment.

See id. at 17 (paragraph breaks and numbering omitted; bold added).

The Estate now has access to the books and records. If, indeed, there is malfeasance, it should be spelled out. Mere failure to make distributions, something that never has been done, is a business judgment of management and, in and of itself, insufficient to allege a breach of fiduciary duty. Simply put, the Estate's allegations are conclusory and speculative.

[8] To the extent the court dismisses causes of action in the AC overlapping with those in the PSAC (e.g., the PSAC's tenth cause of action), the Estate shall not include such claims in its second amended complaint.

III. Defendants' Motion to Dismiss (Seq. 002)

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. The Parties' Disputes

The parties dispute whether: (1) the Estate is a Member or a Withdrawing Member; (2) the Estate has a right to nominate Managers to the Board; (3) the Estate may provide AGI's financial disclosures to Sondland; (4) the Estate has Call Rights; (5) defendants have fiduciary

duties to the Estate; and (6) the Estate has the right to inspect AGI's records. This decision resolves the first, second, and sixth disputes because they are raised in the instant motion to dismiss. The court will not reach the third issue because, as discussed below, further context and clarity is required. The fourth issue is the ultimate question in this case and is not address by the parties at this time. Finally, the fifth issue is non-justiciable at this juncture because the parties seek an advisory opinion not relevant to a ripe dispute.

1. The Estate is a Withdrawing Member and Does Not Have the Right to Nominate Managers to the Board

The parties agree that these issues are governed by Delaware law.[9] Defendants claim that sections 7.1 and 9.7 of the Agreement are unambiguous and dispositive. The Estate disputes the meaning of these provisions and also contends they are affected by 6 *Del C* § 18-705. The Estate is wrong.

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[9] Contrary to the parties' contentions, Delaware's law of contract interpretation is somewhat different from New York's. New York law seeks to divine the parties' intent from the contract and permits the introduction of parole evidence of intent if the contract is ambiguous, even where an inferior interpretation is proffered so long as such interpretation is not commercially unreasonable. *See Universal Am. Corp. v Natl Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 (2015); *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 (2002); *Cole v Macklowe*, 99 AD3d 595, 596 (1st Dept 2012) (commercially unreasonable interpretations cannot be adopted). "Ambiguity exists when, looking within the four corners of the document, the terms are reasonably susceptible of more than one interpretation." *Ellington v EMI Music, Inc.*, 24 NY3d 239, 250 (2014). Delaware, on the other hand, grants courts more power to rule on a contract's meaning as a matter of law if there clearly is a superior interpretation. *See i/mx Info., infra*, 2014 WL 1255944, at *5. Indeed, New York law, particularly in the First Department, can be quite different from Delaware law. For instance, in this case, the Estate seeks an equitable accounting, which the First Department mandates (in contrast to other New York and Delaware courts) merely by virtue of the existence of a fiduciary relationship, whether or not a breach is alleged. *See Barry v Clermont York Assocs. LLC*, 50 Misc3d 1203(A), at *13 n.13 (Sup Ct, NY County 2015) (collecting cases). Here, as discussed below, the Estate is not entitled to an accounting under Delaware law because no fiduciary breach is pleaded in the PSAC.

It is well settled that "Delaware adheres to the 'objective' theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party." *NBC Universal v Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del Ch 2005); *see Rexam Inc. v Berry Plastics Corp.*, 2015 WL 7958533, at *3 (Del Ch 2015) (same). Under Delaware law:

> When interpreting a contract, the court will give effect to the parties' intent based on the parties' words and the plain meaning of those words. The Court will give disputed terms their ordinary and usual meaning. **Of paramount importance is what a reasonable person in the position of the parties would have thought the language of the contract meant.** If either party demonstrates that their construction of the contract is the only reasonable interpretation, that party may be entitled to summary judgment. In addition, **if parties introduce conflicting interpretations of a term, but one interpretation better comports with the remaining contents of the document or gives effect to all the words in dispute, the court may, as a matter of law and without resorting to extrinsic evidence, resolve the meaning of the disputed term in favor of the superior interpretation.**

i/mx Info. Mgmt. Solutions, Inc. v Multiplan, Inc., 2014 WL 1255944, at *5 (Del Ch 2014) (citations and quotation marks omitted; emphasis added).[10] Under Delaware law, a provision in a contract is ambiguous if, when read in the context of the entire agreement, there are multiple commercially reasonable interpretations. *See Kuhn Constr., Inc. v Diamond State Port Corp.*, 990 A2d 393, 396-97 (Del 2010), citing *Vanderbilt Income & Growth Assocs., L.L.C. v Arvida/JMB Managers, Inc.*, 691 A2d 609, 613 (Del 1996).

Moreover, under Delaware law, where, as here, the contract is an LLC Agreement, further important principles are applicable. The Delaware LLC Act provides LLC members with

[10] The "superior interpretation" rule is considered a "canon of contract construction" under Delaware law. *Wills v Morris, James, Hitchens & Williams*, 1998 WL 842325, at *2 (Del Ch 1998); *see Rexam*, 2015 WL 7958533, at *3; *Hampton v Turner*, 2015 WL 1947067, at *3 (Del Ch 2015); *Smartmatic Intl Corp. v Dominion Voting Sys. Int'l Corp.*, 2013 WL 1821608, at *4 (Del Ch 2013).

the flexibility to customize their rights and obligations. 6 *Del C* § 18-1101(b) states that "[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." § 18-1101(e) further states that LLC agreements:

> may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement; provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

See Wood v Baum, 953 A2d 136, 141 (Del 2008).

Simply put, "[t]he basic approach of the Delaware [LLC] Act is to provide members with broad discretion in drafting the Agreement and to furnish default provisions when the members' agreement is silent. The Act is replete with fundamental provisions made subject to modification in the Agreement (e.g. "unless otherwise provided in a limited liability company agreement...."). *Elf Atochem N. Am., Inc. v Jaffari*, 727 A2d 286, 291 (Del 1999). Thus, "the parties to an LLC agreement have substantial authority to shape their own affairs and that in general, **any conflict between the provisions of the Act and an LLC agreement will be resolved in favor of the LLC agreement**." *Achaian, Inc. v Leemon Family LLC*, 25 A3d 800, 802-03 (Del Ch 2011) (emphasis added). Delaware "law provides that LLCs are contractual in nature and that an LLC's members have wide latitude to craft the members' rights and obligations. The Act, on the other hand, exists as a 'gap filler,' supplying terms not fully explicated in an LLC agreement." *Paul v Delaware Coastal Anesthesia, LLC*, 2012 WL 1934469, at *2 (Del Ch 2012). Consequently, to the extent the Agreement addresses the subject

matter of the parties' dispute, provisions in the Delaware LLC Act that may provide for a contrary result are inapplicable.

Here, section 9.7(b) of the Agreement unambiguously provides that if, as here, a Member (i.e., Alex) dies, he shall be considered a "Withdrawing Member" and "shall cease to be a Member of the Company." *See* Dkt. 56 at 55. A Withdrawing Member "has only such rights of an assignee of a limited liability company interest under the Act as are consistent with the other terms and provisions of this Agreement and with no other rights under this Agreement." *Id.* Specifically, "the Withdrawing Member shall only have the rights to Distributions." *Id.* To the extent the Estate suggests that the definition of a Withdrawing Member in section 9.7(b) only includes the latter of the types of scenarios described (e.g., bankruptcy), and not the earlier scenarios (e.g., death), such an interpretation is not tenable because it makes no sense in the context of section 9.7(b). The only issue section 9.7(b) addresses is the implications of becoming a Withdrawing Member. The latter half of the section sets forth the loss of rights suffered when an interest converts from a Member to a Withdrawing Member. Nothing else is addressed. Hence, the first portion of section 9.7(b) identifies the circumstances when a Member becomes a Withdrawing Member. If a Member who dies is not considered a Withdrawing Member, then the first portion of section 9.7(b) would be rendered meaningless, an unacceptable result. *See Osborn v Kemp*, 991 A2d 1153, 1159 (Del 2010) ("We will not read a contract to render a provision or term 'meaningless or illusory.'")

Moreover, section 9.7(b) is consistent with section 7.1(d), which provides that when a Member dies: (1) if that Member was serving as a Manager on the Board, his status as Manager automatically terminates upon his death; and (2) the Member "shall lose its right to have Managers serve on the Board, and its designated Managers on the Board shall be deemed to be

automatically removed, as of the date on which such Member ceases to be a Member or as otherwise provided in this Agreement." *See id.* at 20-21. In other words, when Alex died, not only did his status as a Member and Manager terminate, but his right (under section 7.1(b)(i)) to nominate Managers to the Board terminated as well.

As a result, Ecoplace, as the only current Member with the right to nominate a Manager to the Board, has the exclusive right to control AGI, and it, along with the employees given equity by Alex, are the only remaining Members. As made clear by section 7.1(d), the Estate does not have the right to nominate Members. Section 9.7(b) reinforces this clarity by specifying that the Estate, which now controls Alex's property, is merely a Withdrawing Member with rights to Distributions and no other rights.[11]

Nor is there ambiguity over how many Managers currently need to serve on the Board or who has the right to nominate them. Section 7.1(d) states:

> From and after the date on which a Member shall lose its right to have Managers serve on the Board, all of the provisions of this Agreement referring to Managers and the Board shall be read as if such Member's Managers do not exist **and all quorum requirements and decisions of the Board shall be satisfied and made, as applicable, solely by the Managers designated by the Member whose Managers still serve on the Board**

See Dkt. 55 at 21. While the Estate still has the right to distributions, it has no control rights.[12]

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[11] The Estate's contentions that Alex and Ecoplace never intended for this result (i.e., section 9.7(b) was only meant to be applicable to the employees) and that discovery should be permitted to prove this are not tenable. As noted, where, as here, the Agreement's meaning is clear, any contrary intent that may be inferred from parol evidence is of no legal import. *See i/mx Info.*, 2014 WL 1255944, at *5

[12] The question of whether the Estate still has Call Rights – a question the parties do not seek to adjudicate on this motion – is not necessarily resolved by the fact that the Estate is a Withdrawing Member. Since the Call Rights are contractually granted only to Alex, and not to Members generally, that the Estate is merely a Withdrawing Member is not necessarily dispositive. Section 9.4(e) states that the Call Rights "are personal to [Alex] Calderwood **and cannot be Transferred to any other Person**." *See id.* at 52 (emphasis added). The threshold

That said, and notwithstanding the clear mandates of sections 7.1(d) & 9.7(b), the Estate claims entitlement to Alex's former controlling interest as a Member on the ground that the Delaware LLC Act mandates a different result. Again, the Estate is wrong.

The Estate relies on Subchapter VII of Delaware's LLC statutes. §§ 18-702 and 18-704, which govern transfers and assignment of LLC interests, are caveated in their subsections with the "magical phrase" of "[u]nless otherwise provided" in the LLC agreement. *See R & R Capital, LLC v Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318, at *5 (Del Ch 2008).[13] The default rules in these statutory provisions, therefore, are overridden by sections 7.1(d) and 9.7(b) of the Agreement, which govern the parties' disputes. *See Elf Atochem*, 727 A2d at 291.[14]

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question is whether the Estate can exercise the Call Rights or if such rights died along with Alex. The court expresses no view on this question at this time.

[13] Former Chancellor Chandler rejected the argument, proffered here by the Estate, that "[s]tatutory provisions that do not contain the qualification 'unless otherwise provided in a limited liability company agreement' (or a variation thereof) are mandatory and may not be waived." *See R & R Capital*, 2008 WL 3846318, at *5. He explained that:

> [In *Elf Atochem*], ... the [Delaware] Supreme Court held that a provision of the LLC Act *not* containing petitioners' magical phrase [i.e., "unless otherwise provided"] was nonetheless permissive and subject to modification. Indeed, in [*Elf Atochem*], the Supreme Court explicitly noted that **the "unless otherwise provided" phrase was merely one example of the means by which a court could ascertain the intent of the General Assembly**. Indeed, in other provisions, the General Assembly explicitly forbids waiver. For example, the Act overtly bars members from "eliminat[ing] the implied contractual covenant of good faith and fair dealing.

See id. at *5 (footnotes omitted; italics in original; bold added), citing *Elf Atochem*, 727 A2d at 292-96. However, as noted below, whether § 18-705 is mandatory has no bearing on the parties' disputes.

[14] Defendants observe that the result would be the same even if § 18-702 governed. *See* Dkt. 47 at 6-7. Defendants further explain why this result makes sense in light of the policies behind the default rules provided in Delaware's LLC statutes, which include the principle that one should not be forced to be a member in an LLC with a person (i.e., Alex's father) the member did not contractually consent to be associated with. *See generally Achaian*, 25 A3d at 804 n.14 (then

The Estate, however, rests its case on § 18-705, which, as applicable, provides:

> If a member who is an individual dies … the member's personal representative may exercise all of the member's rights for the purpose of settling the member's estate or administering the member's property, including any power under a limited liability company agreement of an assignee to become a member.

The Estate contends this section is mandatory, and not permissive, because it does not contain the magical "unless otherwise provided" language. This appears to be a question of first impression under Delaware law but has no bearing on the parties' disputes.

While § 18-705 provides that "the member's personal representative [i.e., Alex's father] may exercise all of the member's rights for the purpose of settling the member's estate", § 18-705 does not purport to define what those rights encompass. The Agreement expressly addresses the rights Alex's successors have after death – those of a Withdrawing Member.

That § 18-705 does not purport to define the scope of the substantive rights the personal representative acquires is evidenced by its use of the expression "any power under a limited liability company agreement of an assignee to become a member." Thus, § 18-705 itself recognizes that LLC membership rights arise from the LLC Agreement to the extent such rights are expressly provided for. Here, that is clearly the case. To hold that § 18-705 alters a member's rights upon death in a manner contravening the LLC Agreement is inconsistent with the well settled law articulated by the Delaware courts – that the substantive rights of LLC members are governed by contract. § 18-705 permits the Estate to control the bundle of rights

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Chancellor, now Chief Justice Strine explaining motivations behind the default rules in §§ 18-702 & 18-704), citing *Milford Power Co. v PDC Milford Power, LLC*, 866 A2d 738, 760 (Del Ch 2004) (observing that the LLC Act's default rules that draw a distinction between an LLC member's economic rights which are freely transferable and those aspects of membership, such as managerial rights, which are not freely transferable, "recognize[ ] that it is far more tolerable to have to suffer a new passive co-investor one did not choose than to endure a new co-manager without consent."); *see also In re Carlisle Etcetera LLC*, 114 A3d 592, 600 (Del Ch 2015) (same).

associated with Alex's interest in the Company existing after his death in a manner consistent with the Agreement. The scope of those rights is defined in the Agreement.

2. The Estate Has the Right to Inspect AGI's records for the Purpose of Valuing the Estate's Assets

As discussed at oral argument, the question of whether the Estate has the right to inspect AGI's records does not turn on whether the Estate is a Member. Since the Estate must value its assets in the probate action, it must be given sufficient information to do so.[15] The scope of the required information does not broaden by virtue of the Estate being a Member because even if the Estate only has the right to distributions, it must still have a complete picture of AGI's current and future financial situation and prospects in order to ascertain the present value of its distribution rights. This process is currently underway and is being dealt with in discovery. The question of who may be given a copy of AGI's records to assist the Estate cannot be determined by the record on this motion. This issue shall be addressed in discovery.

That said, the Estate is not entitled to an equitable accounting. It is well settled under Delaware law that one is not entitled to an equitable accounting without first establishing a breach of fiduciary duty. *See Gallagher v Long*, 2013 WL 718773, at *4 (Del Ch 2013) ("any request for an accounting must be based on a successful claim for breach of fiduciary duty"), *aff'd* 65 A3d 616 (Del 2013), citing *Stevanov v O'Connor*, 2009 WL 1059640, at *15 (Del Ch 2009) ("A claim for an accounting in the Court of Chancery generally reflects a request for a particular type of remedy, rather than an equitable claim in and of itself."). Here, as discussed, all of the Estate's alleged fiduciary duty breaches are conclusorily pleaded and fail to state a

[15] Defendants conceded this point at oral argument. They only appear to object to the information's dissemination to competitors. Of course, if the Estate has Call Rights, it also needs AGI's records to determine if the Company's value warrants exercising the call option.

claim. Likewise, the Estate has not proffered the requisite predicate claim to be entitled to demand the imposition of a constructive trust, which, in any event, is not an independent cause of action under Delaware law. *See Teachers' Ret. Sys. of Louisiana v Aidinoff*, 900 A2d 654, 671 n.22 (Del Ch 2006) ("Unless a plaintiff can prove out a claim under a recognized cause of action—such as one for fraud, breach of fiduciary duty, or unjust enrichment—the plaintiff should have no eligibility for any remedy, including the remedy of constructive trust.").

3. *A Declaratory Judgment Regarding the Fiduciary Duties Owed to the Estate Would Be an Impermissible Advisory Opinion*

It is well settled that New York courts do not issue advisory opinions. *Baker v 16 Sutton Place Apt. Corp.*, 110 AD3d 479, 481 (1st Dept 2013); *see Ovitz v Bloomberg L.P.*, 18 NY3d 753, 760 (2012) (court may not issue declaratory judgment absent justiciable controversy). Delaware courts have the same rule. *See Clark v State Farm Mut. Auto. Ins. Co.*, 2016 WL 125432, at *3 (Del 2016) (Strine, C.J.).

That is the case with respect to the parties' disputes over the existence and scope of fiduciary duties allegedly owed by defendants to the Estate. The Estate has not pleaded any facts to suggest that defendants have breached any fiduciary duty recognized under Delaware law. As discussed, at most, the Estate has stated a claim for breach of the Agreement. To the extent the Estate can properly plead facts sufficient to state a claim for breach of fiduciary duty, the court will consider the parties' arguments about whether fiduciary duties, if any, are owed to the Estate. However, the existence of fiduciary duties has no bearing on the actual claims before the court – namely, the Estate's rights under the Agreement with respect to the issues of membership status, books and records access, and Call Rights. Accordingly, it is

ORDERED that the motion by defendants Ace Group International LLC, Ecoplace LLC, and Stefanos Economou to dismiss the Amended Complaint (the AC) is granted to the following extent: (1) the first, second, fifth, and sixth causes of action in the AC are dismissed for failure to state a claim; (2) the fourth cause of action is dismissed as moot in light of the disclosures provided in this action; and (3) the motion is otherwise denied; and it is further

ORDERED that plaintiff's motion for leave to amend is granted to the following extent: (1) within 21 days of the entry of this order of the NYSCEF system, plaintiff may file a second amended complaint that may include (a) the AC's causes of action not dismissed herein; and (b) the additional causes of action in its proposed Supplemental Amended Complaint, except for breach of fiduciary duty and those claims that are duplicative of the claims in the AC dismissed herein; (2) plaintiff may seeks to assert a breach of fiduciary claim or any other claim not previously alleged if plaintiff moves for leave to amend with a proposed pleading with the requisite factual allegations necessary to state such claim; and (3) the motion is otherwise denied; and it is further

ORDERED that defendants shall answer or move to dismiss the second amended complaint within 30 days of its filing on the NYSCEF system.

Dated: February 29, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.