Barmash v Perlman
2013 NY Slip Op 31518(U)
July 3, 2013
Sup Ct, New York County
Docket Number: 650417/2013
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

JEAN BARMASH

INDEX NO. 650417/2013

-v-

MOTION DATE ________

JEFFREY PERLMAN, et al

MOTION SEQ. NO. 002

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ________ | No(s). ________

Answering Affidavits — Exhibits ________ | No(s). ________

Replying Affidavits ________ | No(s). ________

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendant to dismiss the complaint is DENIED per the attached Decision and Order.

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

Dated: July 3, 2013

[signature], J.S.C.
MELVIN L. SCHWEITZER

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 45

JEAN BARMASH, an individual, for himself and derivatively on behalf of nominal defendant ENERGYSCORECARDS, INC.,

Plaintiff,

-against-

JEFFREY PERLMAN and BRIGHT POWER, INC.,

Defendants,

and

ENERGYSCORECARDS, INC.,

Nominal Defendant.

Index No. 650417/2013

DECISION AND ORDER

Motion Sequences Nos.
002 and 003

MELVIN L. SCHWEITZER, J.:

Jeffrey Perlman (Perlman) and Bright Power, Inc. (BP) (collectively "defendants"), and nominal defendant EnergyScoreCards, Inc. ("ESC"), move for an order, pursuant to CPLR 3211(a)(7), to dismiss Plaintiff Jean Barmash's ("Barmash") complaint. The defendants also filed two counterclaims against Barmash, which he moved to dismiss pursuant to CPLR 3211(a)(1) and 3211(a)(7). This case involves both direct and derivative claims relating to a falling out of partners in an entrepreneurial commercial venture.

Background

Barmash is a software developer. In December 2008, Perlman, who is the President and majority shareholder of BP, an energy consulting firm based in New York, approached Barmash with the idea of creating software that would allow building owners to monitor and audit their buildings' energy usage. Cities around the country, including New York, had recently passed

laws requiring buildings to periodically provide detailed energy usage information to them. Perlman believed that energy audit software would be in high demand and presented a major business opportunity for BP. After the two parties signed a Letter of Intent (LOI), Barmash began developing the suggested software product in April 2009. Perlman and Barmash agreed to found a company, ESC, to commercially exploit the software that Barmash was developing. In lieu of payment, Barmash agreed to receive founder's stock in ESC.

Around January 2010, Perlman secured the software's first customer. On February 10, 2010, ESC was incorporated in Delaware. At the time of incorporation, ESC had two directors, Barmash and Perlman. Perlman acted as ESC's President, Treasurer and Secretary, and Barmash acted as the company's Chief Technology Officer. Pursuant to a Restricted Stock Grant Agreement (RSGA), ESC granted 25,000 shares of common stock to Barmash on December 31, 2010. ESC has two shareholders, BP and Barmash. BP owns approximately 75% of ESC's stock, and Barmash owns approximately 25%.[1] The software that Barmash developed is ESC's sole asset and is a trade secret. Around November 2011, Barmash resigned from his position as CTO at ESC, but continued working on the software as a consultant from January 2012 to June 2012. He also helped groom his successor, who started at ESC in early April 2012. Around September 2012, Perlman removed Barmash from ESC's board of directors.

Since 2010, Perlman and BP have successfully marketed and licensed ESC's software to building owners throughout New York City. Yet Barmash claims that the spoils of ESC's successful software have inured to the defendants at ESC's expense. Barmash alleges that the

[1] While there is some dispute as to the exact percentage of stock each party owns, this is not the appropriate time to address this question of fact. For the purposes of this motion, it is sufficient that BP is the majority shareholder and Barmash is the minority shareholder.

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defendants dominate ESC and put their own personal interests first in violation of their fiduciary duties to ESC. He alleges that BP has appropriated ESC's software to itself by marketing itself as the owner of the software, usurping contracts and corporate opportunities that rightfully belong to ESC, and failing to compensate ESC with proper licensing fees in exchange for its use of the proprietary software. Barmash claims every person who operates ESC works for BP and potential clients can only contact ESC through a BP employee. Barmash further alleges that in the summer of 2011, Perlman established a Portfolio Analysis program within BP that directly competes with ESC and utilizes its software without compensation. He also claims that after his resignation as CTO, Perlman tried to convince Barmash to sell his stake in ESC to BP for an unfairly low price. In connection with Perlman's attempt to facilitate an unfair buyout, Barmash alleges that Perlman had BP investors threaten to refuse to have any liquidity event[2] for ESC for the foreseeable future.

On the basis of these allegations, Barmash brings an eight-count complaint alleging direct causes of action against BP and derivative causes of action on behalf of ESC against Perlman for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, waste of corporate assets, unjust enrichment, misappropriation of confidential business information, and conduct by defendants meriting the imposition of a constructive trust and an accounting of monies received by them in connection with their diversion of business that rightfully belonged to ESC. Defendants now move to dismiss all the causes for action for failure to state a claim. In their motion, defendants do not assert that any of Barmash's claims were insufficiently pled or assert that he needed to make demand upon ESC's board before initiating the derivative claims

[2] A liquidity event would facilitate Barmash's exit from his position in ESC by implementing a public offering or merger or recapitalization transaction.

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himself. Instead, defendants challenge the nature of Barmash's purported "direct" claims and his ability to pursue derivative claims altogether. The defendants argue that despite what he may plead, all of Barmash's claims are actually derivative in nature and must be dismissed because he is not an adequate derivative plaintiff. Defendants also argue that Barmash is estopped from bringing these causes of action because he is suing about corporate actions and policies that he approved of as a shareholder.

Defendants allege that Barmash made a commitment to "fully develop" ESC's software and did not do so. They allege that the LOI Barmash and Perlman signed was a binding agreement that committed Barmash to fully developing and maintaining ESC's software. They allege that while they successfully secured customers for ESC's software, the customers constantly complained about the software's quality and capabilities. They claim that after Barmash left ESC, BP and ESC had to spend over $650,000 completing the software that Barmash agreed to fully develop. On the basis of these allegations, defendants bring two counterclaims against Barmash for rescission for failure of consideration and breach of contract in connection with the LOI. Barmash moves to dismiss the counterclaims for failure to state a claim and because defenses are founded upon documentary evidence. He has submitted to the court the LOI and RSGA, the veracity and authenticity of which have not been challenged by the defendants.

Discussion of Plaintiff's Claims

Standard of Review for Motion to Dismiss

When determining if a complaint may be dismissed for failing to state a cause of action pursuant to CPLR 3211(a)(7), "the complaint must be liberally construed, the allegations therein taken as true, and all reasonable inferences must be resolved in plaintiff's favor." *Gorelik v*

Mount Sinai Hosp. Ctr., 19 AD3d 319, 319 (1st Dept 2006) (citations omitted). The motion "must be denied if from the pleading's four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Id.* (citations omitted). However, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003).

All of Barmash's causes of action against Perlman and BP are well-pled. Delaware law governs Barmash's causes of action concerning fiduciary breach. *See, e.g.*, *Diamond v Oreamuno*, 24 NY2d 494, 503-4 (1969) (holding that the law "of the State which created the corporation" governs claims for fiduciary breach); *Marino v Grupo Mundial Tenedora, S.A.*, F Supp 2d 601, 607 (SDNY 2011) ("New York applied the internal affairs doctrine to claims for breach of fiduciary duty and, thus, applies the law of the state of incorporation to such claims"). Barmash has alleged facts, which taken as true, establish that BP is a controlling shareholder of ESC (*Kahn v. Lynch Communication Sys.*, 638 A2d 1110, 1113-1114 [Del 1994] [holding that an entity is a controlling shareholder if it owns over 50% of a corporation's stock or if dominates and controls the corporation's conduct]), Perlman is a director and corporate officer of ESC, and both BP and Perlman owe fiduciary duties to ESC and Barmash. *Lama Holding v Smith Barney Inc.*, 88 NY2d 413, 423 ("Under Delaware law, corporate officers, directors, and controlling shareholders owe their corporation and its minority shareholders a fiduciary obligation of honesty, loyalty, good faith and fairness"); *Cede & Co. v Technicolor, Inc.*, 634 A2d 345, 361 (Del 1993) ("the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder"). Barmash's factual allegations and inferences following therefrom support his claims that the defendants breached

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their fiduciary duties, wasted corporate assets, misappropriated confidential business information, and were unjustly enriched through unfair self-dealings and other misdeeds.

Indeed, the defendants never argue in their motion to dismiss that the factual allegations of the complaint are facially insufficient to give rise to the causes of action. Instead, defendants submit an affidavit that contradicts some of the allegations made in the complaint. The court, though, cannot examine Perlman's affidavit for the purpose of "determining whether there is evidentiary support for the pleading." *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 (1977) (so holding); *Health-Loom Corp. v Soho Plaza Corp.*, 209 AD2d 197, 199 (1st Dept 1993) ("Contrary factual allegations in the defendants-appellants' affidavits in support of their motion 'are not to be examined for the purpose of determining whether there is evidentiary support for the pleading'") (citing *Rovello*). Because Perlman's affidavit does not "conclusively establish that [the plaintiff] has no cause of action," and instead "merely dispute[s] some of the factual allegations of the complaint," (*Skillgames LLC*, 1 AD3d at 250), it can not be considered within the context of a motion to dismiss due to lack of evidentiary support. *Tsimerman v Janoff*, 40 AD3d 242 (1st Dept 2007). Based on the "four corners of the pleadings," Barmash's complaint "manifest[s] causes of action cognizable at law." *Health-Loom Corp.*, 209 AD2d at 198-99.

Nature of the Causes of Action

Defendants contend that Barmash failed to state a claim against BP because the direct claims he makes against BP are actually derivative in nature.

In order to determine if a claim is direct or derivative, the court must look to "the nature of the wrong and to whom the relief should go." *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1039 (Del 2004). To make this determination, the court must examine the "body of the complaint, not the plaintiff's designation or stated intention." *Agostino v Hicks*, 845 A2d

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1110, 1121 (Del Ch 2004) (cited in *Tooley*, 845 A2d at 1036). Defendants argue that Barmash's direct claims are really derivative claims because the "nature of the injury is such that it falls directly on the business entity as a whole and only secondarily on individual investors as a function of and in proportion to [their] pro rata investment." *Metro. Life Ins. Co. v Tremont Grp. Holdings, Inc.*, CIV A 7092-VCP, 2012 WL 6632681, *8 (Del Ch Dec 20, 2012) (internal quotations omitted).

Certain breaches of fiduciary duty may give rise to both direct and derivative causes of action. *Grimes v. Donald,* 673 A.2d 1207, 1212 (Del 1996) ("Courts have long recognized that the same set of facts can give rise to both a direct claim and a derivative claim."). The paradigmatic case that has this dual character is "a species of a corporate overpayment claim where (1) a stockholder having majority or effective control causes the corporation to issue excessive shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Gentile v Rossette*, 906 A2d 91, 99-100 (Del 2006) (internal quotations omitted). The corporation is harmed because of the overpayment and has a claim to compel the restoration of the value of the overpayment; that claim is derivative. *Id.* Yet the minority shareholders suffer a separate, unique, and independent harm from the corporation due to "an extraction from the public shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest." *Id. See also In re Tri-Star Pictures, Inc., Litig.*, 634 A2d 319 (Del 1993); *Gatz v Ponsoldt*, 925 A2d 1265 (Del 2007). When inquiring as to whether a case possesses this

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dual character, the court must look past formalities to the "true substantive effect" of the actions under question. *Gatz*, 925 A2d at 1279.

Barmash's allegations, taken as true, clearly allege an injury to ESC, and any relief for those injuries would flow to ESC accordingly. Yet the breaches which Barmash complains of also have the "true substantive effect" of harming him "uniquely and individually" as a minority shareholder. In *Rhodes v Silkroad Equity, LLC*, the court held that the plaintiffs could proceed with direct claims even though their claims "[did] not fit snuggly [*sic*] within the 'transactional paradigm.'" CIV A 2133-VCN, 2007 WL 2058736, *5 (Del Ch July 11, 2007). In *Rhodes*, the plaintiffs alleged that the defendants purposely took actions against the corporation's interests in order to lower its value and drive out the plaintiffs at a bargain price. The defendants eventually did succeed in buying out the plaintiffs' shares at a bargain price. That court held that it could not "view the transactions [that decreased the value of the corporation] as 'confined to an equal dilution of the economic value of each of the corporation's outstanding shares'" because "those alleged to have benefitted directly from the Defendants' misdeeds are [the defendants themselves] or entities controlled by them." *Id.* (quoting *Gatz*).

The rationale underlying the decision in *Rhodes* applies to the present case. Barmash alleges that BP, ESC's controlling shareholder, advertised itself as be the owner of ESC's software, used ESC's software without paying for it, and used ESC's software to create opportunities for itself that rightfully should have flowed to ESC. All of the alleged breaches by BP and Perlman "directly benefitted" them at ESC's expense. Therefore, these transactions "cannot be viewed as confined to an equal dilution of the economic value of each of the corporation's outstanding shares." Barmash claims that these breaches were committed at least in part to pressure him to sell his shares at an unfair price, an allegation which the court in

Rhodes relied upon when holding that the plaintiffs could bring their claims directly against the defendants.

It is even clearer that the underlying set of facts possesses the requisite dual character when one looks beyond Barmash's "designations" to the "body of the complaint." Viewed as a whole, the breaches that Barmash alleges—BP's false claim of ownership of ESC's software, the defendants' waste of corporate assets, their misappropriation of confidential business information and diversion of corporate opportunities—have the "true substantive effect" of liquidating ESC of its sole corporate asset, its software, for a price substantially below its market value. This *de facto* liquidation results in an injury to both ESC (which can be pursued derivatively) and Barmash (which can be pursued directly). *See ATR-Kim Eng Fin. Corp. v Araneta*, CIV A 489-N, 2006 WL 3783520 (Del Ch Dec 21, 2006) *affd sub nom. Araneta v Atr-Kim Fin. Corp.*, 930 A2d 928 (Del 2007) (holding that the controlling shareholder was liable to the sole minority shareholder on both direct and derivative claims after an unfair *de facto* liquidation of the corporation's assets without proper payment to the minority shareholders.)

The defendants' argument that Barmash's direct claims are derivative fails.

<u>Adequacy of Barmash to Bring Derivative Claims as a Representative of ESC</u>

Defendants assert that Barmash is not an adequate representative of ESC and therefore his derivative claims on behalf of the corporation must be dismissed. The burden rests with the defendant to show that a derivative plaintiff is inadequate. *Emerald Partners v Berlin*, 564 A2d 670, 674 (Del. Ch. 1989). "The defendant must show a substantial likelihood that the derivative action is not being maintained for the benefit of the shareholders." *Id.* In order to determine if a plaintiff is an adequate representative within the context of a derivative suit, courts look to the following eight factors:

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> (1) economic antagonisms between representative and class; (2) the remedy sought by plaintiff in the derivative action; (3) indications that the named plaintiff was not the driving force behind the litigation; (4) plaintiff's unfamiliarity with the litigation; (5) other litigation pending between the plaintiff and defendants; (6) the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; (7) plaintiff's vindictiveness toward the defendants and; (8) the degree of support plaintiff was receiving from the shareholders he purported to represent. *Youngman v Tahmoush*, 457 A2d 376, 379-80 (Del. Ch. 1983).

Defendants must show that a "serious conflict of interest exists, by virtue of one factor or [a] combination of factors" to disqualify the plaintiff. *Id.* at 381. "[P]urely hypothetical, potential or remote conflict of interests never disable the individual plaintiff." *Id.* at 380. Defendants contend that five of these factors indicate that a disqualifying "serious conflict of interest exists." For the reasons set forth below, neither one factor alone, nor a combination of factors, merits disqualification of Barmash and dismissal of the derivative causes of action.

Economic Antagonisms Between Representative and Class

Defendants argue that Barmash is economically antagonistic to ESC's other shareholders (in this case, only BP) because his sole motivation for bringing his derivative claims is an attempt to coerce a "vastly overpriced buyout" that would economically harm ESC. Def. Mem. At 12. Defendants claim that Barmash's threatened lawsuit against ESC in September 2012 and attempt to settle this lawsuit before filing it demonstrate his true goal of an inflated buyout. Defendants rely on *Emerald Partners v Berlin* for the proposition that a plaintiff must be disqualified if his derivative action is filed in pursuit of an above-market buyout. 564 A2d 670 (Del. Ch. 1989). In that case, there was undisputed evidence that the derivative plaintiff had previously attempted to "greenmail" the corporation he purported to represent. *Id.* at 672. "Greenmail" has been defined as "the accumulation of a significant amount of stock by a shareholder, or group of shareholders acting in concert, for the purpose of intimidating a board

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of directors into causing the corporation to repurchase such shares at a substantial premium over their realistic market price." *Id.* (citations omitted). Specifically, defendants rely on that case's dicta that "if the [derivative plaintiff] were in a position to personally profit from this purportedly derivative action to the detriment of the other shareholders, defendants' argument [of economic antagonism] would likely be dispositive." *Id.* at 674.

Defendants' reliance on *Emerald Partners* is misplaced. The derivative plaintiff's past attempts to coerce an unfair buyout ultimately *did not* disqualify it as a representative. *Id.* at 674-75. There is no "undisputed evidence" that Barmash is only seeking an unfair buyout of his shares, and he has not asserted any claim in this action for repurchase of his shares. Even assuming *arguendo* that Barmash does have a personal interest in having his shares bought out, this interest alone does not create economic antagonism. "The fact that the plaintiff may have interests which go beyond the interests of the class, but are at least co-extensive with the class interest, will not defeat his serving as a representative of the class." *Youngman*, 457 A2d at 380. By seeking redress for Perlman's breaches of his fiduciary duties, Barmash's interests are co-extensive with the interests of ESC. *Id.* at 381 ("In this case, it is clear that the plaintiff shares with other stockholders the common interest of seeking redress from the defendants for alleged breaches of fiduciary duties. Any recovery which results from this action will inure to the benefit of the corporation.").

Defendants' other economic antagonism argument, that Barmash must be disqualified because of his past litigation maneuvers, also fails. To show economic antagonism, defendants must show "that the plaintiff cannot be expected to act in the interests of the others because doing so would harm his other interests." *Emerald Partners*, 564 A2d at 674 (citing *Youngman*). For example, the defendants could show that the plaintiff is the owner of a business in direct

competition with the company he purports to represent, or that the plaintiff is trying to recover on a direct claim that could preclude recovery by the class. *See e.g.*, *Robinson v Computer*, NDAla, 75 FRD 637 (1976) (dismissing a derivative action because plaintiff could not fairly and adequately represent the interests of the nominal defendant while he was the owner of a business in direct competition); *Priestley v Comrie*, 2007 US Dist LEXIS 87386, *20 (SDNY Nov 27, 2007) (finding a plaintiff unfit to bring derivative claims when her individual claims for recovery were in direct conflict with any recovery from the derivative claims). Barmash does not seek recovery against ESC directly or derivatively; he only brings causes of action derivatively against Perlman and directly against BP. Therefore, any recovery by Barmash for his direct claims would not interfere with recovery by ESC for his derivative claims. Barmash's past threat of litigation against ESC was never consummated, and thus is merely a "hypothetical or potential" conflict of interest, not an "immediate and obvious" one. *Youngman* 457 A2d at 381., Even having a *pending* lawsuit against the corporation a derivative plaintiff seeks to represent, which is not the case here, does not automatically disqualify a derivative plaintiff. *See Carlton Invs. v TLC Beatrice Int'l Holdings, Inc.*, 1995 Del Ch LEXIS 140, *13-15 (Del Ch Nov 21, 1995).

Defendants have failed to show that acting in the interests of ESC would harm Barmash's other interests, and therefore fail to show that economic antagonism exists between Barmash and ESC that would render Barmash an inadequate derivative plaintiff.

Remedy Sought by the Plaintiff

Defendants next argue that Barmash cannot adequately represent ESC because he requests the court to enjoin BP and Perlman from using ESC's assets further. Defendants claim

that this relief would economically harm ESC, showing that Barmash does not have ESC's best interests at heart.

Whether BP and Perlman are economically hurting ESC is the core factual issue in this litigation. Barmash alleges in his affidavit that the defendants have essentially looted ESC, whereas Perlman alleges in his affidavit that the defendants have always looked out for ESC's best interests and are a major source of revenue for the company. Perlman's affidavit is the only evidence the defendants put forth to support their claim, and an affidavit is not "documentary evidence" that disposes of any factual issues. *Tsimerman*, 40 AD3d at 242. The defendants have not "show[n] a substantial likelihood that the derivative action is not being maintained for the benefit of the shareholders" by merely asserting that one of plaintiff's requests for relief is injurious to the class. In fact, injunctive relief is a completely appropriate remedy for a claim of misappropriation of confidential business information. *See e.g. Invesco Institutional (N.A.), Inc. v Deutsche Inv. Mgt. Ams., Inc.*, 74 AD3d 696, 697 (1st Dept 2010) (affirming grant of preliminary injunction on plaintiff's claim for misappropriation of proprietary software). The court can shape relief however it must in order to ensure that the relief does not do harm to the entity it purports to remedy.

Relative Magnitude of the Plaintiff's Personal Interests
<u>as Compared to His Interest in the Derivative Action Itself</u>

Defendants argue that Barmash's personal interest in a buyout dwarfs his interest in the derivative action itself, from which BP (as the majority shareholder of ESC) principally stands to gain from any recovery. Defendants' allegations about the plaintiff seeking a buyout are unavailing. They further argue that Barmash's pursuit of direct claims in this action precludes him from adequately representing ESC's derivative claims in the same action. Yet the Delaware

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Supreme Court plainly rejected this argument in *Loral Space & Communs., Inc. v Highland Crusader Offshore Partners, L.P.*, holding: "Appellants suggest that, where the facts would support both types of claims, stockholders must pursue only the derivative claim if they have standing to do so. Appellants are mistaken. Both types of claims may be litigated at the same time...Loral offers no authority in support of its position that the pendency of a derivative action precluded Loral's stockholders from bringing a direct action, and we are aware of none." 977 A2d 867, 868-70 (Del 2009).

While the defendants cite several cases holding that a plaintiff cannot represent a corporation that they are simultaneously bringing direct claims against, *e.g.*, *JFK Family Ltd. P'ship v Millbrae Natural Gas Development Fund 2005, L.P.*, 2008 NY Misc LEXIS 5548 (NY Sup Ct Sept 16, 2008), *Jones v Citigroup Inc.*, 28 Misc3d 132(A) (App Term, 1st Dept, July 27, 2010), *et al*, these cases are not relevant. The conflict of interest present in those cases, a person seeking to stand in the shoes of a corporation *and simultaneously* sue that corporation, is not present in this case. Barmash is not suing ESC directly in this action; his only direct claims are against BP. The defendants have not established that Barmash's personal interests in the litigation make him an inadequate representative of ESC.

Plaintiff's Vindictiveness Toward the Defendants

Defendants next argue that Barmash's previous threat of litigation against ESC and his indifference to the harm than an injunction may inflict upon ESC demonstrates vindictiveness worthy of disqualification. "The Court's inquiry into the subject of a representative's (or the representative's agents') personal animosity involved in the litigation centers on: (1) that representative's ill-will to the corporate entity which it purportedly represents in the derivative action; or (2) the fact that the representative might not serve the interests of the other

shareholders well because it is too consumed by its own vindictive feelings." *In re Dairy Mart Convenience Stores, Inc.*, CA 14713, 1999 WL 350473, *10, (Del Ch May 24, 1999) (citations omitted). There is no evidence that Barmash is "attempting to harm" ESC to "secure the demise of the Company through the process of this litigation." *Id.* Merely making unjustified demands on a corporate entity in the past does not establish vindictiveness. *See Carlton Invs.*, 1995 Del Ch LEXIS 140 at *15, n.2 (defendants' allegations that "this derivative suit serves only as another action in a larger pattern of harassment that includes allegedly unjustified demands . . . falls far short of establishing facts that would disqualify [the plaintiff]."). "Further, '[i]nadequacy as a class representative is not made out merely because of a disconcordant [*sic*] relation between plaintiff and defendants. To the contrary, this may inspire plaintiff to be an even more forceful advocate.'" *Canadian Commercial Workers Industry Pension Plan v Alden*, 2006 Del Ch LEXIS 42, *43 (Del Ch Feb 22, 2006) (quoting *Emerald Partners*, 564 A2d at 676). Defendants have failed to show that Barmash cannot represent ESC due to vindictiveness.

Degree of Support Plaintiff is Receiving From Shareholders He Purports to Represent

Defendants' final argument is that Barmash has no support in this action from ESC's other shareholder, BP. That clearly does not matter. "A stockholder derivative claim may be maintained although it does not have the support of a majority of the corporation's shareholders or even the support of all the minority shareholders." *Emerald Partners*, 564 A2d at 674. "Adequacy of representation is judged by how well a shareholder advances the interests of other similarly situated shareholders." *Bakerman v Sidney Frank Importing Co., Inc.*, CIV A 1844-N, 2006 WL 3927242, *13 (Del Ch Oct 10, 2006). If a derivative plaintiff is the only person disadvantaged by an alleged breach of fiduciary duty, he is likely the best representative to pursue a remedy. *Id.*

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This argument not only lacks support in any case law, but also is perverse and antithetical to the core purpose of having derivative actions. If this argument were to prevail, majority shareholders would be given a veto power over any lawsuits that sought to hold them and their corporation's principals responsible for misdeeds and looting. The notion that a derivative shareholder action may only proceed with the consent of the majority shareholder is flatly rejected.

Estoppel

Defendants argue that Barmash is barred from bringing this lawsuit by estoppel. A plaintiff is estopped from maintaining a suit if the plaintiff "ratified, approved, confirmed and participated in the matters which are the basis of the present complaint." *Williams v Robinson*, 9 Misc 2d 774, 775 (Sup Ct 1957), *affd sub nom. Levy v Whipple*, 5 AD2d 823 (1958). Yet the defendants have put forth no evidence that Barmash *affirmatively* approved or participated in any of the events that are the basis of his complaint. *Cf.*, *Kranich v Bach*, 209 AD 52 (1st Dept 1924) (plaintiffs barred by estoppel where they had voted to ratify "all the acts of the directors of this company since the annual election in February, 1903"); *Winter v Bernstein*, 149 Misc 2d 1017, 1019-20 (NY Sup Ct 1991) (plaintiff barred by estoppel where he conceded that he had voted to approve the salary and divided policies at issue). While the defendants attempt to charge Barmash with "knowledge" of the transactions at issue, they do so only through Perlman's affidavit, which cannot be taken into consideration on a 3211(a) motion to dismiss. *Health-Loom Corp.*, 209 AD2d at 199. The defendants have not put forth evidence sufficient to bar Barmash's claim due to estoppel.

Discussion of Defendants' Counterclaims

Standard of Review for Motion to Dismiss

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *lv to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

Letter of Intent

For the purposes of this motion, the April 16, 2009 LOI signed by Barmash and Perlman is documentary evidence. Though Barmash, not the defendants, submitted it to the court, the LOI is still reviewable. See e.g. *Moulton Paving, LLC v Town of Poughkeepsie*, 98 AD3d 1009, 1011 (2d Dept 2012) (reviewing written "Subcontractor's Agreement" tendered by defendants, and affirming dismissal of contract claim where agreement indicated it was not binding on its face). Both of defendants' counterclaims stem from alleged contractual violations of the LOI for Barmash failing to "fully develop" the software. Defendants refer to the LOI as the "Agreement" entered into on April 16, 2009.

"[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of

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its terms." *IDT Corp. v Tyco Grp.*, 13 NY3d 209, 214 (2009) (internal quotations omitted). "Parol evidence—evidence outside the four corners of the document—is admissible *only if a court finds an ambiguity* in the contract." *Schron v Troutman Sanders L.L.P.*, 20 NY3d 430, 436 (2013) (emphasis added).

The LOI is unambiguous and clear on its face, so parol evidence (such as the parties' subsequent actions) is inadmissible. In this case, the LOI has utterly refuted the defendants' counterclaims because the "contract" giving rise to their claims is not binding. The very first sentence of the LOI's recital paragraph states that it is a "non-binding letter of intent." The first section of the LOI (the "Nature of this Letter of Intent") specifies:

> (a) Except as specified in Section 1(b) and 1 [*sic* 2](d), the provisions of this Letter of Intent are not legally binding on any Party and the rights and obligations of the Parties shall only be established pursuant to a definitive agreement between the parties.

The LOI makes it abundantly clear that only two provisions are legally binding, and those provisions are not at issue. The LOI also frequently references things that "will" and "shall" be determined "at the time of Entity formation," reflecting an intent not to be bound until the consummation of some future agreement. *Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213 (1st Dept 2005) ("The intent not to be bound is also manifested in the references in the letter to a 'proposed' commitment and a 'proposed' transaction."). "Dismissal of the breach of contract counterclaims is required where, as here, the parties have agreed that there would be no binding agreement until their execution of a written contract, but no such contract was ever executed." *StarVest Partners II, L.P. v Emportal, Inc.*, 101 AD3d 610, 612 (1st Dept 2012). The LOI that forms the basis of defendants' counterclaims is clearly non-binding, so the counterclaims must be dismissed. *See Bitter v Renzo*, 39 Misc 3d 1208(A)

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(NY Sup Ct 2012), *affd*, 101 AD3d 465 (1st Dept 2012) (dismissing breach of contract claims predicated upon a Term Sheet which stated that it was "non-binding"); *Aksman v Xiongwei Ju*, 21 AD3d 260 (1st Dept 2005), *lv denied* 5 NY3d 715 (2005) (dismissing breach of contract claims based on a letter of intent that expressed the parties' intention to enter into a contract "at a later date."); *Buechner v Avery*, 38 AD3d 443 (1st Dept 2007) (dismissing tortious interference with contract claim because it was based on a letter of intent which expressly provided that it was not binding except with respect to certain clauses not at issue.). While Barmash contends that defendants' claims for both rescission and breach of contracts are inapposite and cannot stand, the court does not need to find on this issue since both claims stem from a document that is clearly not binding and unenforceable. *See e.g. Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 (1996) (dismissing a tortious interference with contract claim because a valid contract did not exist).

The LOI is not even the document that granted Barmash his stock in ESC. Barmash tendered a second document to the court, the RSGA between Barmash and ESC. Both Barmash and Perlman (acting in his capacity as ESC's President) signed this document on December 31, 2010. Nowhere in this document is there any sort of enforceable promise by Barmash to "fully develop" the software. The RSGA specified that Barmash is granted his ESC stock "[f]or valuable consideration, receipt of which is acknowledged." The usage of the past tense indicates that Barmash had already done whatever was necessary to receive this payment from ESC. While the RSGA did contemplate clawing back some of the 25,000 shares it granted Barmash, those provisions were tied to the length of his employment by ESC, not to any specific performance benchmarks. The relevant section reads:

[* 21]

Purchase Option

> (a) In the event that, prior to January 1, 2014, the Founder [Barmash] voluntarily ceases to be employed by the Company [ESC] or is dismissed With Cause (as defined herein below), the company shall have the right and option (the "Purchase Option") to purchase from the Founder, for a sum of $0.50 per share (the "Option Price"), some or all of the Unvested Shares (as defined below).

The RSGA calculates and defines which of Barmash's shares are "Unvested Shares" based purely on the date, e.g. "Unvested Shares" means 12,000 Shares until January 1, 2011, 9,000 Shares from January 1, 2011 until January 1, 2012, etc. There is no reference anywhere in the document to an obligation Barmash had to "fully develop" the software. In fact, the RSGA explicitly rejects the defendants' contention that shares can be clawed back based on a failure to perform, stating that "[f]ailure to meet performance standards or objectives, by themselves, shall not constitute 'Cause.'" The RSGA *protects* Barmash from losing his shares if he does not meet performance standards; it certainly does not *mandate* it as the defendants argue.

The contract that the defendants claim Barmash violated, the LOI, is not binding. The contract that actually granted Barmash his shares does not contain any mention of an obligation by Barmash to "fully develop" ESC's software. The documentary evidence completely refutes the defendants' counterclaims.

Conclusion

Accordingly, it is hereby

ORDERED that the defendants' Motion to Dismiss is denied; and it is further

ORDERED that the defendants' claims of rescission for failure of consideration and breach of contract are dismissed.

Dated: July 3 , 2013

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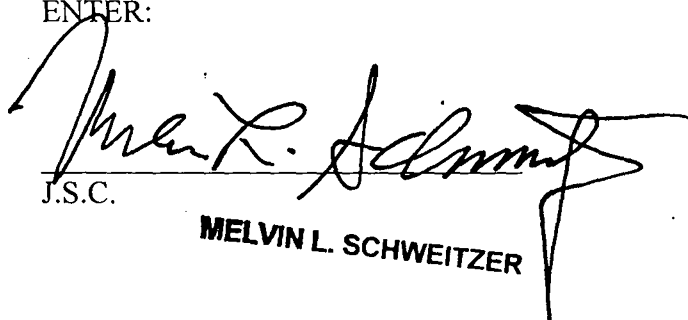

J.S.C.

MELVIN L. SCHWEITZER