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

ROBERT SHAPIRO, Plaintiff-Counterclaim Defendant, - v - GABRIEL ETTENSON and DAVID NEWMAN, Defendants-Counterclaim Plaintiffs.	Index No. 653571/2014 Part 61 Justice Anil C. Singh **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants-Counterclaim Plaintiffs Gabriel Ettenson ("Ettenson") and David Newman ("Newman") (together, "Defendants") respectfully submit this memorandum of law in support of their motion for summary judgment pursuant to CPLR 3212 (the "Motion") seeking a judgment (1) dismissing in its entirety and with prejudice Plaintiff-Counterclaim Defendant Robert Shapiro's ("Shapiro" or "Plaintiff") Complaint, and (2) in Defendants' favor on their Counterclaims.

PRELIMINARY STATEMENT

Plaintiff and each of the Defendants are one-third members of ENS Health, LLC ("ENS" or "Company"), a New York Limited Liability Company formed in January 2012. Plaintiff commenced this action in November 2014, contesting the validity of an operating agreement and amendment to the Company's articles of organization that were approved by a majority of the members of the Company (Defendants) nearly a year earlier, in December 2013. Plaintiff also challenges Defendants' majority determination in October 2014 to reduce Plaintiff's salary and, separately, to issue a ten-thousand dollar ($10,000) capital call to each of the members of the Company. Plaintiff contends that these and "any other actions for or on behalf of ENS" are invalid without the unanimous consent of all members. Defendants, by their Counterclaims, seek a declaration that these actions are valid and binding on the Company and each of its members as a matter of law under the controlling provisions of the New York Limited Liability Company Law, N.Y. Ltd. Liab. Co., §101, et seq. (the "LLC Law").

The material facts are not in dispute, and the Court can resolve the parties' competing claims simply by applying the plain and unambiguous provisions of the LLC Law. Indeed, the LLC Law expressly allows the members of a New York Limited Liability Company to act by majority vote unless there is a *written* operating agreement providing otherwise, or an applicable provision in the LLC Law or articles of organization specifically requiring unanimous consent.

No such agreement or provision requiring unanimous consent exists in this case, and Plaintiff concedes that Defendants together comprise a majority of the Company. In other words, all of Defendants' actions at issue in this case were plainly authorized as a matter of law, and there is no basis whatsoever for Plaintiff's claims. Accordingly, this case is ripe for summary judgment in Defendants' favor pursuant to CPLR 3212.

STATEMENT OF FACTS

The undisputed material facts necessary to decide this Motion are recounted below, and are fully delineated with citations to the record in Defendants' accompanying Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment ("SOUMF").

A. The Company and Its Members

ENS is a limited liability company that was formed in January 2012 by Plaintiff and Defendants under the LLC Law. SOUMF, ¶¶ 1-5. Generally stated, the Company engages in the marketing, sale, and distribution of the HyperVibe Whole Body Vibration Machine, which is used for exercise, therapeutic, and performance enhancement purposes. *Id.* at 2. The Company's primary asset is an exclusive distributorship agreement it has with HyperVibe Pty. Ltd. ("HyperVibe"), the manufacturer of the HyperVibe Whole Body Vibration Machine. *Id.*

The Company was initially established as a member-managed limited liability company by default, because the Company's original articles of organization ("Articles of Organization") did not specifically provide for management of the Company by managers.[1] *Id.* at ¶ 6. However, the original Articles of Organization did not *require* the Company to be member-managed; they were silent on the issue altogether and provided only for the name of the

[1] Under the LLC Law, a limited liability company may be member-managed or manager-managed. To be manager-managed, the articles of organization must state that the management is vested in managers. *See* LLC Law §§ 401(a), 408(a). If it does not, as was the case here in connection with the Company's original Articles of Organization, the company is deemed to be member-managed. *Id.*

Company, the location of its office, and designated an agent and address for service of process. *Id.* at ¶¶ 6-7.

At formation, the Company did not have any operating agreement, which is defined in the LLC Law as a "*written* agreement of the members concerning the business of a limited liability company and the conduct of its affairs and complying with section four hundred seventeen of this chapter." *Id.* at ¶¶ 8-9 (emphasis added). Thus, as Plaintiff concedes, there was no "operating agreement" requiring the Company to be member-managed, requiring all material decisions to be made by unanimous vote of the members, or providing that in the event of a capital call, the inability or decision of a member not to make any payment on account of a capital call would not result in any diminution of that member's membership interest. *Id.*

At all times since formation, Plaintiff and Defendants have been the only members of the Company, and each has been an equal one-third owner of the Company, with equal one-third management rights and rights to one-third of the profits of the Company. *Id.* at ¶¶ 11-12, 26-27, 33-35.

B. The Approval of the Parties' Salaries in September 2013

In September 2013, Plaintiff and Defendants convened for a Company meeting (the "September 2013 Meeting") at the office of the Company's attorneys. SOMF, ¶ 13. At the time of the September 2013 Meeting, the Company still had no operating agreement and the Articles of Organization were the same as originally filed. *Id.* at ¶¶ 14-18. Among the topics discussed at the September 2013 Meeting was the payment of salaries to the members, and the members eventually voted to approve monthly salaries to be paid to them by the Company, depending

upon the cash needs of the business, on the basis of the following annualized rates: Shapiro, $50,000, Ettenson, $100,000, and Newman, $100,000.[2] *Id.* at ¶ 13.

Following the September 2013 Meeting, the Company's attorney circulated by e-mail for the members' consideration a proposed Unanimous Written Consent of the Members of the Company (the "Proposed Consent"). *Id.* at ¶¶ 19-21. The Proposed Consent provided that the members' salaries would "be reviewed by the Members of the Company at the end of the ninety (90) day period commencing as of the date of this Unanimous Written Consent [October 1, 2013] and may be extended or modified at such time by the unanimous consent of the Members." *Id.* at ¶ 20. Both Ettenson and Newman declined to sign this Proposed Consent. *Id.* at ¶ 21. However, in accordance with the parties' votes at the September 2013 Meeting, salaries were paid by the Company to all members – including in months following the expiration of the suggested ninety (90) day period set forth in the unsigned Proposed Consent. *Id.* at ¶¶ 21-22. Plaintiff always accepted his salary, and never once objected to the payment of salaries to all parties. *Id.* at ¶ 22.

C. The Operating Agreement and Amendment to the Articles of Organization

As of December 13, 2013, the Company still had not finalized any operating agreement, despite the advice of the Company's attorney and Defendants' efforts.[3] SOMF, ¶ 23. Thus, on

[2] As Defendants previously recounted in their affidavits in response to Plaintiff's application for an order to show cause and in support of Defendants' motion to dismiss the Complaint, the original impetus behind the September 2013 Meeting was the increasing acrimony among the members arising out of Plaintiff's absence from the business and inattentiveness to his responsibilities to ENS. *See* Affirmation of Stephen M. Plotnick in Support of Defendants' Motion for Summary Judgment ("Plotnick Aff."), Ex. 5 (Newman Aff., ¶¶ 9-13) and Ex. 6 (Ettenson Aff., ¶¶ 3-8).

[3] As described by Plaintiff in his affidavit in support of his earlier application for an order to show cause, and by Defendants in their previous affidavits, in connection with the September 2013 Meeting, and particularly in light of the acrimony among the members, the Company's attorney had recommended that the members of ENS get an operating agreement in place and even circulated a draft. *See* Plotnick Aff., Ex. 4 (Shapiro Aff., ¶¶ 11-17), Ex. 5 (Newman Aff., ¶¶ 18-30), and Ex. 6 (Ettenson Aff., ¶¶ 10-12). Although several drafts and e-mails were exchanged on the subject, Defendants were unable to secure Plaintiff's cooperation in that process. *Id.*

December 13, 2013, Defendants, as a majority of the members of the Company, took action under the LLC Law to approve and adopt an operating agreement (the "Operating Agreement") for the Company. *Id.* at ¶¶ 24-30. In connection with the Operating Agreement, Defendants also authorized an amendment to the Company's Articles of Organization in order to provide for the management of the Company by one or more managers. *Id.* Newman thereafter signed and caused to be filed with the New York Secretary of State a Certificate of Amendment of the Company's Articles of Organization (the "Amendment") on behalf of the Company, which added a new Article FOURTH to the Articles of Organization, providing that the Company "shall be managed by one or more managers." *Id.* at ¶ 31.

Neither the Operating Agreement nor the Amendment changed the parties' ownership interests or their entitlement to equal one-third shares of the current profits of the Company. *Id.* at ¶ 33-34. Moreover, each of Shapiro, Ettenson, and Newman was designated as a manager of the Company, meaning that management of the Company continued to be vested in equal one-thirds among the members. *Id.* at ¶ 35. Consistent with the LLC Law, the Operating Agreement provided that, except as otherwise provided in the Operating Agreement or as required by the LLC Law, any action requiring the approval of the managers or members could be approved by a majority of the members or managers.[4] *Id.* at ¶¶ 35-36. All of the requisite notices and consents relating to Defendants' actions were duly delivered to Plaintiff in accordance with the LLC Law. SOMF, ¶ 30.

[4] The Operating Agreement includes some exceptions to the default majority-rules provision that are not at issue here. Namely, pursuant to § 6.04 of the Operating Agreement, unanimity is required for there to be a material change in the purposes or nature of the Company's business, the admission of new members or the issuance of additional membership interests, a merger or consolidation with another entity, the disposition of all or substantially all of the Company's assets, or a dissolution, liquidation, or winding up of the Company. *See* Plotnick Aff., Ex. 4 (Shapiro Aff., Ex. H), Ex. 5 (Newman Aff., Ex. H).

Plaintiff initially objected to Defendants' actions through counsel by letter dated December 24, 2013. *Id.* at ¶¶ 30, 37. Plaintiff claimed that the Operating Agreement was "of no legal force and effect" and requested that Defendants "immediately rescind the actions taken and withdraw the ... Operating Agreement." *Id.* at ¶ 37. Defendants responded through counsel by letter dated January 2, 2014, declining to rescind the Operating Agreement because it "is valid, binding, and consistent with the [LLC] Law in all respects." *Id.* at ¶ 38.[5] Plaintiff did not respond to Defendants' letter or take any further action to challenge the Operating Agreement or Amendment. *Id.* at ¶ 39. To the contrary, Plaintiff began to participate from time to time in a regular Tuesday meeting that was put in place by § 6.09 of the Operating Agreement. *Id.* at ¶ 40.

D. The October 2014 Capital Call and Salary Reduction

Shapiro, Ettenson, and Newman all participated in the Company's regular Tuesday meeting held on October 14, 2014 (the "October 2014 Meeting"). SOUMF, ¶¶ 41. Prior to that meeting, Newman circulated an e-mail to all members of the Company detailing certain aspects of the Company's financial status and indicating that the Company had a shortfall of approximately $31,000. *Id.* at ¶ 42. Defendants thus voted at the October 2014 Meeting to request from each of the members of the Company an additional capital contribution of ten thousand dollars ($10,000). *Id.* at ¶¶ 43-46. Defendants also voted to reduce Plaintiff's salary to zero dollars ($0), because of his ongoing inattentiveness and dereliction of his duties to ENS. *Id.* at ¶¶ 47-50.[6] However, the reduction in Plaintiff's salary did not impact Plaintiff's rights to distributions of profits as a one-third owner of the Company. *Id.* at ¶ 11.

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[5] With their response, Defendants provided to Plaintiff a copy of the as-filed Amendment. SOUMF, ¶ 37.

[6] As detailed in Defendants' previous affidavits, in addition to Plaintiff's general failure to carry out his responsibilities, Plaintiff's dereliction of his duties included a failure over the course of at least a year to prepare a business plan for HyperVibe. That business plan is required pursuant to the Company's exclusive distributorship agreement with HyperVibe, and a failure to provide HyperVibe with the

Immediately following the October 2014 Meeting, Defendants signed and delivered to Plaintiff a Notice of Action Taken at Meeting Held on October 14, 2014 (the "Notice of Action"), confirming their votes at the October 2014 Meeting to "(i) reduce the salary of Robert Shapiro to zero dollars ($0), for the reasons discussed at the meeting held on October 14, 2014, and (ii) request of each of the Members an additional Capital Contribution of ten thousand dollars ($10,000) each." *Id.* at ¶ 51. Enclosed with the Notice of Action was a Notice of Call for Additional Capital Contributions from Members, dated October 15, 2014 (the "Capital Call"). *Id.* at ¶ 52. The Capital Call formally requested from each of the members of the Company an additional capital contribution of ten thousand dollars ($10,000) by November 21, 2014. *Id.* Plaintiff filed this action slightly more than one month later, on November 17, 2014.

E. <u>This Action</u>

The cornerstone allegation of Plaintiff's Complaint is his claim that, "[i]n connection with the formation of ENS, Ettenson, Newman and Shapiro, expressly agreed that ENS would be member managed, that all material decisions would be by unanimous vote of all the members and that in the event of a capital call, that no members inability or decision not to make any payment on account of a capital call, would result in any diminution of that member's membership interest." Plotnick Aff., Ex. 1 (Complaint, ¶ 6). Plaintiff asserts causes of action for declaratory relief, breach of fiduciary duty, and breach of contract seeking the following relief: (1) a declaratory judgment that the Operating Agreement is invalid, (2) a declaratory judgment that the Capital Call is invalid, (3) a declaratory judgment that "no capital call can be made unless all the terms thereof are agreed to by all the members of ENS," (4) a declaratory judgment "that no member of ENS may receive any salary that is not consented to by all the members of

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business plan could authorize HyperVibe to terminate the Company's exclusive distributorship agreement. *See* Plotnick Aff., Ex. 5 (Newman Aff., ¶¶ 34-39).

ENS"; (5) a declaratory judgment "that no actions for or on behalf of ENS Health, LLC be taken absent the unanimous consent of the members," and (6) damages "in the amounts, if any, of any salary paid to defendants Ettenson and Newman which was in excess of any salary paid to plaintiff Shapiro other than what was agreed to for the period October 1, 2013 through December 31, 2013." Plotnick Aff., Ex. 1 (Complaint at p. 8).

Defendants filed their Verified Answer, Affirmative Defenses, and Counterclaims on January 23, 2015. The Counterclaims seek a declaratory judgment as follows: (1) that Defendants were authorized to adopt the Operating Agreement for the Company, that the Operating Agreement was duly and properly adopted in accordance with the LLC Law, and that the Operating Agreement and each of its provisions are valid and binding on the Company and all of its members, (2) that Defendants were authorized to amend the Company's original Articles of Organization, that the Amendment was duly and properly authorized in accordance with the LLC Law, and that the Amendment is valid and binding on the Company and each of its members, (3) that the default provisions of the LLC Law are the governing terms, conditions, and requirements for the conduct of the members of the Company for the operation of the Company in the absence of any controlling provision of the Operating Agreement or valid and binding written operating agreement for the Company, (4) that Defendants were authorized to issue the Capital Call, and that the Capital Call is valid and binding on all members in all respects, and (5) that the payment of salaries to the members of the Company beyond December 2013 was and is authorized, that Defendants were authorized to reduce Plaintiff's salary to zero dollars ($0) by majority vote, and that the reduction of Plaintiff's salary to zero dollars ($0) is valid and binding.

Pursuant to a stipulation that was so-ordered by the Court and filed January 23, 2015, the parties agreed to proceed immediately to a determination of the issues in this case by way of summary judgment. *See* NYSCEF Doc. No. 42.

ARGUMENT

I THE STANDARD FOR SUMMARY JUDGMENT

A party is entitled to summary judgment if, "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212(b). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, supported by evidence demonstrating the absence of any material issue of fact. *See Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). The opposing party must establish by admissible evidence the existence of a genuine material issue of fact requiring a trial. *See W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 164 (1990); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Here, the parties' respective claims, which effectively mirror each other, are all ultimately centered on the interpretation and application of New York's LLC Law to facts that are not in dispute. The parties agree that there are no material issues that require a trial, and as detailed further below this case is ripe for complete summary judgment in Defendants' favor.

II THE PROVISIONS OF THE LLC LAW CONTROL OVER ANY ALLEGED ORAL AGREEMENT AMONG THE MEMBERS

As a threshold matter, the foundation of Plaintiff's case is his claim that there was some supposed "express agreement" among the members of the Company "in connection with the formation of ENS" that "ENS would be member managed, that all material decisions would be by unanimous vote, of all the members and that in the event of a capital call, that no members inability or decision not to make any payment on account of a capital call, would result in any

diminution of that member's membership interest." Plotnick Aff., Ex. 1 (Complaint, ¶¶ 6, 24-25, 39, 43-44), Ex. 4 (Shapiro Aff., ¶ 5). This purported agreement was apparently an oral one according to Plaintiff, because Plaintiff does not even suggest that it exists in writing. To the contrary, Plaintiff specifically admits that there is no written agreement containing any such provisions. Plotnick Aff., Ex. 1 (Complaint, ¶ 11), Ex. 4 (Shapiro Aff., ¶ 7). And although Defendants disagree that any such oral agreement exists,[7] the point is ultimately academic because Plaintiff's own admission that there is no such *written* agreement is fatal to his claim.

The LLC Law provides generally that a New York limited liability company must be managed in accordance with its provisions, subject to any provisions that may be contained in the company's articles of organization or an operating agreement. LLC Law §§ 401(a), 408(a). An operating agreement must be in writing to have any force or effect. *See* LLC Law § 102(u) (defining an "operating agreement" as a "***written*** agreement of the members concerning the business of a limited liability company and the conduct of its affairs[.]") (emphasis added). In the absence any such written agreement, the default provisions of the LLC Law "become the terms, conditions, and requirements for the conduct of the members for the operation of the limited liability company." *Spires v. Lighthouse Solutions, LLC*, 778 N.Y.S.2d 259, 266 (Sup. Ct. Monroe Co. 2004); *In re 1545 Ocean Avenue, LLC*, 72 A.D.3d 121, 129 (2nd Dept. 2010) ("Where an operating agreement . . . does not address certain topics, a limited liability company is bound by the default requirements set for in the [LLC Law]."); *Overhoff v. Scarp, Inc.*, 812 N.Y.S.2d 809, 816 (Sup. Ct. Erie Co. 2005) (holding that it is "clear ... that the [LLC Law] statute provided default procedures for LLCs, which will apply to LLC proceedings unless the operating agreement of the particular LLC clearly provides otherwise.").

[7] Plotnick Aff., Ex. 5 (Newman Aff., ¶ 8), Ex. 6 (Ettenson Aff., ¶¶ 5-6).

Thus, Plaintiff's reliance upon some supposed oral agreement among the members of the Company that "ENS would be member managed, that all material decisions would be by unanimous vote, of all the members and that in the event of a capital call, that no members inability or decision not to make any payment on account of a capital call, would result in any diminution of that member's membership interest," is irrelevant and cannot support any of his claims as a matter of law.

III DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON EACH OF THEIR COUNTERCLAIMS

Defendants' Counterclaims assert five causes of action seeking declaratory relief with respect to the validity and binding effect of the Operating Agreement and Amendment, the applicability of the LLC Law in the absence of an operating agreement or controlling provision in the Operating Agreement, and the validity and binding effect of the Capital Call and salary determinations. Defendants are entitled to summary judgment on each cause of action.

A. The Operating Agreement And Amendment Are Valid And Binding

Defendants contend that, as a majority of the members of the Company, they were expressly authorized under § 402(c)(3) of the LLC Law to approve the Operating Agreement and Amendment for ENS. Aside from his ineffectual reliance on the supposed oral agreement among the members of the Company, Plaintiff contends that Defendants' actions were not permitted under § 417(c) of the LLC Law. Plaintiff's selective reading of § 417(c) is simply wrong, and it is clear from the plain language of § 402(c)(3) that Defendants were authorized to adopt the Operating Agreement and approve the Amendment for the Company.

None of the facts material to this determination are in dispute. Plaintiff concedes that each of the parties to this litigation is an equal one-third member of ENS. SOUMF, ¶¶ 11-12. Thus, under the LLC Law, any two members of the Company comprise a "majority in interest of

the members" of the Company. *Id.* at ¶ 12; LLC Law § 102(o) ("Majority in interest of the members means, unless otherwise provided in the operating agreement, the members whose aggregate share of the current profits of the limited liability company constitutes more than one-half of the aggregate of such shares of all members."). Moreover, Plaintiff admits that, prior to December 13, 2013, the Company did not have any written operating agreement. SOUMF, ¶¶ 8-9, 14, 23. Thus, as set forth above, prior to December 13, 2013, the default provisions of the LLC Law controlled. *See* LLC Law § 401(a); *Spires,* 778 N.Y.S.2d at 266; *In re 1545 Ocean Avenue, LLC*, 72 A.D.3d at 129; *Overhoff*, 812 N.Y.S.2d at 816.

These undisputed facts mandate summary judgment in Defendants' favor with respect to the validity of the Operating Agreement and the Amendment. Indeed, § 402(c)(3) of the LLC Law specifically provides as follows:

> ***Except as provided in the operating agreement,*** whether or not a limited liability company is managed by the members or by one or more managers the vote of ***a majority in interest of the members*** entitled to vote thereon shall be required to ... ***adopt, amend,*** restate or revoke ***the articles of organization or operating agreement ...***

LLC Law § 402(c) (3) (emphasis added). In other words, under the plain terms of the LLC Law, unless a written operating agreement provides otherwise, a "majority in interest of the members" is all that is necessary to "adopt" an operating agreement or to "amend" the articles of organization. That is precisely what occurred here on December 13, 2013, when Defendants acted without a meeting (as permitted under § 407 of the LLC Law[8]) to adopt the Operating Agreement and approve the Amendment.

[8] *See* SOUMF, ¶¶ 29-30. Section 407 of the LLC Law provides that, whenever the members of a limited liability company are permitted to take action by vote, "such action may be taken without prior notice and without a vote" by "the members who hold the voting interests having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting." LLC Law § 407. Plaintiff's Complaint does not take issue with or challenge the procedure utilized by Defendants under § 407.

1. The Amendment

With respect to the Amendment, there can be no serious argument that it was improper or unauthorized. The Company was initially formed as a member-managed limited liability company by default, because the Company's Articles of Organization did not specifically provide for management of the Company by a manager or managers or a class or classes of managers. *See* SOUMF, ¶¶ 6-7; LLC Law § 401(a). The Articles of Organization did not require the Company to be member-managed, and were in fact silent on the subject altogether. *See* SOUMF, ¶¶ 6-7. Moreover, there was no operating agreement requiring the Company to remain member-managed. *See* SOUMF, ¶¶ 6-7. Under these circumstances, the LLC Law specifically authorizes a member-managed limited liability company to be changed into a manager-managed LLC by "a majority in interest of the members" of the Company. *See* LLC Law §§ 211, 213, 402(c) (3). Section 211, in fact, ***requires*** a limited liability company to amend its articles of organization when such a vote transpires. *See* LLC Law § 211(d)(7) ("a limited liability company ***shall*** amend its articles of organization ... after ... a change in whether the limited liability company is to be managed by ... one or more managers ... .") (emphasis added).

2. The Operating Agreement

With respect to the Operating Agreement, Plaintiff contends in his Complaint that it is invalid under § 417 of the LLC Law because it was not adopted by "all of the members" of the Company "either before, at the time of or within the ninety day period after the filing of the articles of organization, or at any time thereafter." *See* Plotnick Aff., Ex 1 (Complaint, ¶¶ 10-11). Plaintiff's claim fails for several reasons.

First, Plaintiff's apparent assertion that § 417 requires an operating agreement to be approved by "all of the members" is simply made up out of whole cloth. These words, in fact,

appear nowhere in § 417, which refers only to the requirement of members to "adopt a written operating agreement" and says nothing whatsoever about there being any unanimity requirement. *See* LLC Law § 417(a). In fact, the only reference in the LLC Law to the quorum required specifically to adopt an operating agreement is set forth in a separate provision of the LLC Law, § 402(c)(3), which states quite clearly that the vote of "***a majority in interest of the members***" is all that is required to "***adopt,*** amend, restate or revoke the ... ***operating agreement.***" *See* LLC Law § 402(c)(3) (emphasis added). Moreover, the LLC Law is otherwise clear that, "whenever any action is to be taken ... by the members or a class of members," the default rule is majority, "except as otherwise required or specified by this chapter or the articles of organization or the operating agreement." LLC Law § 402(f).[9]

Second, Plaintiff's contention that the Operating Agreement is "a nullity and of no legal force and effect" under § 417(c) because it was not entered into "either before, at the time of or within the ninety day period after the filing of the articles of organization"[10] misreads the statute. Read in full, § 417(c) provides as follows:

> An operating agreement ***may*** be entered into before, at the time of or within ninety days after the filing of the articles of organization. ***Regardless of whether such agreement was entered into before, at the time of or after such filing, such agreement, may be effective upon the formation of the limited liability company or at such later time or date as provided in the operating agreement***; provided, however, under no circumstances shall an operating agreement become effective prior to the formation of such company.

LLC Law § 417(c) (emphasis added). Thus, read in context, § 417(c) merely permits (but does not require) the members of an LLC to adopt an operating agreement within a certain window of time,

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[9] The default majority-rules provision of the LLC Law clearly makes sense. As the court recognized in *Overhoff*, "[t]o rule otherwise would permit a minority member to stonewall any action by the members merely by refusing to attend meetings, as happened here." *Overhoff*, 812 N.Y.S.2d at 816.

[10] *See* Plotnick Aff., Ex 1 (Complaint, ¶¶ 10-11)

and if done within that window of time allows for it to be deemed effective retroactively (up to, and including, the formation date of the company). Section 417(c) does not, however, curtail in any way the rights of a majority of the members to adopt an operating agreement at a later date (although such an agreement could not be retroactively effective). Indeed, that right remains intact under a separate section of the LLC Law, §402(c)(3), which contains no temporal restriction on the right of "***a majority in interest of the members***" to "***adopt,*** amend, restate or revoke the ... ***operating agreement.***" *See* LLC Law § 402(c)(3) (emphasis added). This was in fact the precise conclusion reached by the court in *Spires v. Lighthouse Solutions, LLC*, which held that "[t]here is no provision in the Limited Liability Company Law imposing any type of penalty or punishment for failing to adopt a written operating agreement" within the time frame set forth in § 417, and found that the members of the limited liability company at issue had validly adopted two separate (but temporary) operating agreements ***more than two and a half years*** after the company's articles of organization were filed. 778 N.Y.S.2d at 262-265.

In short, the mere fact that all of the members of the Company did not enter into an operating agreement within ninety days after the filing of the Company's original Articles of Organization did not vitiate the express right of Defendants, as a majority in interest of the members of ENS, to take action pursuant to § 402(c)(3) to adopt the Operating Agreement effective as of December 13, 2013. To the contrary, it is precisely because the members did not enter into an operating agreement providing otherwise that Defendants were permitted to act as a majority pursuant to § 402(c)(3), which by its terms applies in the absence of a written operating agreement providing to the contrary. *See* LLC Law § 402(c).

Accordingly, Defendants are entitled to summary judgment in their favor on their First and Second Counterclaims, holding that (1) Defendants were authorized to adopt the Operating

Agreement for the Company, that the Operating Agreement was duly and properly adopted in accordance with the LLC Law, and that the Operating Agreement and each of its provisions are valid and binding on the Company and all of its members, and (2) Defendants were authorized to amend the Company's original Articles of Organization, that the Amendment was duly and properly authorized in accordance with the LLC Law, and that the Amendment is valid and binding on the Company and each of its members.

B. Majority Rules, With or Without an Operating Agreement

Plaintiff also contends in his Complaint generally "that no actions for or on behalf of ENS Health, LLC be [may] taken absent the unanimous consent of the members." Plotnick Aff., Ex. 1 (Complaint at p. 8). It is unclear whether this assertion is supported by anything other than Plaintiff's irrelevant claim that there was some oral agreement among the members in connection with the formation of ENS. In any event, his position is meritless.

It is undisputed that the Company's Articles of Organization say nothing about voting rights, and provide only for the name of the Company, the location of its office, and designate an agent and address for service of process. SOUMF, ¶¶ 6-7. The Amendment added only that the Company may be managed by managers. *Id.* at ¶ 31. All parties also agree that, prior to December 13, 2013, the Company had no operating agreement. *Id.* at ¶¶ 8-9, 14, 23. Thus, as set forth above, prior to the Operating Agreement, the default provisions of the LLC Law controlled as a matter of law. *See* LLC Law § 401(a); *Spires,* 778 N.Y.S.2d at 266; *In re 1545 Ocean Avenue, LLC*, 72 A.D.3d at 129; *Overhoff*, 812 N.Y.S.2d at 816. The default rule under the LLC Law for member-managed companies is set forth in § 402(f), which provides as follows:

> Whenever any action is to be taken under this chapter by the members or a class of members, it shall, except as otherwise required or specified by this chapter or the articles of organization or the operating agreement as permitted by this chapter, be

> authorized by ***a majority in interest of the members'*** votes cast at a meeting of members by members or such class of members entitled to vote thereon.

LLC Law § 402(f) (emphasis added). Similarly, the default rule under the LLC Law for manager-managed companies is set forth in § 408(b), which provides as follows:

> Except as provided in the operating agreement and in accordance with section four hundred nineteen of this article, the managers shall manage the limited liability company by the affirmative vote of ***a majority of the managers***.

LLC Law § 408(b) (emphasis added).

The Operating Agreement largely tracks these default provisions of the LLC Law. Pursuant to § 6.01 of the Operating Agreement, each of the parties was designated as a manager of the Company, meaning that management of the Company post-Operating Agreement continues to be vested in equal one-thirds among Ettenson, Newman, and Shapiro. SOUMF, ¶ 35. The Operating Agreement provides that, except as otherwise provided therein (or as required by the LLC Law), any action requiring the approval of the managers may be approved by a majority of the managers. *Id.* Likewise, pursuant to § 6.03 of the Operating Agreement, except as otherwise provided therein (or as required by the LLC Law), any action requiring the approval of the members may be approved by a majority of the members. *Id.* at ¶ 36. In fact, the Operating Agreement in some cases actually provides the members with even greater protections than they would have otherwise under the default provisions of the LLC Law, as it includes in § 6.04, a unanimity requirement for a material change in the purposes or nature of the Company's business, the admission of new members or the issuance of additional membership interests, a merger or consolidation with another entity, the disposition of all or substantially all of the Company's assets, or a dissolution, liquidation or winding up of the Company. *See* Plotnick Aff., Ex. 4 (Shapiro Aff., Ex. H), Ex. 5 (Newman Aff., Ex. H).

But again, even if there were no operating agreement at all (or a controlling provision in the Operating Agreement), the default provisions of the LLC Law would clearly apply. *See* LLC Law §§ 401(a), 408(a); *Spires,* 778 N.Y.S.2d at 266; *In re 1545 Ocean Avenue, LLC*, 72 A.D.3d at 129; *Overhoff*, 812 N.Y.S.2d at 816. As stated, those provisions expressly authorize (a) any action to be taken members to be taken by ***a majority in interest of the members***, and (b) the managers to act by the affirmative vote of ***a majority of the managers.*** Thus, there is simply no basis whatsoever for Plaintiff's claim "that no actions for or on behalf of ENS Health, LLC [may] be taken absent the unanimous consent of the members."

Defendants are, therefore, entitled to a judgment on their Third Counterclaim, declaring that, in the absence of any operating agreement or controlling provision in the Operating Agreement, the default provisions of the LLC Law are the governing terms, conditions and requirements for the conduct of the members and managers for the operation of the Company.

C. Defendants Were Authorized to Issue the Capital Call and to Reduce Plaintiff's Salary

Plaintiff also challenges Defendants' determination in connection with the October 2014 Meeting to approve the Capital Call and reduce Plaintiff's salary. Defendants' Fourth and Fifth Counterclaims thus seek a declaratory judgment holding that (1) Defendants were authorized to issue the Capital Call, and that the Capital Call is valid and binding on all members in all respects, and (2) the payment of salaries to the members beyond December 31, 2013, is authorized, that Defendants were authorized to reduce Plaintiff's salary by majority vote, and that the reduction of Plaintiff's salary is valid and binding.

In the case of the Capital Call, § 7.01 of the Operating Agreement authorizes "a Majority of the Members" to "determine if additional Capital Contributions are necessary to conduct the Company's business activity." *See* SOUMF, ¶ 43. If such a determination is made, notice must

be given to all members of the Company, "specifying the due date, which shall not be less than thirty (30) days from the date of the notice, of any additional Capital Contributions which may be required." *Id.* Members are not required to make the additional Capital Contribution, but if they do not do so their interests in the Company may be adjusted if Capital Contributions are made by other members. *Id.*

As detailed above, these provisions were followed by Defendants to the letter. The Operating Agreement had been in place with Plaintiff's knowledge (and acquiescence, after he abandoned his initial objections and began participating in the regular Tuesday meetings required by § 6.09 of the Operating Agreement) for ten months at the time of the October 2014 Meeting. SOUMF, ¶¶ 37-41. Prior to the October 2014 Meeting, Newman circulated an e-mail to all members detailing the Company's financial status and indicating that the Company had a shortfall of approximately $31,000. *Id.* at ¶ 42. Defendants then voted at that meeting – in Plaintiff's presence – to request of each of the members an additional Capital Contribution of $10,000. *Id.* at ¶¶ 44-46. The day after the meeting, the Company issued the Capital Call, which was duly served on all members and specified a due date that was thirty-seven days from the date of the notice. *Id.* at ¶¶ 51-52.

Likewise, the determination to reduce Plaintiff's salary was made by majority vote at the same meeting held in Plaintiff's presence on October 14, 2014. SOUMF, ¶¶ 41, 44-47. That determination was undertaken after Plaintiff failed (yet again) to live up to his obligations, including most recently one of the critical tasks he was directly responsible for: the preparation of the HyperVibe business plan. Plotnick Aff., Ex. 5 (Newman Aff., ¶¶ 34-39). The reduction in Plaintiff's salary did not, however, impact his rights as a one-third owner of ENS to distributions of Company profits. SOUMF, ¶ 11.

As stated, under the LLC Law, unless otherwise provided in the LLC Law itself, the articles of organization, or a written operating agreement, whenever any action is to be taken by members or managers it is authorized to be taken by a determination of a majority in interest of the members or managers. *See* LLC Law §§ 402(f), 408(a). Here, there is no provision in the LLC Law, the Company's Articles of Organization, the Amendment, or the Operating Agreement concerning the payment of salaries – meaning that Defendants' determination as a majority is valid and binding.[11] For the avoidance of any doubt, Plaintiff's claim that determinations regarding salary require unanimous consent is completely belied by the undisputed facts that (a) Defendants refused to agree to the Proposed Consent circulated by the Company's attorney that would have required "the unanimous consent of the Members" for salary determinations, and (b) salaries were actually paid by the Company to Shapiro, Ettenson and Newman – including in months following the expiration of the suggested ninety (90) day period set forth in the Proposed Consent. *Id.* at ¶¶ 21-22. Plaintiff has accepted his salary, and never once objected to the payment of salaries to Defendants. *Id.* at ¶ 22.

Accordingly, Defendants are also entitled to summary judgment on their Fourth and Fifth Counterclaims.

IV THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE IN ITS ENTIRETY

For the same reasons that summary judgment should be entered in Defendants' favor on each of their Counterclaims, so too should judgment be entered dismissing Plaintiff's Complaint

[11] There is a provision in the Operating Agreement, § 9.01 (titled "Management Fees"), that states that "[n]o compensation shall be paid to the Managers for their services in arranging transactions contemplated by the Company and managing the Company." Plotnick Aff., Ex. 4 (Shapiro Aff., Ex. H), Ex. 5 (Newman Aff., Ex. H). However, the salaries paid to the parties are plainly not "Management Fees" under § 9.01, as evidenced by the fact that they were approved at the September 2013 Meeting – three months *before* the Company had any managers at all (it was still member-managed) or an Operating Agreement. SOUMF, ¶¶ 14, 17-18. Moreover, all parties, including Shapiro, knowingly received and accepted their salaries even after the Operating Agreement was adopted. *Id.* at ¶ 22.

in its entirety with prejudice. While Plaintiff may disagree with Defendants' decisions, they are not the proper basis for a claim. At best, they are "business disagreements" which under the business judgment rule "should not be questioned by the courts where, as here, there is no evidence of bad faith or self-dealing on the part of the individual defendants." *See Van Der Lande v. Stout*, 786 N.Y.S.2d 515, 516 (1st Dep't 2004); *see also Auerbach v Bennett*, 47 N.Y.2d 619, 630-31 (1979) ("[B]y definition the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility. Thus, absent evidence of bad faith or fraud (of which there is none here) the courts must and properly should respect their determinations.").

There is no such evidence here, and Plaintiff simply has no claim that the Operating Agreement, Amendment, Capital Call, or Defendants' determination to reduce his salary is invalid. Moreover, Plaintiff can have no claim for breach of contract or breach of the implied covenant of good faith and fair dealing, because the supposed agreement upon which these claims rest – *i.e.*, the purported oral unanimity agreement among the members – is invalid and unenforceable as a matter of law. Finally, Plaintiff can have no claim for breach of fiduciary duty in the absence of any evidence of bad faith or self-dealing – particularly in light of the fact that all of Defendants' actions were expressly authorized under the LLC Law. *See* LLC Law § 409 (barring breach of fiduciary duty claims when a manager has acted "in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances.")[12]

[12] Plaintiff would not, in any event, have any breach of fiduciary duty claim against either of the Defendants because New York Law is clear that any such claim lies only, if at all, against managing or controlling members. *See, e.g., Pokoik v. Pokoik*, 115 A.D.3d. 428, 428-29 (1st Dept. 2014); *Cottone v. Selective Surfaces, Inc.*, 68 A.D.3d 1038, 1039 (2nd Dept. 2009); *Kalikow v. Shalik*, 43 Misc.3d 817, 823-24 (Sup. Ct. Nassau Cty. 2014). Here, as each of the parties is a one-third member and manager, there can be no claim of breach of fiduciary duty against either or both of them together. *See Marino v. Grupo*

CONCLUSION

For the foregoing reasons, Defendants are entitled to a judgment, pursuant to CPLR 3212, dismissing in its entirety and with prejudice Plaintiff's Complaint, and in Defendants' favor on each of their Counterclaims.

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New York, NY

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Mundial Tenedora, S.A., 810 F.Supp.2d 601, 608-609 (S.D.N.Y. 2011) (rejecting argument that a breach of fiduciary duty claim would lie where "multiple members ... combine to over 50% of the voting interests" because such a rule "would, in effect, impose fiduciary duties upon minority members ... for purposes of a specific transaction because they voted with the majority in regards to that transaction.")