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,
PECONIC ASSET MANAGERS LLC,

Defendants.

Index No. 08/115092

Hon. Richard B. Lowe III

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFF SULLIVAN'S MOTION FOR SUMMARY JUDGMENT

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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 in opposition to the Motion for Summary Judgment of Plaintiff Joseph W. Sullivan ("Sullivan").

Preliminary Statement

Sullivan's Motion for Summary Judgment is based on the claim that he had a retroactive oral contract with the Peconic Companies whereby he would be entitled to 33 1/3% of the Peconic Companies' profits for the year 2006 and onward. Sullivan fails to show that there is no material issue of fact and, indeed, summary judgment should be granted against him.

Statement of Facts

The Peconic Companies

William Harnisch has been in the investment management business since 1968 and is the Founder, President and Chief Executive Officer of Peconic Partners LLC and Peconic Asset Managers LLC (the "Peconic Companies"), formerly known as FLA Advisers L.L.C. and FLA Asset Managers L.L.C., which are both limited liability companies. (Exhibit 6 at 54-55; Exhibits 4 and 5; Exhibit 1 at ¶¶ 5, 7; Exhibit 29) (print-outs from N.Y. Secretary of State website showing name changes).[1] Sullivan was a member of the Peconic Companies, holding a 15% interest in 25% of the net profits, and employed in various positions including Chief Operating Officer and Chief Compliance Officer. (Exhibit 1 at 1, 5, 14, et seq.; Exhibit 6 at 59-60, 73, 85, 90-91, 442, 456.) Sullivan's status as a member of the Peconic Companies is confirmed by his testimony, as well as Schedules K-1 he received, Forms ADV filed by the Peconic Companies, and from representations he made to clients and prospective clients. (Exhibit 6 at 59-60, 73, 85,

1 Unless otherwise noted, Exhibit Numbers 1-28 refer to defendants' exhibits attached to the affidavit of Neil Sparber, sworn to May 14, 2010, submitted to the Court by defendants in support of their motion for summary judgment dated May 14, 2010, and incorporated by reference in the Affidavit of Neil G. Sparber, sworn to June 15, 2010, and exhibits 29-35 refer to exhibits attached to the affidavit of Neil Sparber sworn to June 14, 2010 and submitted herewith.

90-91, 442, 456; Exhibit 7; Exhibit 8; and Exhibit 9). Defendants do not presently contest, or have ever contested, that this was Sullivan's interest as a member.

William Harnisch is the sole manager of the Peconic Companies, and his capital contribution to the Peconic Companies was at least $8,000,000. (Exhibit 32 at 242). In addition, among other things, Harnisch personally guarantied the long term lease of the Peconic Companies at 350 Park Avenue. Sullivan ultimately contributed capital of $7,500 each to Peconic Asset Managers and to Peconic Partners, for a total of $15,000. (Exhibit 31 at 126-127, 659).

The Operating Agreement

As a member of the Peconic Companies, Sullivan's membership interest, and corresponding rights to distributions and profits, if any, were governed by the Operating Agreements of the Peconic Companies (collectively the "Operating Agreement") (Exhibits 4 and 5). An explicit provision of the Operating Agreement was that Sullivan's membership could be terminated for cause or no cause. (Exhibits 4 and 5, at 20-21.)

Sullivan was aware of the Operating Agreement, including its application to the Peconic Companies and to himself, and was provided with copies of them. (Exhibit 6 at 75-76, 85-86.) Sullivan's duties as Chief Operating Officer and Chief Compliance Officer by necessity required his familiarity with these documents. Sullivan testified that the Operating Agreement was the "legal document" of the entities and that it addressed "profits-and-loss allocations." (Exhibit 6 at 76-77.) Sullivan was aware of prior operating agreements of the Peconic Companies. (Exhibit 6 at 441, 610-613.) Sullivan consulted the Operating Agreement "[a]s needed" in connection with "profit sharing percentages." (Exhibit 6 at 441.) Sullivan represented to third parties that the Operating Agreement was Peconic's governing document. (Exhibit 6 at 583-589; Exhibit 10.) Sullivan consistently executed documents related to the Operating Agreement as a member,

including a "Written Consent of the Members of FLA Advisers L.L.C. in Lieu of Meeting" and a "Written Consent of the Members of FLA Asset Managers L.L.C. in Lieu of Meeting," each dated September 1, 2001. (Exhibit 6 at 433-434, 443; Exhibits 11 and 12.) On or about August 4, 2006, Sullivan executed an "Amendment to the Amended and Restated Operating Agreement of Peconic Asset Managers" as a member of Peconic Asset Managers. (Exhibit 6 at 643-644; Exhibit 13).

The Ownership and Percentage and Sharing Ratio

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. (Exhibits 4 and 5, at 3.) 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% of the profits and losses are allocated to members based on such member's Sharing Ratio. (Exhibits 4 and 5, at 3, 6-7.) The Operating Agreement provides the Manager, Harnisch, with the sole discretion to determine the Sharing Ratio of a member, and such member's share of the 75% bonus/incentive pool. (Exhibits 4 and 5, at 3, 6-7.)

The 75% bonus/incentive pool is the source of bonus and incentive compensation paid by the Peconic Companies. (Exhibits 4 and 5, at 6-7.) Every year in which the Peconic Companies earned profits, Harnisch allocated profits in accordance with the Operating Agreement. (Exhibit 22 at 418-420). Harnisch awarded the discretionary allocations from the bonus/incentive pool based upon productivity, especially with respect to business generation. (Exhibits 14 and 15; Exhibit 22 at 418-20). Sullivan admits that in 2005 Harnisch had discretion in awarding profits from the incentive pool. (Exhibit 6 at 259-261).

Sullivan's Supposed Oral Agreement

Sullivan alleges that in April 2007 Harnisch purportedly orally agreed that Sullivan would become entitled to receive 33⅓% of the profits of the Peconic Companies for 2006 and all subsequent years. This conversation never occurred. (Exhibit 6 at 154-158; 198-199; Exhibit 1, ¶ 16; Exhibit 2 at 11.) Sullivan, for his part, could not even remember where the alleged conversation with Harnisch took place or the date of its occurrence. (Exhibit 6 at 157).

When asked why Harnisch would allegedly voluntarily give up his discretion to award bonuses and obligate the Peconic Companies to pay Sullivan 33 1/3% of the net profits of the Peconic Companies for 2006 and subsequent years, Sullivan testified "He was very pleased with my work, wanted me as a key partner." (Exhibit 6 at 160). There is no written memorialization of the terms of this putative agreement and Sullivan never asked that this supposed oral agreement be formally evidenced by some form of a writing. (Exhibit 6 at 161).

There was no oral amendment to the Operating Agreement that removed the absolute discretion of Harnisch, as sole Manager of the Peconic Companies, to award bonuses from the incentive pool as he determined was appropriate. (Exhibit 6, at 259-261.) 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." (Exhibits 4 and 5, at 23-24.) Thus, in accordance with its terms, a modification of the Operating Agreement to be effective and binding must be in writing. (Exhibits 4 and 5, at 25.)[2] There is no such writing. It is clear this supposed oral agreement would be a modification of the Operating

[2] Section 417(b) of the Limited Liability Company Law and Section 15-301 of the General Obligation Law also requires a writing. See Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, at pp. 2-13.

Agreement since it would remove the discretion of Harnisch, as sole Manager, to award bonuses and be adverse to his economic interests. (Exhibit 6 at 259-263.)

Sullivan's Conduct Refutes The Existence Of His Supposed Oral Agreement.

Sullivan admits that on September 16, 2008 Richard Bourgeois ("Bourgeois"), a member of Fulbright & Jaworski L.L.P., sent a draft of a proposed Amended and Restated Operating Agreement to Sullivan and asked Sullivan to review it. (Exhibit 17 at 144-146; Exhibit 16.) Bourgeois also advised Sullivan that he should retain counsel in connection with his review of the draft amended Operating Agreement. (Exhibit 17 at 144-146; Exhibit 16.) The draft amended Operating Agreement did not alter the discretion possessed by Harnisch, as Manager, to distribute the 75% bonus/incentive pool as he saw fit, and it did not state that Sullivan was entitled to 33⅓% of the Peconic Companies' profits, or net profits. (Exhibit 16 at Section 10). On its face it states that Sullivan retained his 15% ownership interest. This was confirmed in an e-mail from Harnisch to Sullivan, dated September 25, 2008, which specifically noted that Sullivan's 15% interest was not changed. (Exhibit 30).

On September 23, 2008, Sullivan called Bourgeois to discuss the draft amended Operating Agreement. (Exhibit 17 at 162-173.) In this September 23, 2008 telephone call with Bourgeois, Sullivan's concerns with the draft amended Operating Agreement regarded succession issues and the effect that the provisions would have upon the Peconic Companies' marketing efforts, the timing of payments with respect to Sullivan's payment of taxes, and compensation for bringing in new business. (Exhibit 17 at 162-173; Exhibits 16, 19 and 20). At no point during the telephone call did Sullivan complain that the draft did not reflect his new 33 1/3% interest or state that Harnisch had agreed to surrender his discretion as Manager to determine Sullivan's bonuses. (Exhibit 17, at 162-182; Exhibit 20). The conversation is memorialized in a contemporaneous memorandum prepared by Bourgeois. (Exhibit 20). As of

September 23, 2008, Sullivan had been paid his 15% ownership share of the 25% Ownership pool for 2007 ($1,500,000), and was aware that the Peconic Companies' profits for 2007 were in excess of $40 million. (Exhibit 31 at 170-171, 173, 287).

On September 18, 2008, Sullivan communicated with counsel regarding his concerns with the proposed draft amended Operating Agreement. (Exhibit 19). The specific concerns stated by Sullivan in his communication with counsel after his review of the draft amended Operating Agreement 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 in the event of his termination or his death. (Exhibit 19). Sullivan's email to his counsel failed to mention any issue relating to his supposed guarantee to 33 1/3% of the Peconic Companies' profits, or his supposed entitlement to one dollar for every two dollars, or anything else about a change in the profit sharing provisions of the existing Operating Agreement. (Exhibit 19).

Not only do Sullivan's actions in 2008 betray his belief that an oral agreement existed, but Sullivan testified inconsistently about the terms of the alleged oral agreement. In his verified complaint, Sullivan alleges entitlement to 33 1/3% of the Peconic Companies' "profits" (Exhibit 1 at ¶¶ 92, 95-98; Exhibit 6 at 162-176.) and the figures he used to calculate his alleged entitlements in the complaint were based on the Peconic Companies' profits prior to the allocation of profits to others. (Exhibit 6 at 170.) In marked contrast, Sullivan testified at his deposition that he was really entitled to 33 1/3% of the net profits of the Peconic Companies after distribution of profits to others, but only after his counsel improperly interjected to alert

Sullivan of the inconsistency.[3] (Exhibit 6 at 170-176). Sullivan's inconsistent testimony about the terms of the agreement, his inability to remember the date on which his conversation allegedly occurred or the location where the conversation occurred, and the lack of any witnesses or evidence, all demonstrate that no oral agreement existed and, at a minimum, Sullivan has not demonstrated that no issue of fact exists with respect to the alleged oral agreement.

Sullivan's Wrongful Taking of $300,000; Sullivan's Receives a $1 Million Loan.

Under the Operating Agreements, Sullivan was not permitted to withdraw monies from his capital account, except in connection with his withdrawal or expulsion as a member. (Exhibits 4 and 5, at Sections 8(c) and 17(i)). In June 2007, despite his having been paid all bonus amounts awarded to him for the previous year, (Exhibit 1 at ¶ 22), and despite the distributions for 2007 not having been awarded, Sullivan, without authorization, took monies from the Peconic Companies. These unauthorized withdrawals amounted to $300,000. To date, these monies have not been repaid by Sullivan.

In April 2008, Sullivan received a $500,000 loan from Peconic Asset Managers and a $500,000 loan from Peconic Partners, totaling $1 million. (Exhibit 32 at 477; Exhibit 33 at 242; Pl. Exhibit 35). Sullivan agreed with Harnisch that this money constituted a loan that would be repaid to the Peconic Companies. (Exhibit 32 at 476-477). To date, Sullivan has not repaid any portion of the $1 million loan.

POINT I. SULLIVAN IS NOT ENTITLED TO SUMMARY JUDGMENT ON HIS BREACH OF CONTRACT CLAIM

Plaintiff's motion for summary judgment on his claim for 33 1/3% of the profits is resoundingly silent in that it does not note that his claim is based on a supposed oral conversation that was never documented. In addition, plaintiff erects a straw man in asserting he was a 15%

[3] We have addressed in Defendants' Motion for Summary Judgment the conduct of Plaintiff's counsel in deposition regarding these circumstances.

owner. The facts are uncontested that plaintiff was a 15% owner of 25% of the profits. He was never an owner of 15% of all the profits. Plaintiff has never alleged that there was a written agreement that contains the terms of the agreement that he is seeking to enforce and he admits he never asked to formally document the agreement. In fact, the opposite is true. Plaintiff was a member of the Peconic Companies and the Operating Agreements set forth the terms and conditions on which plaintiff was to share in the profits of the Peconic Companies, i.e., 15% of 25% of the profits as a result of Sullivan's ownership interest and a discretionary bonus to be determined by Harnisch out of the remaining 75%. (See Exhibits 4 and 5, at 6-7).

Plaintiff is attempting to walk away from the express terms of the Operating Agreement despite his actual knowledge of the existence of the Operating Agreement, his referral to the Operating Agreement in connection with his responsibilities as Chief Operating Officer of the Peconic Companies, and his execution of various consents as a member of the Peconic Companies, one of which actually amended the terms of the Operating Agreements.[4] (Exhibit 6 at 441, 433-434, 443, 643-644; Exhibits 11,12, and 13). Despite these admissions, plaintiff contends that in April 2007, Harnisch promised plaintiff that, for no additional consideration, he would give plaintiff one-third of all of the profits of the Peconic entities, retroactive to 2006 and for all subsequent years. (Exhibit 6 at 154, 156; Exhibit 1 at ¶ 16). Harnisch did not ask plaintiff to contribute additional capital, despite plaintiff having only contributed $15,000 in capital while the capital account of Harnisch was in excess of $8,000,000 dollars. (Exhibit 31 at Tr. 127-128, 160, 659; Exhibit 32 at 240-42). Plaintiff contends in the complaint that pursuant to the alleged oral agreement he is owed $23,140,654 dollars for 2007 and 2008 (Exhibit 1 at ¶¶ 97-98, 102),

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[4] Sullivan's assertion that there are no written Operating Agreements for the Peconic Companies should be rejected. While the Operating Agreements bear the former names of the Peconic Companies, FLA Advisers LLC and FLA Asset Managers LLC, those two entities merely changed their names to Peconic Partners LLC and Peconic Asset Managers LLC respectively. (See Exhibit 31 at 52; Exhibit 29). In his brief, plaintiff admits that the "FLA companies were rebranded as the Peconic Companies." (See Pl. Mem. at 3).

yet plaintiff can not remember the date on which the alleged conversation with Harnisch purportedly oral amending the agreement took place, how long the alleged meeting lasted, or where the conversation allegedly occurred. (Exhibit 6 at 157).

The existence of the alleged oral agreement is denied vigorously by defendants. Plaintiff has not identified any witnesses to the alleged conversation with Harnisch. His subsequent communications with his counsel and with Richard Bourgeois in September 2008 concerning the proposed new Operating Agreement, in which there was no mention of his alleged entitlement to one third of the profits, belie his claims. (Exhibits 19 and 20). The attempt to establish the purported oral claim is why Section 417(b) of the Limited Liability Law and Section 15-301 of the General Obligations Law require a written agreement to amend an operating agreement of a limited liability company. See Defendants Memorandum of Law in Support of Their Motion for Summary Judgment, dated May 14, 2010. ("Def. Mem."), in which the reasons why the claim must be dismissed as a matter of law are addressed fully. These reasons include the following:

1. The alleged oral agreement, the existence of which is denied by defendants, is barred by N.Y. L.L.C. § 417(b) which requires that such an amendment to the Operating Agreement be set forth in writing and consented to by Harnisch, the member adversely affected by the terms of the alleged oral agreement;

2. The alleged oral agreement, the existence of which is denied by defendants, modifies the Operating Agreement by removing Harnisch's discretion to allocate the Peconic Companies' profits and, as a result, the Operating Agreement's prohibition on oral modifications bars the alleged oral agreement pursuant to N.Y. G.O.L. § 15-301; and

3. Sullivan was bound by the Operating Agreements of the Peconic Companies, which provided Harnisch had discretion to allocate profits to Peconic employees. The alleged oral agreement contradicts the discretion Harnisch held as Manager.

See Def. Mem. at pp. 2-13.

In order to prevail on a motion for summary judgment, plaintiff must demonstrate that there are no material issues of fact with respect to the alleged oral agreement. Aimatop

Restaurant v. Liberty Mut. Fire Ins., 74 A.D. 2d 516, 517, 425 N.Y.S.2d 8, 9 (1st Dep't 1980) (movant must "demonstrate the absence of genuine issues of material fact on every relevant issue"). As set forth above, and in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, plaintiff can not meet his burden. Nevertheless, in his motion, plaintiff attempts to obfuscate certain uncontestable facts by relying on the purported import of several documents, which in fact refute his claim.

A. The Bonus, Ownership and Profit Sharing Schedules Belie The Existence of an Alleged Oral Argument And Are Consistent With Section 10 of the Operating Agreement.

Plaintiff testified that each year he would meet with Harnisch to discuss what Harnisch proposed to be awarded to Peconic employees as bonuses, if any, of the Peconic entities. (Exhibit 31 at 156-158, 222-223, 226-229). The meetings were always held in the subsequent year, after the profits of the Peconic entities could be ascertained – for example, Sullivan and Harnisch met in or about April 2006 to discuss bonus allocation of the 2005 profits, and they met in April 2007 to discuss bonus allocations of the 2006 profits. (Exhibit 31 at 156-159, 214). Plaintiff testified that he would meet with Harnisch, sometimes over a period of a week or two, and that they would discuss the amounts that Harnisch would award to the employees. (Exhibit 31 at 157-158; 226-229). He would provide his opinion to Harnisch with respect to whether certain employees deserved more or less compensation than Harnisch had decided. (Exhibit 31 at 156-159; 226, 228; Exhibit 32 at 177, 179).

Harnisch would use the prior year's bonus schedule as the template from which to make the current year's decision on compensation. (Exhibit 32 at 176-177, 179). After the final compensation numbers had been decided, the prior years' bonus schedule would be revised to reflect the current year's compensation, always keeping the same format. (See Exhibit 32 at 177; Exhibits 14 and 15). With respect to the compensation awarded to plaintiff by Harnisch, plaintiff

would notify Dennis Ko of Harnisch's decision (Exhibit 6 at 159-160; Exhibit 32 at 177) and Sullivan, who was responsible for the Peconic Companies' financial documents, would direct Mr. Ko to notify the accountants of the Peconic Companies, Grant Thornton, so that Grant Thornton could prepare the tax returns for the Peconic Companies as well as the K-1s for plaintiff and Harnisch, which Mr. Ko did. (Exhibit 6 at 159; Exhibit 32 at 177, 253; Exhibit 33 at 67; Exhibit 34 at 22-24, 37, 120). The K-1s were generated based upon the decisions embodied in the bonus schedules. (Exhibit 33 at 67). In fact, Mr. Ko testified that he had no independent knowledge of the compensation decisions at the time, that he was informed by Sullivan, and that his instructions to Grant Thornton were based entirely upon what Sullivan had told him. (Exhibit 33 at 67, 81, 86, 88-89, 98-102, 109-110, 118, 137, 140-141, 157, 178-179, 189, 194-195).

The bonus schedules are entirely consistent 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. (See Exhibits 4 and 5, at 6-7; Exhibits 14 and 15). The bonus schedules contain a column entitled "Ownership" in which certain percentages are set forth and another column entitled "Incentive." (See Exhibits 14 and 15). 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%. (Exhibit 32 at 175; Exhibits 14 and 15). 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.

It should be noted that in connection with Sullivan's argument that the bonus schedules support his contention that he is entitled to one third of the profits of the Peconic entities (Pl. Mem. at 7), he does not discuss the 2005 bonus schedule. The reason is obvious. Sullivan admits he was paid appropriately pursuant to the 2005 bonus schedule, which is consistent with the Operating Agreement. (Exhibit 1 at ¶ 22). Sullivan also admits that Harnisch had full discretion in awarding bonuses in 2005 as provided by Section 10 of the Operating Agreement. (Exhibit 6 at 261). Sullivan admits that in 2005 Harnisch elected "to pay me approximately a third." (Exhibit 6 at 261). This is a critical point. Sullivan testified at his deposition that Harnisch used his discretion to award Sullivan approximately one-third of the profits of the Peconic entities in 2005. (Exhibit 6 at 261). Sullivan being awarded his bonus compensation in 2005 admittedly had nothing to do with an alleged oral agreement or any other agreement. It simply followed the procedure set forth in the operating agreement pursuant to which Harnisch awarded an incentive bonus to plaintiff.

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 when he received approximately one third. Therefore, the allocation of profits in 2006, as set forth on the 2006 bonus schedule, is consistent with the allocation of profits in 2005, prior to any alleged oral agreement. The profit allocation in 2006 was the result of Harnisch's exercise of discretion consistent with his admitted discretion that he exercised in 2005. If there was an alleged oral agreement in April 2007 under which Sullivan was to receive 33 1/3% of the Peconic Companies' profits retroactive to 2006, 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? As set forth above, Sullivan was heavily involved in the preparation of the

bonus schedules. Why would Sullivan have not changed the format of the bonus schedule to reflect the alleged oral agreement that he became entitled to a guaranteed 33 1/3% interest? Notably, Sullivan never asked Harnisch to formally document the alleged oral agreement. Sullivan's allegation that Harnisch put the alleged obligation to pay him 33 1/3% of the profits "in writing" is allegedly demonstrated by Harnisch's notation on the bonus schedule. (Exhibit 6 at 161-162). This notation is consistent with the amounts on the bonus schedule for 2006. The 2006 split which Sullivan asserts is the product of his retroactive April 2007 agreement is consistent with past practice and not a new agreement to guarantee him with 33 1/3% of the profits retroactive to 2006 and going forward.

B. The K-1s Are Not Independent Evidence of an Agreement.

Furthermore, plaintiff's contention that the K-1s are evidence of the alleged oral agreement is also of whole cloth. (Pl. Mem. at 6). As set forth above, each year Sullivan and Harnisch met to discuss the bonuses to be awarded. After the decision was made by Harnisch with respect to the amount of the bonuses to be awarded, Sullivan prepared the bonus schedule and instructed Dennis Ko to report the information with respect to Sullivan and Harnisch to Grant Thornton. After receiving the information from Mr. Ko, Peter Kim at Grant Thornton prepared the tax returns of the Peconic entities and the K-1s for Sullivan and Harnisch. (Exhibit 34 at 22-23, 37, 120). The K-1s were prepared after the bonus schedules and thus the K-1s are not independent evidence of an oral agreement between Harnisch and Sullivan since the bonus schedules do not establish the oral agreement. (See Point A supra). The bonus schedule for 2005 demonstrates that Harnisch used his discretion to award Sullivan approximately one-third of the net profits of the Peconic entities (Exhibit 15), yet Sullivan's K-1 for 2005 shows him having to pay taxes on 15 percent of the taxable income of the Peconic entities. (Exhibit 7). There is no

correlation between the K-1 and the amounts actually received by Sullivan as set forth on the bonus schedule.

It is undisputed that information provided to Grant Thornton did not come from Harnisch. Harnisch testified that he never spoke with Peter Kim or anyone else at Grant Thornton about the tax returns or K-1s. (Exhibit 33 at 253; Exhibit 32 at 449-450, 455-456). Dennis Ko testified that he was the person that provided information to Grant Thornton and that he had no independent knowledge of any financial arrangements between Harnisch and Sullivan. (Exhibit 33 at 63-64, 67, 73-75). His only knowledge was what Sullivan told him and that was what he communicated to Peter Kim. (Exhibit 33 at 67, 86, 98-102). Peter Kim was deposed and he did not testify as to having spoken at all with Bill Harnisch. (Exhibit 34 and 22-24, 37, 120). Finally, at no time did Sullivan testify to, or even suggest, that Harnisch had any conversations with Grant Thornton. Thus, the K-1s did nothing more than memorialize the tax treatment of the members of the Peconic Entities in a given year based upon information provided to them from Dennis Ko, who received it from Sullivan, and they are not evidence of the alleged oral agreement. The K-1s only show the amount that Sullivan was paid in a given year. Joachim v. Flanzig, 3 Misc. 3d 371, 374 (Sup. Ct. N.Y. Co. 2004) ("A K-1 is an Internal Revenue Service form which is attached to a partnership's income tax return. It is provided to a partner reflecting the partner's share of income, credits, deductions and related financial information for the partnership's tax year.") (emphasis added). They offer no support of any alleged oral agreement.

The cases upon which plaintiff relies are inapposite. Not one of the cases cited by plaintiff addresses a situation where, as herein, the oral agreement sought to be proved was unenforceable by virtue of N.Y. L.L.C. Section 417(b), which requires an amendment to an operating agreement of a limited liability company to be in writing. Similarly, none of the cases

specifically addresses an oral modification to a written agreement that itself expressly provides, as does the Operating Agreement, that it cannot be amended, modified or supplemented except in writing. As discussed above and at length in defendants' moving brief, such a modification is not only prohibited by the terms of the Operating Agreement itself, but by N.Y. General Obligation Law Section 15-301, which states that an agreement containing such a provision against oral modification "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…." Moreover, each case to which plaintiff cites is distinguishable for other reasons.

The case of Conolly v. Thuillez, 58 A.D.3d 973, 871 N.Y.S.2d 476 (3d Dep't 2009), involved a dispute between a former partner of a law firm and the law firm as to whether the former partner had agreed, by oral agreement, to accept $150,000 as full payment for his ownership interest in the firm. The Court found the oral agreement, which was not in contravention of any written provision, was established by the testimony of multiple witnesses and it was the firm's performance of that agreement, i.e. whether or not the former partner was paid appropriately, that was established by the firm's financial records and tax documents. 58 A.D.3d at 974, 871 N.Y.S.2d at 477-478. The K-1 was relied upon to establish the payment of $150,000, not to establish the existence of an agreement. In sharp contrast, the purported agreement alleged by Sullivan is in direct conflict with the provisions of the Operating Agreement governing the discretion vested in Harnisch as to the incentive bonus and Sullivan is seeking to use the documents not to prove performance but to prove the actual agreement.

In Margolin v. Margolin, Lowenstein & Co., 2007 N.Y. Slip. Op. 50182U, 14 Misc.3d 1226A, 836 N.Y.S.2d 493 (Sup. Ct. Nassau Co. 2007), the issue was the amount of money to be distributed after one partner in an accounting partnership died and the counterclaims involved the

valuation of a deceased partner's capital account and the percentage of the respective partnership shares at the time of the death of the partner. There was no dispute that an agreement existed but it was ambiguous, and given no other explanation for the proportions shown in the K-1s and the draw checks, the Court in Margolin determined the draw checks signed by the three partners and the K-1s prepared by the deceased partner, established that the deceased partner had ceded an additional 5% interest to another partner. Id. at *2-3. Thus, in essence, the K-1 constituted an admission that the deceased partner was entitled to an additional 5% membership interest. Here, there is no ambiguity in the Operating Agreement that needs to be clarified and the documents that Sullivan contends prove the purported oral agreement are entirely consistent with the Operating Agreement. Harnisch had discretion to vary the incentive bonus from year to year and the 2006 K-1s and payments to Sullivan reflect that discretion and do not prove an agreement. See Brennan v. J. P. Morgan Securities, 2004 N.Y. Slip. Op. 51879U, *3, 7 Misc. 3d 1013, 801 N.Y.S.2d 230 (Sup. Ct. N.Y. Co. 2004) ("an employee receiving bonuses throughout an employment relationship does not vitiate the employer's right to retain full discretion in determining the amount, if any, of an employee's bonus.")

Joachim v. Flanzig, 3 Misc. 3d 371, 773 N.Y.S.2d 267 (Sup. Ct. Nassau Co. 2004), actually supports defendants' position. Joachim arose from the dissolution of a law firm and the central issue was whether a particular individual, Frommer, was in fact a partner in that firm. There the Court held that plaintiffs could not refute that Frommer was a partner because the written partnership agreement, which was clear and unambiguous, established that he was and the other partners did not deny the agreement's existence. In the face of an unambiguous agreement, the Court denied plaintiff's request for further discovery from Frommer, including production of his W-2s and K-1s, since the documents could not be used to refute Frommer's

claim that he was a partner. Id. at 379. As in Joachim, the Operating Agreement here is clear and unambiguous, and the K-1s cannot be used to refute its unambiguous terms. Similarly, the holding in Shabasson v. Greenberg, 284 A.D.2d 230, 726 N.Y.S.2d 552 (1st Dep't 2001) concerns the issue of disclosure of K-1 partnership returns merely to establish the amount a partner was paid and not to establish an agreement.

C. Other Alleged Documentary Evidence.

Plaintiff also alludes to other alleged documentary evidence as proof of the oral agreement. Plaintiff contends that the Form ADV filed by the Peconic entities demonstrate that he was entitled to a 33 1/3% share of the profits However, as set forth in the Form ADV, the filings only indicate that plaintiff had a 10-25% interest as a member. (Pl. Exhibit 21 at D007972, and Exhibit 22 at D008045). Sullivan testified at his deposition that the Form ADV only indicates in the event of a liquidation, he would be entitled to fifteen percent of the proceeds. (Exhibit 31 at 105-106). Sullivan denied that the ADV related to profit sharing in any way. (Exhibit 31 at 106-107). Thus, by his own admission, the ADVs are not evidence of any alleged oral agreement with respect to his entitlement to profits.

To the extent that plaintiff claims defendants represented to investors his membership interest in the Peconic entities, there is no evidence that any investor was told, either in writing or orally, that plaintiff had a 33 1/3% share of the profits. Significantly, plaintiff has not appended as an exhibit any such document. The only document he has appended is a FAQ sheet which indicates that he was the second largest equity owner after Harnisch. (See Pl. Exhibit 3 at 001355). It contains no information regarding his alleged entitlement to profits or even the amount of his ownership interest, which plaintiff admits was fifteen percent.

POINT II. THERE ARE MATERIAL ISSUES OF FACT WHICH PRECLUDE SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS

Plaintiff's motion for summary judgment on defendants' third, fourth, fifth, sixth, seventh and ninth counterclaims must be denied since material issues of fact exist.

A. Summary Judgment Should Be Denied With Respect To Defendants' Third and Fourth Counterclaims, Alleging Breach of the Operating Agreement.

It is undisputed that Sullivan withdrew $300,000 from his capital accounts in June 2007. While Sullivan contends that he was permitted to do so, Harnisch denies that he ever approved the withdrawal of $200,000 from Peconic Partners and $100,000 from Peconic Asset Managers by Sullivan in 2007 (Exhibit 32 at 74-75, 237). While Sullivan testified that he allegedly discussed the withdrawals with Harnisch (Exhibit 31 at 296), he did not, and could not, testify that Harnisch gave him approval. Although he argues that he is not subject to the Operating Agreement, as demonstrated at Point I above, the agreements bound both the Peconic Companies and Sullivan. Section 8(c) of the Operating Agreement states:

> Withdrawal; Return of Capital Contribution. Except as provided in Section 17(i) hereof, no Member shall be entitled to withdraw or resign as a Member or to receive any part of such Member's Capital Contribution or any distribution from the Company in connection therewith.

Section 17(i) of the Operating Agreement addresses the "[e]xpulsion and withdrawal of a Member." (Exhibits 4 and 5). Thus, by operation of Sections 8(c) and 17(i) the only permitted withdrawal of capital is in association with a member's expulsion or withdrawal. Sullivan's unauthorized withdrawal of $300,000 from the Peconic Companies in June 2007 was not in connection with his expulsion or withdrawal from the companies.

The June 15, 2007 email from Dennis Ko to J.P. Morgan (Exhibit 33 to Felber Aff.) does not classify either the $200,000 or the $100,000 transfers to Sullivan as "draws," and Ko testified that he included the word "draw" on the wire transfer was based solely on instructions from

Sullivan. (Exhibit 33 at 294-295). Further, that J.P. Morgan seems to have classified them as draws (see Exhibit 34 to Felber Aff.) in the context of "miscellaneous debt[s]," does not mean the withdrawals were to be treated by the Peconic Companies or by Sullivan as such.

Nor can Sullivan's unauthorized withdrawal of $300,000 from the Peconic Companies in June 2007 be considered a distribution under Section 9 of the Operating Agreement. Under Section 9, the amount and timing of distributions is determined by the Manager. (Exhibits 4 and 5). As of April of 2007, Sullivan had received for prior years the distribution of his 15% percent of the 25% ownership pool and his bonuses as determined by Harnisch under the terms of the Operating Agreement. (Exhibit 1 at ¶ 22). These are the only distributions to which he was entitled in April 2007. His withdrawal of additional monies over and above these distributions were withdrawal of capital and unauthorized under the terms of the Operating Agreement.

B. Sullivan is Obligated to Repay the $1 Million Loan.

Harnisch has not, as plaintiff argues, "disavowed" the allegations regarding the loan alleged in the fifth cause of action. (Pl. Mem. at 22). Thus, in testimony just prior to that cited by plaintiff, Harnisch testified about his agreement with Sullivan that the $1 million was a loan, and "should not be construed in any way as compensation." (Exhibit 32 at 477). Further, as of April 2008, the discretionary incentive bonus for 2007 had not been decided by Harnisch, and Sullivan could not point to any instance where Harnisch gave advances on incentive bonus awards the amounts of which he had not yet decided. Dennis Ko also testified that he discussed with Harnisch that the $1,000,000 was a loan to Sullivan. (Exhibit 33 at 232, 243). In addition, Ko testified that a similar loan had been given to a former employee and had been repaid after the employee left. (Exhibit 33 at 236-237). This loan was made by FLA Advisers to Charles Howard without setting forth the time within which the loan was to be repaid, interest, if any, which would accrue, or other conditions of the loan agreement. Mr. Howard simply wrote on a

piece of paper that he would repay the $50,000. (See Exhibit 35). Significantly, the loan was authorized by Sullivan on behalf of FLA Advisers.

The case law cited by plaintiff, as discussed below, does not involve the type of loan given Sullivan by the Peconic Companies, and does not stand for the proposition that an ordinary loan must be formally recorded in an instrument bearing all of its terms to be enforceable. In fact, the opposite is true. A simple loan, unlike certain other types of contracts, carries with it the implied obligation to repay upon demand. See Bank of British North America v. Delafield, 126 N.Y. 410, 27 N.E. 747 (1891). Sullivan does not dispute that a demand for repayment was made, nor has he made any attempt to contact defendants to repay the loan after more than 1½ years. In any event, the commencement of an action, or a counterclaim, is in itself sufficient demand. Lion Brewery v. Loughran, 223 A.D. 623, 229 N.Y.S. 216 (1st Dep't 1928).

Oral loan agreements are enforceable. See Alameldin v. Kings Castle Caterers, Inc., 53 A.D.3d 514, 861 N.Y.S.2d 759 (2d Dep't 2008) (affirming finding that defendants breached oral loan agreement). The cases cited by plaintiff in support of his position that the loan is not enforceable are simply not applicable. Cobble Hill Nursing Home, Inc. v. Warren Corp., 74 N.Y.2d 475, 548 N.Y.S.2d 920 (1989), involved not a simple loan, but a supposed option permitting plaintiff to purchase a nursing home, and the issue of whether the price term of that contract was so indefinite as to preclude enforcement by the courts. In finding that a contract did exist, the Court expanded on the concept of definiteness:

> The standard is necessarily flexible, varying for example with the subject of the agreement, its complexity, the purpose for which the contract was made, the circumstances under which it was made, and the relation of the parties.

74 N.Y.2d at 482-483, 548 N.Y.S.2d at 923 (citations omitted). Here, the simple loan given Sullivan is certainly definite in its amount and its repayment is implied, as with all simple loans. That the interest rate was not specified is not fatal to the loan's existence. See Britton v.

Diprima, 71 A.D.3d 1560, 900 N.Y.S.2d 205 (4th Dep't 2010) (court could award statutory interest where the terms of the oral loan between the parties did not include interest).[5]

Nor is the case of Klein v. American Trust Company, 25 A.D.2d 564, 267 N.Y.S.2d 841 (2d Dep't 1966) on point. From what can be gleaned from this one paragraph decision, that case involved the breach of contract to "lend moneys on the purchase of securities up to 90% of market value." The Court found that the supposed contract lacked essential elements and affirmed the dismissal of the claim. Here, unlike Klein, the loan was made and Klein provides no support and does not stand for the proposition that it need not be repaid because it does not expressly state that it must be repaid. Id. 25 A.D.2d at 564, 267 N.Y.S.2d at 842.

Plaintiff bases his argument for dismissal in part on the erroneous assumption that the loan's characterization as a "draw" or as an "advance" supports his argument that it need not be paid back. (Pl. Mem. at 21). Whether the $1 million loan to Sullivan was termed an advance, or a draw, is not dispositive of whether or not it must be repaid. See Boutique Industries, Inc. v. Sobel, 223 A.D. 2d 398, 636 N.Y.S.2d 328 (1st Dep't 1996) (an action to recover excess monies paid to an employee from a drawing account is viable where an agreement exists by which the employee agreed to pay the excess draw); Centerbank Mortgage Co. v. Shapiro, 237 A.D. 2d 477, 655 N.Y.S. 2d 596 (2d Dep't 1997) (same); Biggs v. Lyng, 644 F. Supp. 998, 1006 (E.D.N.Y. 1986) ("denomination of monies supplied to another as an 'advance' by no means necessarily takes the payment out of the realm of a 'loan'"), reversed on other grounds, 823 F.2d 15 (2d Cir. 1987). Here, there is testimony that Sullivan knew the $1 million to have been a loan and agreed to its repayment. (Exhibit 32 at 476-477). Since Sullivan admits the loan was not repaid, summary judgment would be inappropriate.

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[5] Nor does the Statute of Frauds apply to an oral loan agreement capable of complete performance within one year, which this loan certainly was. Moon v. Moon, 6 A.D. 3d 796,798 (3d Dep't 2004).

Further, Harnisch's lack of response to Sullivan's self-serving email referring to the $1 million loan as a "draw" cannot be taken as Harnisch's consent to such characterization, or as a waiver of the previous agreement that Sullivan would repay the loan. See Golfo v. Kycia Assoc., Inc., 45 A.D.3d 531, 533, 845 N.Y.S.2d 122, 124 (2d Dep't 2007) (emphasis added) ("A waiver is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence."). A valid waiver requires "proof that there was a voluntary and intentional relinquishment of a known and otherwise enforceable right." Id. (defendant did not waive its right to cancel a contract even though six months had passed from the date on which the defendant was entitled to cancel) (citing Peck v. Peck, 232 A.D.2d 540, 649 N.Y.S.2d 22) (2d Dep't 1996)). Moreover, since waiver "is essentially a matter of intention, it is for the jury to determine from the facts proven whether or not such intention existed on the part of the defendants." Infotech Mgmt, Inc. v. Morse, 150 A.D.2d 638, 640, 541 N.Y.S.2d 513, 515 (2d Dep't 1989) (reversing grant of summary judgment because questions of fact existed as to whether the defendant waived its right to object to the assignment of an option). Sullivan has not met his burden of showing that there is no issue of material fact that prevents the dismissal of this claim.

C. Sullivan Has Not Met His Burden of Proving That No Material Issue of Fact Exists as to Defendants' Sixth Counterclaim for a Declaratory Judgment.

Defendants' Sixth Counterclaim seeks a declaratory judgment that Sullivan is entitled to "no more than the payment, if any, due pursuant to the Operating Agreement" of the Peconic Companies. Sullivan moves to dismiss this claim on the sole basis that he is not subject to the Operating Agreement of the Peconic Companies. (Pl. Mem. at 24-25). Sullivan was a member of the Peconic Companies and was bound by the Operating Agreement. (See Def. Mem. in

Support of Motion for Summary Judgment at 2-4). At a minimum, plaintiff has not met his burden of demonstrating an issue of material fact exists and the motion should be denied.

D. Summary Judgment Should Be Denied With Respect to Seventh Counterclaim Because Sullivan Breached His Fiduciary Duty to Defendants.

Plaintiff contends that the Court's prior ruling that no fiduciary duty exists running from an at-will employee to his employer compels the dismissal of this claim. Plaintiff also contends that no duty exists post-termination. (See Pl. Memo at 25-26). Sullivan neglects to address, however, that as a member of the Peconic Companies he owed a fiduciary duty to Harnisch. See First Keystone Consultants, Inc. v. DDR Construction Services, 25 Misc. 3d 1217, 2009 N.Y. Slip Op. 52166U (Sup. Ct. Qns. Cty. 2009) (member of a limited liability company owes a fiduciary duty to other members).

As discussed above, Sullivan's withdrawal of $300,000 from the Peconic Companies in 2007 was unauthorized. As such, it constituted a breach of fiduciary duty. Sullivan's conclusory argument that there is no material factual dispute that Sullivan "only took draws to which he was entitled" is not supported by the record (see Point II.A above), and further demonstrates an issue of fact that precludes summary judgment as this claim.

E. The Ninth Counterclaim Should be Sustained as Sullivan's Disloyalty Was Related to His Duties at the Peconic Companies

Sullivan does not dispute that he was both Chief Compliance Officer, Chief Financial Officer and Chief Operating Officer of the Peconic Companies, and that his duties included overseeing the day to day operations of the office. (Exhibit 6 at 264; Pl. Rule 19A Statement at ¶ 1). Nor does Sullivan dispute that the faithless servant doctrine, upon which defendants' ninth counterclaim is based, prohibited him "from acting in any manner inconsistent with his agency or trust" and required him "to exercise the utmost good faith and loyalty in the performance of

his duties" Zakresky v. Graduate School of Figurative Art, 2009 N.Y. Slip. 51884U, *17 (Sup. Ct. N.Y. Cty. 2009).

Despite these admissions, Sullivan contends that "[i]n no way would taking money to which he was allegedly not entitled have any relation to Sullivan's performance of his duties at Peconic." (Pl. Mem. at 30). Sullivan was the Chief Operating Officer and Chief Financial Officer. As such his duties included conducting himself consistent with the Operating Agreement. He did not do so when he withdrew the $300,000. The evidence also demonstrates that (1) Sullivan received money belonging to Harnisch and the Peconic Companies, (2) which Sullivan benefitted from, and, because such monies were unauthorized withdrawals, (3) under principles of equity and good conscience, Sullivan should not be permitted to keep the money, defendants have a valid cause of action for monies had and received against Sullivan. See 22A NY Jur Contracts § 534. Sullivan's wrongful taking of monies to which he was "not entitled" must have a remedy at law.

Moreover, this claim does not pertain to Harnisch alone, as he argues (Pl. Mem. at 30), because the unauthorized withdrawal of money would harm the Peconic Companies as well as Harnisch, and Sullivan's duties were owed to those companies.

Nor is this claim, as Sullivan argues, duplicative of defendants' breach of contract claims (Pl. Mem. at 30) because it stems particularly from Sullivan's duties and dishonesty and disloyalty in performing them, and the relief sought, that Sullivan "must forfeit the compensation he received from the Peconic Companies' during the period of his unfaithful acts" is wholly distinct from the return of the wrongfully withdrawn monies sought in the breach of contract claim. See Sundland v. Korfund Co., 260 A.D. 80, 82. 20 N.Y.S. 2d 819, 822 (1940) ("[f]lagrant

acts of dishonesty or crime which seriously affect the master's interest . . . might well be regarded as a bar to recovery of wages").

In fact, the comment to the Restatement of Agency 2d, Section 469, which section is referenced in the Court of Appeals case of Feiger v. Iral Jewelry, 41 N.Y. 2d 928, 394 N.Y.S. 2d 626 (1977) cited by plaintiff, states that:

> A serious violation of a duty of loyalty or seriously disobedient conduct is a wilful and deliberate breach of the Contract of Service by the agent, and . . . the agent thereby loses his right to obtain compensation for prior services . . .

Restatement of Agency 2d, § 469, Comment (b) (emphasis added). This comment makes it clear that there can be damages for breach of contract and separate damages consisting of the loss of the employee's right to obtain compensation.

Conclusion

For all of the above reasons, Sullivan's motion for summary judgment must be denied in its entirety.

Dated: New York, New York
June 15, 2010

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