SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

JOSEPH W. SULLIVAN,

Plaintiff,

-against-

WILLIAM F. HARNISCH,
PECONIC PARTNERS LLC, and
PECONIC ASSET MANAGERS LLC,

Defendants.

INDEX NO. 08/115092

Hon. Richard Lowe

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR AN ORDER PURSUANT TO CPLR 3212

James Nespole
Neil G. Sparber
FULBRIGHT & JAWORSKI L.L.P.
666 Fifth Avenue
New York, New York 10103

Attorneys for Defendants

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Defendants William F. Harnisch ("Harnisch"), Peconic Partners LLC and Peconic Asset Managers LLC (together, the "Peconic Companies"), submit this memorandum of law[1] in support of their motion for summary judgment pursuant to CPLR 3212 for an order dismissing plaintiff's First Amended Verified Complaint.

PRELIMINARY STATEMENT

Sullivan has attempted to state claims against defendants for breach of contract, both express and implied, for tortious interference with business relations, for fraud and conspiracy to defraud, for defamation, for injurious falsehood, and for breach of fiduciary duty. Discovery has been completed. Sullivan has had his opportunity to obtain evidence he needs to create an issue of fact. His efforts have failed as a matter of law.[2]

FACTS

The relevant facts are set forth in sworn deposition testimony and documented evidence annexed to the affidavit of Neil G. Sparber, sworn to May 14, 2010, (the "Sparber Aff.")[3] and Defendants' Rule 19(a) submitted under separate cover.

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[1] The Court orally granted the parties leave to file a memorandum of law not to exceed thirty pages.

[2] The Court, in a Memorandum and Order dated February 26, 2010 (Exhibit 3), denied defendants' pre-discovery motion for summary judgment on plaintiff's second, third, fourth, fifth, and eighth causes of action. The February 26, 2010 order granted defendant's motion for summary dismissing plaintiff's ninth cause of action, and the remaining eight causes of action are addressed herein.

[3] Exhibits annexed to the Sparber Aff. are referenced through out this memorandum as "Exh. ___" and are numbered as set forth in the index contained in the Sparber Aff.

ARGUMENT

POINT I

SULLIVAN'S FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT SHOULD BE DISMISSED

A. Sullivan Is Bound by the Operating Agreement Including its Profit Allocation Provisions

N.Y. Ltd. Liab. Co. Law § 417 requires that the members of a limited liability company "shall adopt a written operating agreement . . . relating to (i) the business of the limited liability company, (ii) the conduct of its affairs and (iii) the rights, powers, preferences, limitations or responsibilities of its members . . . ." Sullivan was a member of the Peconic Companies[4] and, as a result, his membership interest and corresponding rights to profit distributions, if any, were governed by the Operating Agreements of the Peconic Companies (Exhs. 4 and 5, collectively, the "Operating Agreement"). Throughout his deposition, Sullivan testified that he was not bound by the terms of the Operating Agreement because he did not sign it. (Exh. 6 at 85-86, 88, 90, 96, 100-101, 112-113). This contention is without merit.

Under New York law, where "a party objectively manifests an intent to be bound by a contract, that intent controls, even if the party does not sign the written agreement." Recticel Foam Corp. v. Bay Industries, Inc., 128 Fed. Appx. 798 (2d Cir. 2005) (citations omitted); Liebowitz v. Cornell University, 584 F.3d 487 (2d Cir. 2009); Zurich American Ins. Co. v. Whitmore Group Ltd., 11 Misc. 3d 1070A, 816 N.Y.S.2d 702 (Sup. Ct. N.Y. Co. 2006).

[4] It is undisputed that Sullivan was a member of the Peconic Companies. (See Exh. 1 at ¶¶ 5, 14-20, 149). This is confirmed by Sullivan's testimony concerning his status as an owner and/or member (see, e.g., Exh. 6 at 59-60, 73, 85, 90-91, 442, 456) as well as the K-1s he received from the Peconic Companies (see Exh. 7), Peconic Companies' Form ADVs filed with the Securities and Exchange Commission (see Exh. 8); and representations he made to Peconic clients, an example of which is annexed as Exhibit 9. See also Bobrow v. Liebman, 2007 N.Y. Slip. Op. 50795U (Sup. Ct. N.Y. Co. Apr. 16, 2007) ("[t]he owners of an LLC are its members" and that plaintiff was a "member" of two LLCs where, among other things, plaintiff filed and received K-1s issued by the LLCs); Out of the Box Promotions LLC v. Koschitzki, 15 Misc. 3d 1134A, 841 N.Y.S.2d 821 (Sup. Ct. Kings Co. 2007); Chiu v. Chiu, 38 A.D.3d 619, 832 N.Y.S.2d 89 (2d Dep't 2007).

Likewise, in Giblin v. Sechzer, 97 A.D.2d 833, 468 N.Y.S.2d 719 (2d Dept. 1983), the Court rejected an effort by partners to avoid their expulsion from a partnership, because "irrespective of whether plaintiffs signed the agreement, since their course of conduct demonstrated ratification and compliance with the agreement." Id. at 720. See also Great Western Oil & Gas Co. v. Mitchell, 326 P.2d 794 (Okla. 1958) (partner's actions demonstrated that he "was clearly bound by the Operating Agreement despite the fact that he refused to sign it.").

Sullivan's conduct manifested his intent to be bound by the Operating Agreement and, at a minimum, his "ratification and compliance with the agreement." See Giblin, 97 A.D.2d at 833. Not only was Sullivan actually aware of the Operating Agreement,[5] but Sullivan's own acts demonstrate that he acknowledged that the Operating Agreement governed the affairs of the Peconic Companies, including his membership interest therein. For example, among other things: (i) Sullivan actively represented to third parties in marketing materials and governmental filings that the Operating Agreement was Peconic's governing document. (See Exh. 6 at 583-589); (ii) he executed documents related to the Operating Agreement as a "member," including a "Written Consent of Members of FLA Advisers" and "Written Consent of Members of FLA Asset Managers LLC," each dated September 1, 2001 (Exh. 6 at 433:6-434:10; 443:11:17; see Exhibits 11 and 12); and (iii) on or about August 4, 2006, he executed an Amendment to the

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[5] Sullivan cannot dispute that he was aware of the Operating Agreement. For example: (i) he was provided with the Operating Agreement in 2003 or 2004 (Exh. 6 at 75-76, 85-86; see Exhs. 4 and 5); (ii) he received a draft amended Operating Agreement in November 2004 (Exh. 6 at 618); (iii) he acknowledges that the Operating Agreement was the "legal document" of the entities and that it covered ownership and "profits-and-loss allocation" (Exh. 6 at 76-77 115); (iv) he was aware of prior Operating Agreements of the Peconic Companies (Exh. 6 at 441, 610-613); and (v) he consulted the agreement "as needed" in connection with "profit sharing percentages." (Exh. 6 at 441). Sullivan also had constructive knowledge that the Operating Agreement controlled his membership because N.Y. L.L.C. § 417 requires the adoption of a written operating agreement and Sullivan testified that he had previously worked "extensively with counsel to set up entities" as limited liability companies. (Exh. 6 at 650). See Wallace v. Hayes, 2004 Mont. Dist. LEXIS 3670, *22 (13th Dist. May 21, 2004) (member bound by operating agreement he did not sign because he had actual and constructive knowledge of the state limited liability company law and "was aware that when he agreed to become a major equity holder . . . he impliedly agreed to follow the rules and regulations of the company" as set forth in the operating agreement).

Amended and Restated Operating Agreement of Peconic Asset Managers which was to be signed by the "undersigned members" with signature lines for Harnisch and Sullivan. (See Exh. 6 at 643-644; see Exh. 13). Thus, not only was Sullivan aware of the Operating Agreement but he actually used his position as member to amend the very agreement which he claims has no binding effect on him because he did not sign the document.

It is therefore clear that Sullivan "explicitly or implicitly" accepted that his membership interest was governed by the Operating Agreement by "ratifying it and continuing to operate under its terms," Zurich American Ins. Co., 11 Misc. 3d 1070A, 816 N.Y.S.2d 702, and he was bound by its terms regardless of him having not signed it.

B. The Alleged Oral Agreement Is Unenforceable Because N.Y. L.L.C. § 417(b) Requires Such an Amendment to the Operating Agreement to be in Writing

At the outset we note that Harnisch specifically and unequivocally denies that such an oral agreement ever occurred to deprive him of his discretion to award bonus/incentive compensation.[6] N.Y. Ltd. Liab. Co. Law § 417(b) provides:

> The operating agreement of a limited liability company may be amended from time to time as provided therein; provided, however, that, except as otherwise provided in the operating agreement or the articles of organization, without the written consent of each member adversely affected thereby, (i) no amendment of the operating agreement . . . shall be made that (i) increases the obligations of any member to make contributions, (ii) alters the allocation for tax purposes of any items of income, gain, loss, deduction or credit, (iii) alters the manner of computing the distributions of any member, or (iv) allows the obligation of a member to make a contribution to be compromised by consent of less than all the members.

[6] The following analysis of the law demonstrates that Sullivan's self serving declaration of an oral agreement is insufficient to create a viable issue of fact. No issue of fact is created by Harnisch's denial that an oral agreement occurred because Sullivan's claim is not established as a matter of law. Sullivan's version of the oral argument has various permutations. See infra IC(c) at p. 9-10.

(emphasis added). Thus, for example, an amendment that "alters the manner of computing the distributions of any member" is unenforceable unless it is consented to in writing by each member "adversely affected" by the amendment. N.Y. L.L.C. § 417(b).

The Operating Agreement provides that a member's "Sharing Ratio", which is "the percentage, as determined from time to time by the Manager(s)," of the Profits and Losses, shall be allocated among the Capital Accounts of the Members. (See Exhs. 4 and 5, Sections 1(z) and 10(a)(i) at 3, 6-7). The Operating Agreement provides at Section 10(a)(i) that 25% of the profits and losses are allocated to members based on ownership percentage and 75% based on members' Sharing Ratios. The Operating Agreement, therefore, provides the Manager, Harnisch, with the sole discretion to determine the Sharing Ratio of a member, and such member's discretionary share of the 75% bonus/incentive pool. The 75% pool is the source of bonus/incentive compensation. Sullivan does not dispute that Harnisch had the discretion in awarding profits from the 75% incentive pool and that such provision is consistent with the manner in which profits were distributed to Peconic employees in accordance with the Operating Agreement. (Exh. 6 at 259-261).

Sullivan alleges that in April 2007, Harnisch purportedly orally agreed that Sullivan would become entitled to receive 33 1/3% of the profits of the Peconic Companies for 2006 and all subsequent years. (Exhibit 1 at ¶ 16; Exh. 6 at 153-154, 198-199). In prior years, Sullivan received, in accordance with the Operating Agreement, 15% of the ownership pool and a discretionary amount of the 75% incentive pool as determined by Harnisch. When questioned at his deposition about why Harnisch would allegedly voluntarily give up his discretion to distribute profits and obligate the Peconic Companies to pay Sullivan 33 1/3% of the net profits on a going forward basis, he testified "He was very pleased with my work, wanted me as his key

partner." (Exh. 6 at 160). Interestingly, Sullivan does not even recall where the conversation took place. (Exh. 6 at 157). This is precisely what N.Y. L.L.C. § 417(b) precludes, namely an oral, unsupported, self-serving declaration abrogating the absolute discretion of Harnisch, as sole Manager of Peconic, to allocate the profits from the bonus incentive pool to anyone, or no one, as he determined was appropriate based on their contribution to the business. (Exh. 6 at 259-261). That is the very essence of bonus compensation. It is based upon productivity and resulting contribution to the business. Since the alleged amendment would adversely affect Harnisch, he would have had to have consented to the amendment in writing in order for it to be enforceable. There is no evidence that Harnisch consented to this amendment in writing. The alleged amendment is, therefore, unenforceable by operation of N.Y. L.L.C. § 417(b), which is an absolute bar to the purported oral modification.

C. The Operating Agreement's Prohibition on Oral Modifications and N.Y. G.O.L. § 15-301 Renders Sullivan's Claim of an Oral Agreement Unenforceable

a. Defendants Are Entitled to Summary Judgment Based on the Operating Agreement's Express Prohibition of Oral Modifications

In addition to the absolute bar of Section 417(b), New York General Obligations Law Section 15-301 provides that "[a] written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought . . . ." N.Y. Gen. Oblig. Law § 15-301. An alleged oral modification to a contract is unenforceable where the written contract prohibits such modifications. See Cohen Fashion Opt., Inc. v. V & M Opt., Inc., 2008 N.Y. Slip Op. 4307, *1 (2d Dep't 2008) (affirming summary judgment holding that "defendants' claim that the parties entered into an enforceable oral modification of the subject franchise agreement is precluded by

the express terms of the agreement and by General Obligations Law § 15-301(1)"); Opton Handler Gottlieb Feiler Landau & Hirsch v. Patel, 203 A.D.2d 72, 73, 610 N.Y.S.2d 26, 27 (1st Dep't 1994).

A party demonstrates a "prima facie" right to judgment as a matter of law dismissing a claim of an oral modification by demonstrating that the written agreement at issue prohibits oral modifications. Elizabeth St., Inc. v. Oscar Z. Ianello Assoc., Inc., 2007 N.Y. Misc. LEXIS 2357, *5 (Sup. Ct. N.Y. Co. Mar. 9, 2007). See also Towers Charter & Marine Corp. v. Cadillac Ins. Co., 894 F.2d 516, 522 (2d Cir. 1990) (where a written agreement which contains a bar against oral modification, an alleged oral modification is "presumptively unenforceable"); American Credit Servs. v. R.V. & Marine Corp., 248 A.D.2d 1007, 669 N.Y.S.2d 999 (4th Dep't 1998) (holding that the plaintiff met its initial burden of establishing its entitlement to judgment as a matter of law against the defendant's claim of an oral modification of a written agreement "by showing that the lease required any modification to be in writing and signed by the parties and that no such writing exists" (citing Rose v. Spa Realty Assocs., 42 N.Y.2d 338, 343, 397 N.Y.S.2d 922 (1977); N.Y. G.O.L. § 15-301(1)).

Section 20(h) of the Operating Agreement provides that "[n]o amendment, modification, supplement, or termination of any provision of this Agreement or any consent to any departure therefrom shall in any event be effective, unless the same is in writing and is approved by the Members as set forth herein." (emphasis added). (Exhs. 4 and 5, at 23-24). Sullivan's supposed oral agreement is a modification of the Operating Agreement by removing the discretion of Harnisch, as sole Manager of the Peconic Companies, to allocate the profits and losses, which discretion Sullivan admitted Harnisch had under the Operating Agreement. (Exh. 6 at 259-263).

Any modification of the Operating Agreement must be in writing in accordance with its terms and N.Y. G.O.L. § 15-301. The writing requirement set forth in N.Y. G.O.L. § 15-301 "contemplate[s] a signed writing in the nature of an agreement to alter the original contract" and a note or memorandum of an agreement is insufficient to satisfy the requirements of this statute. Bakhshandeh v. American Cyanamid Co., 8 A.D.2d 35, 37, 185 N.Y.S.2d 635 (1st Dept. 1959), aff'd 8 N.Y.2d 981 (1960). "In other words, the statute is not satisfied by a written memorandum of an oral agreement. It specifically calls for a written contract." Id. at 37. The only "writing" by Harnisch identified by Sullivan concerning the alleged oral modification is a notation on the bonus schedule for 2006. (Exh. 6 at 154-155, 158-159, 160-163). Such a "writing" does not satisfy the writing requirement sufficient to satisfy N.Y. G.O.L. § 15-301.[7] The writing under § 15-301 must be a signed writing in the nature of an agreement. Omega Indus. v. Chemical Bank, 226 A.D.2d 512, 641 N.Y.S.2d 327 (2d Dep't 1996) (citing Bakhshandeh v. American Cyanamid Co., 8 A.D.2d 35, 185 N.Y.S.2d 635 (1st Dep't 1959)). The Court of Appeals in DFI Communications, Inc. v. Greenburg, 41 N.Y.2d 602, 606 (1977) held that Section 15-301 of the General Obligations Law was "intended to compensate for the demise of the seal," and that the statute "requires the dignity of a formal writing to insure the authenticity of amendatory agreement; thus the statute requires the dignity of a formal writing to insure the validity and genuineness of a contractual modification." DFI Commc'ns, at 606.

As a result, pursuant to N.Y. G.O.L. § 15-301, the Operating Agreement's prohibition on oral modifications is enforceable and the first cause of action should be dismissed.

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[7] The standard of a formal writing to satisfy G.O.L. § 15-301 is not the same as a "note or 'memorandum'" sufficient for compliance with the General Statute of Frauds." DFI Commc'ns, 41 N.Y.2d at 606.

b. Sullivan Has Failed to Overcome Defendants' Prima Facie Entitlement to Summary Judgment

In order to overcome N.Y. G.O.L. § 15-301, barring an oral modification of a written agreement, a plaintiff must prove performance that is unequivocally referable to the alleged oral agreement. It is not sufficient that the performance "under the oral agreement could very well have been done in his own self interest in the performance of the original contract." Bakhshandeh, 8 A.D.2d at 38. Rather, the actions alone must be unintelligible or at least extraordinary, explainable only with reference to the oral agreement. . . ." Anostario v. Vicinanzo, 59 N.Y.2d 662, 463 N.Y.S.2d 409 (1983) (emphasis added); Rose, 42 N.Y.2d at 345, 397 N.Y.S.2d at 928; European Am. Bank v. Klein, 1990 U.S. Dist. LEXIS 20969 (E.D.N.Y. Mar. 30, 1990) (citations omitted) ("must be such as will admit of no other possible explanation except one pointing directly to the existence of the oral agreement claimed.") (emphasis added). Furthermore, an "[o]ral modification of a written contract is enforceable . . . only if 'the party seeking to uphold the modification' partially performs under its terms . . . and the partial performance is unequivocally referable to the modification." Beway Realty LLC v. C.N. Fulton Deli, Inc., 5 Misc. 3d 1015A, 798 N.Y.S.2d 707 (Civ. Ct. N.Y. Co. 2004) (emphasis added); Thompson v. Thompson, 294 A.D.2d 943, 741 N.Y.S.2d 641 (4th Dep't 2002) (finding that plaintiff could not rely on alleged part performance of the defendant, the party disputing the alleged oral promise, to remove the alleged oral modification from the N.Y. G.O.L. § 15-301) (citation omitted).

In opposing a motion for summary judgment, it is Sullivan's burden to demonstrate that the only inference possible from any alleged performance is that an oral agreement had been concluded between the parties. L & B 57th St., Inc. v. E.M. Blanchard, Inc., 143 F.3d 88, 93 (2d Cir. 1998). Accordingly, in this context, "the existence of a question of fact supports, rather than

precludes, summary judgment." Pizza Pub. Co. v. Tricon Global Restaurants, Inc., 2000 U.S. Dist. LEXIS 13944, *4-7 (S.D.N.Y. Sept. 22, 2000) (citing Horn & Hardart Co. v. Pillsbury Co., 703 F. Supp. 1062, 1072 (S.D.N.Y.) (granting summary judgment because the possibility of attributing plaintiff's actions to another factor "precludes a finding that such actions were 'unequivocally' referable to the particular oral agreement it has alleged"), aff'd, 888 F.2d 8 (2d Cir. 1989)). See also L & B 57th St., Inc. v. E.M. Blanchard, Inc., 143 F.3d 88, 93 (2d Cir. 1998) ("the existence of a competing inference, rather than precluding summary judgment, makes summary judgment for L&B appropriate."); Carlin v. Jemal, 2009 N.Y. Slip. Op. 09695 (1st Dep't 2009) (reversing lower court's denial of summary judgment holding that, with respect to the alleged partial performance, "neither is unequivocally referable to the alleged oral modifications [of the note's repayment terms] *as there may have been other explanations for such decisions*.") (emphasis added); F. Garofalo Electric Co., v. New York Univ., 270 A.D.2d 76, 705 N.Y.S.2d 327 (1st Dep't 2000) (reversing the lower court's denial of summary judgment, rejecting the lower court's ruling that the issue of oral modification was a credibility determination, and holding that the record allowed the issue to be resolved conclusively in the defendant's favor); accord Towers Charter & Marine Corp. v. Cadillac Ins. Co., 894 F.2d 516, 522 (2d Cir. 1990); AMRESCO Fin. I, L.P. v. Stone-Tec, Inc., 1998 U.S. Dist. LEXIS 19751 (S.D.N.Y. Dec. 18, 1998). As shown below, there is no evidence that Sullivan, as the party seeking to enforce the alleged oral modification, engaged in any conduct which could be deemed "unequivocally referable" to an oral agreement in its various iterations.

c. **The Alleged Oral Agreement**

It should be noted that Sullivan testified inconsistently about the terms of the alleged oral agreement. In the complaint, Sullivan alleges entitlement to 33 1/3% of the Peconic Companies "profits." (Exh. 1 at ¶¶ 92, 95-98). The figures Sullivan used to calculate his alleged

entitlements in the complaint (Exh. 1 at ¶¶ 23-26) were based on the Peconic Companies' profits prior to the allocation of the profits to others. (Exh. 6 at 170). Sullivan testified at his deposition, after his counsel inappropriately interjected during the deposition and instructed and alerted Sullivan to an inconsistency between his allegations in the complaint, that he was really entitled to 33 1/3% of the net profits of the Peconic Companies after distribution of profits to others. (Exh. 6 at 170-176). Subsequently, Sullivan testified that pursuant to the oral agreement, he was purportedly entitled to one dollar for every two dollars after expenses (Exh. 6 at 162-170), even though he sought 33 1/3% of the gross profits in his complaint. Thus, Sullivan could not even consistently describe the terms of the alleged modification to the Operating Agreement, much less demonstrate that his actions were unequivocally referable to the oral agreement.

d. **The Bonus, Ownership and Profit Sharing Schedules**

(1) The Bonus Schedules Are Not Agreements That Satisfy G.O.L. § 15-301

As noted above, in order to satisfy the requirements of G.O.L. § 15-301, any writing by which a party seeks to amend a written agreement which contains a prohibition against oral modifications, must be in the nature of a signed writing in the form of an agreement. On its face, each of the Bonus Schedules (Exhs. 14 and 15) is insufficient as a matter of law since it is not in the form of an agreement. See Point I C(a), supra.

(2) The Bonus Schedules on Their Face Are Consistent With Section 10 of the Operating Agreement

Sullivan's testimony that the oral agreement purportedly entitling him to a 33 1/3% profit sharing interest is established by Harnisch's markings on the 2006 bonus schedule as "1.5 to 1.0" is insufficient. (Exh. 6 at 245-267; 161-162; 154-155, see Exh. 14.). The bonus schedule for 2006 on which Sullivan relies was composed in 2007 (Exh. 6 at 154-155, 162) and is entirely consistent on its face with Section 10 of the Operating Agreement concerning the allocation of

25% of the profits based on ownership and 75% of the profits to be allocated by Harnisch at his discretion. The 2006 bonus schedule contains a column entitled "Ownership" in which certain percentages are set forth and another column entitled "Incentive." (See Exh. 14). The Ownership column represents 25% of the net profits of the Peconic Companies which are to be allocated to members based on their ownership interests, and Sullivan's ownership is reflected as 15%.[8] This is entirely consistent with paragraph 10 of the Operating Agreement. The "Incentive" column represents the 75% of the net profits of the Peconic Entities that is distributed at the sole discretion of Harnisch, which discretionary power is also consistent with paragraph 10 of the Operating Agreement. The 2006 bonus schedule follows the same format as the 2005 bonus schedule (see Exh. 15), pursuant to which Sullivan admits he was paid appropriately and which is consistent with the Operating Agreement. (Exh. 1 at ¶ 22) Sullivan also admits that Harnisch had full discretion in 2005. (Exh. 6 at 261). Thus, the bonus schedules are specifically referable to the Operating Agreement, and not to some alleged oral agreement. We ask if there was an oral agreement in April 2007 under which Sullivan was to receive 33 1/3% of the Peconic Companies' profits, and which would remove Harnisch's discretion to allocate profits based on the 25%/75% formula in the Operating Agreement, why did the 2006 bonus schedule reflect the 25%/75% allocation formula? Sullivan cannot establish that the 2006 bonus schedule is unequivocally referable to the alleged oral agreement because it is entirely consistent with the bonus schedules generated by the Peconic Companies prior to the alleged oral agreement. Sullivan cannot plausibly contend that "the only inference possible" from the payment to Sullivan of approximately one-third of profits in 2006 "is that an oral agreement had

[8] Harnisch is allocated 59.5% of the ownership interest for purposes of the bonus schedule because the Peconic Companies granted other Peconic employees "phantom equity ownership" for purposes of distributing profits, even though they were not actual owners or members.

been concluded between the parties." L & B 57th St., Inc. v. E.M. Blanchard, Inc., 143 F.3d 88, 93 (2d Cir. 1998).

(3) The Bonus Schedules Are Consistent With the Past Exercise of Discretion by Harnisch

Sullivan admits that Harnisch had full discretion in 2005 as provided by Section 10 of the Operating Agreement. (Exh. 6 at 261). Sullivan admits that in 2005 Harnisch elected "to pay me approximately a third." (Exh. 6 at 261). Thus, the allocation of profits for 2006 is consistent with the allocation of profits in 2005, for which Sullivan admits Harnisch had full discretion in 2005 and granted him one third. Therefore, the allocation of profits in 2006 is consistent with the allocation of profits in 2005 and the 2006 bonus schedule can not unequivocally refer to an oral agreement that was allegedly made in April 2007.

e. Sullivan's Actions Belie the Allegations of an Oral Agreement to Pay Him 33 1/3% of the Profits of the Peconic Companies

On September 16, 2008, Richard Bourgeois, a member of Fulbright & Jaworski L.L.P., sent a draft of a proposed Amended and Restated Operating Agreement to Sullivan, asking him to review it, and advising him that he should retain counsel. (Exh. 17 at 144-146; Exh. 16). On September 18, 2008, after Sullivan reviewed the draft amended Operating Agreement, Sullivan communicated the concerns he had with the proposed agreement to his counsel,[9] which concerns were: (i) the rate of compensation for new business brought in by Sullivan; (ii) the timing of the payment of current year draws/payouts with respect to Sullivan's concern over his ability to pay estimated taxes on a timely basis; (iii) income measurement on an annual basis rather than on a calendar year basis; and (iv) lack of entitlement to compensation after his termination or in the

[9] Defendants are unaware whether Sullivan had actually retained counsel as of this date (Exh. 17 at 162-163).

event of his death. (See Exh. 19).[10] Notably, no mention was made of an attempt to deprive Sullivan of any ownership or profit-sharing interest based on a purported oral agreement regarding 33 1/3%, or one dollar for every two dollars, or anything about a change in the profit sharing provision of the existing Operating Agreement. It is simply not believable that if Sullivan actually believed he was entitled to 33 1/3% of the profits of the Peconic Companies, he would not have listed as one of his concerns to his attorney that the profit sharing ratio of 33 1/3% had been omitted from the new agreement. The "email" statement is an admission made when no controversy existed between the parties. Fisch on New York Evidence § 791 (2nd Ed. 1977).

Similarly, on September 23, 2008, Sullivan initiated a telephone call to Richard Bourgeois to discuss his alleged concerns. (Exh. 17 at 163). As reflected in the testimony of Mr. Bourgeois, and in the contemporaneous notes taken by him of the phone conversation, Sullivan was concerned only with succession issues and the effect that the provisions would have upon the Peconic Companies' marketing efforts, the timing of income payments with respect to Sullivan's payment of taxes, and compensation for bringing in new business. (Exh. 17 at 162-182; Exh. 20). Consistent with his prior communication to his attorney, at no point did Sullivan

[10] During the course of defendants' review of documents on the Peconic Companies' computer server in connection with this litigation, defendants discovered several electronic messages sent by Sullivan to his attorneys using his Peconic-issued email address and sent through the Peconic Companies' servers. On November 11, 2009, defendants notified Sullivan's counsel that it was in possession of emails sent by Sullivan to his attorneys which were located on the Peconic Companies' server, attaching copies of the emails and notifying Sullivan's counsel of their intended use of the documents in discovery and at trial. Defendants further notified Sullivan's attorneys of their position that due to Peconic Companies' computer and internet policy, which expressly states that (i) the Peconic companies' email and internet systems are the property of the Peconic Companies; (ii) employees have no expectation of privacy in email communications; and that (iii) all incoming and outgoing email messages are subject to monitoring by the Peconic Companies (see Exh. 18), the emails were not protected by the attorney-client privilege. See Scott v. Beth Israel Medical Center, Inc., 17 Misc. 3d 934, 940, 847 N.Y.S.2d 436, 441 (Sup. Ct. N.Y. Co. 2007) (denying plaintiff's motion for protective order concerning emails plaintiff sent to his attorney because plaintiff's use of the company email system to communicate with his attorney "render[ed] the communication not made in confidence and thus destroy[ed] the attorney-client privilege if it ever applied."). As a result, the September 18, 2008 email from Sullivan to Ms. Donath, using the Peconic Companies' email and server, is not protected by the attorney-client privilege.

make any statements to Mr. Bourgeois that Harnisch had agreed to surrender his discretion as Manager to determine Sullivan's profit sharing percentage and grant Sullivan a guarantee to receive going forward 33 1/3% of the Peconic Companies' profits. Sullivan's self-serving testimony that he raised the issue with Mr. Bourgeois is flatly contradicted by his admissions in the email to his attorney and the contemporaneous notes taken by Mr. Bourgeois.

D. Harnisch Is Not Personally Liable for the Alleged Breach of Contract

Sullivan seeks to impose personal liability upon Harnisch. (Exhibit 1 at ¶¶ 91-102; Exh. 6 at 59). The structure of a limited liability company is meant to limit individual liability of members. See White, New York Business Entities, ¶ 2101.02[2] (Matthew Bender, 14th Ed.) (no member or partner in an LLC may be liable beyond the amount of their contribution). N.Y. Ltd. Liab. Co. Law § 609(a) expressly provides that members and managers of an LLC are exempt from personal liability:

> Neither a member of a limited liability company, a manager of a limited liability company . . . is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager . . . .

N.Y. L.L.C. § 609(a). See Lewis v. Proctor & Gamble Inc., 18 Misc. 3d 1110A, 856 N.Y.S.2d 24 (Sup. Ct. N.Y. Co. 2007); see also Collins v. E-Magine, LLC, 291 A.D.2d 350, 739 N.Y.S.2d 15 (1st Dep't 2002) (affirming grant of summary judgment dismissing plaintiff's breach of contract claim against individual members of a limited liability company); White, New York Business Entities, ¶ L690.01 (Matthew Bender 14th Ed.) (LLC law's grant of limited liability to members and managers "essentially equals the statutory protection available to shareholders of a corporation").

Sullivan testified, without any supporting evidence, that the alleged oral agreement was between "me, the LLCs, and Bill Harnisch" (Exh. 6 at 59, Exhibit 1, ¶¶ 91-102), but he

conceded that Harnisch never stated that he would be personally liable to pay Sullivan the 33 1/3% profit sharing interest. (Exh. 6 at 265-266). The Peconic Companies are limited liability companies, and Harnisch acted at all times as the Chief Executive Officer of these companies in his interactions with Sullivan. As such, Harnisch cannot be held individually liable. See Panasuk v. Viola Park Realty, 41 A.D.3d 804, 839 N.Y.S.2d 520 (2d Dep't 2007) (reversing lower court and granting summary judgment to member of LLC on breach of contract claim because plaintiff failed to raise a triable issue of fact that the member purported to bind himself individually on the contract). Sullivan's cause of action for breach of contract as against Harnisch should be dismissed.

POINT II

SULLIVAN'S SECOND CAUSE OF ACTION FOR RETALIATORY DISCHARGE SHOULD BE DISMISSED

A. There Is No Basis for a Claim of Retaliatory Discharge Because There Is No Evidence of Front-Running[11]

The Court in its earlier opinion with respect to defendants' motion for summary judgment upheld a claim for retaliatory discharge, held that:

> [Defendants'] argument is replete with factual issues that are not appropriately resolved in this motion before discovery has taken place and is irrelevant to the legal issue whether Sullivan maintains a legal basis for the retaliatory discharge claims.

(Exhibit 3 at 6). Discovery is now complete and Sullivan has not come forth with any evidence that Harnisch engaged in front running. Further, as demonstrated below, Sullivan cannot as a

[11] Defendants respectfully disagree with the Court's holding that plaintiff's second cause of action for wrongful termination is actionable and, on March 22, 2010, defendants appealed the Order to the Appellate Division, First Department. Hearing of the appeal is scheduled for June 3, 2010. This Court indicated in its Order at page 6, footnote 2, that the issue of whether Harnisch engaged in front-running was "irrelevant to the legal issue of whether Sullivan maintains a legal basis for his retaliatory discharge claims." Now that discovery has been completed, Sullivan still has presented no evidence that Harnisch engaged in front-running, and defendants' respectfully submit that this failure, post-discovery is fatal to his claims.

matter of law establish a claim for retaliatory discharge on the basis that he had reasonable grounds to raise the issue of Harnisch's supposed front-running.

Sullivan admits that Harnisch had no advance knowledge of the content of the Mosaic announcement of Mosaic's post-closing announcement on October 1, 2008 and Sullivan made no effort to inquire of Mosaic or Potash parties to establish his claim. Harnisch sold Potash not Mosaic. No case, regulatory proceeding or release recognizes "cross-fronting" as a violation. The Court noted in its opinion on defendants' earlier motion for summary judgment that Sullivan's claim of front-running was brought to the attention of the SEC by his counsel (Exh. 3 at 10). Harnisch was interviewed twice (Exh. 17 at 222) by the SEC and to date no action has been taken with respect to Sullivan's charges (Exh. 17 at 223).

B. Even If Sullivan Were Covered by the Whistle Blower Law, He Would Have No Claim Based Upon His Purported Reasonable Concern

New York's whistleblower statute, N.Y. Lab. Law § 740, requires an employee to demonstrate actual proof of a violation of a law -- a good faith, reasonable belief of a violation is insufficient. Bordell v. General Electric Co., 88 N.Y.2d 869, 644 N.Y.S.2d 912 (1996). In Bordell, the plaintiff alleged that he was discharged in violation of Labor Law § 740 for reporting to his superiors, and then to the U.S. Department of Energy, that several employees may have been exposed to radiation levels sufficient to trigger federal mandatory reporting requirements. The Court of Appeals expressly held that the language and legislative history of Labor Law § 740 "requires actual proof of a violation" and affirmed the lower courts' grant of summary judgment dismissing plaintiff's claim because while "there were allegations that plaintiff had a reasonable belief of a possible violation," there was "no proof of an actual violation." 88 N.Y.2d at 869. The Third Department's decision in Bordell had noted that prior to Labor Law § 740's enactment in 1984, "three successive efforts to enact a whistleblowers'

statute embodying a reasonable belief standard had failed." Bordell v. General Electric Co., 208 A.D.2d 219, 221, 622 N.Y.S.2d 1001, 1002 (3d Dep't 1995). Bordell has been consistently followed. See Berde v. North Shore-Long Is. Jewish Health Sys., Inc., 2008 N.Y. Slip Op. 3409 (2d Dep't 2008); Nadkarni v. North Shore-Long Is. Jewish Health Sys., Inc., 21 A.D.3d 354, 799 N.Y.S.2d 574 (2d Dep't 2005); Khan v. State Univ. of New York Health Science Center, 288 A.D.2d 350, 734 N.Y.S.2d 92 (2d Dep't 2001).

Sullivan, who admittedly has no rights under Labor Law § 740, cannot claim to have a greater right than those that the Legislature specifically afforded covered employees. Since discovery establishes that Sullivan did not, and cannot, show an actual violation of front-running, infra, he has no claim based upon his purported outcry.

C. Discovery Has Not Established Evidence of Front-Running

Sullivan and his supposed expert, Robert Conner, have admitted they have no evidence that Harnisch had advance knowledge of the contents of the Mosaic announcement (Exh. 6 at 484; Exh. 21 at 45). Tellingly, no effort was made by Sullivan to inquire of Mosaic or Potash personnel. (Exh. 6 at 486-487).

Front-running is a practice by which a person at a company, such as a broker or investment advisor, takes advantage of company information by using knowledge of that information (what securities the company will buy or sell) to trade for his own personal account.[12] Front-running is a fraudulent and manipulative practice. It violates the Investment Advisers Act and/or the Securities Exchange Act. The SEC has described front-running to Congress as follows:

[12] A more extensive discussion concerning front-running can be found at pp. 10 to 14 of defendants' pre-discovery memorandum of law in support of a motion for summary judgment the complaint, dated June 15, 2009, to which defendants respectfully refer the Court. (See Exh. 23).

> Front-running may be generally defined as involving trading a stock, option, or future while in possession of non-public information regarding an imminent block transaction that is likely to affect the price of the stock, option, or future.

3 Bromberg & Lowenfels on Securities Fraud and Commodities Fraud, § 6:77 (Nov. 2008). The SEC has noted that "an access person may take unfair advantage of an investment company once a particular security has become a probable target of purchase or sale by the investment company." Investment Company Act of 1940, SEC Release No. 11421, p. 2 (Oct. 31, 1980). An essential element of front-running by a person at an investment company is trading a security for a personal account with knowledge concerning an upcoming similar trade by the company that could have an effect upon the price of the security. Front-running is a claim arising under the federal securities laws. Conner admits he is not an expert on the federal securities law (Exhs. 21 at 29), nor is he an attorney (Exh. 21 at 30-32).

D. As a Matter of Law, There Can be No Claim of Cross Front-Running or Inadvertent Front-Running

The sale complained of by Harnisch was in Potash on September 29, 2008 and September 30, 2008. Mosaic had an earnings announcement on October 1, 2008 after the stock market had closed. No case or regulatory ruling or release recognizes cross front-running as a violation. Mr. Conner so admits (Exh. 21 at 107, 109-110). A violation of the federal securities such as front-running requires intent or recklessness, not inadvertence. See, e.g., Opper v. Hancock, 250 F. Supp. 668 (S.D.N.Y. 1966). See also United States of America v. Mahuffy, 2006 U.S. Dist. Lexis 53577, *47-48 (E.D.N.Y. August 2, 2006). Nor does close proximity between trades constitute front-running. See Deutsche Bank v. Bd. of Invs., 7 N.Y. 65 (2006). Here, the delay between Harnisch's last trade of September 30, 2008 and the clients' trade of October 2, 2008 was almost two full trading days. In defendants' reply brief in support of their earlier motion, we noted that the contention that the trade of October 2, 2008 in the clients' account made the

Harnisch trades on September 29, 2008 and September 30, 2008 front-running was "Monday morning quarterbacking." (Exh. 23 at 10 et. seq.). The correctness of defendants' argument was confirmed by Mr. Conner who testified that but for the trades of October 2, 2008 there would be no front-running (Exh. 21 at 43, 44, 95, 96). The Harnisch trades of September 29, 2008 and September 30, 2008 only could have become front-running after the sale of October 2, 2008, following the adverse news of October 1, 2008.

Significantly, Sullivan does not refute the reasons Harnisch sold on September 29, 2008 and September 30, 2008 established by documentary evidence to his affidavit. (See Exh. 24 at ¶¶ 24-37). Harnisch had reasons for selling Potash stock for his Personal Accounts on September 29 and 30, 2008 that were not applicable to the Potash stock held in Client Accounts. His personal accounts were (i) unhedged, (ii) over-concentrated in Potash stock, (iii) on margin, and (iv) Harnisch had accounts at Morgan Stanley when the market was contemplating the same fate for it as Lehman Brothers, which had previously failed, resulting in investors not having access to their positions that were margined. (Exh. 22 at 338-347; Exh. 24 at ¶¶ 24-36). To the contrary, the clients were not overcompensated, were not on margin, were correctly hedged, and were in the process of having their accounts removed from Morgan Stanley. (Ex. 22 at 341-342; 346-347; Exh. 24 at ¶¶ 29-34).

POINT III

SULLIVAN'S THIRD CAUSE OF ACTION AGAINST HARNISCH FOR TORTIOUS INTERFERENCE SHOULD BE DISMISSED

A. Sullivan's Claim of Tortious Interference with his Relations with Peconic and Peconic Managers Should be Dismissed

A claim for tortious interference with business relations requires that a defendant has knowledge of, and intentionally procures the termination of, a valid contract or business

relationship between the plaintiff and a third party, without justification, resulting in an actual breach of the relationship and damages. Mattel, Inc. v. Robarb's, Inc., 2001 U.S. Dist. LEXIS 11742, 25-26 (S.D.N.Y. Aug. 8, 2001) (emphasis added) (citing Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 424, 646 N.Y.S.2d 76, 81 (1996)).[13] "It is well established that only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract." Koret, Inc. v. Christian Dior, S.A., 161 A.D.2d 156, 157, 554 N.Y.S.2d 867, 869 (1st Dep't 1990); Buller v. Giorno, 28 A.D.3d 258, 813 N.Y.S.2d 394 (1st Dep't 2006) (dismissing tortious interference claim against defendant since he was a party to the allegedly interfered-with agreement). Accord Longmire v. Wyser-Pratte, 2007 U.S. Dist. LEXIS 65844, *54-57 (S.D.N.Y. Sept. 6, 2007) ("[U]nder New York law, a party cannot be held liable in interfering with [his] own contract."). McNaughton v. City of New York, 234 A.D.2d 83, 650 N.Y.S.2d 688 (1st Dep't 1996) (no liability since the parties were not strangers to the contract).

Harnisch is the President and Chief Executive Officer of the Peconic Companies and, like the CEO in Longmire, had the sole authority to terminate Sullivan's at-will employment. Moreover, pursuant to the Operating Agreement, Harnisch, as the Manager of the Peconic Companies, and the only other member besides Sullivan, had the sole authority to exercise his rights under the Operating Agreement to expel Sullivan as a member of the Peconic Companies. Harnisch, therefore, was not a "stranger" to Sullivan's employment with the Peconic Companies,

[13] "[A]n at-will employee may maintain a tortious interference claim only if he can establish that a 'third party used wrongful means to effect the termination such as fraud, misrepresentation, or threats, that the means used violated a duty owed by the defendant to the plaintiff, or that the defendant acted with malice.'" Longmire v. Wyser-Pratte, 2007 U.S. Dist. LEXIS 65844 (S.D.N.Y. Sept. 6, 2007) (citation omitted) (emphasis added). See also McHenry v Lawrence, 2009 NY Slip Op 7234, 66 A.D.3d 650, 886 N.Y.S.2d 492 (2d Dep't 2009). As set forth herein, Sullivan has failed to prove any wrongful acts by Harnisch, that Harnsich violated any purported duty to Sullivan, or that Harnisch engaged in any acts with malice. Thus, even if Harnisch could be considered a "third party," Sullivan has failed to demonstrate that his termination from employment or expulsion as a member from the Peconic Companies were a result of any "wrongful means."

or to Sullivan's membership in the Peconic Companies, and thus no cause of action for tortious interference can be maintained against him.

Sullivan's claims of tortious interference with business relations in his third cause of action should be dismissed.

B. Sullivan's Claim of Tortious Interference with Prospective Business Relations With Prime Brokers and Investors Should be Dismissed

To prove tortious interference with prospective advantageous business relations, a plaintiff must demonstrate that "through the intentional and wrongful acts of defendant, identified third parties were prevented from entering into a business relationship with plaintiff." Lio v. Zhong, 2006 N.Y. Slip. Op. 50016U (Sup. Ct. N.Y. Co. 2006) (citation omitted).[14]

Since Sullivan failed to identify specific employment or business relationships he was prevented from entering into allegedly by reason of a defendants' purported wrongful acts, this claim must be dismissed. American Preferred Prescription, Inc. v. Health Mgmt. Inc., 252 A.D.2d 414, 416, 678 N.Y.S.2d 1, 4 (1st Dep't 1998) (granting summary judgment where plaintiff failed to show "any specific business relationships that it was prevented from entering into by the purported tortious interference" and could not prove "but for" causation required); Baker v. Guardian Life Ins. Co. of America, 12 A.D.3d 285, 785 N.Y.S.2d 437 (1st Dep't 2004); Schulman v. Continental Ins., 258 A.D.2d 639, 685 N.Y.S.2d 639 (2d Dep't 1999).

Sullivan testified that "people" would ask him about his termination and the pending lawsuits, and he admitted that no one from whom he was seeking employment ever mentioned that they had spoken to Bill Harnisch concerning Sullivan's termination or the lawsuit

[14] The "wrongful acts" necessary to establish a viable claim include "physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is required." DiCosomo v. Getzoff, 2005 N.Y. Slip. Op. 522794U, *2, 816 N.Y.S.2d 695 (Sup. Ct. Westchester Co. 2005) (citations omitted). Absent a showing of "wrongful acts," a plaintiff must prove malice, i.e., that the defendant "acted for the sole purpose of harming the plaintiff." Id. (citations omitted) (emphasis added).

commenced by the Peconic Companies. (Exh. 6 at 556-557). Sullivan also admitted that "most people would do a Google search and/or the Bloomberg articles would pop up or they would find out themselves that there is litigation . . . ." Sullivan was referring to the article which appeared in Bloomberg.com on November 11, 2008, and he specifically stated that the "Bloomberg reference . . . kept coming up a lot." (Exh. 6 at 558-559). It is undisputed, however, that it was Sullivan, through the actions of his attorneys, who used a press release to notify the media about the litigation commenced by Sullivan, and it is Sullivan's attorneys who made statements which were contained in the Bloomberg and Post article. (Exh. 26). Significantly, Sullivan was unable to name any employment opportunity he sought in which he was informed that they had spoken with Harnisch about Sullivan. (Exh. 6 at 562-563). The only "possible" employer Sullivan is aware of with whom Harnisch spoke was Patrick O'Neill at Credit Agricole. Sullivan admitted that he did not directly ask O'Neill for a job but only for a reference, which Sullivan admitted that O'Neill agreed to give him. (Exh. 6 at 573-574).

C. Harnisch Is Not Personally Liable for the Alleged Tortious Interference

N.Y. L.L.C. § 609(a) expressly provides that members and managers of a limited liability company are not liable for alleged injuries arising in tort solely by their status as members or managers of the limited liability company. N.Y. L.L.C. 609(a). As set forth, in Point B, supra, there is no basis for a tortious interference claim. Therefore, there are no grounds to impose personal liability on Harnisch.

POINT IV

SULLIVAN'S FOURTH CAUSE OF ACTION FOR FRAUD SHOULD BE DISMISSED

A. Sullivan's Fraud Claim Should be Dismissed as Duplicative of His Breach of Express Contract Cause of Action

"A breach of contract does not give rise to a cause of action for fraud." Strasser v. Prudential Sec., 218 A.D.2d 526, 527, 630 N.Y.S.2d 80, 81 (1st Dep't 1995). Because plaintiff's claims of fraud are based on the same facts as his claims of breach of contract, the fraud claims must be dismissed.

Moreover, "[t]he mere addition of allegations that the contracting parties did not intend to meet their contractual obligations does not serve to convert a cause of action for breach of contract into one for fraud." Modell's N.Y. v. Noodle Kidoodle, 242 A.D.2d 248, 249, 662 N.Y.S.2d 24, 26 (1st Dep't 1997); Brennan v. J.P. Morgan Securities, 7 Misc. 3d 1013(A), 801 N.Y.S.2d 230 (Sup. Ct. N.Y.Co. Aug. 31, 2004). Sullivan claims that he is entitled to 33 1/3% as set forth in his first claim for breach of contract. His fraud claim is nothing but a recycled contract claim. See Page v. Muze, 270 A.D.2d 401, 705 N.Y.S.2d 383 (2d Dept. 2000); Selinger v. GF Health Prods., 2009 N.Y. Slip Op. 50726U, 5 (N.Y. Sup. Ct. 2009).

B. Sullivan's Fraud Claim Should be Dismissed Since He Has Not Shown Reliance or Injury

Under New York law, "[i]n an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 80 (1996) (citations omitted) (affirming dismissal of fraud claim). To establish this claim, Sullivan relies upon the

proposed Amended Operating Agreement. (Exh. 1 at ¶ 128). Since Sullivan did not sign the Amended Operating Agreement he could not have relied upon any alleged misrepresentation and suffered no injury. (Exh. 6 at 100-101, 200-201; Exh. 1 at ¶¶ 30, 33). The Vermeer Owners, Inc. v. Gerard Guterman, 78 N.Y.2d 1114, 578 N.Y.S.2d 128 (1991); Tobias v. Tobias, 192 A.D.2d 438, 596 N.Y.S.2d 797 (1st Dep't 1993). Further, no fraud claim is established by referring to the supposed false statement that Sullivan was terminated for valid business reasons. (Exh. 1 at ¶ 129). The element of reliance is absent since Sullivan could not rely to his detriment on the supposed false statement.

Insofar as the Court in its earlier opinion that the fraud involves Sullivan's alleged ownership interest (see Exh. 3, at 6), such a claim is a restatement of Sullivan's fiduciary duty claim which does not lie. See Point VIII, Infra.

POINT V

SULLIVAN'S FIFTH CAUSE OF ACTION FOR CONSPIRACY TO COMMIT FRAUD SHOULD BE DISMISSED

A "cause of action to recover damages for conspiracy to commit fraud must be dismissed since 'a mere conspiracy to commit fraud is never of itself a cause of action.'" Crispino v. Greenpoint Mortgage Corp., 2 A.D.3d 478, 480, 769 N.Y.S.2d 553, 556 (2d Dep't 2003) (granting motion for summary judgment dismissing claim). A cause of action for conspiracy to commit a tort cannot survive without a viable underlying tort, and therefore, a cause of action for conspiracy to commit fraud will be dismissed where the underlying cause of action for fraud has been dismissed. See, e.g., Waggoner v. Caruso, 20 Misc. 3d 1146, 873 N.Y.S.2d 238 (Sup. Ct. N.Y. Co. 2008) (citations omitted) (dismissing conspiracy to commit fraud claim).

Sullivan's conspiracy to commit fraud cause of action should be dismissed.

POINT VI

SULLIVAN'S SIXTH CAUSE OF ACTION FOR DEFAMATION PER SE SHOULD BE DISMISSED BECAUSE THE QUALIFIED PRIVILEGE APPLIES TO THE ALLEGED STATEMENTS

Sullivan's cause of action for defamation per se is based on statements Harnisch purportedly made during an October 10, 2008 meeting, at which Sullivan was not present (Exh. 6 at 402), informing certain Peconic employees that Sullivan and Otmar were terminated.[15]

A. Alleged Statements Concerning Harnisch's Opinion of Sullivan's Performance Are Not Actionable

A statement that a plaintiff has been terminated or discharged is not defamatory. See, e.g., Serratore v. American Port Services, Inc., 293 A.D.2d 464 (2d Dep't 2002); Chang v. Fa-Yun, 265 A.D.2d 265, 697 N.Y.S.2d 31 (1st Dep't 1999). Moreover, "a subjective characterization of the plaintiff's behavior and an evaluation of her job performance . . . constitute[s] a nonactionable expression of opinion.'" Joyce v. Thompson Wigdor & Gilly LLP, 2008 U.S. Dist. LEXIS 43210, 21-22 (S.D.N.Y. June 3, 2008) (citation omitted); Burns v. Palazola, 22 A.D.3d 779, 803 N.Y.S.2d 169 (2d Dep't 2005); See also Piro v. Senior Action in a Gay Envt., Inc., 2006 NY Slip Op 51706U, 2 (Sup. Ct. N.Y. Co. 2006) (statements that plaintiff was terminated because he "ripped someone off'" and for "creating a breach of trust" were nonactionable opinion); Williams v. Varig Brazilian Airlines, 169 A.D.2d 434, 435, 564 N.Y.S.2d 328, 329 (1st Dep't 1991) (statements that employee was "incapable," an "animal," and a "bad influence" on her coworkers were nonactionable).

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[15] Sullivan's defamation cause of action relates to the termination of his employment. Sullivan's cause of action for defamation should be dismissed as an improper attempt to "circumvent the employment-at-will rule by asserting [a] cause[] of action for defamation." Brattis v. Rainbow Advertising Holdings, L.L.C., 2000 U.S. Dist. LEXIS 7345 (S.D.N.Y. May 30, 2000) (citations omitted).

The purported statements Harnisch allegedly made to Peconic employees, i.e., that Sullivan's termination was "performance related," that Sullivan made "misrepresentations to clients," that Sullivan was not performing his duties because he was not marketing or overseeing the department, that he was "dishonest," caused "bad morale, and that he "took some money that he was not authorized to do so," (Exh. 27 at 120-124; Exh. 28 at 198-200), can reasonably be understood to be nonactionable opinion. As a result, Sullivan's claim for defamation should be dismissed.[16]

B. A Qualified Privilege Applies to the Alleged Defamatory Statements

Under New York law, "communications by supervisors or co-workers made in connection with the evaluation of an employee's performance, including allegations of employee misconduct and communications regarding the reasons for an employee's discharge are qualifiedly privileged." Tomasino v. Mount Sinai Med. Ctr. & Hosp., 2003 U.S. Dist. LEXIS 3766, at *46-47 (S.D.N.Y. Mar. 13, 2003) (staff meeting statement that plaintiff was "terminated for cause" and that plaintiff's nursing license was suspended was protected by the qualified privilege). See also Burns v. Palazola, 22 A.D.3d 779, 803 N.Y.S.2d 169 (2d Dep't 2005); Carone v. Venator Group, Inc., 11 A.D.3d 399, 783 N.Y.S.2d 565 (1st Dep't 2004).

[16] In addition, defamation per se, as applicable here, is limited to statements that allege the commission of a serious crime or tend to injure the reputation of a plaintiff in his trade, occupation, or profession. Liberman v. Gelstein, 80 N.Y.2d 429, 590 N.Y.S.2d 857 (1992). Sullivan provided no proof to support his allegation that Harnisch accused Sullivan of criminal conduct (Exh. 1 at ¶ 138). Burdick v. Verizon Communications, Inc., 305 A.D.2d 1030, 758 N.Y.S.2d 877, 878 (4th Dep't 2003) (statements that plaintiff "took a swing" or "hit" a woman did not constitute defamation per se because it did not specify all the necessary elements of an assault charge and holding that statements "are not slanderous per se unless they specify a crime or a crime is readily apparent from properly pleaded innuendo."). A plaintiff seeking to recover on a cause of action asserting defamation per se inasmuch as a defendant's statements have hurt his trade, business or profession, must prove that the defamation "is of the kind incompatible with his business, trade, office, or profession." Liberman v. Gelstein, 80 N.Y.2d at 436. The alleged statements "must be made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiff's character or qualities." Id. The statements allegedly made by Harnisch do not raise the level of defamation per se.

The alleged statements made by Harnisch at the meeting on October 10, 2008 fall squarely within this privilege. The termination of Sullivan, the Chief Operating Officer to whom the employees reported, as well as the termination of Dan Otmar, constitute matters of common interest to Harnisch and the Peconic employees in attendance at the meeting. The statements were limited to the reasons for the terminations of Sullivan and Otmar. The qualified privilege attaches to the communications and is a complete defense to the defamation cause of action. The sixth cause of action for defamation per se, therefore, should be dismissed.

POINT VII

SULLIVAN'S SEVENTH CAUSE OF ACTION FOR INJURIOUS FALSEHOOD SHOULD BE DISMISSED

Sullivan's seventh cause of action for injurious falsehood is based on the same allegations as his claim for defamation per se and should be dismissed as duplicative. (Exh. 1, ¶¶ 144-147). See Stern v. Burkle, 2008 N.Y. Slip Op. 51183U (Sup. Ct. N.Y. Co. 2008). In addition, Sullivan's failure to demonstrate "any legally protected property interest" and "special damages with particularity" requires dismissal of his seventh cause of action for injurious falsehood. See supra, p. 21, 22. Jonas v. Faith Properties, Inc., 221 A.D.2d 959, 962, 634 N.Y.S.2d 323, 326 (4th Dep't 1995); 103 N.Y. Jur. 2d Torts § 19.

Moreover, "[t]he general allegation that numerous prospective employers refused to employ plaintiff by reason of the intentional misstatements of defendants is inadequate as a pleading of special damages in a claim for injurious falsehood," as are general allegations as to damage to reputation. L.W.C. Agency, Inc. v. St. Paul Fire & Marine Ins. Co., 125 A.D.2d 371, 373, 509 N.Y.S.2d 97, 100 (2d Dep't 1986); DiCosomo v. Getzoff, 2005 N.Y. Slip Op. 52279U, 4-5 (Sup. Ct. N.Y. Co. 2005); Pitcock v. Kosowitz, Benson, Torres & Friedman, 2009 N.Y. Slip

Op. 32262(U) (Sup. Ct. N.Y. Co. 2009) (dismissing cause of action by expelled partner for injurious falsehood where plaintiff's allegations of "lost income" was insufficient where "special damages by itemizing specific business lost" was required). See Point III, supra. As noted, Sullivan has not testified to any facts establishing special damages.

POINT VIII

SULLIVAN'S CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY SHOULD BE DISMISSED BECAUSE SULLIVAN COULD BE EXPELLED WITHOUT CAUSE

A. Harnisch's Compliance With the Operating Agreement's Expulsion Provision Precludes a Claim for Breach of Fiduciary Duty Against Harnisch

Sullivan's claim against Harnisch for breach of fiduciary should be dismissed as a matter of law based upon the Court of Appeals decision in Gallagher v. Lambert, 74 N.Y.2d 562, 549 N.Y.S.2d 945 (1989). There, a minority shareholder in a corporation alleged that he was expelled because the majority sought in bad faith to deprive him of the fair value of his minority stock interest to their own aggrandizement. Gallagher, 74 N.Y.2d at 566, 571. The Court rejected the claim and held that the buy-back provision in a shareholders agreement fulfilled the majority's fiduciary duty to plaintiff. Id. at 567.

Section 17(i) of the Operating Agreement provides that (i) a member may be required to withdraw as a member of the Peconic Companies "with or without cause" upon the written vote of the members whose ownership percentage equals or exceed 66 2/3% and (ii) the Peconic Companies will pay a withdrawing member his capital account balance. (emphasis added). (See Exhs. 4 and 5, at p.20). As set forth in Point I, Sullivan is bound by the Operating Agreement, including Section 17(i)'s expulsion provision, which defines his rights to membership in the Peconic Companies. Inasmuch as Harnisch, whose ownership exceeds 66 2/3%, exercised his

"unfettered discretion" to expel Sullivan from the Peconic Companies in accordance with the Operating Agreement, there can be no claim by Sullivan that Harnisch breached a fiduciary duty to him.

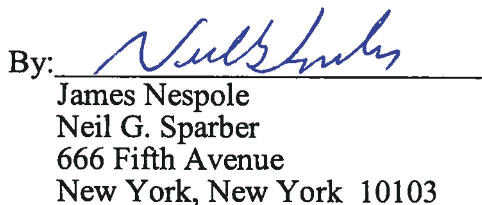
In dissent, Judge Kaye contended that a fiduciary obligation was owed to a minority shareholder by controlling shareholders to refrain from purely self-aggrandizing conduct (Id. at 571). The majority rejected this contention. The same result should prevail here. Accordingly, Sullivan's eighth cause of action for breach of fiduciary duty should be dismissed.

CONCLUSION

For all the foregoing reasons, the motion for summary judgment should be granted and the Court should dismiss the First Amended Verified Complaint.

Dated: New York, New York
May 14, 2010

FULBRIGHT & JAWORSKI L.L.P.
Attorneys for Defendants

By: 

James Nespole
Neil G. Sparber
666 Fifth Avenue
New York, New York 10103