SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

LCM HOLDINGS GP, LLC, Plaintiffs - against - LAURENT IMBERT, Defendant.	Index No. 652878/2012 (I.A.S. Pt. 48)

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

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LCM Holdings GP, LLC ("LCM GP"), by its undersigned counsel, submits this Memorandum of Law in opposition to Defendant Laurent Imbert's ("Imbert" or "Defendant") Motion to Compel Arbitration, Partial Summary Judgment, and Related Relief.

PRELIMINARY STATEMENT

Plaintiff LCM GP, an international investment firm, commenced this action in order to be made whole for damages caused by Imbert's numerous wrongful acts against LCM GP. Imbert, a founder, Manager, and Member of LCM GP, violated the trust of his fellow Members by obtaining large sums of money that he was not entitled to by conspiring with his personal accountant to abuse provisions of LCM GP's LLC agreement that were intended to make Members whole for tax liabilities incurred in connection with their Membership. When confronted by his fellow Members in early summer of 2012, Imbert conceded his wrongdoing and immediately wrote a personal check to the company for over $740,000, promising to remit the remaining amount owed to the company, approximately $1.9 million, as soon as he could raise the money.

However, Imbert shortly thereafter reversed his position, retained counsel, and refused to fulfill his obligation to reimburse the company. Accordingly, LCM GP commenced this action by Summons and Complaint on August 16, 2012. Since then, Imbert has engaged in one delaying, expense-engendering tactic after another, including a books and records inspection and a separate proceeding in Delaware Chancery Court seeking advancement and indemnification of expenses, to which Imbert is not entitled. Now, without a pre-motion conference or any other communications with LCM GP's counsel or the Court regarding the subject of the present Summary Judgment motion, Imbert has moved by Order to Show Cause, necessitating additional and unnecessary expenditure of time and resources by the parties.

LCM GP's objectives are simple. It wishes to be made whole, as efficiently as possible, for the monies wrongfully taken by Imbert while a Member of LCM GP and LCM Interest Holding, LLC ("LCM Holding"). Accordingly, upon LCM GP's receipt and review of Imbert's Motion, the parties entered into a Stipulation pursuant to CPLR 3217 and 3025(b) withdrawing without prejudice the allegations complained of in Imbert's Motion regarding Imbert's falsification of travel and entertainment expense reports, but preserving LCM GP's right to bring or assert such allegations before the Financial Industry Regulatory Authority in New York, New York (the Stipulation also provides for an amendment of the Complaint to add LCM Holding as a plaintiff). LCM GP opposes that portion of Defendant's Summary Judgment Motion which seeks dismissal of or summary judgment regarding LCM GP's Fourth Cause of Action seeking a declaratory judgment that (i) Imbert is no longer a Member of LCM GP and (ii) determining the value of his shares in LCM GP. LCM GP's claim for such declaratory judgment is supported by the language of the LLC Agreement governing LCM GP and its Members. Even if that were not the case, there are sufficient issues requiring further factual development that neither dismissal nor summary judgment is appropriate.

I. STATEMENT OF FACTS

A. The Parties

Imbert is presently a Member of LCM GP and/or LCM Holding, and was a Manager and employee of LCM GP and LCM Holding until he was terminated on June 21, 2012. (*See* Complaint ("Compl."; attached as Exhibit 8 to the Affirmation of Thomas J. Fleming ("Fleming Aff.") ¶ 3.) Imbert resides in Greenwich, Connecticut. (*Id.*)

Defendant LCM GP is a Delaware limited liability company with its principal place of business located in New York, New York. (Compl. ¶ 2.) Nonparty LCM Holding is a Delaware

limited liability company with its principal place of business located in New York, New York. (Affirmation of Leslie D. Corwin in Opposition to Defendant's Motion for Partial Summary Judgment and Related Relief "Corwin Aff.," ¶ 3.)

Michael Benhamou ("Benhamou") and Imbert established LCM GP in 1999 in New York as a Delaware Limited Liability Company, under the name Louis Capital Markets LLC. (Compl. ¶ 5.) In 2003, the ownership and capital structure of Louis Capital Markets LLC were reorganized such that LCM GP and its sister entity LCM Holding were created, Limited Liability Company Agreements were executed as to each entity, and the London office of LCM GP was established. (*Id.* ¶ 6.)

LCM Holding is the sole limited partner of, and owns 99% of the economic interests in, Louis Capital Markets, L.P. ("Louis Capital Markets"), a New York-based broker-dealer. (*See* Exhibit 2 to the Affidavit of Laurent Imbert in Support of Defendant's Motion to Compel Arbitration, Partial Summary Judgment, and Related Relief ("Imbert Aff.").) LCM Holding also holds, directly and indirectly, interests in Louis Capital Markets' affiliated offices in London, Paris, Hong Kong, and in other areas. (*Id.*) LCM GP acts as the general partner for Louis Capital Markets and owns 1% of that company. (*Id.*) LCM Holding owns approximately 20.4% of LCM GP. (*Id.*)

B. The Governing Agreements

On March 11, 2010, Imbert, Benhamou, and Cohen entered into the Second Amended and Restated Limited Liability Company Agreement of LCM GP and also the Amended and Restated Limited Liability Company Agreement of LCM Holding (together, the "LLC Agreements"), which contain similar or identical terms. (*See* Imbert Aff., Ex. 7, and Corwin Aff. Exhibit A.). The LLC Agreements provide, in part, that Imbert, Benhamou, and Cohen are

Members of LCM GP and LCM Holding. (Imbert Aff., Ex. 7, § 1.01; Corwin Aff., Ex. 1, § 1.01.) The LLC Agreements also provide that Imbert, Benhamou, and Cohen were the Managers of LCM GP and of LCM Holding. (Imbert Aff., Ex. 7, § 4.06; Schedule B; Corwin Aff., Ex. 1, § 4.06; Schedule B.)

The LLC Agreements provide that a Member who is terminated as an employee must offer to transfer his membership shares to the LLC so that he can be paid the value, if any, of his membership shares and no longer be a Member:

> 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 [by notice to the other Members pursuant to Section 10.05 of the LLC Agreements].

(Imbert Aff., Ex. 7, § 10.03; Corwin Aff., Ex. 1, § 10.03.) Section 10.10 of the LCM GP Second Amended Agreement provides that:

> For purposes of purchase of Membership Shares by the Company or other Members pursuant to this Article X, the purchase price of the Membership Shares shall be determined by two independent consultants selected by the Board. If the valuations of the two consultants are different, the average of the two will be used. For the purposes of this Agreement, except for manifest error, the valuation determined pursuant to this Section 10.10 shall be conclusive. ... Such valuation shall be prepared as of a date not later than the date of the Member's withdrawal ... or other event giving rise to the transfer right.

The LLC Agreements also contain provisions regarding distributions by the LLCs sufficient to permit the Members to pay their income taxes. (*See* Imbert Aff., Ex. 7, § 6.02; Corwin Aff., Ex. 1, § 6.02.)

C. Defendant's Termination

This action arises out of Imbert's receipt and wrongful retention of funds from LCM GP that were meant to pay his income taxes on the value of his membership shares. When Imbert received refunds from the IRS, instead of returning the overpayment, he pocketed the refund wrongfully retaining approximately $1.9 million. (*See* Compl. ¶ 35.) Imbert's receipt and

retention of these funds arise only as a result of Imbert's status as a Member with membership shares in LCM GP and LCM Holding.

The Amended and Restated Limited Liability Company Agreement of LCM GP dated March 31, 2004 provided that LCM would distribute to its ***Members*** funds sufficient to pay their income taxes:

> Subject to the provisions of Sections 4.4 and 7.4 at the end of each Fiscal Period in which the Company has earned a Profit, the Managers shall declare a Distribution of not less than an amount determined by multiplying the Profits of the Company by the then highest combined applicable federal, state and local income tax rates. The actual amount to be distributed to a Member will be his *pro rata* share (based upon his or its Membership Percentage Interest) of the total amount of the Distribution available as calculated in accordance with the preceding sentence.

(Compl. ¶ 9, Compl. Ex. A § 7.2.)

This section was amended on or about December 1, 2005 (hereinafter defined collectively with the Amended and Restated Limited Liability Company Agreement of LCM GP as the "LCM GP Agreement"), but similarly provided for a distribution to its ***Members*** funds sufficient to pay their income taxes:

> Subject to the provisions of Sections 4.4 and 7.4, at the end of each Fiscal Period in which the Company has earned a Profit, the Managers shall declare a Distribution of not less than an amount determined by multiplying the Profits of the Company by the then highest combined income tax rates applicable to a Member (adjusted appropriately to take into account any tax credit provisions). The actual amount to be distributed to a Member will be his *pro rata* share (based upon the allocation of Profits during that Fiscal period pursuant to Section 7.1) of the total amount of the Distribution available as calculated in accordance with the preceding sentence.

(Compl. Ex. B.)

Similarly, the Limited Liability Company Agreement of LCM Holding (the "LCM Holding Agreement") entered into by its Members, defined as Imbert, Benhamou, and Cohen, on or about April 30, 2009, provided, in part, that:

> [LCM Holding] shall endeavor to make distributions to each ***Member*** within 75 days of the end of each fiscal year of the Company in an amount equal to such Member's federal income tax liability attributable to allocations made to such Member pursuant to this Article 4 with respect to such fiscal year, calculated on the basis of the highest effective marginal United States individual income tax rate for such fiscal year.

(Corwin Aff. Ex. B, Section 4.1(b)).

The Members each retained an outside accountant to calculate their estimated taxes: Benhamou and Cohen shared a United States-based accountant, and Imbert insisted on retaining a separate accountant, Leonard Green ("Green"). (Compl. ¶ 14.) The estimated tax distributions were made to Members under the LCM GP Agreement § 7.2 and the LCM Holding Agreement § 4.1(b) (the "Tax Distributions") were paid directly to the United States Treasury for all Members ***except*** Imbert, who informed LCM GP through Green that he would pay his taxes directly to the United States Treasury, thus received his Tax Distributions directly from LCM GP. (Compl. ¶ 16.) On a number of occasions, Green requested that LCM GP increase the Tax Distributions to Imbert, on the pretext that the increases were necessary to compensate for Imbert's U.S. tax liability. (*Id.* ¶ 17.) On each occasion, in the mistaken belief that Green's representation on behalf of Imbert was truthful, the distributions were increased as requested. (*Id.*)

Starting in or around late 2007, LCM GP began to receive taxable income from foreign countries, thus the Members incurred a foreign tax liability. (*Id.* ¶ 18.) To compensate for this liability, in addition to the United States Tax Distributions, LCM GP also paid taxes owed by Members in countries outside of the United States. (*Id.*) LCM GP made these payments directly to the relevant governmental tax-collecting bodies for all Members, including Imbert. (*Id.*) In 2008, LCM GP determined that certain tax returns of its Members had not been filed for the years 2006 to 2008, although the corresponding tax payments had been timely made. LCM GP

filed the 2006 to 2008 tax returns in 2008, and determined in the course of preparing the returns that a tax refund was owed to all Members. (*Id.* ¶ 19.)

In or about late December of 2009, pursuant to a decision made by the Managers, including Imbert, LCM GP made a special distribution (the "Special Distribution") to three of the Members, Benhamou (in the amount of $112,828), Pierre Houri ("Houri"; in the amount of $59,847), and Imbert (in the amount of $283,072). (*Id.* ¶ 20.) The Special Distribution was intended as a tax equalization (or compensation to employees with taxable foreign income) to compensate Benhamou, Houri, and Imbert for the fact that they had apparently received low or no refunds from the United States federal and state tax authorities for the years 2006 to 2008. (*Id.*) LCM GP and the other Members and Managers were not aware at the time that the Special Distribution was made that Imbert had received and retained rebates of $629,687 for 2007 and $263,068 for 2008, mostly derived from foreign tax credits intended to compensate for foreign tax payments. (*Id.* ¶ 21.) However, those foreign tax payments had been made not by Imbert, but by LCM GP on Imbert's behalf. (*Id.*) At the time the Special Distribution was made, Imbert knew, but did not inform the other Members, that he had received tax refunds for at least tax years 2007-2008. (*Id.*)

On March 11, 2010, Imbert, Benhamou, and Cohen entered into both the Second Amended and Restated Limited Liability Company Agreement of LCM Holdings GP, LLC (the "LCM GP Second Agreement") and the Amended and Restated Limited Liability Company Agreement of LCM Interest Holding, LLC ("LCM Holding Amended Agreement", collectively with the LCM GP Second Agreement the "LCM Agreements"). (Compl. Ex. C; Corwin Aff. Ex. B.) The LCM Agreements provide that Imbert, Benhamou, and Cohen are Members and Managers of LCM GP and LCM Holding (the "LCM Companies"). (Compl. Ex. C §§ 1.01,

4.06, Schedule B; Corwin Aff. Ex. B §§ 1.01, 4.06, Schedule B. Similar to the LCM GP Agreement, the LCM Agreements provide that LCM GP shall distribute to its Members funds sufficient to pay their income taxes:

> [LCM], to the extent there exist Available Funds, shall distribute to the Members, pro rata in accordance with their Membership Shares, a payment in an amount sufficient so that on or before the tenth day prior to each date on which estimated United States federal, state, and local income tax payments are required to be paid by individuals, the amount distributed to each Member pursuant to this Section 6.02 for the fiscal year shall equal, on a cumulative basis, the Estimated Taxes ... multiplied by the Applicable Percentage for that payment.

(Compl. Ex. C § 6.02; Corwin Aff. Ex. B § 6.02.)

In April of 2012, Green once again requested on behalf of Imbert that the projected tax distribution for Imbert be increased. (Compl. § 30.) On May 24, 2012, at a regular weekly meeting of the company's Managers, the meeting participants discovered that in order to inflate his distributions, Imbert had been deliberately overestimating the amount of his U.S. tax liabilities so that his Tax Distributions were disproportionately large compared to those received by the other Members. (*Id.* ¶ 31.) The meeting participants requested a full audit of Imbert's estimated tax payments, distributions, and refunds for tax years 2007-2011. (*Id.*) On June 1, 2012, LCM GP's Chief Operating Officer Frederic Vitalis ("Vitalis") provided Benhamou and Cohen with analyses that showed that Imbert had received--and retained--federal and state refunds that were substantially larger than Benhamou's or Cohen's. (*Id.* ¶¶ 32, 33; Exs. D, E.) On or about June 1, 2012, Benhamou and Cohen confronted Imbert, who, stating "I do not want to have less money at risk than you," presented them with a personal check in the amount of $740,000, for the purpose of depositing in his capital account, that represented the full amount of his most recent federal tax refund, as discovered during the internal audit. (*Id.* ¶ 34; Corwin Aff. Ex. C.) Benhamou and Cohen requested that Imbert also reimburse LCM GP for the full balance

of the tax refunds he had received for tax years 2009, 2010, and 2011, which they estimated to be $1,928,689. (*Id.* ¶ 35.) Imbert agreed to return that amount, but stated he did not have sufficient cash available and would have to sell certain real estate in his possession first. (*Id.*)

On June 19, 2012, Cohen and Benhamou met with Imbert, but despite his earlier agreement to remit the funds he had acknowledged that he wrongfully took from LCM GP, Imbert refused to acknowledge any wrongdoing. (*Id.* ¶ 37.) On June 20, 2012, in their capacity as Board Managers, and pursuant to §4.07 of the LCM GP Second Amended Agreement, Cohen and Benhamou met with Imbert and terminated him from his position as a Manager and an employee of LCM GP. (*Id.* ¶ 38.) During subsequent internal investigations, Benhamou and Cohen discovered that Green had received fees, paid by LCM GP at the request of Imbert, that were far in excess of industry standards for his accounting services to Imbert. (*Id.* ¶ 40.) On June 27, 2012, Benhamou and Cohen received a letter from Imbert purporting to resign "from all positions at [LCM GP and LCM Holdings], effective as of the date hereof." (Compl. ¶ 41; Compl. Ex. G) (emphasis added). Accordingly, Imbert is no longer an employee or Manager of LCM GP or LCM Holding. However, Imbert has never tendered his membership shares in either entity. (*See* Imbert Aff. ¶13.)

D. Procedural History

LCM GP filed its Summons and Complaint in this action against Imbert on August 16, 2012. The Complaint alleges generally that Imbert, who was a Manager and Member of LCM Holding and LCM GP from 1999 to 2012, through a scheme with his personal accountant, wrongfully received and retained large tax refunds made possible by distributions to their Members by LCM GP and LCM Holding. (*See Generally* Compl.) Three out of the four causes

of action in the Complaint arise only out of Imbert's wrongful receipt and retention of large tax refunds made to Imbert as a Member (Compl. ¶¶ 47-61):

- Imbert was unjustly enriched as a result of his wrongful receipt and retention of large tax refunds made possible by LCM GP distributions to its Members, (*id.* ¶¶ 48-52);
- Imbert committed fraud by falsely representing to LCM GP that he was entitled to the Special Distribution as a Member by reason of not having received a United States federal tax refund for the tax years 2006-2008, (*id.* ¶¶ 54-58); and
- Declaratory judgment as to whether Imbert is still a Member and how to determine the value, if any, of Imbert's membership shares; (*id.* ¶¶ 60-61).

The other cause of action, that Imbert breached his fiduciary duty as a manager of LCM GP also arises out of Imbert's conduct as a Member because it alleges that he breached these duties by scheming with his personal accountant to withdraw millions of dollars in unnecessary distributions as a Member. (*Id.* ¶¶ 43-46.) Indeed, all of the monetary damages sought by this cause of action are for the amounts Imbert wrongfully received as a Member. *Id.* Defendant filed an Answer to the Complaint on September 12, 2012.

On September 6, 2012, Imbert filed a Verified Complaint against LCM GP and LCM Holding in the Court of Chancery of the State of Delaware seeking advancement and/or reimbursement of litigation expenses, including attorneys' fees and other expenses, incurred in this action (the "Delaware Action"). (Corwin Aff. ¶ 6; Ex. D.) LCM GP and LCM Holding (the "LCM Companies") filed a verified answer on October 4, 2012. (*Id.*, Ex. E) On October 3, 2012, the parties to the Delaware Action entered into a Stipulation setting forth a briefing schedule. (*Id.*; Ex. F.) On October 16, both Imbert and the LCM Companies filed motions for

summary judgment in the Delaware action. (*Id.*; Ex. G) Oral argument on the motions will take place on November 7, 2012. (Corwin Aff. ¶ 6.)

On October 2, 2012, without seeking either to meet and confer with counsel for Plaintiff or a pre-motion conference in accordance with Rule 24 of the Rules of Practice for the Commercial Division, Defendant filed this Motion by Order to Show Cause, seeking relief including an order dismissing the Complaint's fourth cause of action or, in the alternative, declaring that Imbert continues to own his membership shares in LCM GP. On October 18, 2012, Plaintiff and Defendant entered into a Stipulation providing that Plaintiff's claims regarding Defendant's business expenses (the "Business Expense Claims") "are not to be brought or asserted against defendant by plaintiff or any of its subsidiaries, affiliates, directors, officers, members, managers, successors, or assigns, including but not limited to LCM Interest Holding LLC, Louis Capital Markets, LP, Michael Benhamou, and/or Patrice Cohen, in any court or forum, in the United States or elsewhere, except such claims may be brought or asserted before the Financial Industry Regulatory Authority in New York, New York." (Corwin Aff. ¶ 2; Ex. A.) The Stipulation further provides that "Plaintiff shall file with the Court within 20 days of this Stipulation an Amended Complaint ... [that] shall add as a plaintiff LCM Interest Holding LLC, a Delaware Limited Liability Company and shall add allegations against defendant by LCM Interest Holding LLC." (*Id.*) Accordingly, this brief disregards as moot those portions of Defendant's moving papers that pertain to the Business Expense Claims. However, Plaintiff opposes Defendant's motion to the extent it seeks dismissal, or, in the alternative, summary judgment with respect to Plaintiff's Fourth Cause of Action for Declaratory Judgment.

II. ARGUMENT

A. The Documentary Evidence Offered by Defendant Is Not Sufficient to Support a Motion to Dismiss

New York law sets a high bar for defendants seeking a motion to dismiss, particularly where defendants seek dismissal on the basis of documentary evidence under CPLR 3211(a)(1). As set forth by the Court of Appeals,

> [o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [New York courts] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.

Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 (1994) (emphasis added) (cited by Defendant) (affirming reversal of dismissal of claim for breach of parties' agreement); *see also Fortis Financial Services, LLC v. Fimat Futures USA, Inc.*, 290 A.D.2d 383, 737 N.Y.S.2d 40 (1st Dep't 2002) (reversing dismissal of breach of contract claim where parties' agreement did not extinguish defendant's obligations to plaintiff).

Moreover, on a motion to dismiss pursuant to CPLR 3211(a)(1), "such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 865 (2002) (affirming denial of motion to dismiss where documents offered in support of motion did not provide conclusive defense); *see also Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (affirming Appellate Division's determination that complaint was adequate to survive dismissal where documents offered in support of dismissal adequately supported plaintiff's claims); (*Martin v. New York Hosp. Medical Center of Queens*, 34 A.D.3d 650, 650, 826 N.Y.S.2d 85, 86 (2d Dep't 2006) (affirming

denial of motion to dismiss where parties' agreement did not establish that plaintiff consented to defendant's complained-of activity).

Here, the Complaint alleges that Imbert committed fraud against LCM GP. (Compl. ¶¶ 53-57.) The governing LCM GP Second Agreement, cited by Defendant in support of his motion, provides that a Manager may be terminated for acts including fraud. (Imbert Aff., Ex. 7, § 4.07.) The Complaint alleges that Imbert was terminated as a Manager on June 20, 2012. (Compl. ¶¶ 38-39; *see also* Imbert Aff. Ex. 4.) The Complaint also sets forth that, when confronted with his acts of fraud by his fellow Members, he immediately wrote a check to the Company for approximately $740,000, essentially admitting his culpability. (Compl. ¶ 34; Corwin Aff. Ex. C.) The LCM GP Second Agreement also provides that if 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" by notice to the other Members pursuant to Section 10.05 of the LCM GP Second Agreement. (*Id.* § 10.03.)

Once Imbert was no longer a Manager, it is clear that he no longer had an interest in the Companies, and the termination of his employment meant that he was obligated to offer his shares for transfer to LCM GP and LCM Holdings pursuant to Section 10.03 of the LLC Agreements (*See* Section I(B), *supra.*) There is no dispute that, to date, Imbert has not offered his membership shares for valuation (*See* Imbert Aff. ¶¶ 11-14.) Given the absence of non-competition provision in the LLC Agreements and/or a non-compete agreement signed by the Companies' Managers, Section 10.03 avoids the nonsensical outcome that would result if a Member could retain his shares after leaving the Companies and then become employed by or engage in a competing business.[1]

[1] Although the LCM GP and LCM Holdings agreements were drafted so as to create certain gaps and deficiencies,

In light of the foregoing, it cannot be said that the documentary evidence offered by Defendant--that is, with respect to the declaratory judgment claim, the LLC Agreements--"resolves all factual issues as a matter of law, and conclusively disposes of" LCM GP's declaratory judgment claim. Indeed, as Plaintiff will show, the LLC Agreements compel the contrary conclusion to that argued by Defendant; in other words, Defendant is required under the LLC Agreement to withdraw his Membership in LCM GP and LCM Holding, and to offer his membership shares for valuation by LCM GP and LCM Holdings.

Moreover, Imbert's clear violation of the LLC Agreements in failing to offer his membership shares for valuation warrants a grant by the Court of summary judgment in favor of LCM GP ordering such valuation. *See* CPLR 3212(b) ("If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."); *Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.*, 87 A.D.3d 65, 926 N.Y.S.2d 471 (1st Dep't 2011) (affirming denial of summary judgment to defendant and granting partial summary judgment to non-moving plaintiff declaring that certain provisions of the parties' agreement did not authorize the relief sought by defendant).

B. Defendant is Not Entitled to Summary Judgment with Respect to LCM GP's Declaratory Judgment Claim

In this motion, Defendant asks in the alternative for summary judgment declaring that he continues to own his shares in LCM GP. "It is well-settled that summary judgment is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues." *Morette v. Kemper, Unitrin Auto and Home Ins. Co., Inc.*, 35 Misc.3d 200, 204, 941 N.Y.S.2d 440, 443 (N.Y. Sup. 2012) (quotations omitted) (denying summary judgment to

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contractual provisions must nevertheless be read in a manner that gives meaning to each part. *Petracca v. Petracca*, 302 A.D.2d 576, 577, 756 N.Y.S.2d 587, 588 (2d Dep't 2003) (plaintiff gave adequate notice, under contract, of his intention to dissolve business relationship with defendant).

insurer despite provisions of policy that insurer argued barred plaintiff's claims). Under CPLR 3212(b) a motion for summary judgment "shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."

As stated in Defendant's moving brief, "Limited Liability Companies are creatures of contract." *TravelCenters of Am., LLC v. Brog*, 2008 WL 1746987 at *1 (Del. Ch. Apr. 3 2008); Moving Br. at 15. The LLC Agreements provide that when "the employment of a Member other than a Manager ... is terminated for any reason," he must "immediately offer to Transfer all of his Membership Shares" to the Company (defined as LCM GP and LCM Holdings, respectively, in each LLC Agreement), whereupon the Company will engage in the process of valuing the Membership Shares, as set forth in Section 10.10 of the LLC Agreements. Notably, Defendant's Memorandum of Law states that the LLC Act provides that a member "may resign from an LLC" only as specified in the LLC Agreement. (Moving Brief at 15.) Because the LLC Agreement sets forth the mechanism by which a member can withdraw, the cited statute is no bar to a ruling that Imbert is no longer a Member of LCM GP or LCM Holding.

As set forth in Section II(A), above, Imbert was terminated as an employee and Manager of the Companies on June 20, 2012, obligating him to offer his shares for transfer to LCM GP and LCM Holdings pursuant to Section 10.03 of the LLC Agreements. (*See* Section I(B), *supra*.) Moreover, on June 27, 2012, Imbert sent Benhamou and Cohen a letter from Imbert purporting to resign "from all positions at [LCM], effective as of the date hereof." (Complaint ¶ 41; Complaint Ex. G) (emphasis added); *see also* Imbert Aff. ¶ 6 ("I submitted my resignation from all positions at the LCM Companies")). It is not clear whether, at the time of and by means of that resignation, Imbert intended to, or in fact did, withdraw from his Membership in LCM GP and LCM Holdings; that is an inquiry that requires further examination through discovery and at

trial.

Had Imbert offered his shares for transfer in compliance with the requirements of Section 10.03 of the LLC Agreements, LCM GP and LCM Holdings would have engaged in the valuation process set forth in Section 10.10 of the LLC Agreements to determine the proper compensation to Imbert for his Membership shares. However, it is undisputed that Imbert has never made any communication to LCM GP, LCM Holding, or any Managers or Members of those entities regarding tendering his shares for transfer. (*See* Section I(C), *supra.*) Accordingly, because fact issues exist regarding, *inter alia*, Defendant's resignation from LCM GP and LCM Holdings, which may have included his resignation as a Member, the drastic remedy of summary judgment is not appropriate here.

CONCLUSION

WHEREFORE, Plaintiff LCM Holdings GP, LLC respectfully requests that this Court deny that portion of Defendant's Motion to Compel Arbitration, Partial Summary Judgment, and Related Relief that seeks dismissal, or in the alternative, a grant of summary judgment with respect to the declaratory judgment claim in Plaintiff's Complaint, and grant to Plaintiff such other and further relief as the Court may deem just and proper.

Dated: New York, New York
October 19, 2012

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