IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LAURENT IMBERT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 7845-ML
	)	
LCM INTEREST HOLDING LLC and LCM HOLDINGS GP, LLC,	)	
	)	
Defendants.	)	

MASTER'S REPORT
(Cross-Motions for Summary Judgment)

Date Submitted: November 7, 2012
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LEGROW, Master

INTRODUCTION

The plaintiff, Laurent Imbert ("Mr. Imbert"), a Member and former Manager of the defendant limited liability companies, seeks advancement of the fees and expenses he is incurring to defend a lawsuit the defendants filed against him after he was terminated from his position as Manager. The limited liability company agreements contain broad clauses awarding Mr. Imbert mandatory advancement for fees and expenses he incurs in an action filed against him "by reason of the fact" that he is or was a Manager of the company.

The defendants in this action filed suit against Mr. Imbert in New York. The New York complaint alleges, among other things, that Mr. Imbert owed fiduciary duties as a Manager and that he breached those fiduciary duties by approving improper distributions. When they received Mr. Imbert's inevitable advancement demand, however, the companies chose not to honor their contractual commitments. Instead, they engaged in the time-honored dance of trying to convince this Court that, notwithstanding the language in the underlying New York complaint, Mr. Imbert is being sued by reason of his status as a Member, not a Manager, of the companies. This dance, although elaborate and clever, largely is unconvincing. For that reason, I recommend that the Court award Mr. Imbert advancement for all but one count in the New York action. This is my final report in this matter.

BACKGROUND

The plaintiff, Mr. Imbert, is a founder, Member, and former Manager of the defendants, LCM Interest Holding, LLC ("LCM Holding") and LCM Holdings GP, LLC

("LCM GP," together the "LCM Companies"), two Delaware limited liability companies with principal places of business in New York, New York. The LCM Companies were formed in 2003 after a capital and ownership restructuring of Louis Capital Markets, LLC, a company that Mr. Imbert, together with Michael Benhamou ("Mr. Benhamou"), established in 1999. After the restructuring, LCM Holding became the 99% owner and sole limited partner of Louis Capital Markets, L.P. ("LCM"), a New York-based broker-dealer. LCM GP owns the remaining 1% interest in LCM and serves as its general partner. Mr. Imbert, Mr. Benhamou, and Patrice Cohen ("Mr. Cohen"), who joined as a Member in 2003, each own 20% of LCM GP and are its majority interest holders. Mr. Benhamou and Mr. Cohen manage LCM GP's European operations, and until June 2012, Mr. Imbert managed LCM GP's New York office and served as the Chief Executive Officer ("CEO") of LCM. LCM serves as the broker-dealer to the LCM Companies.

Nearly identical limited liability company agreements govern both of the LCM Companies, and each LLC Agreement was amended in 2010 ("the LLC Agreements[1]"). The LLC Agreements provide for distributions of funds sufficient to pay the income

[1] Citations to the LLC Agreements refer to the Amended and Restated Limited Liability Company Agreement of LCM Interest Holding, LLC, and the Second Amended and Restated Limited Liability Company Agreement of LCM Holdings GP, LLC, both dated March 11, 2010 and contained in the Affidavit of Thomas J. Fleming (hereinafter referred to as the "Fleming Affidavit") as Exhibit 1 and Exhibit 2, respectively, to Exhibit A. The LLC Agreements are contained in multiple exhibits filed with the briefing in this action. For simplicity, I will cite to the Fleming Affidavit, Ex. 1 and 2 to Ex. A when referring to these LLC Agreements. The relevant terms of previous LLC Agreements are substantially similar to the ones contained in these amended agreements.

taxes of the LCM Companies' Members (the "Tax Distributions[2]"). Section 6.02 of the LLC Agreements states, in relevant part, that the LCM Companies:

> to the extent there exist Available Funds, shall distribute to the Members, *pro rata* in accordance with their Membership Shares, a payment in an amount sufficient so that … the amount distributed to each Member pursuant to this Section 6.02 … shall equal … the Estimated Taxes … for that payment.

Section 6.02(a)(1) specifies that the Board (of Managers) must allocate a reasonable estimate of taxable income to each Member. To establish a reasonable estimate of taxable income, as well as each of the other determinations necessary to calculate the Tax Distributions, the Board must make good faith judgments "based upon the books and records, including the Member transfer records, of the Company."[3] The Members allegedly retained outside accountants to calculate their tax liability. Mr. Imbert used Leonard Green ("Mr. Green"), and not the accountant used by both Mr. Benhamou and Mr. Cohen. In addition, and unlike the other Members who had their Tax Distributions paid directly to the United States Treasury, Mr. Imbert requested that his Tax Distributions be paid to him, allowing him to pay his own taxes to the United States Treasury.

On several occasions, Mr. Green allegedly requested, and received, increases in Mr. Imbert's Tax Distributions. The LCM Companies allege that Mr. Green made these requests under the pretext that the increases were necessary to cover Mr. Imbert's full

[2] The relevant provisions regarding Tax Distributions were amended when the various agreements were amended in 2004 and 2010. The parties do not contend that the revisions affect the resolution of Mr. Imbert's advancement claims, and therefore I will refer to the language in the 2010 agreements.
[3] Fleming Affidavit, Ex. 1 and 2 to Ex. A. (Section 6.02(a) of the LLC Agreements).

United States tax liability when, in reality, Mr. Imbert had been inflating his tax liability so that he would receive Tax Distributions that were disproportionately large. In addition, in 2009, the LCM Companies made a special tax distribution (the "Special Distribution") to make up for a failure to file tax returns for certain Members for the years 2006 to 2008. Mr. Imbert received a Special Distribution, but the LCM Companies allege that, in fact, Mr. Imbert had received refunds for those years.

Upon discovering evidence that they believed showed that Mr. Imbert had inflated his tax liability in order to receive disproportionately large Tax Distributions and had consistently received and retained tax refunds that were substantially larger than their own, while continuing to accept Tax Distributions from the LCM Companies, Mr. Benhamou and Mr. Cohen confronted Mr. Imbert. According to the LCM Companies, Mr. Imbert responded to these accusations by writing a personal check in the amount of $740,505, the full amount of Mr. Imbert's most recent federal tax refund, to be deposited into his capital account.[4] The LCM Companies further allege that at the initial confrontation, Mr. Imbert agreed to reimburse the LCM Companies for the full balance of the tax refunds that he had received from 2009 to 2011, an amount equal to approximately $1.9 million, but he then retracted that promise a few weeks later and claimed that he had not engaged in any wrongdoing.

On June 20, 2012, Mr. Benhamou and Mr. Cohen, in their official capacities as Managers, wrote a letter to terminate Mr. Imbert's employment at the LCM Companies.

[4] Mr. Imbert is alleged to have said, "I do not want to have less money at risk than you," upon presenting the check. Fleming Affidavit, Ex. O ¶ 39.

In that letter, received by Mr. Imbert the following day, Mr. Benhamou and Mr. Cohen specified that "[e]ffective immediately … your employment and your role as Manager in each of LCM Interest Holding, LLC, LCM Holdings GP, LLC, and Louis Capital Markets, L.P. … are hereby terminated."[5] The LLC Agreements governing the LCM Companies allow for the termination of a Manager under limited circumstances. Section 4.07 states:

> A Manager's status as a Manager of the Company may be terminated by a vote of a majority of the Board but only if such Manager (i) is convicted of a felony, (ii) commits any act of theft, and/or fraud with respect to the Company, and (iii) is found guilty of any material violation (including assisting any customer in the violation) of any state or federal securities law of regulation, or any applicable rule or regulation of a self-regulatory organization which results in the revocation or suspension for more than 12 consecutive months of such Manager's securities license.[6]

A few days after receiving the termination letter, Mr. Imbert submitted a resignation letter in which he stated that the purported termination was ineffective "because, among other things, it [was] based on false allegations of wrongdoing" but he nevertheless had decided to "resign from all positions at the [LCM] Companies."[7] At that time, he also retained counsel.

On June 27, 2012, Mr. Imbert sent a letter to the LCM Companies demanding advancement and indemnification for his legal expenses incurred as a result of the LCM Companies' allegations of "fraud and theft and threatened litigation" and providing the

[5] Fleming Affidavit, Ex. F to Ex. C.
[6] Although the use of "and" rather than "or" in Section 4.07 suggests that romanettes (i) through (iii) must all be satisfied in order for a Manager to be terminated, the parties appear to take the position that a Manager may be terminated if any one of the three elements is met. *See, e.g.*, Pl. Op. Br. at 19-20.
[7] Transmittal Affidavit of Thomas A. Uebler, Ex. C (hereinafter referred to as the "Uebler Affidavit").

requisite undertaking.[8] He also attached a bill for the $10,000 retainer he paid to his counsel. Mr. Imbert's claim to advancement is based on Sections 9.01 and 9.02 of the LLC Agreements. Section 9.01 provides that the LCM Companies "shall indemnify," "to the full extent authorized or permitted by law," any person (an "Indemnified Person"):

> made, or threatened to be made, a party to any action or proceeding … by reason of the fact that he …, whether before or after adoption of this Article, (a) is or was a Manager, or an officer of the Company, or (b) if not a Manager or an officer of the Company, is serving or served, at the request of the Company, as a manager, director … or officer of any other limited liability company or corporation … against all … reasonable expenses, including attorneys' fees and costs ….[9]

Section 9.02 of the LLC Agreement requires the LCM Companies to advance or promptly reimburse:

> [a]ll expenses reasonably incurred by an Indemnified Person in connection with a threatened or actual action or proceeding with respect to which such Person is or may be entitled to indemnification … upon the receipt of an undertaking, but in advance of the final disposition of the action or proceeding.[10]

The LCM Companies called Mr. Imbert's first demand for advancement "risible" and premature.[11] Since then, Mr. Imbert has been incurring legal expenses to address the charges brought by the LCM Companies and to avoid a negative Form U5 filing with the Financial Industry Regulatory Authority ("FINRA"). On July 17, 2012, Mr. Imbert also

[8] Fleming Affidavit, Ex. 3 to Ex. A. Although the LCM Companies asserted in correspondence between the parties that Mr. Imbert had not provided a proper undertaking, they have not pursued that argument in this litigation, and in argument before this Court they conceded that Mr. Imbert's letter satisfied the requirements of the LLC Agreements. *See Imbert v. LCM Interest Holding LLC and LCM Holdings GP*, C.A. No. 7845 (September 24, 2012) (TRANSCRIPT) (hereinafter "Transc.") 42:19–22.
[9] Fleming Affidavit, Ex. 1 and 2 to Ex. A
[10] *Id.*
[11] Uebler Affidavit, Ex. D.

made a books and records demand purportedly to "allow [Mr. Imbert] … to defend against the claims made by [Mr.] Benhamou and [Mr.] Cohen ….[12] Then, on August 16, 2012, LCM GP filed suit against Mr. Imbert in the Supreme Court of the State of New York. The core allegations in that suit concern Mr. Imbert's wrongful handling of approximately $1.9 million in various Tax Distributions. LCM GP also asserted claims that Mr. Imbert improperly charged approximately $600,000 in personal expenses to an expense account issued to him as the CEO of LCM (the "Business Expense Claims"). The Business Expense Claims have since been dismissed without prejudice in the New York action based on a stipulation between the parties and with the expectation that they will be submitted to mandatory, binding arbitration before FINRA.

The LCM Companies' Amended New York Complaint[13] contains four causes of action. The first count is based on Mr. Imbert's alleged breach of his fiduciary duties. The Amended New York Complaint alleges that Mr. Imbert, "[a]s a Manager of LCM … owed to the [LCM] Companies fiduciary duties of loyalty and care" and that he breached his fiduciary duties by, among other things, "scheming with his personal accountant to withdraw millions of dollars in unnecessary distributions."[14] The second count alleges

[12] Uebler Affidavit, Ex. E.

[13] The initial New York complaint contained the Business Expense Claims, which have since been withdrawn. I will address advancement as to those claims in a separate part of the analysis. Recent correspondence to the Court from the parties suggests that the LCM Companies may move to further amend their New York complaint. That motion has not been addressed by the New York court, and the parties dispute what, if any, impact the proposed new complaint will have on Mr. Imbert's advancement claims. I will address Mr. Imbert's advancement claims based on the current operative complaint in New York, which appears as Exhibit O in the Fleming Affidavit. It would be grossly premature to address Mr. Imbert's entitlement to advancement for the new claim the LCM Companies seek to add in their proposed amended New York complaint, when the New York court has not yet granted the motion to amend, and Mr. Imbert has not yet demanded advancement for that claim.

[14] Fleming Affidavit, Ex. O ¶¶ 47, 49.

that Mr. Imbert was unjustly enriched as a result of his retention of the Tax Distributions. The third count asserts a fraud claim. In their New York pleadings, after alleging that the Special Distribution was made "pursuant to a decision made by the Managers, including [Mr.] Imbert" the LCM Companies assert that Mr. Imbert acted fraudulently by "approving the Special Distribution to recipients that included himself" and "falsely represent[ing] to the [LCM] Companies that he was entitled to the Special Distribution by reason of not having received a United States tax refund for the tax years 2006-2008."[15] The fourth count seeks a declaration as to whether Mr. Imbert is still a Member of the LCM Companies as well as a determination of how to value Mr. Imbert's membership shares.

To date, the LCM Companies have refused to advance Mr. Imbert's legal fees and costs.[16] Mr. Imbert filed this action for advancement on September 5, 2012, and the LCM Companies answered on October 4, 2012. The parties then filed simultaneous cross-motions for summary judgment under Court of Chancery Rule 56. Since the commencement of this action, the court in the New York action, in addition to overseeing the withdrawal of the Business Expense Claims, denied Mr. Imbert's motion to dismiss, or for summary judgment against, the declaratory judgment count. In a bench ruling, the New York court explained that there is a question of fact as to whether Mr. Imbert "has

[15] Fleming Affidavit, Ex. O ¶¶ 22, 57.
[16] In a letter dated October 19, 2012, the LCM Companies, through counsel, informed Mr. Imbert that they have "no intention of advancing fees or expenses" at this time. Fleming Affidavit, Ex. U.

been properly removed" as Manager, and whether "his removal requires him to turn over his shares" in the LCM Companies.[17]

ANALYSIS

Summary judgment practice is an "efficient and appropriate method" to decide an advancement dispute as "the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought."[18] Ordinarily, to prevail on summary judgment, the moving party must "demonstrate that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law."[19] Here, because the parties have filed cross motions for summary judgment and have not argued to the Court that there is any genuine issue of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[20] The Court will consider the LLC Agreements, along with the operative New York pleading and the briefing in this action, to form a decision as to Mr. Imbert's advancement rights. The only factual dispute raised in the briefs is whether Mr. Imbert engaged in the wrongdoing that is alleged in the Amended New York Complaint. That dispute of fact is not material to resolving this advancement claim, however, and does not preclude the entry of a dispositive order.

[17] *LCM Holdings GP LLC v. Imbert*, Ind. No. 652878/12 (Oct. 24, 2012) (TRANSCRIPT) (hereinafter "NY Transc.") 21:13–19.
[18] *Weinstock v. Lazard Debt Recovery GP, LLC*, 2003 WL 21843254, at *2 (Del. Ch. Aug. 8, 2003).
[19] Ct. Ch. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[20] Ct. Ch. R. 56(h).

A. Mr. Imbert's Claim for Advancement of Litigation Expenses under the LLC Agreements

Mr. Imbert correctly asserts that the advancement and indemnification provisions contained in the LLC Agreements are mandatory, and as such, the burden rests on the LCM Companies to prove that advancement is not required.[21] The LCM Companies attempt to satisfy that burden by arguing that their claims in the New York proceeding are rooted in Mr. Imbert's wrongdoing as a Member, not a Manager. As is often the case in advancement disputes, particularly when the claimant had more than one role at the company, only one of which enjoyed advancement rights, the question of whether the LCM Companies have sued Mr. Imbert for conduct in his capacity as a Member or in his capacity as a Manager is critical to the inquiry in this case.

In order to decide whether Mr. Imbert is entitled to advancement, this Court must determine whether the claims in the New York action arise "by reason of the fact" that Mr. Imbert was a Manager of the LCM Companies.[22] In considering each count of the Amended New York Complaint, the Court must determine whether it was Mr. Imbert's actions as a Manager or as a Member that are at issue because "if there is a nexus or causal connection between any of the underlying proceedings … and one's official

[21] Sections 9.01 and 9.02 direct that the LCM Companies "shall" indemnify certain individuals and that all reasonable expenses "shall be advanced or promptly reimbursed" to indemnified persons. This language has been interpreted to mandate advancement. *See Stockman v. Heartland Indus. Partners, L.P.*, 2009 WL 2096213, at *6, 13 (Del. Ch. Jul. 14, 2009) (explaining that the plain meaning of "shall be advanced" is that advancement is mandatory); *see also VonFeldt v. Stifel Fin. Corp., 1999 WL 413393, at *3 (Del.Ch. June 11, 1999)* ("By using the phrase 'shall indemnify,' the bylaw not only mandates indemnification; it also effectively places the burden on [the corporation] to demonstrate that the indemnification mandated is not required.").

[22] Sections 9.01 and 9.02. *See* Fleming Affidavit, Ex. 1 and 2 to Ex. A.

capacity, those proceedings are 'by reason of the fact' that one was a corporate officer."[23] This Court has held that the nexus is established if the "the corporate powers were used or necessary for the commission of the alleged misconduct."[24] This language has been interpreted broadly, and includes all actions brought against an officer or director "for wrongdoing that he committed in his official capacity," and for all misconduct that allegedly occurred "in the course of performing his day-to-day managerial duties."[25]

Complicating this inquiry is the fact that the LCM Companies' assertions against Mr. Imbert have shifted since the LCM Companies made their initial allegations in the New York Complaint. This could be because, in order to deny Mr. Imbert the advancement rights he may be entitled to as a former Manager, the LCM Companies must argue that the New York allegations are solely based on his conduct as a Member. As Mr. Imbert is quick to point out, the LCM Companies' assertion that Mr. Imbert was sued for wrongful conduct as a Member contradicts the plain language of the New York pleadings. The Amended New York Complaint, particularly the first count, is replete with allegations that Mr. Imbert acted in breach of his fiduciary duties "as a Manager" by engaging in acts that amount to self-dealing and dishonest conduct. The other counts also refer to him "as a Manager" or describe actions he took as Manager, and in most cases those acts are essential to the cause of action alleged. The reality is that Mr. Imbert cannot have acted as a Member for the purposes of this proceeding but as a Manager for

[23] *Homestore v. Tafeen*, 888 A.2d 204, 214 (Del. 2005).
[24] *Berstein v. TractManager, Inc.*, 953 A.2d 1003, 1011 (Del. Ch. 2007).
[25] *Reddy v. Electronic Data Systems Corp.*, 2002 WL 1358761, at *6 (Del. Ch. June 18, 2002).

the purposes of the New York proceeding, and this reality presents a problem for the bulk of the LCM Companies' arguments to this Court.

The Court must seek to discern the true nature of the New York claims that Mr. Imbert is called upon to defend rather than rely on clever labeling or wordsmithing in the pleadings.[26] To do so, I must read the Amended New York Complaint, along with the papers filed in this action, as a whole. I must then interpret the substance of the allegations supporting each claim to determine whether the claim was brought "by reason of" Mr. Imbert's conduct as a Manager or as a Member. With that in mind, I turn to the parties' contending arguments.

i. Count I: The Breach of Fiduciary Duty Claim

As discussed above, the LCM Companies' Amended New York Complaint alleges that Mr. Imbert, "[a]s a Manager of the [LCM] Companies, and pursuant to Section 4.02 of [the LCM Agreements] … owed to the [LCM] Companies fiduciary duties of loyalty and care."[27] The allegation goes on to describe how Mr. Imbert's wrongful conduct, such as "scheming with his personal accountant to withdraw millions of dollars in unnecessary distributions," breached those fiduciary duties.[28] In their briefs submitted to this Court, the LCM Companies reverse direction, claiming that the first cause of action for breach of fiduciary duties is rooted in Mr. Imbert's "wrongdoing as a Member, not a

[26] *See Brown v. LiveOps, Inc.*, 903 A.2d 324, 329 (Del. Ch. 2006) (explaining that the defendant cannot evade advancement by simply altering the phrasing or re-labeling the counts in the underlying proceeding).
[27] Fleming Affidavit, Ex. O ¶ 47.
[28] *Id*. ¶ 49.

Manager."[29] They now argue that it was Mr. Imbert's actions in receiving and retaining certain Tax Distributions that were wrongful. This clever maneuvering allows the LCM Companies to argue that Mr. Imbert's "powers as Manager were unnecessary and irrelevant" to his misconduct because he could have engaged in the same "scheming" and "padding" whether or not he was a Manager, and therefore Mr. Imbert cannot establish the requisite nexus between his role as Manager and the misconduct at issue. The LCM Companies cite to this Court's decision in *Berstein v. TractManager, Inc.* to support their contention that Mr. Imbert must "prove that his powers as Manager were necessary to commit the wrongs alleged."[30] But this misstates the rule in *Berstein*, which held that the requisite connection "is established if the corporate powers *were used* or necessary."[31] Therefore, this Court's inquiry is not limited to whether Mr. Imbert's powers as Manager were necessary to his allegedly wrongful acts; rather, advancement is required if Mr. Imbert used his power as Manager in his alleged misconduct.

As is too often the case, the LCM Companies' Fred Astaire-like footwork trips up on the text of their own allegations in the underlying proceeding. The question as to the first count is whether the underlying fiduciary duty claim was "asserted by reason of [Mr. Imbert's] service" as a Manager in that it "directly challenges [Mr. Imbert's] … alleged failings in his official capacity."[32] The LCM Companies, in their Amended New York Complaint, list several wrongful acts that Mr. Imbert allegedly committed. Most, like

[29] Def. Op. Br. at 16.
[30] Def. Answ. Br. at 6.
[31] *Bernstein*, 953 A.2d. at 1011. (Emphasis added.)
[32] *Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392, 407 (Del. Ch. 2009).

approving the Special Distribution to himself despite having received large tax refunds from the government, required Mr. Imbert to use his powers as Manager. It is true that others allegations, such as wrongfully receiving and retaining inflated Tax Distributions along with the Special Distribution, arguably did not require Mr. Imbert to act in his managerial capacity. What is not clear from either the complaint or the briefs in this action is how the receipt and retention of the distributions in his capacity as a Member rose to the level of a breach of fiduciary duties. Thus, the simple fact that Count I contains factual allegations regarding actions Mr. Imbert took as a Member is of no moment. What the LCM Companies must do is show that such conduct is the basis for the claims in the underlying litigation. This they cannot do.

Section 4.02 of the LCM Agreements imposes fiduciary duties on the Managers, but notably not on the Members, of the LCM Companies.[33] Delaware law imposes no default fiduciary duties on non-managing, non-controlling members of limited liability companies.[34] Problematically, the LCM Companies do not explain how Mr. Imbert could have breached his fiduciary duties if he only was acting as a Member. The LCM Companies argue to this Court that Mr. Imbert's wrongful conduct was his receipt and retention of inflated Tax Distributions and the Special Distribution despite having received tax refunds from the government. No provision of the LCM Agreements,

[33] The LLC Agreements provide that "[e]ach Manager shall perform its duties as a Manager in good faith and with the degree of care that an ordinarily prudent person in a like position would use under similar circumstances, and with the level of fiduciary duty towards the Company that the director of a Delaware corporation would have towards the corporation under applicable Delaware law." Fleming Affidavit, Ex. 1 and 2 to Ex. A.

[34] *See Kuroda v. SPJS Holdings, L.L.C.*, 2010 WL 925853, at *8 (Del. Ch. Mar. 16, 2010); *see also Feeley v. NHAOCG, LLC*, --- A.3d ---, 2012 WL 6840577 at *10 (Del. Ch. Nov. 28, 2012) (explaining that managing members owe default fiduciary duties but passive members do not).

however, requires Members to return the Tax Distributions or the Special Distribution in the event that the Member received a government tax refund,[35] and even if Mr. Imbert is shown to have "schemed" to inflate his Tax Distributions and then wrongfully retain those distributions, it is difficult to conceive of how those acts could amount to a breach of his fiduciary duty as a Member because Members owe no such duties. The far more reasonable conclusion to draw, and the one that finds textual support in the operative pleading in New York, is that the first count of the complaint arises from actions Mr. Imbert took as a Manager.[36] Both the title of Count I and several key allegations in that portion of the complaint support that conclusion. For this reason, the nexus between the first count in the New York action and Mr. Imbert's official capacity as Manager is established.

After claiming to establish that Mr. Imbert breached his fiduciary duties as a Member by wrongfully receiving and retaining certain Tax Distributions, the LCM Companies proceed to argue that "it cannot reasonably be disputed that the [other Causes of Action] arise solely from [Mr. Imbert's] capacity as a Member of the LCM Companies and not 'by reason of the fact' that he is a former Manager."[37] But, because the fiduciary duty claim was in fact brought "by reason of the fact" that Mr. Imbert acted wrongfully

[35] Indeed, the LCM Companies admit in their own brief that the LCM Agreements do not "even contemplate[,] the wrongful retention of these [Tax Distributions] by Members." Def. Answ. Br. at 12.

[36] In argument before this Court, the LCM Companies argued that Managers had no discretion as to whether to make a tax distribution. *See* Transc. 30:22 – 31:1 (Counsel for the LCM Companies)(denying that "the Managers have some discretionary power as to whether to make tax distributions, and that [Mr.] Imbert played some managerial decision role that made it all happen.….") This assertion contradicts Section 6.02 of the LLC Agreements, which instructs the Board of Managers to make all determinations necessary to effect the distributions in good faith.

[37] Def. Op. Br. at 15.

as a Manager, the Court cannot so easily attribute the other counts to Mr. Imbert's Member status.

ii. Count II: The Unjust Enrichment Claim

The second count of the New York pleadings alleges that Mr. Imbert was unjustly enriched "by his retention of the tax refunds he received in addition to distributions from the [LCM] Companies intended only to cover his tax liabilities."[38] Mr. Imbert argues that this claim could only be brought against him as a Manager because an unjust enrichment claim does not arise where the parties' relationship is governed by a contract, and Mr. Imbert's relationship with the LCM Companies as a Member is governed by the LCM Agreements. The Court is not convinced by this shrewd, but nevertheless hollow, argument. In New York, actions for unjust enrichment have been allowed to proceed despite the existence of a valid contract, where that contract did not cover the dispute at issue.[39] The LCM Companies correctly point out that the LCM Agreements do not address how to handle wrongfully retained Tax Distributions. Therefore, the existence of the LCM Agreements would not necessarily bar an unjust enrichment claim against Mr. Imbert as a Member.

Further, a cause of action to recover damages for unjust enrichment against Mr. Imbert as a Member makes sense if one believes the allegations that Mr. Imbert requested, received, and retained inflated Tax Distributions and improperly kept the

[38] Fleming Affidavit, Ex. O ¶ 52.

[39] *AHA Sales, Inc. v. Creative Bath Products, Inc.*, 58 A.D.3d 6, 7 (N.Y. App. Div. 2008) To state a cause of action to recover damages for unjust enrichment, a plaintiff must allege that "(1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.'" *Cruz v McAneney*, 31 A.D.3d 54, 59 (N.Y. App. Div. 2006), quoting *Citibank, N.A. v Walker*, 12 A.D.3d 480, 481 (N.Y. App. Div. 2004).

Special Distribution. All of those actions allegedly were taken by Mr. Imbert as a Member, and the LCM Companies seek to recover the benefit Mr. Imbert unjustly attained from those distributions. Unlike Count I, or Count III discussed below, an unjust enrichment claim does not necessarily require proof that Mr. Imbert acted wrongfully.[40] Likewise, there is no merit to Mr. Imbert's argument that by incorporating by reference the preceding paragraphs in the complaint, Count II incorporates actions Mr. Imbert took as a Manager. Such reasoning places form over substance, ignoring the rule that the Court looks to the true basis of each claim, rather than the manner in which it was pled.[41]

Mr. Imbert's arguments notwithstanding, none of the allegations on which Count II relies depend on actions Mr. Imbert took as a Manager. Under the theory advanced in this count of the complaint, a member is unjustly enriched in their "wrongful" retention of distributions, irrespective of how such distributions were approved. For this reason, the LCM Companies have established that this count arises from Mr. Imbert's passive receipt of the distributions as a Member,[42] without reference to his actions as a Manager. Therefore, Mr. Imbert is not entitled to advancement for Count II.

[40] Proof of wrongful action is not a necessary element of a claim for unjust enrichment in either Delaware or New York. In Delaware, unjust enrichment is the "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Schock v. Nash,* 732 A.2d 217, 232 (Del. 1999) (internal quotation marks omitted). *See Cruz v McAneney*, 31 A.D.3d 54, 59 (N.Y. App. Div. 2006) *supra* note 39 (for the elements of unjust enrichment in New York.)

[41] *See* footnote 26, *infra*.

[42] Mr. Imbert correctly points out that Count II also alleges that Mr. Imbert was unjustly enriched by his retention of business expense reimbursements. As discussed below, the claims relating to the business expenses have been dismissed in favor of binding arbitration before FINRA. As I understand it, therefore, the LCM Companies are not pursuing this aspect of Count II. If that understanding is in error, the parties should so advise the Court.

iii. Count III: The Fraud Claim

The fraud claim alleged in the Amended New York Complaint explicitly refers to actions Mr. Imbert took as a Manager. The LCM Companies assert that, "[b]y his conduct in ***approving*** the Special Distribution to recipients that included himself, [Mr.] Imbert falsely represented to the [LCM] Companies that he was entitled to the Special Distribution by reason of not having received a United States federal tax refund for the tax years 2006-2008."[43] Much like Count I, the LCM Companies have re-characterized for these proceedings their fraud count as one against Mr. Imbert as a Member. They now argue that it was not the representation Mr. Imbert made by his conduct in approving the Special Distribution that was wrong, but rather the representation he made as a Member that he was entitled to the Special Distribution.

What is absent from the New York pleadings is an explanation of precisely what representation Mr. Imbert made as a Member. In neither the Amended New York Complaint, nor their papers in this action, do the LCM Companies allege facts that suggest the method by which Mr. Imbert falsely represented, as a Member, that he was entitled to the Special Distribution, other than his silence in not disclosing the refunds he previously had received. Without alleged affirmative acts or statements, the Court struggles to see how this claim does not implicate Mr. Imbert's conduct as a Manager. As Mr. Imbert argues, he was under no obligation, as a Member, to disclose that he had received federal tax refunds for the specified years because, "in the absence of a confidential or fiduciary relationship between [himself and the LCM Companies]

[43] Fleming Affidavit, Ex. O ¶ 57 (emphasis added).

imposing a duty to disclose, [Mr. Imbert's] mere silence, without some act which deceived [the LCM Companies], cannot constitute a concealment that is actionable as a fraud."[44] Simply accepting the Special Distribution required no action from Mr. Imbert as a Member, and therefore he could not have acted deceptively as a Member. Conversely, however, Mr. Imbert's approval of the Special Distribution as a Manager, despite purportedly knowing that he was not properly entitled to it and remaining silent as to that fact, conceivably could constitute a deceptive act amounting to fraud. As in the case of the first count for breach of fiduciary duty, LCM's cause of action for fraud necessarily depends upon Mr. Imbert's exercise of his powers as a Manager and for that reason, Mr. Imbert is entitled to advancement on this count.

iv. Count IV: The Declaratory Relief Claim

The fourth and final count in the Amended New York Complaint seeks a declaratory judgment as to whether Mr. Imbert remains a Member of the LCM Companies, as well as a declaration as to how the parties should determine the value of Mr. Imbert's membership shares. Mr. Imbert moved for summary judgment or dismissal of this count in New York, arguing that as a Manager, Mr. Imbert could not be unilaterally stripped of his Member status by the other Managers. On October 24, 2012, during argument on Mr. Imbert's motion, Judge Oing held that resolution of Count IV turned on the disputed factual question of whether Mr. Imbert properly was terminated as a Manager. The New York court explained that even though Mr. Imbert has resigned

[44] *Mobil Oil Corp. v. Joshi*, 202 A.D.2d 318, 318 (N.Y. App. Div. 1994).

from all positions at the LCM Companies, "there is a factual issue at least concerning whether or not [Mr. Imbert] has been properly removed" as it remained to be shown that Mr. Imbert "actually did the act that he is accused of such as to justify his removal."[45] Until that issue is resolved, the New York court announced it could not decide whether Mr. Imbert could retain his membership shares because if Mr. Imbert was not properly removed, the "case is over."[46] It appears that this is the case because only a non-Manager Member may be expelled from the LLC.[47] As such, the core issue in this claim is Mr. Imbert's conduct as a Manager, and therefore he is entitled to advancement for Count IV.

v. The Business Expenses Claim

The LCM Companies allege that Mr. Imbert wrongfully used a business expense account for "personal travel and entertainment expenses."[48] These claims have been withdrawn from the New York proceeding, but are expected to be submitted to FINRA arbitration. Mr. Imbert argues that because the expense account was issued to him as the CEO of LCM, allegations of improper charges made to that account necessarily implicate his work as CEO. He further contends that the advancement and indemnification provisions in the LCM Agreements extend to him as the CEO of LCM because Section

[45] NY Transc. 21:13–14; 15:10–11.
[46] NY Transc. 20:26.
[47] *See* Fleming Affidavit, Ex. 1 and 2 to Ex. A (Section 10.03 provides that "[i]n the event that the employment of a Member other than a Manager with the Company or one of its Affiliates is terminated for any reason, such Member shall immediately offer to Transfer all of his Membership Shares ….")
[48] Def. Op. Br. at 10.

9.01 covers those who serve "at the request of the Company, as a manager, director, partner, trustee or officer of any other … enterprise."[49]

The LCM Companies assert that the allegedly improper claims were paid from Mr. Imbert's "member expense account."[50] They provide no citation or evidence of any such account, and the affidavit submitted by Mr. Imbert establishes that the accounts at issue were in the name of LCM.[51] The LCM Companies' halfhearted defense, that other Members, who also happened to be employees, had similar expense accounts (but with lower charges) does not convince this Court that the Business Expense Claims are brought "by reason of" Mr. Imbert's conduct as a Member. To the contrary, like the claims against the plaintiff in *Zaman v. Amedeo Holdings, Inc.*,[52] the Business Expense Claims are rooted in the alleged misuse of the substantial responsibility and trust Mr. Imbert was given to promote the operations of LCM as its CEO. Indeed, the fact that the LCM Companies agreed that this claim should be withdrawn from the New York action in favor of mandatory arbitration before FINRA confirms that the claim relates solely to Mr. Imbert's role as the CEO of LCM, and not to his status as a Member of the LCM Companies. FINRA arbitration is appropriate for disputes between FINRA "members"

[49] Fleming Affidavit, Ex. 1 and 2 to Ex. A. In argument before this Court, the LCM Companies acknowledged that the advancement right provided for in the LLC Agreements would cover Mr. Imbert's service at LCM if the Court decided that the claims were brought against Mr. Imbert "by reason of" his conduct as CEO of LCM. *See* Transc. 43:14–16.
[50] Def. Op. Br. at 16–17.
[51] Fleming Affidavit, Ex. G ¶ 9, 10 (In an affidavit, Mr. Imbert stated that, as CEO of LCM, he "was issued one or more credit cards in the name of [LCM].").
[52] 2008 WL 2168397 (Del. Ch. May 23, 2008)

such as LCM and "associated persons" such as Mr. Imbert.[53] In other words, a dispute between the LCM Companies and Mr. Imbert, as a Member of the LCM Companies, would not be subject to mandatory arbitration before FINRA. Mr. Imbert, therefore, is entitled to advancement for these claims.

In their exceptions to the draft report, the LCM Companies raised a new argument, arguing that because they have not yet moved to reassert the Business Expense Claims in arbitration, Mr. Imbert is no longer entitled to advancement and must instead seek indemnification. Of course, the LCM Companies are not willing to indemnify Mr. Imbert unless and until he can establish that he acted in good faith and in a manner he reasonably believed to be in the best interests of the LCM Companies.[54] In other words, although the LCM Companies have chosen not to pursue the claim (at this time), they contend that Mr. Imbert must essentially prove that the claim lacked merit, and must do so without the benefit of advancement.

This contention borders on bad faith. The LCM Companies remain free to assert their claims related to the business expenses, and have not made any binding legal representation that they will not do so. Mr. Imbert therefore is entitled to advancement.[55] In any event, to hold otherwise would turn advancement on its head, allowing a company to assert claims against a former fiduciary, dismiss those claims without prejudice before

[53] As Mr. Imbert points out in a footnote, "courts have consistently ruled that similar disputes between a broker-dealer and its employees arise out of the [broker-dealer's] 'business activities'" as that term is used in FINRA Rule 13200. Pl. Answ. Br. at 17 n. 2.
[54] Defendants' Memorandum In Support of Exceptions at 7.
[55] *See, e.g. Hermelin v. K-V Pharm. Co.*, 54 A.3d 1093, 1108 n.51 (Del. Ch. Feb. 7, 2012) (dismissal of a claim pending in one forum so that similar claim can proceed in another forum is not a final disposition of the underlying proceeding such that claim for indemnification becomes ripe).

the fiduciary obtains advancement, and then force the fiduciary to prove his entitlement to indemnification without the benefit of the advancement claims for which he bargained. The LCM Companies' argument on this point is, to borrow a term, risible.

vi. The Books and Records Claim

The parties also dispute Mr. Imbert's right to advancement for the fees he incurred in making his July 17, 2012 books and records request under §18-305 of the Delaware Limited Liability Company Act.[56] While Mr. Imbert notes in his brief that this issue is "not appropriate at this summary judgment phase, and is rather more appropriately addressed during the reasonableness inquiry phase," he further contends that the LCM Companies are wrong to deny him advancement for his books and records request because he made that request to defend himself against the claims made by Mr. Cohen and Mr. Benhamou, and to determine the value of his interests in the LCM Companies. The LCM Companies argue that Mr. Imbert made his books and records request as a Member, and as such, the fees associated with the request are not covered by the advancement provisions. They further claim that Mr. Imbert could not have made his books and records request as a Manager because he no longer held that position as of July, 17 2012, and that Mr. Imbert's right to obtain books and records arose by virtue of his status as a member.

[56] The parties only briefly addressed the books and records issue in their filings with this Court. At oral argument, Mr. Imbert maintained that the books and records fees were "modest in amount" but nonetheless advanceable as he made the books and records request for the purpose of allowing him to defend himself as a Manager against the alleged impropriety surrounding his Tax Distributions and business expenses. *See* Transc. 18:17 – 19:23. The LCM Companies continued to assert that the books and records request was made by Mr. Imbert as a Member but noted that it was a "non-issue for purposes of the advancement." *See id*. 47:8-9.

This Court has held that for certain offensive actions, like Mr. Imbert's books and records action, "some degree of offensive response … can legitimately be part of 'defending.'"[57] Mr. Imbert's books and records action can fairly be characterized as part of his defense against the claims that he acted wrongfully as a Manager with respect to the Tax Distributions and the business expense account. The fact that he had a right to certain books and records because of his membership status is not dispositive, because he sought those books and records to defend claims asserted against him as a Manager. As such, to the extent that he seeks advancement for his books and records action, he should receive it.

To summarize, Mr. Imbert largely prevails in his advancement action.[58] For all but Count II in the New York proceeding, the claims against Mr. Imbert were brought "by reason of the fact" that he was a Manager of LCM GP and the CEO of LCM. The LCM Companies' belated attempt to portray each claim as if it were based on the wrongful actions Mr. Imbert took as a Member is unconvincing. Each claim except the unjust enrichment claim involves actions that Mr. Imbert could only have taken as a Manager, such as approving the Tax and Special Distributions. For that reason, and as

[57] *Paolino v. Mace Sec. Int'l, Inc.*, 2009 WL 4652894 at *7 (Del. Ch. Dec. 8, 2009).

[58] The Court notes that Mr. Imbert has satisfied the nexus requirement for four of the five claims against him, as well as the books and records claim. In analyzing Mr. Imbert's right to advancement for these claims, however, the Court did not consider the defenses Mr. Imbert intends to raise in the New York or FINRA proceedings. Indeed, consideration of Mr. Imbert's defenses would be inappropriate because determination of advancement rights requires only that this Court reasonably interpret the allegations of each count, and whether they arise "by reason of" Mr. Imbert's conduct as Manager or Member. *See Weaver v. ZeniMax Media, Inc*., 2004 WL 243163 at *4 (Del. Ch. Jan. 30, 2004). Further, as the Delaware Supreme Court explained in *Homestore, Inc. v. Tafeen*, advancement proceedings have a narrow focus that "precludes litigation of the merits of entitlement to indemnification…." 888 A.2d at 214. For these reasons, Mr. Imbert's possible defenses to the New York allegations have no place in this proceeding.

explained in detail above, the necessary nexus exists between Counts I, III, and IV in the New York proceeding, as well as the Business Expense Claim, and Mr. Imbert's position as a former Manager of the LCM Companies. I therefore recommend that the Court award Mr. Imbert all of the reasonable attorneys' fees and costs he has incurred, and will continue to incur, in defending himself against these claims in the New York action and before FINRA.

B. Mr. Imbert is Entitled to Fees on Fees

In general, plaintiffs are entitled to an award of "fees on fees" to the extent they prevail in their claim to enforce a contractual right to advancement.[59] As noted above, the LCM Agreements provide for indemnification and advancement "to the full extent authorized or permitted by law."[60] The LCM Companies appear to concede as much; they do not contend that the operative contractual language does not permit an award of "fees on fees," but simply assert that Mr. Imbert should not prevail on his advancement claim and therefore should not receive an award of "fees on fees." Mr. Imbert is entitled to the attorneys' fees and costs he incurred in pursuing this action, but only in proportion to his success in this action. Because Mr. Imbert prevailed on all but Count II, the unjust

[59] *See Stifel Financial Corp. v. Cochran*, 809 A.2d 555, 561 (Del.2002) ("allowing indemnification for the expenses incurred by a director in pursuing his indemnification rights gives recognition to the reality that the corporation itself is responsible for putting the director through the process of litigation"); *Fasciana v. Electric Data Systems Corp.*, 829 A.2d 178 at 184 (holding that a corporate official is entitled to "fees on fees" in an advancement action, but is limited to that portion of "fees on fees" that is proportionate to the level of success he achieved in bringing the action").

[60] Fleming Affidavit, Ex. 1 and 2 to Ex. A.

enrichment claim, a comparatively minor point, I recommend that he receive an award of "fees on fees" equal to 80% of the fees he incurred in bringing this action.[61]

C. Mr. Imbert is Entitled to Prejudgment Interest

In Delaware, prejudgment interest is awarded as a matter of right, and should be computed from the date payment is due.[62] A distinction is drawn between those expenses that were incurred before Mr. Imbert made his first demand for payment and those that were incurred after his first demand.[63] Mr. Imbert initially demanded advancement on June 27, 2012, when he provided the LCM Companies with an invoice for the $10,000 retainer he had paid and included the necessary undertaking. He again demanded payment on September 4, 2012 for the additional $8,334.19 in fees he had incurred during the month of July. The LCM Companies contend that Mr. Imbert's retainer bill does not qualify as a demand for payment as it is not sufficiently descriptive and it does not list any expenses actually incurred, but they cite no authority to support their argument.[64] In accordance with the holdings in both *Citrin*[65] and *Underbrink*[66], I

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[61] *See Zaman v. Amedeo Holdings, Inc*., 2008 WL 2168397 at *39 (Del. Ch. May 23, 2008) (explaining that an award of 80% of the plaintiffs' fees is a measured way to reflect the policy goal that "corporate officials do not achieve a pyrrhic victory in § 145 cases whereby what they win is largely offset by their costs of prosecution … while giving the defendants credit for the fact that the [plaintiffs] did not attain complete success."). Here, Mr. Imbert has been successful on Counts I, III, and IV and the Business Expense Claim. He has prevailed on four of the five claims he argued, and as such, an award of 80% of fees is sensible. *See Fasciana v. Electronic Data Systems Corp.*, 829 A.3d 178, 188 (Del. Ch. 2003) (The Court awarded the plaintiff one-third of his fees on fees because he was successful on one of the three claims he raised.)

[62] *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992)

[63] *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at * 19 (Del. Ch. May 30, 2008).

[64] As Mr. Imbert points out in his brief, the Delaware Supreme Court has explained that a demand for payment simply requires that the party specify the amount of reimbursement demanded and produce a written promise to repay. *See Citadel*, 603 A.2d at 826 n. 10.

[65] *Citrin v. Int'l Airport Ctrs. LLC*, 922 A.2d 1164, 1168 (Del. Ch. 2006).

[66] *Underbrink*, 2008 WL 2262316, at * 19.

recommend that the Court award Mr. Imbert prejudgment interest at the legal rate on the $10,000 retainer from the date of his first demand, June 27, 2012, and on all later expenses, including the $8,334.19 already incurred, from the date they were paid.[67]

D. Mr. Imbert's Claim for Declaratory Relief is Unnecessary

Because Mr. Imbert is entitled to the reasonable attorneys' fees and costs he has incurred, or will incur, in defending himself against Counts I, III, and IV in the New York action, as well as against the Business Expense Claims that the parties expect to arbitrate before FINRA, it is not necessary that this Court award him declaratory relief. The Court recognizes, however, the difficulty in distinguishing those fees incurred for the indemnifiable claims from those incurred for Count II, the unjust enrichment claim. In *Fasciana*, this Court explained that, often times, lawyers can apportion the time, and accompanying fees, spent on defending against the claims that may ultimately be indemnifiable.[68] Therefore, to implement the fee advancement provided for in this report on a forward-going basis, Mr. Imbert should submit to the LCM Companies a good faith estimate of the fees he incurred in defending himself against the claims this Court has found to be covered by the indemnification and advancement provisions in the LCM Agreements. The Court acknowledges that "some degree of imprecision will be involved

[67] *See Schoon v. Troy Corp.*, 948 A.2d 1157, 1173 (Del. Ch. Mar. 28, 2008) (applying legal rate of interest when neither party carried its burden of proof with respect to the applicable rate of interest); *Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 909 (Del. Ch. 1999) (noting that even though this Court "has broad discretion, subject to principles of fairness, in fixing the [interest] rate to be applied," generally, "the legal rate of interest has been used as the benchmark for pre-judgment interest," and finding "no reason why the legal rate of interest should not be applied" "[b]ased on the record before [the court]").

[68] *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 176 (Del. Ch. 2003).

in the retrospective accomplishment of this task."[69] The parties should confer and attempt to agree upon a procedure for submitting, reviewing, and responding to future advancement requests, including procedures and time frames for disputing particular requests, paying undisputed amounts, and periodically submitting unresolved issues to the Court. This Court's recent decision in *Danenberg v. Fitracks, Inc.*[70] may prove helpful in that regard, but the parties should not feel bound by that case, provided that the procedure agreed upon does not require granular review by this Court, or the Court's monthly involvement in disputed advancement requests.

CONCLUSION

For the foregoing reasons, I recommend that the Court enter an order awarding Mr. Imbert advancement of his attorneys' fees and costs, to the extent that they are reasonable, incurred in order to defend himself against Counts I, III, and IV of the underlying New York action, as well as the Business Expense Claims. I also recommend that the Court award Mr. Imbert the proportional "fees on fees" he has incurred in pursuing this action, as well as prejudgment interest in accordance with the specifications detailed above. This is my final report in this action, and exceptions should be taken in accordance with Rule 144.

Respectfully submitted,

/s/ *Abigail M. LeGrow*
Master in Chancery

[69] *Id*. at 177.
[70] 58 A.3d 991, 1001-03 (Del. Ch. 2012).