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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SETH WALLACK and SAN DIEGO  
VETERINARY IMAGING, INC.,  
  
vs.

Plaintiffs,

IDEXX LABORATORIES, INC.;  
IDEXX REFERENCE  
LABORATORIES, INC.; MATTHEW  
WRIGHT; an individual; and  
STEPHEN WALTERS, an individual

Defendants.

CASE NO. 11cv2996-GPC(KSC)

**ORDER GRANTING  
DEFENDANTS WRIGHT AND  
WALTERS' MOTION FOR  
SUMMARY JUDGMENT**

[Dkt. No. 87.]

Presently before the Court is Defendants Matthew Wright (“Wright”) and Stephen Walters’ (“Walters”) (collectively “Defendants”) motion for summary judgment. (Dkt. No. 87.) Plaintiff Seth Wallack (“Plaintiff”) opposed the motion. (Dkt. No. 93.) Defendants filed a reply. (Dkt. No. 9.) Having considered the parties’ submissions, supporting documentation, and the applicable law, the Court GRANTS Defendants’ motion for summary judgment.

**Procedural Background**

Plaintiff and San Diego Veterinary Imaging, Inc. (“SDVI”) filed a complaint against Defendants Idexx Laboratories, Inc. and Idexx Reference Laboratories, Inc. on December 22, 2011 alleging numerous causes of action for federal and state securities

1 fraud, fraud related causes of action and trademark infringement. (Dkt. No. 1.) On  
2 April 11, 2013, the Court granted in part and denied in part Defendants’ motions to  
3 dismiss with leave to amend. (Dkt. No. 33.) A first amended complaint was filed on  
4 May 2, 2013. (Dkt. No. 34.) On September 12, 2013, the Court granted in part and  
5 denied in part Defendants’ motions to dismiss with leave to amend. (Dkt. No. 49.) The  
6 operative second amended complaint was filed on September 26, 2013 and asserts four  
7 causes of action: (1) trademark infringement by Plaintiff SDVI against Idexx and Idexx  
8 RL; (2) breach of fiduciary duty by Plaintiff Wallack against Wright and Walters; (3)  
9 civil conspiracy by Plaintiffs against all Defendants; and (4) request for declaratory  
10 relief by Plaintiffs against Idexx and Idexx RL. (Dkt. No. 50.) Defendants Wright and  
11 Walters moved to dismiss the second cause of action for breach of fiduciary duty, and  
12 third cause of action for civil conspiracy. (Dkt. No. 52.) On April 14, 2014, the Court  
13 denied Defendants Wright and Walters’ motion to dismiss the breach of fiduciary duty  
14 claim; and granted Defendants’ motion to dismiss the civil conspiracy claim with  
15 prejudice. (Dkt. No. 68.) Therefore, the remaining cause of action alleged against  
16 Defendants Wright and Walters is breach of fiduciary duty which is subject to the  
17 instant motion for summary judgment.

### 18 **Factual Background**

19 Plaintiff is a licensed veterinary radiologist and established San Diego  
20 Veterinary Imaging, Inc. (“SDVI”), in 2002, to conduct his veterinary radiology  
21 practice. (Dkt. No. 93-5, Wallack Decl. ¶¶ 2, 8.) In the early 2000s, Plaintiff  
22 recognized the need and benefit of digital imagery to view x-rays over the internet  
23 instead of “making the rounds” and visiting veterinary offices, clinics and hospitals to  
24 conduct his practice. (Id. ¶¶ 2, 3, 4.) In early 2004, Plaintiff contemplated and began  
25 work to develop a software program to serve as a “platform” for veterinary radiologists  
26 where they could keep, organize, retrieve and use all of their imagery. (Id. ¶ 7.)

27 At that time, Plaintiff hired Defendant Stephen Walters, a computer programmer,  
28 to assist in the programming and coding of the computer platform/website. (Id. ¶ 9.)

1 They worked together for months to develop the program and they agreed that Walters  
2 would eventually become a 20% ownership in any future company. (Id.) Walters also  
3 retained ownership of the portions of the source code/programmed information he  
4 developed related to the platform/website. (Id.)

5 In early 2004, Plaintiff named the software “DVMInsight” and decided to  
6 conduct his tele-radiology practice under the name “DVMInsight.” (Id. ¶ 10.) In 2005,  
7 SDVI established, through GoDaddy.com a domain name and website called  
8 “DVMInsight.com” and SDVI registered the trademark “DVMInsight”. (Id.)

9 In July 2005, Plaintiff created and incorporated a new business called Veterinary  
10 Imaging Center of San Diego, Inc. (“VICSD”). (Id. ¶ 13.) VICSD replaced SDVI for  
11 some but not all of his work. (Id.) After VICSD opened, Plaintiff performed  
12 conventional veterinary radiology and tele-radiology under its auspices. (Id.)

13 At the end of November 2005, Defendant Wright, a veterinary radiologist,  
14 joined Plaintiff to work at VICSD to work on the DVMInsight platform and set up a  
15 new corporation called DVMInsight, Inc. (Id. ¶ 14.) In 2005/2006, Wright became the  
16 manager and resident radiologist at VICSD so Plaintiff could generate funds by  
17 “making the rounds” to veterinary hospitals. (Id.)

18 Wright, through his company Animal Insides, Inc., provided online commentary  
19 on veterinary radiology and on the increasing importance of digital imaging in  
20 veterinary radiology. (Id. ¶ 15.) Plaintiff appreciated Wright’s talent for writing and  
21 Wright expressed his appreciation for Plaintiff’s talent for undertaking and organizing  
22 the DVMInsight/VICSD initiatives. (Id.) All three worked to complete the  
23 development of the software program. (Id.)

24 In September 2006, Plaintiff, Wright and Walters incorporated DVMInsight, Inc.  
25 (“DVMi”). (Dkt. No. 95-2, Ds’ Concordance of Separate Statement of Undisputed  
26 Material Facts (“CSSUF”) No. 1.) At the time of incorporation, the purpose of  
27 DVMInsight was threefold: 1) development of a software platform (“DVM platform”)  
28 that could be used by veterinarians for teleradiology purposes; 2) operation of a

1 website where clients and providers could use the software; and 3) the generation of  
2 teleradiology work for Plaintiff and Wright. (Id.) At the time of incorporation,  
3 Plaintiff and Wright each owned 40% of DVMI's outstanding stock, and Walters  
4 owned the remaining 20%. (Id., CSSUF No. 2.) Plaintiff, Wright and Walters were  
5 named officers and directors of DVMI. (Id.) Plaintiff was the President, Director and  
6 Shareholder. (Id., CSSUF No. 4.) Plaintiff was never an employee of DVMI but he  
7 occasionally read cases for DVMI. (Id.)

8 Plaintiff's role was to grow VICSD while Wright's role was to grow DVMI.  
9 (Dkt. No. 87-16, Ds' NOL, Ex. I, Wallack Depo. at 88:6-11; 90:19-91:5.) Over time,  
10 Plaintiff stepped away from being administratively involved at DVMI and allowed  
11 Wright to take over and grow the business. (Dkt. No. 87-16, Ds' NOL, Ex. I, Wallack  
12 Depo. at 71:5-16; 73:18-74:8.) Eventually, he was no longer involved in the day to day  
13 operations of DVMI as he had a lot of other things going on. (Id.) There was a clear  
14 separation of responsibilities. (Dkt. No. 87-16, Ds' NOL, Ex. I, Wallack Depo. at  
15 90:19-91:5.) His role was to grow the VICSD business and he left Wright and Walters  
16 in charge of the DVMI business. (Id.)

17 From the beginning of DVMI, Walters was employed and responsible for  
18 information technology for the DVMI. (Dkt. No. 95-2, CSSUF No. 8.) In particular,  
19 Walters was responsible for programming, keeping the servers up and running, and  
20 providing high level technical support. (Id.) Wright also became an employee of  
21 DVMI after he left employment at VICSD in June/July 2009. (Id., CSSUF No. 6.)  
22 DVMI grew steadily. (Id., CSSUF No. 9.)

23 Around the spring 2009, Defendant Idexx Laboratories, Inc. ("Idexx") was  
24 searching for partners for its teleradiology/storage needs and issued a Request for  
25 Proposal ("RFP") to companies, including DVMI, to fulfill that need. (Id., CSSUF No.  
26 10.) Wright made Plaintiff aware of the RFP and Defendants worked to prepare a  
27 response on behalf of DVMI to offer its ImageBank services. (Id.) Because Plaintiff  
28 devoted his full attention to VICSD, he did not have time to review the RFP or to

1 contribute, in a substantial way, to the RFP response. (Id.)

2 Wright nonetheless provided Plaintiff with the RFP response, kept him apprised  
3 of the status of the response, and informed Plaintiff that in the late spring of 2009, he  
4 would be traveling to Maine, where Idexx was headquartered, to present the response  
5 and to explore any interest that Idexx had in purchasing DVMI. (Id., CSSUF No. 11.)  
6 While Plaintiff now professes to have had a desire to attend the Idexx meeting, he  
7 acknowledges that Wright did not stop him from accompanying Wright to the meeting  
8 in Maine and that Plaintiff simply had other commitments outside of DVMI that  
9 prevented him from attending. (Id.)

10 Wright testified that he and Farber discussed an offer where Idexx would pay a  
11 multiple of 1.1-1.2 of DVMI's gross revenues to purchase DVMI's assets. (Dkt. No.  
12 87-15, Ds' NOL, Ex. H, Wright Depo. at 134:22-135:6.) Wright calculated the amount  
13 based on DVMI's \$900,000 gross revenues for 2008/09 and came up with a purchase  
14 price of \$1 million. (Id.) When Wright returned, he informed Walters and Plaintiff  
15 about the offer of \$1 million and they collectively agreed it was not acceptable. (Id.  
16 at 145:22-146:4; Dkt. No. 93-5, Wallack Decl. ¶ 22.)

17 While it is disputed as to who initially raised the idea of DVMI buying out  
18 Plaintiff's shares, in August 2009, the parties exchanged emails about the possibility  
19 of buying Plaintiff out. (Dkt. No. 87-18, Ds' NOL, Ex. I at 16-18<sup>1</sup>.) Plaintiff  
20 acknowledged that since Wright and Walters grew the company, they should reap the  
21 rewards. (Id. at 16.) Plaintiff raised concern about distribution at the time for  
22 shareholder distributions since he was not involved in DVMI. (Id.) DVMI's attorney,  
23 Michael Christian ("Christian"), responded that Plaintiff should hold onto his 40%  
24 ownership and go along for the ride. (Id. at 17.) However, Plaintiff responded that he  
25 did not agree because he did not think it would be fair and could result in a "train  
26 wreck when it is time for shareholder distributions." (Id.) Plaintiff was open to a  
27 buyout. (Id.) Later, in another email, Plaintiff wrote that he did not need to get out and

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28 <sup>1</sup>The page numbers are based on the CM/ECF pagination.

1 was fine “staying in for the ride.” (Id. at 18.) At that time, discussions regarding a  
2 buyout ended. As a result, Wright proposed a shareholder meeting to discuss the issue  
3 of shareholder distribution. (Dkt. No. 93-3, P’s NOL, Ex. S at 274; 277-78.) A  
4 shareholder meeting was held in August 2009. (Dkt. No. 87-17, Ds’ NOL, Ex. I,  
5 Wallack Depo. at 146:2-3.)

6 On December 7, 2009, Plaintiff emailed Christian, DVMI’s attorney, about  
7 having DVMI repurchase his shares and asked for advice. (Dkt. No. 87-20, Ds’ NOL,  
8 Ex. J, Christian Depo. at 51:1-9; Dkt. No. 87-20, Ds’ NOL at 18.) Plaintiff wrote,

9 I am forwarding an email I received today from Matt. It is good to see  
10 the company is doing well however, the context of the message  
11 concerns me with respect to fiduciary responsibilities and bonuses  
12 intended to drive the year end profits to a level that would require  
13 retention of earnings. I don’t want to get into a legal battle so rather  
14 than call for an accounting evaluation I think it is better if the other  
15 shareholders buy me out. I am steadfast on this decision and believe  
16 that a complete company valuation is required to determine a fair  
17 market value.

18 (Dkt. No. 87-20, Ds’ NOL at 18.) Christian informed Plaintiff that since he represented  
19 DVMI, he could not represent Plaintiff, a shareholder, against the interests of the  
20 company. (Dkt. No. 87-20, Ds’ NOL, Ex. J, Christian Depo. at 63:3-8; Dkt. No. 87-20,  
21 Ds’ NOL at 18.)

22 Plaintiff subsequently retained counsel, William Markham (“Markham”), to  
23 assist him in selling his shares to DVMI. (Dkt. No. 95-2, CSSUF No. 20.) In order to  
24 determine the value of DVMI, Plaintiff reached out to Farber at Idexx in December  
25 2009 to confirm the information that Wright had relayed in April 2009 that an offer of  
26 a potential purchase price was made in the \$1 to \$1.1 million range. (Dkt. No. 95-2,  
27 CSSUF No. 21.)

28 In mid-December 2009, Plaintiff believed he had three options for effectuating  
the repurchase of his DVMI shares: 1) negotiations between the parties; 2) submission  
to binding arbitration and selection of a business valuation specialist/accountant whose  
valuation would be binding on the parties; or 3) litigation among the parties. (Dkt. No.  
95-2, CSSUF No. 22.)

1 On December 18, 2009, Wallack, through his attorney, threatened to initiate a  
2 lawsuit against Defendants. (Dkt. No. 95-2, CSSUF No. 23; Dkt. No. 87-23, Ds' NOL,  
3 Ex. L at 24-25.) In an effort to resolve differences among the parties without litigation,  
4 Markham and Christian began working together in mid-December 2009 to negotiate  
5 a stock repurchase agreement. (Dkt. No. 95-2, CSSUF No. 36.) Negotiations  
6 continued through the latter part of December 2009 with the parties having vastly  
7 different views about the value of DVMI and the provisions to be included in any  
8 agreement. (Dkt. No. 95-2, CSSUF No. 37.) After negotiations with counsel and with  
9 the assistance of a third party, David Zanders, the parties reached an agreement. (Dkt.  
10 No. 95-2, CSSUF No. 37.) The parties executed a Stock Repurchase Agreement on  
11 December 31, 2009. (Dkt. No. 93-3, P's NOL, Ex. M.) Plaintiff agreed to sell his  
12 DVMI shares for \$274,500 and received a payment of \$30,000 in exchange for the  
13 settlement and mutual release. (Dkt. No. 95-2, CSSUF No. 37; Dkt. No. 93-3, P's  
14 NOL, Ex. M.)

15 On September 9, 2011, DVMI and Idexx entered into an Asset Purchase  
16 Agreement where Idexx purchased the assets of DVMI and Animal Insides, Inc. for  
17 around \$3,200,000. (Dkt. No. 93-3, P's NOL, Ex. N; Dkt. No. 95-2, CSSUF No. 42.)  
18 On December 22, 2011, Plaintiff and SDVI filed the instant action. (Dkt. No. 1.)

## 19 Discussion

### 20 A. Legal Standard on Motion for Summary Judgment

21 Federal Rule of Civil Procedure 56 empowers the Court to enter summary  
22 judgment on factually unsupported claims or defenses, and thereby "secure the just,  
23 speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477  
24 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the "pleadings,  
25 depositions, answers to interrogatories, and admissions on file, together with the  
26 affidavits, if any, show that there is no genuine issue as to any material fact and that the  
27 moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact  
28 is material when it affects the outcome of the case. Anderson v. Liberty Lobby, Inc.,

1 477 U.S. 242, 248 (1986).

2 The moving party bears the initial burden of demonstrating the absence of any  
3 genuine issues of material fact. Celotex Corp., 477 U.S. at 323. The moving party can  
4 satisfy this burden by demonstrating that the nonmoving party failed to make a  
5 showing sufficient to establish an element of his or her claim on which that party will  
6 bear the burden of proof at trial. Id. at 322-23. If the moving party fails to bear the  
7 initial burden, summary judgment must be denied and the court need not consider the  
8 nonmoving party's evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60  
9 (1970).

10 Once the moving party has satisfied this burden, the nonmoving party cannot rest  
11 on the mere allegations or denials of his pleading, but must "go beyond the pleadings  
12 and by her own affidavits, or by the 'depositions, answers to interrogatories, and  
13 admissions on file' designate 'specific facts showing that there is a genuine issue for  
14 trial.'" Celotex, 477 U.S. at 324. If the non-moving party fails to make a sufficient  
15 showing of an element of its case, the moving party is entitled to judgment as a matter  
16 of law. Id. at 325. "Where the record taken as a whole could not lead a rational trier  
17 of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In  
18 making this determination, the court must "view[] the evidence in the light most  
19 favorable to the nonmoving party." Fontana v. Haskin, 262 F.3d 871, 876 (9th Cir.  
20 2001). The Court does not engage in credibility determinations, weighing of evidence,  
21 or drawing of legitimate inferences from the facts; these functions are for the trier of  
22 fact. Anderson, 477 U.S. at 255.

24 **B. General Release<sup>2</sup>**

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26 <sup>2</sup>Both parties argue that the Court's prior rulings on Defendants' motion to  
27 dismiss applies to support their arguments. Defendants argue that the Court previously  
28 ruled that any allegations of fraudulent concealment would be barred. Plaintiff argues  
that the Court previously ruled that he alleged facts of fraud sufficient to render the  
release voidable, and therefore, the case cannot be dismissed based on the release.  
However, the Court's ruling on a motion to dismiss is based on a different standard



1 As a threshold issue, Defendants argue that by signing the Stock Repurchase  
2 Agreement, that contained a mutual release, Plaintiff knowingly and voluntarily  
3 released the Defendants from any and all claims as of December 31, 2009. Plaintiff  
4 argues that the release is voidable because as a fiduciary, Defendants did not fully  
5 disclose all the relevant facts. Plaintiff contends that as to all the instances of breaches  
6 of fiduciary duty, he either had no idea they were occurring or he did not know the  
7 import of why they were occurring.

8 A “general release can be completely enforceable and act as a complete bar to  
9 all claims (known or unknown at the time of the release) despite protestations by one  
10 of the parties that he did not intend to release certain types of claims.” San Diego  
11 Hospice v. County of San Diego, 31 Cal. App. 4th 1048, 1053 (1995) (citing Winet v.  
12 Price, 4 Cal. App. 4th 1159, 1173 (1992)). In determining the enforceability of a  
13 release, courts consider (1) whether the parties are represented by counsel; (2) whether  
14 the releasor was aware of any potential claims, and (3) whether the releasor with this  
15 awareness of the second factor, and advice of counsel, the releasor agreed to release  
16 unknown claims explicitly waiving the protection of Civil Code section 1542. Id. at  
17 1054 (citing Winet, 4 Cal. App. 4th at 1168).

18 However, a release may be rescinded or the release can be avoided if (1) there  
19 was fraud in the inception - misrepresenting the nature or contents of the document  
20 being executed; (2) a release obtained by a fiduciary without full disclosure of the  
21 relevant facts; (3) fraud as a ground for not applying a release to an unknown claim  
22 because the fraud prevented the releasor from knowing about the claim. Id. at 1055 n.  
23 2.

24 In this case, the mutual release contained in the Stock Repurchase Agreement,  
25 entered on December 31, 2009 provides:

26 \_\_\_\_\_  
27 than on a motion for summary judgment. Moreover, allegations of fraudulent  
28 concealment is a distinct cause of action from breach of fiduciary duty. The Court will  
not rely on its prior ruling on motions to dismiss in considering the instant motion for  
summary judgment.

1 Mutual Release. The Company, Matt, and Stephen release Seller and  
2 his attorneys, employees, and agents, and Seller releases the Company,  
3 Matt, and Stephen and their attorneys, employees, and agents from all  
4 claims, liabilities, obligations, promises, agreements, controversies,  
5 and damages of any nature and kind, known or unknown, attributable  
6 to or otherwise arising from any matter, transaction, occurrence, event  
7 or controversy from the beginning of time until the Effective Date. The  
8 only possible claim between the two sides that can survive this release  
9 will be one for breach of this agreement, and any such claim is  
10 specifically preserved from this release. This release specifically  
11 includes any and all claims under any federal, state, or local statute,  
12 rule, or regulation, as well as any claims for negligent or intentional  
13 infliction of emotional distress, breach of contract, fraud or any other  
14 unlawful behavior, the existence of which the Company, Matt, Stephen  
15 and the Seller deny. This release is not an admission of any wrongful  
16 or unlawful acts or of any breach of any agreement. This release will  
17 be effective as a full and final accord and satisfaction and general  
18 release of and from all of the claims released in this agreement (the  
19 "Released Claims"). The parties acknowledge that they are familiar  
20 with Section 1542 of the Civil Code of the State of California, which  
21 provides as follows:

22 **1542. CERTAIN CLAIMS NOT AFFECTED BY A GENERAL  
23 RELEASE.**

24 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS  
25 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO  
26 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING  
27 THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST  
28 HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT  
WITH THE DEBTOR.**

Each party waives any and all rights he or it has, or may have, under California Civil Code Section 1542 (or any successor statute) with respect to the Released Claims. In connection with this waiver, the parties acknowledge that they are aware that they may discover claims presently unknown or unsuspected, or facts in addition to or different from those that they now know or believe to be true, with respect to the subject matter of this agreement. Nevertheless, each party reaffirms that by entering into this agreement, and having had the opportunity to seek the advice of its own independently selected counsel, such party intends to release fully, finally, and forever the Released Claims.

(Dkt. No. 87-9, Ds' NOL, Ex. C at 5.) This is a broad release that covers any known and unknown claims and also waives the rights under California Civil Code section 1542.

As to enforceability, Defendants argue that Plaintiff was represented by an

1 experienced and competent counsel, William Markham.<sup>3</sup> Defendants also maintain that  
2 Plaintiff was aware of all the facts he currently alleges as breaches of fiduciary duty  
3 prior to signing the Stock Repurchase Agreement, and he voluntarily and knowingly  
4 released known and unknown claims, and explicitly waived the protections under Civil  
5 Code section 1542. Plaintiff does not dispute Defendants' argument as to the  
6 enforceability of the mutual release, but argues that the mutual release is voidable  
7 based on Defendants' role as fiduciaries and their failure to fully disclose all the  
8 relevant facts.

9 In his opposition, Plaintiff lists the acts or omission of acts that should void the  
10 release. (Dkt. No. 93 at 19-20.) These acts are:

- 11 a. Withholding/Misrepresenting DVMI's true financial condition  
12 during 2009 from Wallack;
- 13 b. Taking control/seizing the books and accounting of DVMI;
- 14 c. Moving the DVMI business operations to Wright's home, with  
15 little or any notice;
- 16 d. Holding at least one secret meeting with the company  
17 accountant, including discussing that much of the 2009 profits  
18 (which Wright had in August told Wallack there would likely be  
19 none), would be distributed in the form of back paid salary to  
20 Wright and Walters, and bonuses to Walters, Wright and other  
21 DVMI employees, to the exclusion of Wallack.
- 22 e. Eliminating Wallack's Administrator access to the DVMI  
23 website;
- 24 f. Seizing and transferring ownership of the DVMIinsight.com  
25 domain name to themselves from Wallack's company (SDVI) by  
26 having Walters surreptitiously use his prior SDVI access to the  
27 GoDaddy.com account to contact GoDaddy.com and have the  
28 domain name switched to another account and web host, with no  
access to Wallack or SDVI;
- g. As part of the Stock Repurchase Agreement, by attempting in  
bad faith to "steal" SDVI's registered ownership of the  
DVMINSIGHT Trademark, with the intent of selling that  
Trademark to IDEXX, knowingly without obtaining the  
necessary written assignment under federal law (namely 15 USC  
1055(a)(3)). In fact, the Trademark was never mentioned in the  
negotiations, there is no written assignment, and its registered  
owner, SDVI, was not even a party to the Stock Repurchase  
Agreement (see, Christian Depo, **Exhibit "D,"** pages 81-82);

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<sup>3</sup>Plaintiff retained counsel, William Markham to assist him in selling his shares  
in DVMI in late 2009. (Dkt. No. 87-22, Ds' NOL, Ex. L, Markham Depo. at 15:21-  
16:4.) Markham has been practicing law for about 27 years and has been involved in  
cases concerning shareholder disputes, and drafting settlement agreements and stock  
repurchase agreements. (Id. at 8:17-19; 13:6-9; 19-14:12; 15:11-20.)

- 1 h. Refusing to allow a fair business valuation of DVMI to establish  
2 a purchase price for Wallack's shares of stock; and  
3 i. Knowingly retaining DVMI's corporate counsel, Michael  
4 Christian, as also their personal counsel to represent them in the  
5 Stock Repurchase Transaction, including having Christian  
6 advocate to not have a business valuation and otherwise  
7 dissuade Wallack from receiving the benefits of a fair,  
8 reasonable, good faith and honest negotiation he deserved with  
9 those who owed him fiduciary duties (but who were fraudulently  
10 and clandestinely negotiating the Stock Repurchase so they  
11 could reap the rewards of future employment and millions of  
12 dollars from an asset purchase- to the tortuous exclusion of  
13 Wallack from reaping those benefits.)  
14 j. Subjecting Wallack to a coordinated effort to make his  
15 relationships with co- owners and is (sic) working environment  
16 with them and staff hostile ones; and  
17 k. Threatening to misdirect DVMI's revenues/assets to their own  
18 personal companies if Wallack insisted on remaining a  
19 shareholder of the company.  
20

21 (Dkt. No. 93 at 20-21.) Plaintiff alleges either he did not know these acts were  
22 occurring or he did not understand the "import of why they were occurring." (Id. at  
23 21.)

24 Plaintiff explains he did not know the import or significance of these acts at the  
25 time of the Stock Repurchase Agreement because he was not aware that Defendants  
26 were in continuous communications with Idexx from April 2009 until the Asset  
27 Purchase Agreement between Idexx and DVMI was signed in September 2011.  
28 Plaintiff claims that the \$1 million was the "first offer" which increased over time.  
Moreover, it was later discovered, and unknown to Plaintiff that at the time of signing  
the Stock Repurchase Agreement, that Wright, Walters and all employees of DVMI,  
except Plaintiff, were offered future employment at Idexx, in April/May 2009 when  
Wright went to visit Idexx, to continue to operate DVMI's business model the same as  
before. Consequently, in order to achieve their goal of an asset sale and future  
employment at Idexx, Defendants had to remove Plaintiff from his stock ownership  
interest in DVMI. From the time Wright returned from Idexx in April 2009, Plaintiff  
alleges Defendants committed numerous overt acts and concealed key facts from  
Plaintiff which forced Plaintiff to succumb to Defendants' pressure to sell his interests  
in DVMI.

1 First, Plaintiff does not provide any legal authority that while he was aware of  
2 the many alleged acts of breaches of fiduciary duty prior to the stock repurchase  
3 agreement containing the mutual release, he did not understand the significance of all  
4 the acts, in totality, until after he discovered that there were continuous discussions of  
5 the sale of DVMI to Idexx and the offer of employment to Defendants and DVMI  
6 employees at the exclusion of Plaintiff.

7 Even if the Court considered Plaintiff's argument, he has failed to demonstrate  
8 a genuine issue of disputed material fact as to the facts giving rise to Plaintiff's  
9 argument that he did not understand the significance of all the acts constituting breach  
10 of fiduciary duty. Defendants argue Plaintiff has not demonstrated a genuine issue of  
11 disputed material fact that there were continuous discussions between Wright and  
12 Walters with Idexx concerning the sale of DVMI to Idexx after Wright returned from  
13 Maine in April/May 2009 and that Defendants knew at that time they would be offered  
14 employment at Idexx once the sale was complete that specifically excluded Plaintiff.

15 Defendants present the following facts in support. When Farber, an Idexx  
16 representative, suggested a purchase price of not more than \$1 million, which was a  
17 multiple of 1.1-1.2 of DVMI's gross revenues, Plaintiff and Defendants all agreed that  
18 the price was too low and not acceptable. (Dkt. No. 87-15, Ds' NOL, Ex. H, Wright  
19 Depo. at 145:22-146:4; Dkt. No. 93-5, Wallack Decl. ¶ 22.) In a brief conversation,  
20 Wright told Farber, "no" to the offer. (Dkt. No. 87-15, Ds' NOL, Ex. H, Wright Depo.  
21 at 145:22-146:4; 153:3-6; Dkt. No. 87-16, Ds' NOL, Ex. I, Wallack Depo. at 94:11-17.)  
22 Wright testified that after he said "no" to Idexx concerning its RFP, there was radio  
23 silence. (Dkt. No. 87-15, Ds' NOL, Ex. H, Wright Depo. at 155:8-156:5.) According  
24 to DVMI's attorney, negotiations ceased regarding selling anything to Idexx. (Dkt. No.  
25 87-20, Ds' NOL, Ex. J, Christian Depo. at 48:1-25.) Wallack also testified that when  
26 he contacted Farber in December 2009 to confirm the potential price offered by Idexx,  
27 Farber told him there were no continued business discussions. (Dkt. No. 87-18, Ds'  
28 NOL, Ex. I, Wallack Depo. at 313:13-315:3.) According to Schofield, an Idexx

1 representative, he stated that there was communication with Wright about six to ninth  
2 months before the asset purchase sale in September 2011. (Dkt. No. 93-3, P’s NOL,  
3 Ex. F, Schofield Depo at 44:5-12.) He also testified that he did not know why there  
4 were no documents as to another nondisclosure agreement (“NDA”), a letter of intent  
5 and/or term sheet sent to DVMI for the purchase of its assets. (Id. at 61:3-18.) Wright  
6 testified that he got a call from Schofield a few months before September 2011  
7 concerning Idexx’ interest in purchasing DVMI. (Dkt. No. 87-15, Ex. H, Wright Depo.  
8 at 158:17-160:7.) In addition, he recalls that Idexx did not contact him more than three  
9 months before September 2011 because Christian informed him that Idexx wanted the  
10 deal completed within 60 days. (Id.) Defendants’ facts demonstrate that negotiations  
11 between DVMI and Idexx ceased in the Spring of 2009 and did not start up again until  
12 2011.

13 In response, Plaintiff points to three facts to support his argument that there were  
14 continuous negotiations between DVMI and Idexx and an offer of employment to all  
15 DVMI employees and Defendants. First, Plaintiff asserts that a nondisclosure  
16 agreement (“NDA”) was negotiated in April/May 2009 and that the NDA remained  
17 open until the deal closed in September 2011. According to Plaintiff, this demonstrates  
18 there were continued discussion between Defendants and Idexx. In his declaration,  
19 Plaintiff states that he later learned of extensive correspondence between Farber,  
20 Wright and DVMI’s attorney concerning negotiations on an exclusive Non-Disclosure  
21 Agreement (“NDA”) with Idexx at the time of Wright’s visit to Maine in April/May  
22 2009. (Dkt. No. 93-5, Wallack Decl. ¶ 23.) After the NDA was signed, Wright  
23 provided DVMI’s financials to Idexx. (Id.) He states, “I was for the most part unaware  
24 of these communications.”<sup>4</sup> (Id.)

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25  
26 <sup>4</sup>Defendants object to Plaintiff’s declaration based on the sham affidavit rule.  
27 A “party cannot create an issue of fact by an affidavit contradicting his prior deposition  
28 testimony.” Nelson v. City of Davis, 571 F.3d 924, 927 (9th Cir. 2009). “[I]f a party  
who has been examined at length on deposition could raise an issue of fact simply by  
submitting an affidavit contradicting his own prior testimony this would greatly  
diminish the utility of summary judgment as a procedure for screening out sham issues

1 In reply, Defendants argue that Plaintiff knew about the NDA at the time of its  
2 negotiation. A non-disclosure agreement was discussed and negotiated by email  
3 between Wright, Farber and Christian, DVMI's attorney, in May 2009. (Dkt. No. 93-3,  
4 P's NOL, Ex. P.) Plaintiff was cc'ed on most of the emails. (Id.) Also, Plaintiff  
5 testified that he was aware of the negotiations regarding the NDA at the time as he  
6 acknowledged he received the emails. (Dkt. No. 95-4, Freeland Decl., Ex. A, Wallack  
7 Depo. at 115:5-116:23.) Plaintiff further testified that while he understood that the  
8 NDA was being put in place he did not know the contents of the NDA. (Id.) He said  
9 he understood the NDA was related to the potential purchase of DVMI by Idexx. (Id.)  
10 Financials were sent to Farber. (Dkt. No. 87-15, Ds' NOL, Ex. H, Wright Depo. at  
11 134:9-135:6.)

12 Based on these facts, Plaintiff has not demonstrated that he was not aware of the  
13 NDA at the time it was negotiated. Plaintiff presents an implication that there were  
14 continued negotiations of a sale from April 2009 to September 2011 because

15 \_\_\_\_\_  
16 of fact.” Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991).  
17 However, the sham affidavit rule must be applied with caution because “it is in tension  
18 with the principle that the court is not to make credibility determinations when granting  
19 or denying summary judgment. Yeager v. Bowlin, 693 F.3d 1076, 1080 (9th Cir. 2012)  
20 (citation omitted). Therefore, in order for the sham affidavit rule to apply, the court  
must make a factual determination that the contradiction was actually a “sham” and the  
“inconsistency between a party's deposition testimony and subsequent affidavit must  
be clear and unambiguous to justify striking the affidavit.” Id. (citation omitted).

21 Here, Plaintiff deposition was taken on December 12, 2014 and the declaration  
22 was executed on March 20, 2015. His declaration statement “I was for the most part  
23 unaware of these communications” is an exaggeration, and not a direct contradiction,  
24 of his deposition testimony where he testified that he, in fact, received the emails about  
25 the NDA and was aware one was being negotiated. Moreover, it does not appear that  
26 Plaintiff was aware that DVMI gave Idexx its financial document which support  
27 Plaintiff's statement that “for the most part [he] was unaware of these communications.”  
28 See Brown v. Showboat Atlantic City Propco, LLC, No. 08–5145(NLH), 2010 WL  
5237855, \* 4 (D.N.J. Dec.16, 2010) (“An inherent requirement of a sham affidavit is  
that the affiant's statement must contradict deposition testimony. Statements in an  
affidavit that ‘merely . . . conflicts to some degree with an earlier deposition’ cannot  
be disregarded as shams . . . . Courts do not declare these affidavits shams because  
they do not flatly contradict deposition testimony and, therefore, a reasonable jury may  
find the affidavit credible and conclude that any discrepancy is inadvertent[.]” citing  
Baer v. Chase, 392 F.3d 609, 625 (3d Cir. 2004)). Therefore, the Court declines to  
strike the paragraph in Plaintiff's declaration and overrules Defendants' objections.

1 Defendants did not produce another NDA that was negotiated for the Asset Purchase  
2 Agreement. Therefore, Plaintiff implies that since the same NDA was most likely used  
3 for the Asset Purchase Agreement, there must have been continued negotiations about  
4 the sale of DVMI to Idexx. Plaintiff's assertion is merely an implication and no facts  
5 are presented to support that assertion. The NDA issue does not show there were  
6 continuous negotiations of a sale between Defendants and Idexx.

7 Second, Plaintiff contends that an email, dated July 26, 2009 and titled "Idexx",  
8 sent to him from Wright indicated that Wright was in communication with a TJ Dupree,  
9 an executive and Farber's boss at Idexx, demonstrates continuous negotiations between  
10 the two companies. (Dkt. No. 93-5, Wallack Decl. ¶ 23; Dkt. No. 93-3, P's NOL, Ex.  
11 Q.) According to Plaintiff, contrary to Wright's representation that his discussion  
12 with Idexx were over and would not be dealing with Idexx on any further matters, he  
13 became aware that Wright exchanged emails with a TJ Dupree, at Idexx. (Dkt. No. 93-  
14 5, Wallack Decl. ¶ 23.) At the time, Plaintiff was unaware of any work being done by  
15 or with Idexx in July 2009 by DVMI. (Id.)

16 One email in July 2009, does not demonstrate that Defendants and Idexx were  
17 still discussing the sale of DVMI to Idexx. Moreover, even if it did demonstrate  
18 continued discussions concerning the sale of DVMI to Idexx, Plaintiff was fully aware  
19 of Wright's communications with Idexx in July 2009.<sup>5</sup> Moreover, Plaintiff testified  
20 that prior to 2009, he was not involved in the day-to-day business of DVMI so he was  
21 not aware whether DVMI had a business relationship with Idexx. (Dkt. No. 87-16, Ds'  
22 NOL, Ex. I, Wallack Depo. at 90:19-91:5.) Plaintiff has not created a genuine issue of

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23  
24 <sup>5</sup>Wright explained that he emailed TJ Dupree and had conversations with  
25 Brandon French, also an employee of Idexx, about the CR leases Plaintiff was doing.  
26 (Id. Ds' NOL, Ex. H, Wright Depo. at 153:9-155:8) While the parties do not explain  
27 the meaning of "CR leases", Wright testified about CR systems and how they are  
28 distinct digital radiology machines and create a conflict of interest if you sell both.  
(Dkt. No. 87-15, Ds' NOL, Ex. H, Wright Depo. at 154:1-23.) At that time, Plaintiff  
and Idexx were competitors in the sale of digital radiography machines and there was  
a relationship. (Id.) Wright's goal was to encourage digital radiology vendors to keep  
a level playing field to allow anybody to send images to anybody else. (Id.) Idexx sent  
images to DVMI even though they had their own teleradiology division. (Id. at 155:3-  
7.)



1 material fact that the one email in July 2009 to an employee at Idexx demonstrates  
2 continued negotiations between Defendants and Idexx concerning the sale of DVMI  
3 to Idexx.

4 Third, Plaintiff states that the alleged agreement in 2009 to sell DVMI to Idexx  
5 also included an employment offer to Defendants and DVMI's employees and not  
6 Plaintiff. For support, Plaintiff only cites to his declaration which states that "Wright  
7 did not mention that any potential sale would also include IDEXX retaining all DVMI  
8 management except me." (Dkt. No. 93-5, Wallack Decl. ¶ 23.) Defendants filed  
9 objections to Plaintiff's declaration. (Dtk. No. 95-1.) As to this statement, Defendants  
10 object because this statement lacks personal knowledge under Federal Rules of  
11 Evidence 602 and lacks relevance. (Id.) The Court agrees and sustains Defendants'  
12 objection. Plaintiff provides no foundation as to how he learned that Wright knew that  
13 any potential sale would include employment with Idexx back in April/May 2009.

14 Plaintiff's allegations do not show that Defendants had continued negotiations  
15 about the sale of DVMI from April/ May 2009 through September 2011 when the Asset  
16 Purchase Agreement was executed, and do not demonstrate that Defendants, in  
17 April/May 2009, were offered employment by Idexx, if the acquisition occurred.

18 As discussed above, the underlying bases of Plaintiff claim that he did not  
19 understand the import or significance of the eleven acts because Defendants concealed  
20 information about the potential later sale of DVMI to Idexx and concealed the offer of  
21 employment to Defendants and DVMI employees only is without merit as Plaintiff has  
22 failed to demonstrate a genuine issue of material fact. Plaintiff presents many  
23 arguments, claims, and conjectures without evidentiary support.

24 Furthermore, as to the eleven acts of breaches of fiduciary duty, Defendants  
25 argue that Plaintiff knew about the claims he alleges in this case and cannot void the  
26 mutual release. In an email dated December 18, 2009, Plaintiff, through Markham,  
27 threatened to initiate a lawsuit against Defendants alleging, among other things, breach  
28 of fiduciary duty. (Dkt. No. 87-23, Ds' NOL, Ex. L at 24.) In the email, Markham

1 stated the law on the fiduciary duties owed by Defendants, the majority shareholders,  
2 to Plaintiff, the minority shareholder. (Id.) Markham addressed the following issues  
3 in his email: Wright and Waters' refusal to agree to a valuation of the company; the  
4 additional pay bonuses to be paid out to Defendants; Defendants' removal of the  
5 software from the company; Defendants' restriction of Plaintiff's ability to monitor the  
6 company's activities; and an indication that Defendants intended to transfer the value  
7 of the business to other entities to avoid paying an honest purchase price. (Id. at 24-  
8 25.) Plaintiff provided notice that unless an agreement is worked out, he will bring suit  
9 in Superior Court on January 5, 2010 seeking a judicial accounting, an involuntary  
10 dissolution and damages for breach of contract, mismanagement, breach of fiduciary  
11 duty and related wrongs. (Id. at 25.)

12 At his deposition, Markham confirmed that in December 2009, he sent an email  
13 threatening to bring a lawsuit in state court. (Dkt. No. 87-22, Ex. L, Markham Depo.  
14 at 118:1-122:5.) He testified that the breaches of fiduciary duties he was referencing  
15 in the December 2009 email were Defendants diverting the assets and/or revenues to  
16 Wright and Water's companies so DVMI would have no value; meeting privately with  
17 DVMI's accountant to make tax planning and payment arrangements that benefit the  
18 controlling shareholders but to the detriment of the minority shareholder; not disclosing  
19 to the minority shareholder the status of their arrangements to sell the company for  
20 what they think the company is worth if they were able to sell it; trying to suppress  
21 what the minority shareholder knew about the value of the company or the revenues  
22 it was receiving, excluding the minority shareholder from information that the  
23 shareholder requires in order form a fair assessment of the value of the company;  
24 refusing in bad faith to any sort of valuation process when negotiating the purchase of  
25 the minority shareholders' interest in the company; and insisting that the company had  
26 negligible or no value during these negotiations. (Id. at 120:7-121:9.)

27 Markham's email and testimony reveal that Plaintiff knew about alleged acts or  
28 omissions a, b, d, e, f, h, and k prior to the signing of the mutual release. (Cf., Dkt. No.

1 93 at 19-20.) Therefore, these cannot be a basis to for void the mutual release. The  
2 Court next addresses items c, g, i, and j to determine if Plaintiff knew about these  
3 issues prior to signing the Stock Repurchase Agreement.

4 As to item c concerning Wright relocating DVMI's business operations to his  
5 home and changing the mailing address to a post office box only he had access to, the  
6 Court concludes that Defendants have not provided appropriate citation to facts in the  
7 record to support their position. In their CSSUF, Defendants assert that Plaintiff  
8 testified that moving DVMI to Wright's home was financially beneficial because  
9 DVMI would no longer have to pay rent to VICSD. However, the citations to  
10 Plaintiff's deposition and to Walters and Christian's deposition pages do not support  
11 this claim. (See Dkt. No. 95-2, CSSUF Nos. 3, 12, 34.)<sup>6</sup> Plaintiff asserts in his  
12 declaration that Wright relocated business operations to his home and changed the  
13 mailing address to a post office box that only Wright had access to raising the  
14 implication that the move was done to shut Plaintiff out of the business operations of  
15 DVMI. (Dkt. No. 93-5, Wallack Decl. ¶ 25.)

16 Coincidentally, as the Court was reviewing the record, it came across an email  
17 in early August 2009 where Plaintiff writes, "I also agree that there is no reason for  
18 DVMinSight to spend the money on rent but if you want to continue getting mail at the  
19 center that is fine you don't have to rent a PO Box." (Dkt. No. 93-3, P's NOL, Ex. S  
20 at 274.) Therefore, Plaintiff not only was notified and aware of the move of operations  
21 of DVMI to Wright's home but actually condoned it. This cannot be a basis to void the  
22 mutual release.

23 As to item g, concerning Plaintiff's allegation that Defendants breached a  
24 fiduciary duty by attempting to "steal" SDVI's registered ownership of the  
25 DVMinSight trademark as it was a listed asset in the Asset Purchase Agreement with  
26

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27 <sup>6</sup>The Court notes many pages are missing from the record that are cited by the  
28 both parties in the CSSUF. For example, pages 79-83; 130-34 and 142-43 of Plaintiff's  
deposition are not in Defendants' supporting documents or even in Plaintiff's  
documents. Therefore, the Court only considered the pages that were in the record.

1 Idexx without obtaining a written assignment under trademark law. Plaintiff did not  
2 learn of this fact until after the execution of the Asset Purchase Agreement.

3 The Asset Purchase Agreement in schedule 1.1 states that the trademark was an  
4 asset owned by DVMI and was being sold to Idexx. The trademark was filed in April  
5 2005 in SDVI's name and no assignment was ever made. In November 2011, Idexx  
6 attempted to have the trademark registered in its name. (Dkt. No. 93-3, P's NOL, Ex.  
7 W.)

8 In order to demonstrate that Defendants breached their fiduciary duty, Plaintiff  
9 has to show that prior to the 2009 Stock Repurchase Agreement, Defendants intended  
10 to "steal" the trademark as part of DVMI's asset sale to Idexx later in September 2011.  
11 As discussed above, Plaintiff has not created a genuine issue of material fact that there  
12 were continued negotiations between Defendants and Idexx from April/May 2009 to  
13 September 2011. It follows that Defendants could not have intended to "steal" the  
14 trademark as part of the sale to Idexx prior to December 2009.

15 Defendants argues that they were permitted to use the trademark after the Stock  
16 Repurchase Agreement in December 2009. Wallack testified that there was an oral  
17 license between SDVI and DVMI concerning the use of its trademark. (Dkt. No. 95-4,  
18 Freeland Decl., Ex. A, Wallack Depo. at 243:16-244:10; 245:3-12.) When Wright  
19 came on board in 2004, they agreed that with the creation of the new entity, SDVI,  
20 everything would remain the status quo so that the assets, such as the trademark,  
21 remained part of the original company, SDVI, and would be used by the new entity,  
22 DVMI. (Id.) He testified that the parties never discussed termination of the license.  
23 (Id. at 245:13-23.) Plaintiff does not raise an issue of trademark violation after the  
24 Stock Repurchase Agreement in December 2009 as to Defendants or DVMI but only  
25 alleges it as to Idexx as part of the Asset Purchase Agreement and later conduct by  
26 Idexx.

27 Defendants also contend that Plaintiff has no standing to raise this issue because  
28 SDVI is the owner of the trademark and SDVI did not file an opposition to Defendants'

1 motion for summary judgment. Furthermore, Defendants argue that there was no  
2 longer a fiduciary relationship between the Defendants and Wallack after December  
3 31, 2009. They assert that Idexx' attempt to register the DVMinSight trademark is not  
4 relevant to Plaintiff's claim for breach of fiduciary duty against Defendants. The Court  
5 agrees.

6 Plaintiff has not shown that Defendants intended to sell the trademark to Idexx  
7 at the time they entered into the Stock Repurchase Agreement in December 2009.  
8 Therefore, this issue cannot void the mutual release.

9 As to item i, Plaintiff alleges that Defendants knowingly retained DVMI's  
10 corporate counsel Michael Christian, as their personal counsel to represent them in the  
11 Stock Repurchase transaction, including having Christian advocate to not have a  
12 business valuation and otherwise dissuade Plaintiff from receiving the benefits of a  
13 fair, reasonable, good faith and honest negotiation owed to him by Defendants'  
14 fiduciary obligations to him.

15 Defendants argue that Plaintiff asserts a legal conclusion which has no support.  
16 According to Plaintiff, Christian's response to Plaintiff's email of December 7, 2009  
17 demonstrates that Defendants violated their fiduciary duties by knowingly retaining  
18 corporate counsel, Christian, to represent them as individual parties as well as DVMI  
19 as to the Stock Repurchase Agreement without obtaining a waiver of conflict letter.  
20 Christian's response only stated that he could not represent the interests of the  
21 shareholders since he represented the corporation. (Dkt. No. 87-20, Ds' NOL, Ex. J  
22 at 18.) There is no indication that Christian was representing Defendants in the Stock  
23 Repurchase Agreement. Plaintiff's speculative argument concerning item i is without  
24 merit.

25 Finally, Plaintiff relies on item j which alleges in a conclusory fashion that  
26 Defendants subjected Plaintiff to a coordinated effort to make his relationships with co-  
27 owners and his working environment a hostile one. This allegation is essentially an  
28 amalgamation of items a-j which have been shown to be meritless individually and are

1 no more meritorious combined.

2 In sum, Plaintiff has not created a genuine issues of fact that he was unaware of  
3 the allegations of breaches of fiduciary duty prior to the Stock Repurchase Agreement  
4 such that the mutual release can be voided.

5 Based on the evidence, it is clear that by December 2009 the relationship  
6 between Plaintiff and Wright/Walters had deteriorated. Plaintiff was motivated to sell  
7 his shares in the company. In order to avoid prolonged litigation, he was willing to  
8 accept a significant discount on the valuation in order to get something reasonable and  
9 to sever his ties with Wright and Walters. (Dkt. No. 95-6, Freeland Decl., Ex. C,  
10 Markham Depo at 69:9-12.) Plaintiff contacted Farber at Idexx concerning Idexx’  
11 offer in April/May 2009 and Markham conducted his own valuation of the company.  
12 (Id., Markham Depo. at 111:21-25.) Plaintiff was fully aware of the issues he alleged  
13 concerning Defendants’ breach of their fiduciary duty; however, he acknowledged that  
14 he wanted to avoid litigation and voluntarily gave up his rights as to these claims when  
15 he signed and agreed to the mutual release. Plaintiff made a choice to settle his claims  
16 rather than pursue litigation. He also acknowledged that he would be receiving less  
17 than what he believed DVMI was worth. On December 27, 2009, Markham wrote to  
18 Christian, Wright and Walters to accept a settlement offer. (Dkt. No. 87-23, Ds’ NOL.,  
19 Ex. L at 35-36.) In that email, he discussed his disagreement with the valuation  
20 procedures and cited to caselaw and disputed opposing counsel’s supporting article.  
21 (Id. at 36.) In the end, Markham wrote, “[t]hese points, however, no longer matter, as  
22 Seth accepts Matt’s offer, which he understands to be the following . . .” (Id. at 36.)

23 Moreover, Plaintiff admits that he read the Agreement, did not have any  
24 concerns about the mutual release, and had an opportunity to speak to his lawyer about  
25 the Agreement before signing it. (Dkt. No. 87-18, Ds’ NOL, Ex. I, Wallack Depo. at  
26 329:19-331:21; 334:4-13; Dkt. No. 87-22, Ex. L, Markahm Depo. at 143:9-144:5.)  
27 After reading the Agreement, Plaintiff understood the terms and signed it on December  
28 31, 2009 and received all the consideration provided under the Agreement. (Id.)

1           Therefore, based on the evidence presented, Plaintiff has not demonstrated a  
2 genuine issue of material fact that the mutual release is voidable based on Defendants',  
3 as fiduciaries, failure to fully disclose the relevant facts. Since the mutual release bars  
4 Plaintiff from asserting any claims for breach of fiduciary duty, the Court GRANTS  
5 Defendants Wright and Walters' motion for summary judgment on the cause of action  
6 for breach of fiduciary duty.

7 **C. Evidentiary Objections**


8           Defendants filed evidentiary objections to Plaintiff's declaration. (Dkt. No. 95-  
9 1.) The Court notes their objections. To the extent that the evidence is proper under  
10 the Federal Rules of Evidence, the Court considered the evidence. To the extent that  
11 the evidence is not proper, the Court did not consider it.

12 **Conclusion**

13           Based on the above the Court GRANTS Defendants Wright and Walters' motion  
14 for summary judgment on the breach of fiduciary duty cause of action. The hearing set  
15 for April 17, 2015 shall be vacated.

16           IT IS SO ORDERED.

17  
18 DATED: April 15, 2015

19   
20 HON. GONZALO P. CURIEL  
21 United States District Judge  
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