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. 48) (Motion Seq. No. 1)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE DECLARATORY JUDGMENT CLAIM

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Defendant Laurent Imbert, by his attorneys, Olshan Frome Wolosky LLP, respectfully submits this reply memorandum of law in support of his motion, pursuant to CPLR § 3211(a)(1), dismissing the fourth cause of action, which seeks a judgment declaring that Mr. Imbert has lost or forfeited his membership shares in LCM Holdings GP, LLC ("LCM GP") and LCM Interest Holding, LLC ("LCM Holding") (collectively, the "Companies"). (The parties have recently stipulated to add LCM Interest as a plaintiff in this action).

Defendant's remaining requests for relief, which sought to compel arbitration of certain claims asserted by LCM GP relating to defendant's business expenses (the "Business Expense Claims"), or in the alternative to dismiss those claims pursuant to CPLR § 3211(a)(7) and/or CPLR § 3212, have been mooted, because the Companies now concede that the Business Expense Claims are subject to mandatory arbitration before FINRA, and the parties have stipulated to withdraw such claims.

Because LCM Holding is governed by an operating agreement that is identical in all material respects to the operating agreement governing LCM GP, this reply brief addresses the declaratory judgment claim as if asserted by both plaintiffs.

Preliminary Statement

Now that Plaintiffs have submitted their opposition papers, two facts ring clear. First, the relevant Operating Agreements are those upon which Mr. Imbert has relied in seeking dismissal or summary judgment. Second, when Plaintiffs purported to terminate Mr. Imbert in June 2012, he was a Manager, and not an Operational Member. The Operating Agreements compel Operational Members, and employees who are Members (but not Managers), to tender their shares upon separation. But the Operating Agreements make clear that a forced sale does not apply to Managers, such as Mr. Imbert. Had Plaintiffs and their Managers wished to require a forced sale, they could have easily so stated. Instead, they exempted Managers from a

compulsory sale upon termination, protecting their large equity holdings from an arbitrary valuation process. Because the documents are clear and Mr. Imbert's status as a Manager at the time of his termination is conceded, dismissal based upon the documentary evidence, or alternatively summary judgment, is appropriate.

We review below plaintiffs' concessions on this motions and the flaws in their opposition.

Argument

1. Plaintiffs' Dispositive Concessions

Plaintiffs' opposition papers contain significant concessions that confirm that dismissal of the declaratory judgment claim is appropriate. Specifically, Plaintiffs fail to dispute any of the following:

(a) that Plaintiffs have no ability under Delaware law to expel a Member from the LLC (*see* Pl. Opp. pp. 12-16);

(b) that the Operating Agreements at issue are authentic and govern the Plaintiffs (Pl. Rule 19-a Resp. ¶ 11; Pl. Opp. pp. 3-4);

(c) that there are no documents necessary to resolve this dispute other than the Operating Agreements, the June 21, 2012 termination letter, and/or Mr. Imbert's June 27, 2012 resignation letter (*see* Pl. Opp. pp. 3-4, 12-14);

(d) that Mr. Imbert was a Manager at the time of his purported termination on June 20, 2012 (Pl. Rule 19-a Resp. ¶ 4);

(e) that Section 10.03 is the only section of the Operating Agreements that would require a Member to transfer or sell his membership interests (*see* Pl. Opp. p. 13); and

(f) that Mr. Imbert is not an Operational Member (Pl. Rule 19-a Resp. ¶ 12).

These concessions spell the end for Plaintiffs' claim that Mr. Imbert, a Member and, at the time of his termination, a Manager, is obligated to transfer his membership shares against his will and for a price that he does not accept.

2. Section 10.03 of Operating Agreements

Plaintiffs rely exclusively on Section 10.03 of the Operating Agreements for their claim that Mr. Imbert must offer to transfer his membership shares. (*See* Pl. Opp. pp. 4, 13) This provision states:

> In the event that the employment of a Member *other than a Manager* with the Company or one of its Affiliates 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; Imbert Reply Aff. Ex. 1 § 10.03) (emphasis added).

The plain terms of Section 10.03, contradict Plaintiffs' position, because it explicitly applies only to "a Member *other than a Manager*." (emphasis added)

Here, there is no dispute that Mr. Imbert was a Manager until at least June 20, 2012, when Messrs. Benhamou and Cohen "met with Imbert and terminated him from his position as a Manager and employee" of LCM GP and LCM Holding. (Compl. ¶ 38) Indeed, the next day, Plaintiffs sent Mr. Imbert a letter purporting to terminate Mr. Imbert's "employment and [] role as Manager" in the Companies, as well as in their broker-dealer subsidiary, Louis Capital Markets, LP.[1] (Imbert Aff. ¶ 6, Ex. 4) Thus, pursuant to the express terms of Section 10.03, Mr. Imbert is not required to sell his membership interests in LCM GP or LCM Holding.

Undeterred by the plain language of Section 10.03, Plaintiffs advance the argument that Section 10.03 applies due to the fact that Mr. Imbert was terminated as a Manager. (*See* Pl. Opp.

[1] Whether Mr. Imbert was terminated on June 20, 2012 or June 21, 2012 is irrelevant, because the material issue is whether Mr. Imbert was a Manager at the time of his termination. Regardless of the date on which such termination occurred, there can be no dispute that Mr. Imbert was a Manager at the time that he was purportedly terminated.

p. 13) Again, this argument is belied by the plain language of Section 10.03, because there is no dispute that, *at the time of his purported termination*, Mr. Imbert was a Manager. Plaintiffs' own termination letter is dispositive on this point, stating:

> This letter confirms the actions taken by the Board of Managers of LCM Interest Holding, LLC and LCM Holdings GP, LLC at the meeting held on June 20, 2012 attended by all three of the Managers.
>
> Effective immediately, upon your receipt of this letter, your employment and your role as a Manager in each of LCM Interest Holding, LLC, LCM Holdings GP, LLC and Louis Capital Markets, LP, as well as their respective Affiliates and subsidiary companies (collectively, the "LCM Companies"), are hereby terminated.
>
> You are advised to vacate the LCM Companies' offices and to return all property belonging to any of the LCM Companies and upon departure leave all LCM Companies' computers and other property in the office. All access to the LCM Companies' offices, banking and credit facilities, tradition authorization, telephone, computer and other systems are terminated immediately as well.

(Imbert Aff. Ex. 4)

The rationale for Section 10.03's exclusion of Managers is self-evident. The three Managers owned the lion's share of the Companies' equity – positions worth millions of dollars – developed through over a decade of hard work. They did not want to be subject to the disadvantageous appraisal process set forth in Section 10.10, in which "the purchase price of the Membership Shares shall be determined by two independent consultants selected by the Board." (Imbert Reply Aff. ¶ 6; *see also* Imbert Aff. Ex. 7 § 10.10; Imbert Reply Aff. Ex. 1 § 10.10)

Moreover, if Plaintiffs' interpretation were adopted, the words "other than a Manager" would be rendered inoperable and superfluous. The inclusion of these words makes clear that the parties were providing added protections to the Plaintiffs' Managers that do not apply to the other employee-members. (*See* Imbert Reply Aff. ¶ 6) Section 10.03 could have easily been

written to apply to all Members. By its plain terms, however, it does not. Thus, because Plaintiffs' interpretation would eviscerate an important component of Section 10.03, it cannot be adopted. *See Pearce, Urstadt, Mayer & Greer Realty Corp. v. Atrium Dev. Associates*, 77 N.Y.2d 490, 497, 571 N.E.2d 60, 64 (1991) (the court "should not accept an interpretation that ignores the interplay of the terms, renders certain terms inoperable, and creates a conflict where one need not exist.") (citation omitted); *Perlbinder v. Bd. of Managers of 411 E. 53rd St. Condo.*, 65 A.D.3d 985, 986, 886 N.Y.S.2d 378, 381 (1st Dep't 2009) ("In construing a contract, an interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation.") (citation omitted).

Plaintiffs have offered no evidence that would support their interpretation of Section 10.03. For example, they have not submitted any affidavits on personal knowledge claiming that Section 10.03 was intended to be interpreted as they claim. The assertions of their counsel as to the meaning of Section 10.03 are irrelevant. *See Kartiganer Associates, P.C. v. Town of New Windsor*, 132 A.D.2d 527, 517 N.Y.S.2d 266, 267 (2d Dep't 1987) ("unsubstantiated and conclusory allegations of fact by an attorney lacking personal knowledge are patently insufficient to defeat a motion for summary judgment."); *see also Johannsen v. Rudolph*, 34 A.D.3d 338, 339, 824 N.Y.S.2d 276, 277 (1st Dep't 2006) ("averment … contained in an attorney's affirmation submitted in opposition to defendant's motion for summary judgment … was not made on the basis of personal knowledge of the facts or supported by evidence in admissible form and, therefore, was insufficient to defeat the motion for summary judgment.").

Finally, Plaintiffs concede that Mr. Imbert is not, and was never designated, an Operational Member. ((Pl. Rule 19-a Resp. ¶ 12) Thus, Plaintiffs cannot demonstrate that Mr. Imbert is subject subject to removal as an Operational Member; nor can they demonstrate, for the

reasons explained above, that Mr. Imbert is subject to Section 10.03, because he was a Manager at the time of his termination. This claim must, therefore, be dismissed.

3. Mr. Imbert's Resignation Does Not Create an Issue of Fact

Next, LCM GP and LCM Holding attempt to defeat summary judgment by arguing that there are issues of fact arising from Mr. Imbert's resignation. (*See* Pl. Opp. p. 15) Specifically, on June 27, 2012, Mr. Imbert sent the following letter to the LCM Companies:

> I have reviewed your June 21, 2012 letter purporting to terminate my employment and role as a Manager in each of LCM Interest Holding, LLC, and LCM Holdings GP, LLC, and their affiliates and subsidiaries (the "Companies"). Please be advised that such purported termination is ineffective because, among other things, it is based on false allegations of wrongdoing. Nevertheless, in light of your behavior, I hereby resign from all positions at the Companies, effective as of the date hereof.

Plaintiffs contend that Mr. Imbert's resignation from "all positions" somehow creates issues of fact regarding whether Mr. Imbert resigned as a Member of LCM GP and LCM Holding. This position is untenable.

To start, the Delaware Limited Liability Company Act (the "Act") expressly prohibits a Member from resigning unless otherwise specified by the governing agreement. Section 18-603 of the Act provides that "unless a limited liability company agreement provides otherwise, a member may not resign from a limited liability company prior to the dissolution and winding up of the limited liability company." Del. C. § 18-603. It further provides that "[a] member may resign from a limited liability company only at the time or upon the happening of events specified in a limited liability company agreement and in accordance with the limited liability company agreement." *Id.* The Operating Agreements do not permit a Member to resign from the LCM Companies. Accordingly, Plaintiffs' attempt to create a factual issue resulting from Mr. Imbert's resignation fails as a matter of law.

Section 10.01 of the Operating Agreement confirms that Mr. Imbert may not withdraw as a Member simply by sending a letter, as Plaintiffs claim. Section 10.01 states as follows:

> Except as set forth in this Article X, and subject to the other restrictions on Transfer contained in this Agreement, no member shall Transfer any of its Membership Shares without the approval of the Board. Any attempt to Transfer a Member's Membership Share(s) or withdraw in violation of the applicable provisions of this Article X shall be void, the Company shall refuse to recognize any such Transfer or withdrawal and shall not reflect on its records any change in record ownership of a Members Shares pursuant to any such Transfer or withdrawal…."

(Imbert Aff. Ex. 7 § 10.01; Imbert Reply Aff. Ex. 1 § 10.01)

Here, Article X contains no provision allowing a Member to withdraw. Indeed, that Article deals only with situations that are inapplicable here, including (1) involuntary transfers arising out, for example, a Member's bankruptcy or death, pursuant to Section 10.02; (2) transfers in the event that the employment of a Member other than a Manager is terminated, pursuant to Section 10.03); (3) transfers upon receipt of a bona fide offer from a third party, pursuant to Section 10.04; and (4) transfers to another member, in which case Mr. Imbert would have had to provide notice to and sought the consent of the other Members, pursuant to Section 10.05. (*See* Imbert Aff. Ex. 7 §§ 10.02-10.05; Imbert Reply Aff. Ex. 1 §§ 10.02-10.05) None of these provisions apply here: (1) Mr. Imbert is alive and well, and is not in bankruptcy; (2) as discussed above, Mr. Imbert was a Manager at the time of his termination; (3) Mr. Imbert has not received an offer from a third-party to purchase his shares; and (4) Mr. Imbert has not offered to transfer his shares to another Member, nor complied with the other requirements of Section 10.05 to do so.

Mr. Imbert's announcing his withdrawal from "all positions at the Companies" was sent in response to the LCM Companies' June 21, 2012 letter, in which they purported 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…." (Imbert Aff. Ex. 4; Imbert Reply Aff. Ex. 2) It is clear that the words "all positions" were intended to refer to Mr. Imbert's employment and role as Manager in the LCM Companies, as confirmed by the sworn testimony of Mr. Imbert. (Imbert Aff. ¶ 7) Plaintiffs have offered no evidence to suggest that the words "all positions" could have had any other meaning, and their attorneys' speculations, which are not based on personal knowledge, are insufficient to create issues of fact to defeat summary judgment. *See Kartiganer, supra; Johannsen, supra*.

Last, Plaintiffs' claim is belied by their own admissions that Mr. Imbert "is presently a Member of the Companies." (Amended Compl. ¶ 4; *see also* Compl. ¶ 3) If Plaintiffs believed Mr. Imbert's resignation from "all positions" to have included his status as a Member, then they would not have alleged, as they do, that Mr. Imbert remains a Member of the Companies. In fact, on July 25, 2012 – a month after Mr. Imbert's resignation – Plaintiffs consented to Mr. Imbert's review of their books and records, a right available only to Members, and confirmed that Mr. Imbert was entitled to inspect such books and records "as a Member." (Imbert Reply Aff. Exs. 3, 4)

4. The Documentary Evidence Is Sufficient to Warrant Dismissal Pursuant to CPLR § 3211(a)(1)

Aware that their arguments are lacking in merit, Plaintiffs attempt to escape judgment in Mr. Imbert's favor by relying on technical grounds, arguing that the Operating Agreements are insufficient documentary evidence to support dismissal pursuant to CPLR § 3211(a)(1). (*See* Pl. Opp. pp. 12-13.) New York courts have consistently accepted the parties' contracts under CPLR § 3211(a)(1). *See, e.g., Talbi v. ZCWK Associates*, 179 A.D.2d 475, 476, 579 N.Y.S.2d 879 (1st Dep't 1992) (holding that "it was error to deny [defendant's] motion to dismiss the first cause of

action pursuant to CPLR § 3211(a)(1) since the Offering Plan and purchase agreement definitively disposed the plaintiff's claim.").

In fact, courts have previously dismissed complaints pursuant to CPLR § 3211(a)(1) based on the terms of a governing operating agreement. *See, e.g., Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808, 921 N.Y.S.2d 260, 265 (2d Dep't 2011) (reversing lower court's failure to dismiss repudiation and breach of fiduciary duty claims pursuant to CPLR § 3211(a)(1), where operating agreement and letter established that plaintiff's claims were without merit); *First Keystone Consultants, Inc. v. DDR Const. Services*, 74 A.D.3d 1135, 1137, 904 N.Y.S.2d 113, 115 (2d Dep't 2010) (dismissing claim for breach of fiduciary duty pursuant to CPLR § 3211(a)(1) where "the documentary evidence, which included [company's] operating agreement, conclusively established that [defendant] was not a member of [the company]"); *J.C. Studios, LLC v. Telenext Media, Inc.*, 32 Misc. 3d 1211(A), 932 N.Y.S.2d 760 (N.Y. Sup. 2011) (dismissing breach of contract claim pursuant to CPLR § 3211(a)(1) where operating agreement conclusively established lack of breach thereof).

Notably, Plaintiffs do not explain why the Operating Agreements are insufficient as documentary evidence, nor do they point to any other evidence that would be necessary to resolve the motion to dismiss. Rather, they simply repeat the allegations in the Complaint and then assert in conclusory fashion that the documentary evidence is insufficient. For example, Plaintiffs state that the Complaint alleges that Mr. Imbert committed fraud, and recite that Mr. Imbert was then purportedly terminated as a Manager. However, whether or not Mr. Imbert was properly terminated as a Manager is not at issue on this motion to dismiss. Similarly, Plaintiffs claim that, by writing a check to Louis Capital Markets, Mr. Imbert somehow admitted his

culpability. Again, this issue is irrelevant to the dispute at hand.[2] The *sole* issue for the Court's consideration is whether or not Plaintiffs' purported termination of Mr. Imbert as a Manager somehow resulted in a forfeiture of Mr. Imbert's membership interests, or obligates Mr. Imbert to sell his membership interests.

The Operating Agreements, along with the June 21, 2012 letter purporting to simultaneously terminate Mr. Imbert's employment and role as Manager, resolve this dispute conclusively. Plaintiffs do not dispute, because they cannot, that the Members' rights arise exclusively from the Operating Agreements. As explained above, the sole provision of the Operating Agreements relied on by Plaintiffs is patently inapplicable, in that it expressly applies only to Members who are not also Managers. Because it is undisputed that Mr. Imbert was a Manager at the time that his employment was terminated, there is no basis for Plaintiffs' claims that Mr. Imbert is no longer a Member of the Companies.

Conclusion

WHEREFORE, defendant requests that the Court grant its motion and dismiss the Fourth Claim for Relief with prejudice, holding that Mr. Imbert's membership interests are not forfeited, or, alternatively, the Court should grant Mr. Imbert summary judgment on this count declaring that he continues to be a member of LCM GP, along with such other and further relief as the Court deems just and proper.

[2] In any event, Mr. Imbert strongly denies that by writing the check he somehow admitted his culpability. Rather, Mr. Imbert wrote the check in response to Messrs. Benhamou's and Cohen's claims that Louis Capital Markets needed cash, and request that Mr. Imbert deposit his tax refund, which would also have the effect of equalizing the Managers' capital account balances in proportion to their membership interests. Moreover, the check at issue is dated June 1, 2012, and thus was written *prior* to the first time that Plaintiffs accused Mr. Imbert of any wrongdoing. Indeed, Plaintiffs admit that they first accused Mr. Imbert of wrongdoing at a meeting that took place on June 20, 2012, and purported to terminate him the day after. (Compl. ¶¶ 38, 39) Clearly, Mr. Imbert could not have admitted any wrongdoing prior to even being aware that he was being accused of wrongdoing. (*See* Imbert Reply Aff. ¶¶ 9, 10)

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