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

LCM HOLDINGS GP, LLC, Plaintiff, *-against-* LAURENT IMBERT, Defendant.	Index No. 652878/2012 (I.A.S. Pt. _____)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ARBITRATION, PARTIAL SUMMARY JUDGMENT, AND RELATED RELIEF

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Defendant Laurent Imbert, by his attorneys, Olshan Frome Wolosky LLP, respectfully submits this memorandum of law in support of his motion:

(1) pursuant to CPLR § 7503(a), directing the parties to arbitrate before the Financial Industry Regulatory Authority the claims asserted in the Complaint relating to defendant's business expenses (the "Business Expense Claims") incurred with Louis Capital Markets, L.P., a broker-dealer and FINRA member, and staying the proceedings insofar as they relate to the Business Expense Claims pending the arbitration; or

(2) pursuant to CPLR § 3211(a)(7), dismissing the Business Expense Claims asserted by plaintiff; or

(3) pursuant to CPLR § 3212, granting summary judgment in favor of defendant on the Business Expense Claims asserted by plaintiff; and

(4) pursuant to CPLR § 3211(a)(1), dismissing the fourth cause of action, which seeks a judgment declaring that defendant has lost or forfeited his membership shares in plaintiff limited liability company; or

(5) pursuant to CPLR § 3212, granting summary judgment on the fourth cause of action, declaring that defendant continues to own his membership shares in plaintiff limited liability company.

Preliminary Statement

Plaintiff is a Delaware limited liability that controls a securities broker-dealer, Louis Capital Markets, L.P. ("Louis Capital Markets"). Defendant Laurent Imbert is the former CEO of Louis Capital Markets and until June 2012 was one of the three Managers of plaintiff.

After terminating defendant as a Manager and as the CEO of its broker-dealer, plaintiff brought this action asserting three claims. First, plaintiff alleges that certain distributions that it

made to Mr. Imbert in connection with his quarterly tax payments were overstated and should be returned. Second, plaintiff alleges that Mr. Imbert's business expenses were overstated and should be returned. Third, plaintiff seeks a declaration that Mr. Imbert has ceased to be a member of the limited liability company, on the apparent theory that his termination as a Manager resulted in a forfeiture of his membership shares. Two of these claims – those involving business expenses and the claim for declaratory relief – must be dismissed at the outset.

Plaintiff's business expense claim suffers from two fundamental flaws. First, plaintiff did not advance any of the business expenses that are in dispute; rather, all of these expenses were advanced and paid by Louis Capital Markets, a FINRA member and broker-dealer. Plaintiff mistakenly claims to be a broker-dealer, when in fact Louis Capital Markets is the broker-dealer and plaintiff is its general partner. Second, the expense claims at issue involve a dispute between a FINRA member firm and an "associated person" and are therefore subject to compulsory arbitration under FINRA Rules. As set forth below, the Court should compel arbitration of these claims or alternatively dismiss them for the simple reason that plaintiff is not the correct party to bring them.

Plaintiff's claim for a declaration that Mr. Imbert has forfeited his valuable membership shares – worth perhaps more than $15 million – is contrary to the express terms of the Operating Agreement that governs Mr. Imbert's rights as a member. The Operating Agreement specifically provides that members *other than Managers* who cease employment must sell their shares. There is no dispute that Mr. Imbert was a Manager when his employment ceased and therefore not subject to this provision. Further, Delaware law does not recognize a doctrine of forfeiture

for membership interests. Accordingly, the Court should dismiss with prejudice the claim for declaratory relief, holding that Mr. Imbert continues as member of the limited liability company.

Statement of Facts

The following facts are taken from the Affidavit of Laurent Imbert, sworn to September 28, 2012 (the "Imbert Aff."); the Affirmation of Thomas J. Fleming, dated October 2, 2012 (the "Fleming Aff."), and their exhibits.

The Parties

Plaintiff LCM Holdings GP, LLC ("LCM GP") is a Delaware limited liability company with its principal place of business at 445 Park Avenue, 16th Floor, New York, New York 10022. (Fleming Aff. Ex. 8, Compl. ¶ 2) LCM GP is the general partner of Louis Capital Markets, LP ("Louis Capital Markets"), a broker-dealer based in New York. (Imbert Aff. ¶ 3)

Defendant Laurent Imbert resides in Connecticut. (Fleming Aff. Ex. 8, Compl. ¶ 3) He is a former Manager of plaintiff and former CEO of Louis Capital Markets. (Imbert Aff. ¶ 4; Fleming Aff. Ex. 8, Compl. ¶ 13)

Louis Capital Markets

In 1999, Mr. Imbert, along with Michael Benhamou, founded Louis Capital Markets, a securities broker-dealer named after his late father, Louis Imbert. Louis Capital Markets, now operated as Louis Capital Markets, LP, has been a member firm of the Financial Industry Regulatory Authority ("FINRA") since at least 2000. (Imbert Aff. ¶ 1, Ex. 1)

Plaintiff's Complaint mistakenly alleges that LCM GP is a "global independent agency broker-dealer." (Fleming Aff. Ex. 8, Compl. ¶ 2) In fact, Louis Capital Markets is the broker-dealer. (Imbert Aff. ¶¶ 2-3, Ex. 1) Plaintiff LCM GP was formed to manage Louis Capital Markets. It is the general partner of, and owns a 1% interest in, the broker-dealer. The remaining 99% of Louis Capital Markets is owned by LCM Interest Holding, LLC ("LCM

Holding," and collectively with LCM GP and Louis Capital Markets, the "LCM Companies"). (Imbert Aff. ¶ 3, Ex. 2)

Mr. Imbert's Role as Member, Manager, and Chief Executive Officer

Mr. Imbert is a founder and Member of both LCM GP and LCM Holding. Until at least June 21, 2012, he was also a Manager of both LCM GP and LCM Holding, and the Chief Executive Officer of Louis Capital Markets. As a result of his employment with Louis Capital Markets, he was registered with FINRA and held numerous FINRA licenses. (Imbert Aff. ¶ 4, Ex. 4)

For many years, Mr. Imbert served as the CEO of Louis Capital Markets, where he worked on a daily basis and received a salary. On June 20, 2012, his fellow Managers, Michael Benhamou and Patrice Cohen, accused him of misconduct. (*Id.* at ¶ 5) The next day, on June 21, 2012, they issued a letter purporting to terminate Mr. Imbert's "employment and [] role as Manager in each of LCM Interest Holding, LLC, LCM Holdings GP, LLC, and Louis Capital Markets, LP...." (*Id.* at ¶ 6, Ex. 4) Mr. Imbert has disputed all of their charges. Nonetheless, on June 27, 2012, he submitted his resignation from all positions at the LCM Companies so that he could earn a livelihood elsewhere in the brokerage industry. (*Id.* at ¶ 6)

Mr. Imbert's Business Expenses at Louis Capital Markets

On June 25, 2012, counsel to the LCM Companies sent Mr. Imbert a letter alleging that "[Louis Capital Markets] has been paying, on behalf of you and other employees, legitimate travel and entertainment business expenses," and claiming that he "caused [Louis Capital Markets] to pay, on your behalf, personal expenses which you falsely characterized as business expenses." (*Id.* at Ex. 5) The letter further demanded a return of the alleged improper business expenses. (*Id.*).

Plaintiff has asserted a claim in this case to recover the expenses that Louis Capital Markets paid to Mr. Imbert (the "Business Expense Claims"). Plaintiff's allegations thus include the charge that Mr. Imbert's "T&E report showed charges … [that] included what were obviously payments for personal expenses, such as cash withdrawals, personal flights, and personal credit card payments." (*See* Fleming Aff. Ex. 8, Compl. ¶ 36)

Mr. Imbert has disputed the charge that his business expenses were improper. (Imbert Aff. ¶ 9; *see also* Fleming Aff. Ex. 9) What cannot be disputed, however, is that all of the expenses at issue in the Complaint were paid, if at all, by Louis Capital Markets, a FINRA member, and not plaintiff LCM GP. As CEO, Mr. Imbert received one or more credit cards in the name of Louis Capital Markets, which he used to charge certain company-related expenses. (Imbert Aff. ¶ 9, Ex. 6) The charges on his Louis Capital Markets credit card were regularly paid by Louis Capital Markets. While LCM GP purports to recover alleged improper expenses, it never paid any of Mr. Imbert's personal or business expenses because all such business expenses were paid, if at all, by Louis Capital Markets. (*Id.* at ¶ 9, Ex. 6).

Status of this Action

Plaintiff filed its Complaint on August 17, 2012. (Fleming Aff. Ex. 8) The Complaint asserts four claims. The first two counts concern Mr. Imbert's receipt of distributions from plaintiff to pay quarterly income taxes, and certain business expenses that he charged Louis Capital Markets. The third count seeks recovery of the alleged tax overpayments on a theory of fraud. The fourth cause of action seeks a declaration that defendant has somehow forfeited his membership shares in plaintiff, a limited liability company. (*Id.* at ¶ 3)

Mr. Imbert served and filed his Answer to the Complaint on September 12, 2012. (Fleming Aff. Ex. 9) Among other things, Mr. Imbert raised compulsory arbitration as an affirmative defense. The Court has not yet held a preliminary conference.

Argument

I

THE COURT SHOULD DIRECT PLAINTIFF TO ARBITRATE THE BUSINESS EXPENSE CLAIMS OR DISMISS THOSE CLAIMS AS NOT BELONGING TO PLAINTIFF

A. The Court Should Direct Arbitration

CPLR § 7503 provides that "[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration," and [w]here there is no substantial question whether a valid agreement was made or complied with ... the court shall direct the parties to arbitrate." CPLR § 7503(a). New York's public policy strongly favors arbitration. *Boz Exp. & Imp., Inc. v. Karakus*, 32 Misc. 3d 1242(A), 938 N.Y.S.2d 225 (N.Y. Sup. 2011) (citation omitted); *see also Union Free Dist. No. 15, Town of Hempstead v. Lawrence Teachers Ass'n*, 33 A.D.3d 808, 822 N.Y.S.2d 767, 768 (2d Dep't 2006). "New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration." *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 50, 666 N.Y.S.2d 990 (1997) (citations omitted).

The Federal Arbitration (the "FAA"), which "applies to any written agreement to arbitrate 'a contract evidencing a transaction involving commerce,'" and which governs this dispute, also "establishes an 'emphatic' national policy favoring arbitration which is binding on all courts, State and Federal." *Singer v. Jefferies & Co., Inc.,* 78 N.Y.2d 76, 81, 575 N.E.2d 98, 100 (1991) (citing 9 U.S.C. § 2). "Pursuant to the Arbitration Act, 'questions of arbitrability must be addressed with a healthy regard for the federal policy ... [and] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* (directing parties to arbitrate pursuant to NASD Code); *see also Flanagan v. Prudential-Bache Sec., Inc.,* 67 N.Y.2d 500, 506, 495 N.E.2d 345, 348 (1986) (same); *State v. Philip Morris Inc.,* 30 A.D.3d 26, 31, 813

N.Y.S.2d 71, 75 (1st Dep't 2006) ("Arbitration is strongly favored under New York law" and "[a]ny doubts as to whether an issue is arbitrable will be resolved in favor of arbitration.").

Although LCM GP purports to assert the Business Expense Claims, these claims could only belong to Louis Capital Markets, because all of Mr. Imbert's expenses were incurred on a credit card issued by Louis Capital Markets and/or were paid by Louis Capital Markets from its funds. The Business Expense Claims are, therefore, subject to mandatory arbitration under FINRA Rule 13200, which provides for mandatory arbitration of claims "aris[ing] out of the business activities of a member or an associated person," where such dispute is between or among (1) members, (2) members and associated persons, or (3) associated persons. FINRA R. 13200. (Fleming Aff. Ex. 11)

Before this litigation, plaintiff recognized that the Business Expense Claims involved Louis Capital Markets, not LCM GP. In a June 25, 2012 letter to Mr. Imbert, plaintiff's counsel explicitly asserted the Business Expense Claims on behalf of Louis Capital Markets, stating that "the Partnership" – which was defined as Louis Capital Markets – had paid Mr. Imbert's business expenses, and accused Mr. Imbert of causing "the Partnership" to pay his personal expenses. The use of the word "Partnership" was deliberate, as demonstrated by the preceding paragraph in the June 25, 2012 letter, which reiterates the substance of the distribution tax claims, and refer to LCM GP and LCM Holding only. (Imbert Aff. Ex. 5)

In an apparent effort to avoid FINRA's mandatory arbitration provisions, plaintiff has now reversed course and purports to assert the Business Expense Claims independent of Louis Capital Markets. This stratagem is based on plaintiff's false allegation that LCM GP is a broker-dealer. (*See* Fleming Aff. Ex. 8, Compl. ¶ 2; *see also* Imbert Aff. ¶¶ 2-3, Ex. 1) However, the

Business Expense Claims properly belong to Louis Capital Markets, which is a member of FINRA, and must be arbitrated pursuant to FINRA Rule 13200.

There can be no dispute that Louis Capital Markets is a "member" and that Mr. Imbert is an "associated person" within the meaning of FINRA Rule 13200. (Imbert Aff. Exs. 1, 3) Further, the Business Expense Claims clearly "arise[] out of the business activities" of Mr. Imbert and Louis Capital Markets, because Mr. Imbert incurred the expenses at issue by virtue of his position as CEO of Louis Capital Markets. Courts have consistently ruled that similar disputes between a broker-dealer and its employees arise out of a member's "business activities." *See Hawkins v. Toussaint Capital Partners, LLC*, 08 CIV. 6866 (PKL), 2010 WL 2158332, at *5 (S.D.N.Y. May 27, 2010) (disputes over commissions and discharge "clearly fall with the scope of the parties 'business activities,' because they directly implicate some of the most fundamental aspects of [plaintiff's] business relationship with [defendant]."); *Thomas James Associates, Inc. v. Jameson*, 102 F.3d 60, 66 (2d Cir. 1996) (defendant required to arbitrate former employee's employment-related claims[1]).

Louis Capital Markets agreed to submit to FINRA's mandatory arbitration provisions by virtue of its membership in FINRA. FINRA Rule 0140 provides that its "Rules shall apply to all members and persons associated with a member." FINRA R. 0140(a). The FINRA by-laws similarly provide that an application for membership in FINRA shall contain, among other things, "an agreement to comply with the federal securities laws, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board and the Treasury

[1] FINRA Rule 13200 is similar in substance to former NASD Code § 8, which provided that "Any dispute, claim or controversy eligible for submission under part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s), or in connection with the activities of such associated person(s), shall be arbitrated under this Code, at the instance of: (1) a member against another member; (2) a member against a person associated with a member or a person associated with a member against a member; and (3) a person associated with a member against a person associated with a member." Accordingly, cases decided under former NASD Code § 8 remain applicable and instructive.

Department, the By-Laws of the Corporation, NASD Regulation, or NASD Dispute Resolution...." (NASD bylaws § 1(a)(1)) Thus, by registering for membership with FINRA, Louis Capital Markets has entered into a binding agreement to arbitrate disputes falling under FINRA Rule 13200. *See Oppenheimer & Co., Inc. v. Neidhardt,* 93 CIV. 3854 (SS), 1994 WL 176976, at *1 (S.D.N.Y. May 5, 1994) ("Member securities dealers are subject to a compulsory arbitration agreement intended directly to benefit their customers."); *Prudential Sec., Inc. v. Am. Capital Corp.,* 96-CV-440, 1996 WL 280830 (N.D.N.Y. May 15, 1996) ("By virtue of their membership in the NASD, the parties have agreed to arbitrate disputes that arise between them."); (*Hanney v. Taylor*, 121359/00, 2001 WL 1691986, at *1 (N.Y. Sup. Ct. Oct. 26, 2001) ("the mandatory arbitration required by the NASD rules makes it irrelevant whether or not there was a written arbitration agreement"); *McMahan Sec. Co. L.P. v. Aviator Master Fund, Ltd.,* 20 Misc. 3d 386, 391, 862 N.Y.S.2d 747, 753 (N.Y. Sup. 2008) ("The NASD Code of Arbitration Procedure creates the right of parties to compel an NASD-member firm to arbitrate").

Plaintiff is also bound to arbitrate the Business Expense Claims under a written agreement to arbitrate. Specifically, in connection with his employment by Louis Capital Markets, Mr. Imbert was required to sign a Form U-4, which form was countersigned and filed by Louis Capital Markets. FINRA's Form U-4 provides:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my *firm*, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the *SROs* indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent *jurisdiction.*

(Fleming Aff. Ex. 12)

The Second Circuit had recognized that "Form U-4 binds both parties to mandatory arbitration...." *Gold v. Deutsche Aktiengesellschaft,* 365 F.3d 144, 150 (2d Cir. 2004);

Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 207 (2d Cir. 1999); *see also Imperatore v. Putnam Lovell NBF Sec. Inc.*, 05 CV 4966(RPP), 2006 WL 648214 (S.D.N.Y. Mar. 15, 2006). Thus, by counter-signing and filing the Form U-4 on behalf of Mr. Imbert, Louis Capital Markets entered into a written agreement to submit all disputes between itself and Mr. Imbert to mandatory arbitration before FINRA.

Thus, if plaintiff is indeed a broker-dealer, it must proceed to arbitrate. If it is an assignee of claims originating with Louis Capital Markets, it must also go to arbitration, because Louis Capital Markets cannot avoid its arbitration obligations by assigning its claims to another. *Hosiery Mfrs.' Corp. v. Goldston*, 238 N.Y. 22, 28, 143 N.E. 779, 780 (1924) ("Arbitration contracts would be of no value if either party thereto could escape the effect of such a clause by assigning a claim subject to arbitration between the original parties to a third party."); *Banque de Paris et des Pays-Bas v. Amoco Oil Co.*, 573 F. Supp. 1464, 1470 (S.D.N.Y. 1983) (same); *GMAC Commercial Credit LLC v. Springs Indus., Inc.*, 171 F. Supp. 2d 209, 214 (S.D.N.Y. 2001) (assignee could not escape contract's arbitration clause because "[p]lainly, an assignment cannot alter a contract's bargained-for remedial measures, for then the assignment would change the very nature of the rights assigned."); *Cutting Room Appliances Corp. v. Nat'l Bronx Bank of N.Y.*, 97 N.Y.S.2d 363 (N.Y. Sup. 1950) (assignee bound by arbitration clause).

Accordingly, whether asserted by plaintiff or Louis Capital Markets, the Business Expense Claims must be heard before a FINRA arbitration panel.

B. Alternatively, the Business Expense Claims Should Be Dismissed or Defendant Awarded Summary Judgment

Alternatively, the Business Expense Claims should be dismissed pursuant to CPLR §§ 3211(a)(3) and/or CPLR 3212. LCM GP has no standing to assert these claims, which belong to Louis Capital Markets. To the extent that LCM GP relies on its claim to be a broker-dealer,

the Court should award summary judgment as plaintiff's position is disproven beyond dispute by FINRA's records.

"Standing is a threshold determination," which is based on "the principle that only proper parties will be allowed to maintain claims...." *Society of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769-71, 573 N.E.2d 1034, 1038-40 (1991). "Under the common law, there is little doubt that a court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected." *Id.* at 771, 573 N.E.2d at 1040 (citation omitted). One of the touchstones of standing is the existence of an "injury in fact – an actual legal stake in the matter being adjudicated." *Id.* at 773, 573 N.E.2d at 1040.

The courts have further articulated "a general prohibition on one litigant raising the legal rights of another..." *Id.* at 773, 573 N.E.2d at 1041. Thus, "courts will not allow a parent to pierce the corporate veil it created for its own benefit, so as to assert the claims of its subsidiary." *Ahuja v. Ian Schrager Hotels, Inc.,* 29 A.D.3d 387, 815 N.Y.S.2d 62, 63 (1st Dep't 2006). "In terms of legal responsibility, parent, subsidiary or affiliated corporations are treated separately and independently and one will not be held liable for the contractual obligations of the other, unless it is shown that there was an exercise of complete dominion and control.... Similarly, one corporation will generally not have legal standing to exercise the rights of other associated corporations." *Alexander & Alexander of New York Inc. v. Fritzen*, 114 A.D.2d 814, 815, 495 N.Y.S.2d 386, 388 (1st Dep't1985) (parent had no standing to sue on claims belonging to subsidiaries); *see also Saint Gobain v. Assessor & Bd. of Assessment Review of Town of Wheatfield*, 17 A.D.3d 1112, 794 N.Y.S.2d 770 (4th Dep't 2005) (parent corporation lacked standing to challenge assessment of property owned by its wholly-owned subsidiary; parent

company did not establish a direct adverse impact on its pecuniary interests, and remote and consequential impact was insufficient).

Pursuant to CPLR § 3211(a)(3), a Complaint may be dismissed when "the party asserting the cause of action has not legal capacity to sue." CPLR § 3211(a)(3). "While the allegations in the complaint are to be accepted as true when considering a motion to dismiss, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." *Garber v. Bd. of Trustees of State Univ. of New York,* 38 A.D.3d 833, 834, 834 N.Y.S.2d 203, 205 (2d Dep't 2007) (holding that plaintiff's conclusory allegations were contradicted by documentary evidence, which demonstrated that plaintiffs lacked standing) (citations omitted).

Here, the Complaint contains no facts to support LCM GP's entitlement to bring this action, other than the false claim that it is a broker-dealer and a conclusory allegation that Mr. Imbert "padd[ed] his expens[e] accounts to receive approximately $600,000 in expenses not related to LCM [GP] business." (*See* Compl. ¶ 45) Because all of the expenses at issue were paid by Louis Capital Markets, LCM GP cannot possibly have suffered an "injury in fact," and therefore has no legal stake in these claims. *See Society of Plastics*, 77 N.Y.2d at 773, 573 N.E.2d at 1040. The Business Expense Claims must, therefore, be dismissed.

Alternatively, if plaintiff indeed contends that it is a broker-dealer, then judgment for defendant is appropriate. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986). The documentary evidence establishes beyond dispute that Louis Capital Markets, not LCM GP, is a broker-dealer registered with FINRA. (Imbert Aff. Ex. 1) Having submitted sworn testimony confirming that all of his expenses were paid by Louis Capital Markets, and not by LCM GP, Mr. Imbert has established his *prima facie* entitlement to

judgment as a matter of law. (*See* Imbert Aff. ¶¶ 9-10) It is now plaintiff's burden to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact," which it cannot do. *See Bethlehem Steel Corp. v. Solow*, 51 N.Y.2d 870, 872, 414 N.E.2d 395, 433 N.Y.S.2d 1015 (1980). The Court should, therefore, grant summary judgment dismissing the Business Expense Claims.

II

THE COURT SHOULD STAY THE PROCEEDINGS RELATING TO PLAINTIFF'S BUSINESS EXPENSE CLAIMS PENDING ARBITRATION

CPLR § 7503(a) further provides that, when the court directs the parties to arbitrate, such "order shall operate to stay a pending or subsequent action or so much of it as is referable to arbitration." CPLR § 7503(a). Further, the FAA provides that if a proceeding is subject to arbitrate, "the court in which such suit is pending … shall on application of one of the parties stay the trial of the action until such arbitration has been had…." 9 U.S.C. § 3; *see also McMahan Sec. Co. L.P. v. Forum Capital Markets L.P.*, 35 F.3d 82, 85 (2d Cir. 1994) ("Under the [FAA], a district court must stay proceedings if satisfied that the parties have agreed in writing to arbitrate an issue or issues underlying the district court proceeding.").

Here, the Business Expense Claims are subject to mandatory arbitration before FINRA. To the extent that portions of this proceeding involves these claims, those portions should be stayed. *See Szabados v. Pepsi-Cola Bottling Co. of New York, Inc.*, 174 A.D.2d 342, 570 N.Y.S.2d 553, 554 (1st Dep't 1991) (granting motion to compel arbitration and staying proceedings pursuant to CPLR § 7503(a)); *Jung v. Skadden, Arps, Slate, Meagher & Flom, LLP*, 434 F. Supp. 2d 211, 214 (S.D.N.Y. 2006) (same, pursuant to FAA); *Caruso Glynn, LLC v. Sai Trust,* 11 CV 4360 VB, 2012 WL 4053802, at *5 (S.D.N.Y. July 9, 2012) (same).

III

THE COURT SHOULD DISMISS THE DECLARATORY JUDGMENT CLAIM

Plaintiff's Fourth Cause of Action seeks a declaratory judgment that Mr. Imbert is no longer a Member of LCM GP. (Fleming Aff. Ex. 8, Compl. ¶¶ 59-61) Plaintiff offers no explanation for its theory that Mr. Imbert has forfeited his membership interests, estimated to exceed $15 million in value. Apparently plaintiff contends that Mr. Imbert's termination as a Manager of the limited liability company results in a forced sale or forfeiture of his membership interests. The relevant documents establish that this theory is without merit.

A. Standard of Review

Section 3211(a)(1) of the CPLR permits a court to consider "documentary evidence" on a motion to dismiss without converting the motion to one for summary judgment, where such evidence "conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 974 (1994). A court may consider documents "whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based." *Brown v. Solomon and Solomon, P.C.*, 181 Misc.2d 461, 462-63, 694 N.Y.S.2d 843, 846 (Albany City Ct., 1999); *see also Quatrochi v. Citibank N.A.*, 210 A.D.2d 53, 53, 618 N.Y.S.2d 820, 820 (1st Dep't 1994) (affirming dismissal of complaint pursuant to CPLR § 3211(a)(1) where documentary evidence attached to the complaint "flatly contradicted the allegations in the complaint").

B. The Operating Agreement Confirms That Mr. Imbert Remains a Member and Is Not Required to Sell His Membership Shares

Plaintiff admits that Mr. Imbert "is presently a Member of LCM [GP]." (Fleming Aff. Ex. 8, Compl. ¶ 3) LCM GP asserts that a dispute exists regarding Mr. Imbert's status as a

Member, with plaintiff claiming that Mr. Imbert's interests are subject to forfeiture. (*See id.* at ¶ 60) Plaintiff's theory appears to be that, once Mr. Imbert ceased to be a Manager, he somehow lost his membership interest. This theory, however, has no basis in either the Operating Agreement or Delaware Law.

"Limited Liability Companies are creatures of contract, designed to afford the maximum amount of freedom of contract, private ordering and flexibility to the parties involved." *TravelCenters of Am., LLC v. Brog*, CIV.A. 3516-CC, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008). Delaware Courts enforce such contracts, which usually take the form of operating agreements. *E.g., Fisk Ventures, LLC v. Segal*, CIV.A. 3017-CC, 2008 WL 1961156, at *8 (Del. Ch. May 7, 2008) ("In the context of limited liability companies, which are creatures not of the state but of contract … duties or obligations must be found in the LLC Agreement or some other contract.") Indeed, Section 18-603 of Delaware's Limited Liability Company Act provides that a member may resign from an LLC "only at the time and upon the happening of events specified in a limited liability company agreement …'

LCM GP is governed by a Second Amended and Restated Limited Liability Company Agreement, dated March 11, 2010 (the "Operating Agreement"). (Imbert Aff. Ex. 7; Fleming Aff. Ex. 8, Compl. ¶ 22) Under the Operating Agreement, Mr. Imbert has no obligation to sell or transfer his shares after he ceases to be a Manager. The Operating Agreement provides only that "[i]n the event that the employment of a Member *other than a Manager* with the Company … is terminated for any reason, such Member shall immediately offer to Transfer all of his Membership Shares in accordance with Section 10.05." (Imbert Aff. Ex. 7 § 10.03 (emphasis added)). Because Mr. Imbert was a Manager of LCM GP until at least June 21, 2012, this section does not compel a transfer of his shares. (*See id.* at ¶ 4)

No provision in the Operating Agreement provides for the removal of Members, except possibly for "Operational Members." (See *id.* at Ex. 7 Art. X.) Operational Members are "Members designated by the Board as Operational Members." (*Id.* at Ex. 7 § 1.01 (p. 4)) The Complaint makes no claim that Mr. Imbert was designated an Operational Member. (*See* Fleming Aff. Ex. 1) In fact, no such designation was ever made. (*Id.* at ¶ 14)

In the absence of a contractual provision involving a compulsory transfer, Delaware law is clear that a member retains his interests, even in the face of charges of misconduct. The holding in *Walker v. Res. Dev. Co. Ltd., L.L.C. (DE)*, 791 A.2d 799, 813 (Del. Ch. 2000), is on point. There, defendants took the position that one member's shares were subject to forfeiture, even though, as the Chancery Court noted, the operating agreement contained no provision for removal of the member's interests. Citing to Delaware's LLC Act, the Court explained that "LLC members' rights begin with and typically end with the Operating Agreement." With this in mind, the court reviewed the operating agreement, concluding that it "include[d] no provision that can be read to allow the [other members] to deprive [plaintiff] of his ownership interest in the circumstances presented in this case." *Id.* To reach this conclusion, the court pointed to the removal provision of the operating agreement, but noted that that provision "makes clear that 'removal shall be without prejudice to the [Manager's] contract rights," which the court determined meant his ownership rights. The court also looked to the provisions governing voluntary and involuntary withdrawal, but found that those provisions identify "no instance even arguably applicable in this case." Observing that the members could have provided for removal of a member's interests, but did not do so, the court concluded that, "[s]ince the Operating Agreement does not justify [plaintiff's] removal, defendants are left to the default rules," provided by Delaware law. *Id.*

Next, the Chancery Court looked to Delaware's Limited Liability Company Act and found no basis for the unilateral removal of an LLC member. The Court held that it was a "fundamental principle under Delaware law that a majority of the members (or stockholders) of a business entity, unless expressly granted such power by contract, have no right to take the property of other members (or stockholders). Other mechanisms may be available to them to recast their business relations to eliminate persons from the enterprise, such as the merger provisions of the various business entity laws. But, these provisions do not provide for the forfeiture of economic rights, requiring instead that the persons whose interests are eliminated are entitled to receive fair value therefor." *Id.* at 814.

Based on the express terms of the Operating Agreement and CPLR 3211 (a)(1), the Court should dismiss the Fourth Claim for Relief with prejudice, holding that Mr. Imbert's membership interests are not forfeited. Alternatively, the Court should grant Mr. Imbert summary judgment on this count declaring that he continues to be a member of LCM GP.

Conclusion

WHEREFORE, defendant requests that the Court grant its motion to compel arbitration and stay the proceedings or, alternatively, to dismiss the claims related to Mr. Imbert's expenses, and to dismiss the claim for declaratory relief, along with such other and further relief as the Court deems just and proper.

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