SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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JOSHUA VASBINDER, individually and derivatively on behalf of Universal Processing, LLC,

Plaintiff,

-against-

SAINT HUNG, UNIVERSAL PROCESSING, LLC, HUAIBOA DING, CHUNG YIN YAU, CAPITAL PROCESSING SOLUTIONS, INC., KAI ZHANG, BUFAN YANG, NA HUO, KUN FAI CHU, and COLSULPAY, LLC,

Defendants.

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Index No.: 651325/2016

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 004, 005, and 007 are consolidated for disposition.

Defendants Universal Processing, LLC (the Company), Chung Yin Yau, Capital Processing Solutions, Inc., Kai Zhang, Bufan Yang, Na Huo, and Kwun Fai Chu (collectively, the Universal Movants) move, pursuant to CPLR 3211, to dismiss the amended complaint (the AC). Seq. 004. Defendants Saint Hung and Huaibao Ding separately move to dismiss the AC. Seq. 005. Plaintiff Joshua Vasbinder opposes the motions.

After these motions were fully submitted, Vasbinder moved, by order to show cause, to enforce the terms of a settlement agreement or, in the alternative, to vacate that agreement on the ground of unilateral mistake. Seq. 007. Defendants oppose the motion.

For the reasons that follow, defendants' motions to dismiss are granted in part and denied in part, and Vasbinder's motion is denied.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the AC (*see* Dkt. 54)[1] and the documentary evidence submitted by the parties.

The Company, a New York LLC, "is engaged in the business of merchant processing (e.g., credit card processing), payment services, payment technologies, and merchant services."[2] AC ¶ 18. The plaintiff in this action, Vasbinder, is a former Managing Member, Chief Operating Officer, and Chief Financial Officer of the Company. By virtue of a resolution passed by a majority of the Company's members at a February 18, 2016 special meeting, Vasbinder was fired from the Company and removed as a Managing Member, purportedly for cause. Vasbinder claims to own a 25.5% membership interest in the Company, which was not affected by his removal.[3]

Defendants Hung and Ding currently are Managing Members of the Company and, respectively, own 40% and 20.5% of the Company's membership interests. Hung is the Company's Chief Executive Officer, and Ding is the Chief Revenue Officer. The other individual defendants, Yau, Zhang, Yang, Huo, and Chu, also own membership interests in the Company. They are sued herein solely for their decision to vote to remove Vasbinder as Managing Member. Consulpay, LLC (Consulpay) is a competitor of the Company; it also was

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[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[2] *See iPayment, Inc. v Allstate Merchant Servs., LLC*, 2014 WL 882789, at *1 (Sup Ct, NY County 2014) (brief discussion of credit card processing business model).

[3] Defendants dispute his ownership interest, but that is not an issue on this motion. However, the court has granted Vasbincder books and records access by virtue of the preliminary injunctive relief discussed herein.

named as a defendant. A settlement with Consulpay[4] is the subject of the disputed settlement agreement, which is addressed further herein.

The Company is governed by an Amended and Restated Operating Agreement dated as of April 5, 2014. *See* Dkt. 55 (the Operating Agreement).[5] Section 5.1 provides that the Company's Managing Members have the "exclusive and absolute right" to run the Company." *See id.* at 11.[6] Section 5.2(a) states that Vasbinder, Hung, and Ding are the initial Managing Members and also sets forth their role as officers. *See id.* at 11-12. Section 5.2(b) entitles the Managing Members to Management Fees. *See id.* at 12. Section 5.2(d) states that "[a] Managing Member may be removed ... for cause with the consent of the remaining Managing Members together with an equity vote in excess of 85% excluding the equity position of the Managing Member in question." *See id.* Cause is defined to be "limited to the following acts, which may result in immediate removal upon obtaining the required consents":

> (i) Theft of the Company's cash or other property or assets.
>
> (ii) Failure to achieve specific goals for the Company as agreed upon by the Managing Member and the Company in writing, but only after the other Managing Member(s) has provided to the Managing Member detailed, written notice of such alleged failure and further has provided the Managing Member with a reasonable opportunity over a period of no less than thirty (30) days after the Managing Member's receipt of such notice to cure same.

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[4] As discussed herein, Consulpay's motion to dismiss was withdrawn pursuant to the settlement agreement. *See* Dkt. 175.

[5] Schedule A to the Operating Agreement is a list of the Members, their Capital Contributions, and their percentage interests. *See* Dkt. 55 at 31. It should be noted that a two-page amendment to the Operating Agreement was executed in October 2015, which, pursuant to another Schedule A, altered the members and their percentage interests. *See id.* at 33-35. That amendment did not alter any applicable provision of the Operating Agreement.

[6] The Company's Managing Members have the classic broad array of management rights that are commonly permitted in member-managed LLCs. *See* Dkt. 55 at 13 (section 5.3, setting forth Managing Members' "rights and powers").

> (iii) Consistent (i.e., over a period of no less than thirty (30) days) failure of the Managing Member to perform duties in a professional manner, but only after the other Managing Member(s) has provided to the Managing Member detailed, written notice of such alleged failure and further has provided the Managing Member with a reasonable opportunity (over a period of no less than thirty (30) days after the Managing Member's receipt of such notice) to cure same.

See id. at 12-13. Ergo, theft is the only ground for removal that does not require 30-days' notice. Theft is not defined in the Operating Agreement. In fact, the only time the word theft appears in the Operating Agreement is in section 5.2(d)(i).

Section 5.2(e) then provides:

> Upon the removal of a Managing Member, the removed Managing Member shall have no right to participate in the business and operations of the Company, and shall cease to receive its Management Fee as set forth in Section 5.2(b) above, but such removed Managing Member shall retain the Membership Interests held by such Managing Member, and shall maintain its rights as a Member of the Company.

See id. at 13.

Section 12.2 prohibits the Members from engaging in a Competitive Business while employed by the Company and for one year thereafter. *See id.* at 24. Competitive Business is defined to mean "any payment services, payment technologies, merchant processing, or merchant services company." *See id.*

The Operating Agreement memorializes the fact that, in 2014, the Company "went through a corporate restructuring and the Members and Managing Members … agreed that a certain book of pre-existing accounts (the "Prior Transactions") would continue to generate revenue for" the Company. AC ¶ 28. The Prior Transactions are listed in Schedule B to the Operating Agreement. *See* Dkt. 55 at 32. Distributions regarding the Prior Transactions are governed by section 4.2(c):

> Notwithstanding anything contained herein to the contrary, distributions of Available Cash resulting from the business of the Company which occurred prior

> to March 3, 2014 including, but not limited to, equity, cash flows, and distributions or payments relating to any and all actions, agreements, and investments of the Company as listed on Schedule B annexed hereto (the "Prior Transactions"), shall be distributed to the Managing Members in the following manner: two-thirds (2/3) to [Hung], and one-third (1/3) to [Vasbinder], or a business entity of their choosing. This provision can only be amended upon the consent of both [Hung and Vasbinder]. This provision will be appropriately represented in all future amendments to this Agreement or any other legal binding document related to the Company's distributions of Available Cash.

Dkt. 55 at 9. Section 4.2(d) states that "[t]he Managing Members shall make distributions of Available Cash when they deem appropriate, in their sole discretion." *See id.*

Vasbinder claims that Consulpay, also a New York LLC, was formed in June 2015. Consulpay, like the Company, is in the credit card processing industry. Thus, it is a Competitive Business under section 12.2 of the Operating Agreement. Hung was an initial member of Consulpay. He first disclosed his interest in Consulpay to the Company in December 2015. Allegedly, Hung previously told Vasbinder that he did not have an interest in Consulpay. Vasbinder claims that Hung violated section 12.2 of the Operating Agreement by performing work for Consulpay, a competitor, and that Hung used the Company's confidential information to do so, a violation of section 12.1. *See* Dkt. 55 at 22-23. According to plaintiff, between October 2015 and March 2016, Hung permitted Consulpay to operate in the Company's offices, without paying rent or for use of the Company's resources. Additionally, in September and October 2015 (i.e., prior to Hung disclosing his interest in Consulpay), Hung caused the Company to sell some of its accounts to Consulpay for $68,320 (the Accounts), which Vasbinder claims was below market value (he claims the accounts were worth at least $158,841.84). At the time of the sale, Hung had a 47.5% membership interest in Consulpay.

After Hung's actions came to light, he called a special meeting of the Company's members on February 18, 2016, at which he "proposed a series of resolutions for the purposes of

stripping [Vasbinder] of his position as a Managing Member, CFO, and COO of [the Company] and suspend[ed] [the Company's] obligations to make distributions to [Vasbinder]." AC ¶ 70. Hung, Ding, and the other individual defendants "approved the resolutions over [Vasbinder's] objections." AC ¶ 71. The resolution states that Vasbinder was being removed as Managing Member and officer pursuant to section 5.2(d) of the Operating Agreement. *See* Dkt. 57. While the resolution passed with the requisite 85% vote, it does not state that Vasbinder was being removed for Cause, nor does it indicate the reason for his removal. Theft is not mentioned. Nonetheless, Vasbinder was removed immediately, without 30-day's notice, and without an opportunity to cure. The members passed a separate resolution that purported to recognize that "incorrect distributions took place under Section 4.2 [of the Operating Agreement] and the [Company's] financial statements ... must be reexamined to determine the proper amount due to" Vasbinder and Hung by virtue of the supposed incorrect distributions. *See* Dkt. 58. That resolution also stated that no further distributions would be made until the issues were addressed.

On March 11, 2016, Vasbinder commenced this action by filing his original complaint. *See* Dkt. 2. He also moved by order to show cause (Seq. 001) for sundry relief, including an injunction directing the Company to restore his status as Managing Member and for the books and record access he is entitled to under the Operating Agreement. By order dated April 1, 2016, the court granted the motion only to the extent of providing him with books and records access and ordering that his membership interest in the Company not be diminished. *See* Dkt. 52.

On April 8, 2016, Vasbinder filed the AC. It contains 28 direct and derivative causes of action, which are numbered here as in the AC: (1-2) breach of section 12.2's covenant not to

compete, asserted derivatively against Hung,[7] (3) breach of fiduciary duty, asserted derivatively against Hung; (4-5) breach of section 12.2's covenant not to compete, asserted derivatively against Hung; (6-7) misappropriation of trade secrets, asserted derivatively against Consulpay; (8-9) unfair competition, asserted derivatively against Hung and Consulpay; (10) breach of section 5.2 of the Operating Agreement, asserted directly against the Company and the individual defendants, for improperly removing Vasbinder as Managing Member; (11) breach of the duty of good faith and fair dealing under the Operating Agreement, asserted directly against the individual defendants, for improperly removing Vasbinder as Managing Member; (12) breach of fiduciary duty, asserted directly against Ding, for voting to remove Vasbinder as Managing Member; (13) a direct claim, asserted against the Company and the individual defendants, for a declaratory judgment that the removal of Vasbinder as Managing Member was improper and the resolution effectuating such removal is a nullity; (14) breach of the Operating Agreement, asserted directly against the Company and the individual defendants, for suspending payment of distributions; (15) a direct claim, asserted against the Company and the individual defendants, for a declaratory judgment that such suspension of distributions was improper under the Operating Agreement; (16-17) fraud, asserted derivatively against Hung, for failure to disclosure his interest in Consulpay and the alleged below market sale of accounts to Consulpay; (18) aiding and abetting Hung's fraud, asserted derivatively against Consulpay; (19) breach of the duty of good faith and fair dealing, asserted derivatively against Consulpay, for underpaying for the accounts;[8] (20) civil conspiracy, asserted derivatively against Hung and Consulpay; (21)

[7] Most of the dual numbered causes of action are denoted as such because, for reasons that are unclear, Vasbinder pleaded duplicative causes of action that separately seek monetary damages and injunctive relief. This partially accounts for the excessive total number of causes of action.
[8] This odd invocation of the implied covenant suggests that a counterparty-purchaser has an implied duty not to agree to pay too little on a contract. This claim was settled.

rescission, asserted derivatively against Consulpay; (22-23) breach of section 7.1(a) of the Operating Agreement, asserted directly against the Company and the individual defendants, for failure to provide books and records access; (24) violation of New York Limited Liability Company Law (LLCL) § 1102(b), asserted directly against the Company and the individual defendants, for failure to provide books and records access; (25-26) defamation, asserted directly against Hung;[9] (27) a derivative claim, asserted against the individual defendants, for a declaratory judgment regarding the *non*-Managing Members' lack of a right to indemnification under the Operating Agreement; and (28) breach of an Education Aid Agreement, dated October 1, 2015 (the Education Agreement) (Dkt. 59), which was executed in conjunction with the October 2015 amendment to the Operating Agreement. *See* Dkt. 54.

Defendants filed the two instant motions to dismiss on April 20, 2016. Consulpay separately moved to dismiss. By order dated September 8, 2016 (Dkt. 175), Consulpay's motion to dismiss (Seq. 006) was permitted to be withdrawn as moot in light of an August 25, 2016 stipulation settling the claims against Consulpay. *See* Dkt. 174 (the Stipulation). The Stipulation further provides that Vasbinder is discontinuing, with prejudice, the 4th through 9th and 16th through 21st causes of action. *See id.* at 2. The court reserved on the other two motions to dismiss after oral argument. *See* Dkt. 209 (1/6/17 Tr.).

While these motions were judice, on January 26, 2017, Vasbinder moved by order to show cause to either enforce his interpretation of the Stipulation or have it vacated on the ground

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[9] Vasbinder's counsel withdrew this claim at oral argument; it is formally dismissed herein. *See* Dkt. 236 (3/8/17 Tr. at 4)

of unilateral mistake. Consulpay and the remaining defendants oppose the motion. The court also reserved on this motion after oral argument. *See* Dkt. 236 (3/8/17 Tr.).[10]

II. Motions to Dismiss

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v*

[10] The court held the motions to dismiss in abeyance pending the motion regarding the Stipulation because the outcome of the latter dictates the scope of the claims at issue on the former. Despite this being made abundantly clear to the parties, they failed to submit the March transcript until early May, thereby significantly delaying the issuance of this decision.

Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. The Universal Movants' Motion (Seq. 004)

1. The Education Agreement (28th Cause of Action)

Paragraph 1 of the Education Agreement states that "the Managing Members consent to provide $80,000.00 to Member **Joshua Vasbinder** for educational funding in the year [sic] 2016, 2017, 2018." *See* Dkt. 59 at 1 (bold in original). The Universal Movants argue that Vasbinder does not "allege that he has engaged in any prerequisites to receipt of educational funding" because "he does not allege that he is enrolled in any educational program; nor does he provide any factual allegations regarding the cost of any such educational program." *See* Dkt. 105 at 13-14. In addition, they take issue with the fact that "Vasbinder seeks the full amount of the alleged funding, despite the fact that the parties plainly agreed to spread those payments over a three-year period." *Id.* at 14. Finally, they contend that since "Vasbinder no longer works for Universal, [he] is thus precluded by Paragraph 2 of the Education Aid Agreement from receiving payment."

Paragraph 2 provides:

> All Managing Members further consent that as of January 2016, all Members shall have access to education aid, upon a majority approval of the voting Members, **however, any Member receiving aid must continue to work for the Company, unless otherwise approved by a majority vote**. If the Company cannot finance the aid, a credit will be given to the Member approved for such aid on his capital balance for monies actually expended.

Dkt. 59 at 1 (emphasis added). Vasbinder disputes the Universal Movants' contentions "(a) that [he] be an employee of Universal; (b) that [he] be enrolled in an educational program; and (c) that [he] disclose the cost of such a program to Universal." *See* Dkt. 156 at 13. He is wrong.

As an initial matter, while Vasbinder is still a member, paragraph 2 requires him to be employed by the Company to receive education funding. Vasbinder does not allege there to have been a majority vote exempting him from this condition. Moreover, New York law requires agreements to be interpreted in a commercially reasonable manner in accordance with the plain meaning of their terms. *Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 54 (1st Dept 2015). Consequently, an agreement to provide "educational funding" must be interpreted to mean reimbursement for actual educational expenses. Vasbinder does not allege that he actually incurred any such expenses. Therefore, no actual breach of the Education Agreement is alleged. The claim is dismissed without prejudice and with leave to replead if Vasbinder can allege that he incurred educational expenses while employed by the Company.

2. Vasbinder's Removal as Managing Member (10th Cause of Action)

The Universal Movants are not entitled to dismissal of this claim. While they now allege that Vasbinder engaged in theft (which, as noted, is not a term defined in the Operating Agreement), theft was not set forth as a reason for his removal in the board resolutions. Hence, Vasbinder has stated a claim that he was removed without proper notice under section 5.4(d) of the Operating Agreement. Moreover, even if theft was properly invoked as the basis for removal without notice, the parties' factual disputes over whether any such theft occurred precludes dismissal on this motion, where all of Vasbinder's allegations are assumed to be true and have not been utterly refuted by defendants' documentary evidence. The court will not opine on whether the allegations of theft, which have yet to be explained in detail and which will be the subject of the Company's forthcoming counterclaims, fall within the meaning of theft in the Operating Agreement.

3. Vasbinder's Distribution Claim (14th & 15th Causes of Action)

Vasbinder alleges a breach of the Operating Agreement because he was not paid distributions of Available Cash from Prior Transactions under section 4.2(c). The Universal Movants argue that he has not stated a claim for breach of section 4.2(c) because section 4.2(d) provides that "the Managing Members shall make distributions of Available Cash **when they deem appropriate, in their sole discretion**." *See* Dkt. 55 at 9 (emphasis added). Vasbinder has no valid response to this argument. Of course, an allegation of improper pari passu treatment (i.e., distributions to Hung but not to Vasbinder) or an allegation that a distribution was improperly made under section 4.2(a) would state a claim. He alleges neither, despite having been granted access to the Company's book and records. He can seek leave to amend if he can properly plead such a claim.

That said, the current Managing Members' decision not to make section 4.2(c) distributions until resolution of the cost allocation issue (the basis for their theft allegations against Vasbinder) appears to be an exercise of their business judgment. *See In re Kenneth Cole Prods., Inc.*, 27 NY3d 268, 274 (2016) ("we have long adhered to the business judgment rule, which provides that, where corporate officers or directors exercise unbiased judgment in determining that certain actions will promote the corporation's interests, courts will defer to those determinations if they were made in good faith."). Vasbinder proffers no basis for the court to conclude otherwise. *See Auerbach v Bennett*, 47 NY2d 619, 631 (1979). If he seeks leave to amend, Vasbinder is urged to be mindful about pleading around the business judgment rule.

4. Declaratory Judgment Claims (13th, 15th & 27th Causes of Action)

"Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy. The general purpose of the declaratory judgment is to serve some

practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 (1st Dept 2009) (internal citations and quotation marks omitted).

The Universal Movants correctly contend that Vasbinder's declaratory judgment claims merely relate to his breach of contract claims and are improperly duplicative. *See Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 (1st Dept 1998) ("A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract."). However, the declaratory judgment claim concerning the individual defendants' rights to seek indemnity from the Company is clearly a ripe controversy. Based on recent discovery conferences, after this motion is decided, it appears there will be motion practice over whether the Company may advance their legal fees (in addition to Vasbinder's) during the pendency of this action. While this motion will not decide this issue because the parties have not yet briefed its merits, there is no question that this is a live controversy for which a declaratory judgment claim is an appropriate resolution mechanism.[11]

5. Books and Records Claim (22nd, 23rd & 24th Causes of Action)

This claim is now moot by virtue of the court's April 1, 2016 preliminary injunction, which granted Vasbinder the access he is entitled to under the Operating Agreement. *See* Dkt. 52. To the extent that order has not been complied with, Vasbinder may raise the issue with the court in a conference or move for contempt.

6. Implied Covenant of Good Faith & Fair Dealing (11th Cause of Action)

[11] Portions of this claim may become moot depending on how the case proceeds (e.g., if certain members cease to be parties to the case).

Vasbinder's implied covenant claims are dismissed because they are duplicative of his breach of contract claims. He does not make any allegation involving any issue that is not expressly addressed by the Operating Agreement. *See Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 (1st Dept 2009) (The claim that defendants breached the implied covenant of good faith and fair dealing was properly dismissed as duplicative of the breach of contract claim because both claims arise from the same facts.")

7. Vasbinder's Derivative Claims

The Stipulation settled Vasbinder's claims against Consulpay and resolved the derivative claims in the fourth through ninth and sixteenth through twenty-first causes of action. Since the court, for the reasons addressed further below, will not vacate the Stipulation, it will only address the remaining derivative claims – the first, second, third, and twenty-seventh causes of action.

The first two causes of action concern Hung's breach of section 12.2's covenant not to compete by working for Consulpay. The Universal Movants do not dispute that this allegation states a claim for breach of the Operating Agreement. But, they argue that Vasbinder has not pleaded demand futility. *See Marx v Akers*, 88 NY2d 189, 193 (1996). They are wrong. "The controlling case in New York on demand futility [i.e., *Marx*] establishes that there are three types of circumstances in which shareholders may proceed with derivative claims in the absence of a demonstrated attempt to persuade the board to initiate an action itself." *In re Comverse Tech., Inc.*, 56 AD3d 49, 53 (1st Dept 2008). "The complaint must allege with particularity that '(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction.'" *Id.*, quoting *Marx*, 88 NY2d at 198; *see also Bansbach v Zinn*, 1 NY3d 1, 9 (2003). Vasbinder pleads the first option.

Under section 5.2(a)(i) of the Operating Agreement, Hung has exclusive authority over the company's legal matters. *See* Dkt. 55 at 12. Demand on Hung would be futile due to his "self-interest in the transaction." *See Comverse*, 56 AD3d at 54. Hung cannot be expected to cause the Company to sue himself for breaching his non-compete obligations.[12] The court also rejects the notion that Vasbinder's supposed "personal agenda" renders him an improper derivative plaintiff because the other members are clearly aligned with Hung, making them ill-suited to file suit against Hung for his alleged breaches.

That being said, the third cause of action for beach of fiduciary duty is dismissed as duplicative. This alleged fiduciary duty breach amounts to nothing more than breach of section 12.2 of the Operating Agreement. *Coventry Real Estate Advisors, L.L.C. v Developers Diversified Realty Corp.*, 84 AD3d 583, 585 (1st Dept 2011) (breach of fiduciary duty claim identical to claim for breach of operating agreement is duplicative); *see Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 (1st Dept 2014).

Finally, the twenty-seventh cause of action regarding the individual defendants' indemnification rights is not dismissed. It is properly pleaded for reasons discussed earlier.

C. Hung's & Ding's Motion (Seq. 005)

[12] It should be noted that Vasbinder failed to name the Company as a nominal defendant. *See Summer v Ruckus 85 Corp.*, 2017 WL 2106294, at *1 (1st Dept May 16, 2017), citing *Tobias v Tobias*, 192 AD2d 438, 440 (1st Dept 1993) ("a corporation is ordinarily an indispensable party in a derivative suit."). While the Company is named as an actual defendant, so it is not technically absent, it should be named as a nominal defendant on the derivative claims. Vasbinder is given leave to amend to do so. *See O'Neal v Muchnick Golieb & Golieb, P.C.*, 149 AD3d 636 (1st Dept 2017) ("Given that all the other elements of the derivative claims are pleaded in the body of the complaint, and there is no prejudice to defendants, we grant plaintiff leave to amend the caption to add the corporation as a party.").

The court will not address the vast majority of the arguments madeby Hung and Ding, since they are either identical to those made by the Universal Movants or concern claims that have either been settled or withdrawn. The motion's only unique argument, with which the court agrees, is that Ding's mere act of voting for Vasbinder's removal does not amount to breach of fiduciary duty.[13] Vasbinder cites no case supporting his contention to the contrary. In any event, as noted, the question of whether Vasbinder's removal was proper is governed by the Operating Agreement, a fact that precludes the maintenance of an independent claim for breach of fiduciary duty. *See Coventry*, 84 AD3d at 585.

III. The Consulpay Settlement Agreement (Seq. 007)

It is well settled that "[s]tipulations of settlement are favored by the courts and not lightly cast aside." *Hallock v State*, 64 NY2d 224, 230 (1984). "Whenever the enforceability of a stipulation among parties in a civil case is put in issue, [the court] must begin [its] analysis with the recognition that courts have long favored and encouraged the fashioning of stipulations as a means of expediting and simplifying the resolution of disputes." *Mitchell v N.Y. Hosp.*, 61 NY2d 208, 214 (1984). "Strict enforcement of stipulations of settlement serve the interest of efficient dispute resolution, and is essential to the management of court calendars and the integrity of the litigation process." *Hotel Cameron, Inc. v Purcell*, 35 AD3d 153, 155 (1st Dept 2006). As a result, "[a] party will only be relieved from the consequences of a stipulation made during litigation when there is sufficient cause to invalidate a contract, such as fraud, collusion, or mistake." *Toos v Leggiadro Int'l, Inc.*, 114 AD3d 559, 561 (1st Dept 2014).

[13] The alleged wrong was failure to provide notice, not the vote itself. Voting for removal is something that may be done under the Operating Agreement and is ordinarily an act subject to the protections of the business judgment rule.

Moreover, a settlement agreement is a contract subject to the usual principals of contractual interpretation. *Brad H. v City of N.Y.*, 17 NY3d 180, 185 (2011). "A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties." *Id.* "Ambiguity is present if language was written so imperfectly that it is susceptible to more than one reasonable interpretation." *Id.* at 186. "Ambiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement and, therefore, extrinsic evidence 'may be considered only if the agreement is ambiguous.'" *Id.*, quoting *Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 29 (2008).

Prior to the Stipulation's execution, Hung owned 47.5% of the membership interests in Consulpay. Paragraph 1 of the Stipulation provides that "[Hung] has sought and obtained approval to transfer thirty-seven one half percent (37.5%) ***of his ownership interest*** in [Consulpay] to [Universal]." *See* Dkt. 174 at 1 (emphasis added). Paragraph 2 states that "Hung has deposited all necessary transfer documents in escrow pending court approval to transfer thirty-seven one half percent (37.5%) ***of his ownership interest*** in [Consulpay] to Universal." *Id.* (emphasis added). Paragraph 3 then provides that upon "the Court's so-ordering and filing of this stipulation, the escrow will be broken and thirty-seven one half percent (37.5%) ***of Hung's ownership interest in [Consulpay]*** will be transferred to Universal." *Id.* (emphasis added). Paragraph 5 further provides that "[i]n consideration for this transfer to Universal, [Vasbinder] (derivatively, on behalf of Universal) agrees that the following derivative causes of action shall be, and hereby are dismissed with prejudice: Causes of Action 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, and 21." *Id.* at 2. In paragraph 6, the claims against Consulpay are dismissed with prejudice. *Id.*

The Stipulation clearly provides that Hung was to transfer 37.5% "of his ownership interest" in Consulpay. His ownership interest was 47.5%, 37.5% of which is 17.81%. Hung, indeed, transferred a 17.81% interest in Consulpay to the Company.

Vasbinder, nonetheless, avers that he thought the parties' agreement was that Hung would transfer a 37.5% stake in Consulpay. That is not what the Stipulation says. It could have stated that of the 47.5% stake held by Hung, Hung was transferring an interest amounting to 37.5% of Consulpay. Instead, the Stipulation states that Hung was to transfer 37.5% "of his interest", which is exactly what he did. While Vasbinder's counsel conceded at oral argument that he was sloppy in how he drafted and approved the Stipulation,[14] that is not a reason to interpret a contract in contravention of its plain meaning. *See Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 (2002) ("if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity.").

Perhaps recognizing the weakness of his proffered interpretation, Vasbinder also seeks to set aside the Stipulation due to his unilateral mistake as to its meaning. Numerous First Department cases stand for the proposition that a contract shall not be rescinded based on unilateral mistake unless such mistake was procured by fraud. *See Kotick v Shvachko*, 130 AD3d 472, 473 (1st Dept 2015), citing *Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369 (1st Dept 2007); *see also Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 179 (1st Dept 1998) (same); *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 29 (1st Dept 1992) ("What is required is a showing of unilateral mistake induced by the other party's fraudulent representations."). That said, some First Department cases do suggest that the result of unjust

[14] *See* Dkt. 236 (3/8/17 Tr. at 6) ("I understand the Court's position that it's not drafted perfectly and I put some of the blame on myself.").

enrichment, on its own, may be a sufficient ground to support rescission based on unilateral mistake. *See Gessin Elec. Contractors, Inc. v 95 Wall Assocs., LLC*, 74 AD3d 516, 520 (1st Dept 2010) ("a court sitting in equity can rescind a contract for unilateral mistake if failure to rescind would unjustly enrich one party at the other's expense, and the parties can be returned to the status quo ante without prejudice."), citing *Cox v Lehman Bros., Inc.*, 15 AD3d 239 (1st Dept 2005), accord *Rosenblum v Manufacturers Trust Co.*, 270 NY 79, 84-85 (1936) ("The term 'mistake' may be used to cover all kinds of mental error, however induced, and equity can interfere in a suit for cancellation or rescission to prevent the enforcement of an unjust agreement induced by a unilateral mistake of fact. A mistake not mutual but only on one side may be ground for rescinding but not for reforming a contract.") (internal citation omitted).

The court will not endeavor to reconcile the cases that appear to require fraud with the cases that do not. That is because courts will not find there to be the requisite fraud or unjust enrichment if the party seeking rescission was unreasonable in how it entered into the contract. *Wachovia Secs., LLC v Joseph*, 56 AD3d 269, 270 (1st Dept 2008) ("Wachovia also failed to establish a right of recovery on the basis of unilateral mistake, as the complaint failed to allege facts that would sufficiently establish that its purported unilateral mistake was caused by fraudulent conduct on the part of any of respondents, and that the mistake occurred despite Wachovia's exercise of due diligence."); *cf. MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 291 (1st Dept 2016) (fraud claim requires reasonable reliance). In other words, a party who fails to take ordinary care and acts negligently in entering into a contract will not be permitted to claim unjust enrichment. *See Wachovia*, 56 AD3d at 271 ("The record does not support Wachovia's allegations of injustice or unjust enrichment, **but only supports a finding that Wachovia made a costly error due to its own conduct**."); *see also Weissman v Bondy &*

Schloss, 230 AD2d 465, 469 (1st Dept 1997) ("Even where a mistake is unilateral, as herein, not mutual, a court acting in equity may rescind the contract if failing to do so would result in unjust enrichment of the plaintiff. **Plaintiff would not, however, be unjustly enriched by enforcement of the stipulation as executed after arms-length negotiation.**") (emphasis added), citing *Gould v Bd. of Educ. of Sewanhaka Cent. High Sch. Dist.*, 81 NY2d 446, 453 (1993).

Here, Vasbinder's counsel purports to have made a costly error by executing a terse, rather informal stipulation of settlement without any whereas clauses. A more robust agreement would have clearly set forth Hung's overall interest and specified the precise amount agreed to be transferred. But that is of no moment. The "37.5% of his ownership interest" language found in the Stipulation was lifted directly *from Vasbinder's counsel's* own July 14, 2016 email. *See* Dkt. 216. Even if the court found the language to be ambiguous (and it does not), ambiguities in a settlement agreement are to be construed against the drafter. *Sokolovic v Throgs Neck Operating Co.*, 147 AD3d 646 (1st Dept 2017).

Vasbinder's counsel's alleged erroneous (yet unambiguous) written description of what he thought Hung was agreeing to transfer is not a reasonable excuse to set aside the Settlement. He cites no authority to support the proposition that the existence of a more efficient written expression (Hung will transfer a 17.81% interest in Consulpay) will negate an alternative, albeit more awkward, but nonetheless unambiguous expression of the same logical proposition (Hung will transfer 37.5% of his ownership interest in Consulpay). Mathematically equivalent expressions should be interpreted equivalently. A reasonably diligent attorney should be capable of discerning the difference between these two propositions and a proposition that clearly states that the percentage equity interest to be transferred is actually 37.5%, and not 37.5% of a 47.5%

interest. One who sloppily drafts a contract cannot later complain that a supposedly unanticipated interpretation resulted in his counterparty being unjustly enriched if such interpretation comports with the plain meaning of the contract.

That said, even if the court were to overlook all of these issues, it still would not conclude that Hung was unjustly enriched. He gave up a 17.81% interest instead of a 37.5% interest in the Company. It is far from clear the approximately 20% difference in equity is worth so much so as to render the consideration for the Stipulation to be unfair. Vasbinder's effective interest in this difference is only about 5% of the Consulpay equity, since he owns 25.5% of the Company (the transferee of Hung's 17.81%). This simply is not a situation where the released claims were unsupported by any meaningful consideration.

To the extent Vasbinder complains that defendants stonewalled him by not providing copies of the escrowed transfer documents prior to closing, which make clear that Hung is only transferring a 17.81% interest in Consulpay, his complaint falls on deaf ears. This is not reasonable reliance, but a failure to conduct due diligence. Vasbinder could have, but did not, insist on reviewing the transfer documents prior to executing the Stipulation. Had he done so, he would have discovered the alleged fraud about which he now complains. *See Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 279 (2011) ("[P]laintiffs knew that defendants had not supplied them with the financial information necessary to properly value the TWE units, and that they were entitled to that information. Yet they chose to cash out their interests and release defendants from fraud claims without demanding either access to the information or assurances as to its accuracy in the form of representations and warranties. In short, this is an instance where plaintiffs have been so lax in protecting themselves that they cannot fairly ask for the law's protection.") (quotation marks omitted).

For these reasons, the court finds that the Stipulation was not breached and that no ground exists to vacate it and revive the claims settled therein. Accordingly, it is

ORDERED that defendants' motions to dismiss the amended complaint are granted to the extent that Vasbinder's claims regarding the Education Agreement (the 28th cause of action), unpaid distributions (14th cause of action), the duplicative declaratory judgment claims (13th & 15th causes of action), the books and records claims (22nd, 23rd & 24th causes of action), the implied covenant claim (11th cause of action), breach of fiduciary duty claims (3rd & 12th causes of action), and defamation claims (25th & 26th causes of action) are dismissed without prejudice, and that leave to replead these claims may only be sought by way of a motion and submission of a proposed second amended complaint (along with a redline against the AC) that remedies the deficiencies addressed herein; the motions to dismiss are otherwise denied; and it is further

ORDERED that Vasbinder's motion to enforce or vacate the Stipulation is denied.

Dated: June 9, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C