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

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TALKING CAPITAL LLC, together with its subsidiaries TALKING CAPITAL PARTNERS II, LLC, TALKING CAPITAL PARTNERS III, LLC, and FOREFRONT PARTNERS LLC,

Index No.: 650973/2017

DECISION & ORDER

Plaintiffs,

-against-

RODNEY OMANOFF, OMANOFF AMERICA TELECOM, LLC, BRENDAN ROSS, MARK PROTO, MUDMONTH, LLC, JOSEPH RAHMAN a/k/a YOUSSEF RAHMAN, CHRISTOPHER LARA, INTOUCH TELECOM, INC., DLI TC, LLC, VOIP GUARDIAN PARTNERS I LLC, VOIP GUARDIAN LLC, DIRECT LENDING INVESTMENTS LLC, and DIRECT LENDING INCOME FUND, L.P.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

At heart, this is an action brought by Talking Capital LLC (the Company), its subsidiaries, and one of its members against former managing members and others for forming a competing entity. Defendants DLI TC, LLC (DLI TC), Direct Lending Investments, LLC, Direct Lending Income Fund, L.P. (collectively, the DLI Companies), and Brendan Ross (collectively, the DLI Defendants) move to dismiss the amended complaint (the AC). Seq. 004. Defendants Rodney Omanoff, Mark Proto, Joseph Rahman (collectively, the Manager Defendants), Omanoff America Telecom, LLC (OAT), Mudmonth, LLC (Mudmonth), Christopher Lara, InTouch Telecom, Inc. (InTouch), VoIP Guardian Partners I LLC, and VoIP Guardian LLC (together, the VoIP Companies) (collectively, the Omanoff Defendants) separately move to dismiss the AC. Seq. 005. Plaintiffs, the Company, Talking Capital Partners

II, LLC (TCP II), Talking Capital Partners III, LLC (TCP III; and together with TCP II, the Subsidiaries), and Forefront Partners, LLC (Forefront), oppose both motions. For the reasons that follow, defendants' motions are granted in part and denied in part.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the AC (Dkt. 62)[1] and the documentary evidence submitted by the parties.[2]

In 2014, non-party Bradley Reifler, acting on behalf of Forefront,[3] negotiated and agreed with Omanoff, Proto, and Rahman to create the Company, a Delaware LLC based in New York. The Company provides financing to telecommunications firms that route international calls. The Company was in the factoring business; it would lend money to telecoms in exchange for a percentage of their accounts receivable.

The Company is governed by an operating agreement dated September 8, 2014. *See* Dkt. 63 (the Operating Agreement).[4] Its three Members – Forefront, OAT, and Mudmonth – are

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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] The court, however, will not consider factual averments in defendants' affidavits (such as Ross' claim that DLI TC was not given a certain contractually require notice) because they are inadmissible on a motion to dismiss. *See Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 n.4 (1st Dept 2014), *accord Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *see also Amsterdam Hospitality Group, LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 (1st Dept 2014)("We have held that affidavits that 'do no more than assert the inaccuracy of plaintiffs' allegations [ ] may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint ... and do not otherwise conclusively establish a defense to the asserted claims as a matter of law."), quoting *Tsimerman v Janoff*, 40 AD3d 242 (1st Dept 2007).

[3] Reifler claims to be a manager of Forefront. *See* Dkt. 102 at 1.

[4] Plaintiffs' allegations concerning some of the defendants' representations about their experience and the state of the factoring market are of no moment, not just because of a lack of any alleged due diligence, but also because each member warranted in section 11.1 of the

LLCs controlled by Reifler, Omanoff, and Proto, respectively, and each had a one-third interest. *See id.* at 63-64. Sections 5.1 and 5.4 of the Operating Agreement provide that the Company is to be controlled by a Board of Managers (the Board), consisting of three Managers – Reifler, Omanoff, and Proto. *See id.* at 8-9, 64. Rahman worked for the Company and was named in section 5.11 as a "Tax Matter Partner" along with Omanoff and Riefler. *See id.* at 14-15.

Section 1.5 states, in bold, that "**Notwithstanding anything to the contrary set forth herein, it is agreed and understood that the affirmative vote, consent or approval of all the Managers is required for *every* act or decision done or made by the [Board].**" *See id.* at 2 (bold and underline in original; italics added for emphasis).[5] The Company's purpose is set forth in section 2.6, which provides that the Company's factoring clients would include small and medium sized telecoms (Tier 3 Carriers) that were awarded contracts by "major" telecoms (Tier 1 Carriers), such as Verizon and AT&T. *See id.* at 4. Section 2.6 further provides that the Board

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Operating Agreement that: "By reason of his … business or financial experience, or by reason of the business or financial experience of his … financial advisor … he … is capable of evaluating the risks and merits of … this investment." *See* Dkt. 63 at 21. Likewise, section 11.4 provides that the members are "financially able to bear the economic risk of" losing their entire investment. *See id.* at 22. Regardless, plaintiffs do not assert a claim for fraudulent inducement.

[5] A provision to this effect can be found in multiple sections of the Operating Agreement. For instance, section 4.7, which addresses how voting interests are to be commensurate with the members' percentage interests, concludes, again in bold, that "**Notwithstanding anything to the contrary set forth herein, it is agreed and understood that the affirmative vote, consent or approval of all the Members holding all Interests is required for *every* act or decision done or made by the Members.**" *See* Dkt. 63 at 8 (bold and underline in original; italics added for emphasis); *see also id.* at 9 (**Notwithstanding anything to the contrary set forth herein, it is agreed and understood that the affirmative vote, consent or approval of all the Managers is required for every act or decision done or made by the [Board] unless a majority of those present of three members present authorize one member to take action in a specific matter.**") (bold and underline in original). Likewise, section 4.9(a) requires "all" members to call meetings, and requires written consents in lieu of a meeting to be signed by "all" members. *See id.* at 8.

is authorized to form subsidiaries to purchase accounts receivable of Tier 1 Carriers from Tier 3 Carriers. *See id.* at 4-5.

Sections 2.8 and 5.5 contain exculpatory clauses that restrict the liability of Members and Managers to acts such as gross negligence and fraud. *See id.* at 5, 13. Section 2.10(b) states that the Operating Agreement is only intended to benefit the Company's Members, that it "is expressly not intended for the benefit of any creditor of the Company or any other Person," and that no other party shall have any rights under the Operating Agreement. *See id.* at 5. The Operating Agreement contains partial disclaimers of the duty of loyalty.[6] Section 5.6 states that the Managers need not devote all their time to the Company, but may "devote whatever time, effort, and skill as they deem appropriate." *See id.* at 14. Section 5.7, which governs conflicted transactions, permits the Managers and their Affiliates to "engage in any transaction … with the Company so long as:

> (i) such transaction is not expressly prohibited by this Agreement and the terms and conditions of such transaction, on an overall basis, are fair and reasonable to the Company and are at least as favorable to the Company as those that are generally available from Persons capable of similarly performing them and in similar transactions between parties operating at arm' length **and** (ii) such transaction has been consented to in writing by the Members holding all interests.

Id. (emphasis added). However, the Operating Agreement does not permit Members or Mangers to appropriate corporate opportunities without the consent of the other Members.

In section 5.5, the Members agreed they would otherwise be subject to the fiduciary duties applicable under Delaware law to directors of a corporation,[7] and not those duties

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[6] *See Auriga Capital Corp. v Gatz Props.*, 40 A3d 839, 851 (Del Ch 2012), *aff'd* 59 A3d 1206 (Del 2012) (Delaware law imparts default fiduciary duties on managing members of an LLC).

[7] Absent a fiduciary duty waiver in an operating agreement, Delaware corporate law mandates application of entire fairness scrutiny to conflicted transactions. *See Miller v HCP & Co.*, 2018 WL 656378, at *2 (Del Ch 2018).

applicable to partners. *See id.* at 13. In other words, aside from the Operating Agreement's fiduciary duty waivers and exculpatory clauses, the Company is governed like a corporation.

In practice, "Omanoff was principally in charge of managing all day-to-day operations, including procuring financing opportunities relating to overseas telecom providers and supervising [the Company's] New York offices," while Forefront "concentrated its efforts on raising capital for [the Company] and its affiliates." *See* AC ¶¶ 25-26. In that regard, Reifler introduced the other Managers to Ross, whose DLI Companies could finance the Company's factoring business. Allegedly, "Ross came to New York on at least three occasions to meet with the representatives of [the Company] and entered into negotiations to provide loans to [the Company] and its affiliates." AC ¶ 28. "The negotiations in New York proved successful and led to a series of loans made by Ross's affiliated companies in 2014 to early 2016." ¶ 30. The loans were made to wholly owned subsidiaries of the Company, TCP II and TCP III, which were formed pursuant to section 2.6 of the Operating Agreement.[8] "The total amount of loans issued by Ross's affiliated companies amounted to approximately $180 million (including renewals and rollovers of prior financings)." ¶ 31. "Given this magnitude, Ross's affiliated companies became the leading lending source for [the Company and Subsidiaries]." ¶ 32.

"The first set of loans were made in the fall of 2014 totaling $7 million, pursuant to two promissory notes each in the sum of $3.5 million (the "Initial Loans"). The Initial Loans were

[8] The Subsidiaries, also Delaware LLCs, do not have separate operating agreements. Plaintiffs conclusorily allege they operated under the Company's Operating Agreement. This allegation is not supported by any documentation. Since the Operating Agreement requires unanimous consent, the Company's subsidiaries could not have "adopted" the Operating Agreement without unanimous consent of the Members. Forefront does not allege that the other Members unanimously agreed. In any event, as noted herein, Forefront is not aggrieved by the holding that the Subsidiaries are not governed by the Operating Agreement because that fact actually may result in the Omanoff Defendants having broader liability (e.g., due to no fiduciary duty waivers and exculpatory clauses).

personally guaranteed by [Reifler]." ¶ 33. "The Initial Loans were timely repaid with interest and led to a number of subsequent loans in 2015 pursuant to a certain Master Receivable[s] Purchase and Servicing Agreement dated as of December 1, 2014." ¶ 35; *see* Dkt. 70 (the PSA). The PSA is an agreement between TCP II (defined as Originator) and DLI TC (defined as Buyer). *See id.* at 1.[9] Section 25 of the PSA provides that the PSA, and all matters related to it, are governed by New York law. *See id.* at 22. In section 27(a), the parties to the PSA submitted to the jurisdiction of New York courts in any action relating to the PSA,[10] subject to the following caveat:

> provided, each party agrees that it will not commence any such action, other than regarding claims specified in the first sentence of Section 10(b) [i.e., concerning a breach of warranty], **without first entering into good faith discussions with the other party for a period of not less than thirty (30) days, in an effort to amicably resolve any such differences.**

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[9] The PSA's whereas clauses explain that "the Originator enters into Factoring Agreements with Merchants, under which the Originator agrees to purchase from the Merchant Receivables from Customers for service provided under a Carrier Agreement"; that "pursuant to this Agreement, Originator will provide a Credit Package (as hereinafter defined) relating to a Merchant and each Carrier Agreement relating to Receivables that the Originator proposes to sell to Buyer"; that "Originator has agreed to provide Buyer with an exclusive Purchase Option on the terms and conditions set forth below"; and that "if Buyer exercises the Purchase Option, Buyer will purchase the Receivables generated under the subject Factoring Agreement, on the terms and conditions set forth herein." *See* Dkt. 70 at 1. While the PSA is an extensive agreement, the court limits its discussion to the portions of the PSA that are relevant to the instant motions. It should be noted that section 23 of the PSA provides that:

> The relationship between Originator and Buyer shall be that of independent contractors. Neither is a trustee or agent for the other, nor does either have any fiduciary obligations to the other. This Agreement shall not be construed to create a partnership or joint venture between the Parties. ...

Dkt. 70 at 22.

[10] It should be noted that, unlike the PSA, the Operating Agreement does not contain a forum selection clause.

Id. (emphasis added). In other words, this meet and confer obligation is a procedural condition precedent to DLI TC's consent to jurisdiction in this court.

Section 2 of the PSA provides DLI TC with a right of first refusal to finance the Company's telecom factoring. *See id.* at 5-7. Section 2(a) sets forth the information that must be provided to DLI TC and requires that this information be sent by email and made available on a Credit Website. *See id.* at 5. DLI TC could exercise its right of first refusal "by indicating its approval to purchase the Receivables covered by the Credit Notice in a reply email … within four (4) Business Days after the Effective Offer Date." *See id.* at 6.

The PSA had a five-year term, subject to early termination under certain conditions set forth in section 16. *See id.* at 18. Section 18(d) contains a restrictive covenant that prohibits DLI TC, its principals, and affiliates from engaging "in any business providing trade finance or factoring services to telecommunications carriers in connection with voice over internet protocol (VoIP) services outside of the PSA while the PSA is in effect and for two years thereafter." *See id.* at 20-21. Further, section 18(e) prohibits DLI TC, its principals, and affiliates from soliciting customers and employees of the Company and its affiliates during this restriction period. *See id.* at 21. Section 18(f) states that "[t]he restrictions set forth in this Section 18 are considered by the Parties to be reasonable for the purposes of protecting the value of their respective businesses and goodwill and respecting applicable legal and contractual requirements"; contains a "blue penciling" provision that provides that "[i]f any provision of this Section 18 relating to the time period, scope of activities or geographic area of restrictions is declared by a court of competent jurisdiction to exceed the maximum permissible time period, scope of activities or geographic area, each such provision shall be reduced to the maximum which such court deems

enforceable"; and provides for recovery of attorneys' fees in an action to enforce section 18. *See id.*

According to plaintiffs, the Company initially "operated successfully for more than a years' time, earning combined profits with its lenders and capital partners of approximately $7 million." *See* AC ¶ 39. However, problems arose in 2016 with loans TCP III made to a British Tier 3 Carrier, Bolotel Limited (Bolotel). The loans to Bolotel (the Bolotel Transactions) were made in consideration for the right to Tier 1 Carrier accounts receivable owned by an Italian telecom company, AV Partners, SRL (AVP), a subsidiary of Logica SRL (Logica), another Italian company which had been in bankruptcy since 2010. The circumstances of the Bolotel Transactions are not explained with much detail in the AC other than with general allegations implying impropriety on the part of Manager Defendants, who supposedly failed to consider the bankruptcy. For example, plaintiffs allege: "Omanoff, Proto, Rahman and/or Lara structured and executed the Bolotel Transactions down to every last detail and [Forefront] had no involvement in the underwriting or due diligence of Bolotel or AV Partners."[11] ¶ 43.

Plaintiffs also suggest misconduct on the part of the DLI Defendants. They contend that, under section 2 of the PSA, DLT TC was given the opportunity to participate in the Bolotel Transactions, but that Ross declined.[12] Plaintiffs, however, do not allege when or how Ross was

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[11] The AC does not explain how due diligence on the credit risk associated with the Company's factoring was ordinarily performed or how/why that process failed with the Bolotel Transactions other than alleging the Logica bankruptcy was overlooked. These omissions must be remedied if, as explained herein, Forefront seeks leave to amend to assert a non-exculpated *Caremark* claim. If all that can be alleged is simply that the Logica bankruptcy was overlooked, Forefront should not seek leave to replead as doing so would be futile.

[12] While paragraph 55 of the original complaint stated something different [*see* Dkt. 127 at 16], defendants do not cite any controlling authority for the proposition that conflicting allegations between pleadings *in the same action* necessarily have preclusive effect on a motion to dismiss, as opposed to being a basis to mount a credibility challenge to the finder of fact. The authority

given notice, nor do they allege that the requisite electronic notices were provided as required by section 2(a) of the PSA. They merely allege the following:

> During the period of time leading up to the Bolotel Transactions, Omanoff was in regular contact with Ross and his affiliated finance companies, and consistent with the parties' course of dealing they were presented with the opportunity to participate in the Bolotel Transactions. It was reported to Forefront Partners that Ross declined to participate in the Bolotel Transactions because the financial information associated with the Bolotel Transactions was either incomplete or inadequate and did not meet Ross's underwriting criteria.

AC ¶¶ 44-45 (paragraph breaks omitted).[13] Plaintiffs claim, without particulars or explanation, "that Omanoff and the other individual Defendants steered Ross and his companies away from the Bolotel Transactions to protect their developing business relationship relating to a competing business discussed below."[14] ¶ 46.

Forefront claims that the Company lost more than $8.5 million on the Bolotel Transactions because Omanoff did not properly conduct due diligence on the deal. Additionally, it complains that one of the loans to Bolotel was actually made to a different entity based in the

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cited by defendants concerns when conflicting allegations in *prior litigation* constitute judicial admissions. *See New Greenwich Lit. Trust, LLC v Citco Fund Servs. (Europe) B.V.*, 145 AD3d 16, 25 (1st Dept 2016). Probing the reasons for the prior allegation (e.g., mistake vs. dishonesty) is fair game for discovery.

[13] These allegations must be assumed to be true for the purposes of this motion, and thus Ross' claim that he did not receive notice under section 2 of the PSA could not warrant dismissal. Forefront claims it was told that Ross was provided notice. Without discovery, Forefront cannot know whether the other Members or Mangers did in fact notify Ross. *See* AC ¶ 47 ("Omanoff, Proto and Rahman were responsible on behalf of [the Company] and its affiliates to present all lending opportunities to Ross and his companies pursuant to the [PSA].").

[14] As discussed herein, plaintiffs allege that the Bolotel Transactions were a bad deal and that the Company lost more than $8.5 million on them. Omanoff (through OAT) had the same interest in those deals as Forefront. Even if Omanoff and Ross had some side dealing that aligned their interests, it appears illogical for Omanoff to protect Ross from the Bolotel Transactions while harming himself. If Omanoff was concerned with the Bolotel Transactions, he could have both helped Ross and himself by making sure the Company steered clear of the deal. Simply put, the court does not understand plaintiff's theory of scienter.

United Arab Emirates, called Bolotel FZE.[15] Forefront contends, without explanation, that "[b]ased upon [Forefront's] ensuing investigation, it now appears that the payments on the initial loans [to Bolotel] were designed as part of a fraudulent enterprise to lull [TCP III] into a false sense of security regarding continued financing despite Bolotel's otherwise shaky financial condition," and that "Bolotel and/or [AVP] is a criminal enterprise, making use of a web of international bank accounts to divert, loot or embezzle the loan proceeds from [TCP III]." *See* AC ¶¶ 65, 68.[16] Bolotel now is the subject of insolvency proceedings in England.

Aside from the Bolotel debacle, plaintiffs allege that in September and October of 2015, Omanoff, Proto, Rahman, and Lara, through OAT and Mudmonth, established new factoring companies – the VoIP Companies – to compete with the Company. These new companies purportedly are "engaged in the identical business as [the Company], to wit, providing financing to telecommunications carriers utilizing voice over internet protocol." AC ¶ 81. Omanoff, Proto, and Rahman formed these companies while they still worked for the Company. Omanoff resigned from the Company in October 2016. While Proto and Rahman have not formally resigned, they allegedly no longer actually work for the Company. The VoIP Companies use "the same New York address and telephone number as those used by Omanoff while he was a member of [the Company]." ¶ 96. Moreover, plaintiffs claim that, in violation of section 18 of the PSA, Ross and his companies finance the VoIP Companies' factoring business. Based on

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[15] The import of this allegation is unclear since, according to Forefront, the reason the deal failed was due to the insolvency of AVP's parent company. Even if the funds were referred to the correct Bolotel entity, the Company still would have suffered a loss (there is nothing alleged to the contrary in the AC).

[16] Forefront further alleges – yet again without specifies – that it "has since learned from the Kroll Investigatory Service that, upon information and belief, Omanoff's partners, Proto and Rahman (and Rahman's entity InTouch), have previously been involved in significant wrongdoing in the telecommunications industry involving creating phony receivables." AC ¶ 72. Even if this is true, it is not clear why it is relevant.

these allegations, Forefront contends that it would be futile to demand that the Company's Board file suit against defendants given the wrongdoing alleged against the Manager Defendants.[17]

On February 24, 2017, plaintiffs commenced this action by filing their original complaint. *See* Dkt. 1. After defendants moved to dismiss that complaint, on June 16, 2017, plaintiffs filed the AC. *See* Dkt. 62. Plaintiffs assert seven causes of action, numbered here as in the AC: (1) breach of the Operating Agreement, asserted by Forefront directly and derivatively on behalf of the Company and double derivatively on behalf of the Subsidiaries, against Omanoff, OAT, Proto, Mudmonth, and Rahman; (2) breach of fiduciary duty, asserted by Forefront directly and derivatively on behalf of the Company and double derivatively on behalf of the Subsidiaries, against Omanoff, OAT, Proto, Mudmonth, and Rahman; (3) aiding and abetting breach of fiduciary duty, asserted by Forefront directly and derivatively on behalf of the Company and double derivatively on behalf of the Subsidiaries, against Lara and InTouch; (4) misappropriation of corporate opportunity and unjust enrichment,[18] asserted by Forefront directly and derivatively on behalf of the Company and double derivatively on behalf of TCP II, against Omanoff, OAT, Proto, Mudmonth, and Rahman; (5) breach of section 18 of the PSA, asserted by Forefront directly and double derivatively on behalf of TCP II, against the DLI Defendants; (6) aiding and abetting breach of fiduciary duty, asserted by Forefront directly and derivatively on behalf of the Company and double derivatively on behalf of TCP II, against the DLI Defendants; and (7) permanent injunctive relief, asserted by Forefront directly and derivatively on behalf of

[17] Forefront's demand futility allegations are pleaded in paragraphs 105-113 of the AC. *See* Dkt. 62 at 18-19. As discussed herein, while defendants challenge Forefront's standing to prosecute the Company's claims based on the unanimous consent provisions of the Operating Agreement, they do not take specific issue with the sufficiency of Forefront's demand futility allegations.

[18] The court does not understand why these separate causes of action (the first of which is really a claim for breach of fiduciary duty) are pleaded together.

the Company and double derivatively on behalf of the Subsidiaries, asserted against all defendants.[19]

Defendants filed the instant motions to dismiss the AC on July 13, 2017. The court reserved on the motions after oral argument. *See* Dkt. 128 (12/21/17 Tr.).

II. Discussion

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

[19] The claims all concern the ways in which the Company and its subsidiaries were harmed. As discussed herein, these are classic derivative claims. It should be noted that the cause of action headers might to interpreted as purporting to assert that some of the causes of action are being brought directly by either the Company or the Subsidiaries. *See, e.g.*, Dkt. 62 at 25 ("Directly and Derivatively on Behalf of TCPII"). That surely cannot be plaintiff's intent, as the Operating Agreement (which Forefront itself alleges governs the Company's subsidiary's) precludes Forefront from acting on behalf of these entities without the other Members' unanimous consent. Therefore, the causes of action that are asserted in the name of the Company and the Subsidiaries must necessarily be prosecuted by Forefront either derivatively or double derivatively based on Forefront's allegations of demand futility.

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

B. The DLI Defendants' Motion (Seq. 004)

The DLI Defendants move to dismiss for lack of personal jurisdiction and for failure to state a claim.

It is undisputed that the DLI Defendants, which are domiciled or incorporated in either California or Delaware, are not subject to general jurisdiction in New York. They contend they are not subject to specific jurisdiction, arguing that plaintiffs: (1) cannot rely on the PSA's consent to jurisdiction in section 27(a) because plaintiffs did not comply with that section's conditional pre-suit dispute resolution requirement; and (2) have not otherwise proffered any applicable basis for jurisdiction under New York's long arm statute. The court agrees with the first argument.

DLI TC predicated its consent to jurisdiction on the condition precedent of TCP II engaging in pre-suit good faith settlement discussions. It is undisputed that TCP II did not do so. Where, as here, sophisticated parties express their contractual intentions unambiguously, the court must hold them to their bargain. *Bank of N.Y. Mellon v WMC Mortg., LLC*, 136 AD3d 1, 6 (1st Dept 2015).[20] Plaintiffs do not cite any authority to support their request that that court disregard this bargained-for right. DLI TC, a foreign entity, submitted to New York jurisdiction

[20] Unlike the Operating Agreement, the PSA is governed by New York law.

on condition that it have the opportunity to seek a pre-suit resolution. Neither law nor equity militates in favor grating plaintiffs the benefit of that bargain while effectively telling DLI TC that its consideration was illusory. *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."). Plaintiffs proffer no explanation for their failure to comply with section 27(a). The proper response to this failure to live up to their side of the deal is to deny plaintiffs the benefit they would have obtained had they done so (i.e., precluding DLI TC from arguing that the court lacks personal jurisdiction over it in this action).[21]

That said, plaintiffs have nonetheless alleged sufficient facts to establish jurisdiction over all of the DLI Defendants. It is well established that personal jurisdiction may exist even when the defendant never sets foot in New York. *Paterno v Laser Spine Institute*, 24 NY3d 370, 376 (2014) ("The lack of an in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York."); *see Deutsche Bank Secs., Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71 (2006) ("the growth of national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it."). "So long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is

[21] This conclusion obviates the need for the court to consider plaintiffs' argument regarding the applicability of the "closely related" doctrine to the DLI Defendants that are not parties to the PSA. *See Universal Investment Advisory SA v Bakrie Telecom PTE, Ltd.*, 154 AD3d 171, 179 (1st Dept 2017) ("Under New York law, a signatory to a contract may invoke a forum selection clause against a non-signatory if the non-signatory is 'closely related' to one of the signatories such that 'enforcement of the forum selection clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound.'") (citations omitted); *Tate & Lyle Ingredients Americas, Inc. v Whitefox Techs. USA, Inc.*, 98 AD3d 401, 402 (1st Dept 2012).

subjected to jurisdiction even if not 'present' in that State." *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466 (1988); *see Daimler AG v Bauman*, 134 SCt 746, 754 (2014).

Under CPLR 302(a)(1), jurisdiction over a non-domiciliary may exist "even though the defendant never enters New York [] so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Fischbarg v Doucet*, 9 NY3d 375, 380 (2007). Notably, CPLR 302(a)(1) "is a '**single act statute**' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter*, 71 NY2d at 467 (emphasis added). "A non-domiciliary defendant transacts business in New York when on his or her own initiative[,] the non-domiciliary projects himself or herself into this state to engage in a sustained and substantial transaction of business." *D & R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298 (2017) (citation and quotation marks omitted). CPLR 302(a)(3)(ii) also provides jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state ... if he ... expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 (2000).

Plaintiffs allege that Ross, who controls the DLI Companies, came to New York to negotiate the PSA on their behalf. *See* Dkt. 102 at 3 (Reifler met with Ross three times in New York regarding the DLI Companies funding the Company). Ross does not deny this and admits he traveled to New York to conduct business on behalf of the DLI Companies. *See* Dkt. 75 at 2. Also, plaintiffs claim that the DLI Companies financed the Company *and* the VoIP Companies,

both of which operate in New York. Indeed, the DLI Companies were the primary source of funding for the Company. *See D & R Global*, 29 NY3d at 298 ("not only was defendant physically present in New York on several occasions, but its activities here resulted in the purposeful creation of a continuing relationship with a New York corporation.") (citation and quotation marks omitted). These allegations form the basis of plaintiffs' claims for breach of section 18 of the PSA and for aiding and abetting the Manager Defendants' breach of fiduciary duty. Such allegations, which must be assumed to be true since the DLI Defendants have not submitted any documentary evidence that utterly refutes them,[22] suffice to show that the DLI Defendants purposely availed themselves of this jurisdiction by coming to New York to negotiate their financing of a factoring business based in New York, and then later financed a competing firm, also based in New York, that is allegedly improperly competing with plaintiffs. Coming to New York to do business related to the subject contract (which, as noted, is not a necessary predicate for jurisdiction) satisfies CPLR 302(1)'s single transaction test. Causing wrongful competition to occur between two New York based companies qualifies as causing an injury in New York if the plaintiff loses business, as a result, within New York.[23] *See Penguin Grp. (USA) Inc. v Am. Buddha*, 16 NY3d 295, 306 (2011). Here, the Company not only lost

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[22] As noted earlier, the court cannot dismiss the action based on facts alleged in defendants' affidavits because such allegations may not be considered on a motion to dismiss.

[23] It should be noted that the Omanoff Defendants suggest that the location of an injury is the location of a company's customers. That is not the law. Rather, "the situs of commercial injury is **where the original critical events associated with the action or dispute took place**, not where any financial loss or damages occurred." *McBride v KPMG Int'l*, 135 AD3d 576, 577 (1st Dept 2016) (emphasis added), quoting *CRT Investments, Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 471-72 (1st Dept 2011). Here, most of the "original critical events" – such as the meetings and the locations of the competing companies – allegedly occurred in New York. Hence, that the "customers" (i.e., the telecoms from which the Company acquires accounts receivable) are in Europe is of no moment and, it should be noted, defendants do not cite any controlling authority to that effect.

business to a competing firm in New York (the VoIP Companies), but allegedly, that competing firm "uses the same New York address and telephone number as those used by Omanoff while he was a member of [the Company]." *See* AC ¶ 96.

To the extent the DLI Companies' contend they do not derive substantial revenue from interstate or international commerce, that connection is both implausible and refuted by the record. The DLI Companies, though based in California, funded the Company's New York-based factoring of European telecoms. Moreover, plaintiffs submitted the DLI Companies' promotional materials that show they do business across the United States, including in New York. *See* Dkt. 104 at 6. And while not dispositive, that DLI TC conditionally agreed to be subject to jurisdiction in New York refutes the notion that it could not have reasonably expected to have to defend against plaintiffs' claims in this court. Therefore, the prong of the DLI Defendants' motion to dismiss based on lack of personal jurisdiction is denied.

Furthermore, at this juncture, the court rejects the DLI Defendants' argument that plaintiffs' own, prior breach of the PSA precludes it from enforcing section 18's restrictive covenants. To be sure, if the DLI Defendants can prove that plaintiffs breached first, such an adjudicated fact could defeat plaintiffs' contract claims. *See Cornell v T. V. Dev. Corp.*, 17 NY2d 69, 75 (1966) (party who breached contract containing covenant not to compete cannot enforce such covenant if he breached contract first); *see DeCapua v Dine-A-Mate, Inc.*, 292 AD2d 489, 491 (2d Dept 2002); *see also Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010) (breach of contract claim requires plaintiff to demonstrate his own performance). However, the parties' competing affidavits regarding whether Ross was in fact given the

opportunity to participate in the Bolotel Transactions precludes dismissal. *See Amsterdam Hospitality*, 120 AD3d at 432.[24]

The court also rejects the DLI Defendants' argument that the AC lacks the requisite specificity (under CPLR 3013 on the breach of contract clam and CPLR 3016(b) on the claim for aiding and abetting breach of fiduciary duty). Plaintiffs allege that the DLI Defendants are funding the VoIP Companies. If this is true, that would be a violation of section 18 of the PSA and would, as discussed further herein, amount to substantially assisting the other Members' breach of their duty of loyalty to not compete with the Company. *See Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 476 (1st Dept 2009). Plaintiffs are not required to plead the specifics of the deals financed by the DLI Defendants because, without discovery, they cannot do so. CPLR 3016(b) does not requires this level of specificity. *See Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 491-92 (2008) ("We have cautioned that section 3016(b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud.

[24] The court is skeptical of this defense. The DLI Defendants claim that TCP II failed to provide DLI TC with the requisite notice under section 2 of the PSA, foreclosing DLT TC from the opportunity to exercise its right of first refusal on the Bolotel Transactions. Even assuming this alleged breach, it is cynical for DLI TC to complain about not getting the opportunity to participate in the Bolotel Transactions. Not only was DLI TC not damaged by virtue of TCP II's alleged breach – but it actually is indisputably much better off as a result. The court questions the notion that DLI TC can now use that alleged breach to justify to its own, subsequent breach of section 18 of the PSA (especially when it is alleged the Members who supposedly caused the Company to breach are now working with Ross). Not every breach of contract is material or has harmful consequences and can be used by the non-breaching party to justify termination or rescission of the contract. *See Kassab v Kasab*, 137 AD3d 1138, 1140 (2d Dept 2016). Here, plaintiffs allege that the DLI Defendants agreed in the PSA to be the Company's primary source of financing and not to compete for two years after such exclusive arrangement ended. Section 16 of the PSA governs when and how the PSA could be terminated in the event of a material breach. *See* Dkt. 70 at 18. The DLI Defendants do not claim to have invoked a termination under section 16. Retrospectively, they seek effective termination of their obligations under the PSA due to one missed deal that, in hindsight, fortuitously did not involve them.

Consequently, where concrete facts are peculiarly within the knowledge of the party charged with the fraud, it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings.") (citations and quotation marks omitted). Here, the facts alleged regarding the DLI Defendants' funding of the VoIP Companies permit a reasonable inference that the DLI Defendants have aided and abetted the Manager Defendants' breach of their fiduciary duty of loyalty. *See Sargiss v Magarelli*, 12 NY3d 527, 531 (2009).

Next, the court finds that the enforceability of section 18's restrictive covenants cannot be decided at this juncture. Under New York law, a contractual restrictive convent not to compete is only enforceable if it is reasonable. *BDO Seidman v Hirshberg*, 93 NY2d 382, 388-89 (1999). Covenants not to compete "are subject to specific enforcement to the extent that they are 'reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome..." *Ashland Mgmt. Inc. v Altair Investments NA, LLC*, 59 AD3d 97, 102 (1st Dept 2008) (citation omitted), *aff'd as mod.*, 14 NY3d 774 (2010). Critically, the permitted scope of such covenants turns on the nature of the parties' relationship. When that relationship is simply employer-employee, the permitted scope is at its narrowest; when that relationship is between the purchaser and seller of a company, the permitted scope is at its broadest. *See BDC Mgmt. Servs., LLP v Singer*, 2016 WL 75603, at *5 (Sup Ct, NY County 2016) (collecting cases), *aff'd*, 144 AD3d 597 (1st Dept 2016). Here, we are dealing with sophisticated businesses in an independent contractor relationship where the subject restrictive covenant does not impact the entirety of the DLI Defendants' business. Only one sector of the DLI Defendants' factoring – to certain telecom firms – is impacted. Notably, the parties do not cite any controlling authority that dictates whether the subject restrictive

covenant is enforceable. Moreover, the reasonableness of the restriction and the legitimacy of the plaintiffs' interest in the restriction must be viewed in light of the circumstances alleged. Certainly, it may be reasonable for a Company, through a non-compete, to protect itself from its quasi-exclusive, primary source of funding from breaking that agreement and immediately funding a competing firm. This particularly may be true where the competing firm is run by the Company's former managing members who supposedly were aided by the DLI Defendants in establishing the competing firm in violation of fiduciary duties. The question of reasonableness, here, must be decided on a complete factual record. The question of whether the two-year restriction is reasonable is not necessarily dispositive because settled New York law and section 18(f) of the PSA permit the court to "blue pencil" the length of the non-compete period if a shorter time would be reasonable. *See BDO Seidman*, 93 NY2d at 394-95; *Ashland*, 59 AD3d at 106 n.3. Moreover, an international scope is not necessarily unreasonable where, as here, the clients are located internationally. *See Estee Lauder Companies Inc. v Batra*, 430 FSupp2d 158, 181 (SDNY 2006).

As for the DLI Defendants' contention that only DLI TC may be held liable for breach of the PSA, they are clearly correct in this regard. Ordinarily, privity of contact is a necessary predicate of a breach of contract claim. *Leonard v Gateway II, LLC*, 68 AD3d 408 (1st Dept 2009). While DLI TC may be held liable for permitting its affiliates to compete in contravention of section 18, those affiliates cannot be held liable since they did not sign the PSA.[25] That said, all of the DLI Defendants remain parties to this action due their potential liability on the aiding and abetting claims.

[25] Plaintiffs *did not* assert a claim against the affiliates for tortious interference with contract.

Finally, the court rejects the DLI Defendants' argument that the AC fails to plead damages with enough specificity, as the alleged wrongful competition permits a reasonable inference that plaintiffs were economically harmed. The precise amount of damages is a question to be probed in discovery.

C. The Omanoff Defendants' Motion to Dismiss (Seq. 005)

Rahman, Proto, Lara, Mudmonth, and InTouch move to dismiss for lack of personal jurisdiction. Rahman and Proto are clearly subject to jurisdiction in New York. As previously discussed, that they do not live in New York is of no moment. *See Paterno*, 24 NY3d at 376. They allegedly came to New York to negotiate the Operating Agreement, which they executed while in New York. *See* Dkt. 102 at 2. Moreover, they served as Mangers of the Company (which is based in New York), and actually conducted business (e.g., meetings with investors) on behalf of the Company in New York. *See id.* They allegedly are responsible for helping the VoIP Companies wrongfully compete with the Company in the very same New York location as the Company. Since Proto acted on behalf of Mudmonth – which is one of the Company's managing members – Mudmonth also is subject to jurisdiction. Likewise, Lara and his company, InTouch, are alleged to have helped the VoIP Companies wrongfully compete with the Company in New York. Under the authority cited earlier, this alleged conduct is sufficient to justify the imposition of specific personal jurisdiction under New York's long arm statute.

That said, the Omanoff Defendants also move to dismiss on the ground that plaintiffs lack standing. As an initial matter, Forefront has not asserted any claim that qualifies as a direct cause of action since all of the alleged harm was caused to the Company and the Subsidiaries. Under Delaware law, which governs the internal affairs of these LLCs, such claims are derivative. *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 (Del 2004), accord

NAF Holdings, LLC v Li & Fung (Trading) Ltd., 118 A3d 175, 180 (Del 2015); *see Lerner v Prince*, 119 AD3d 122, 128-29 (1st Dept 2014). Hence, Forefront's claims for breach of the Operating Agreement may only be asserted derivatively on behalf of the Company, and Forefront's claims for breach of fiduciary duty may only be asserted derivatively on behalf of the Company or double derivatively on behalf of the Subsidiaries. *Dietrichson v Knott*, 2017 WL 1400552, at *4 (Del Ch 2017) (claim is derivative if stockholders are only harmed insofar "as their stock loses value" and where "any recovery must flow directly to the Company."), citing *Tooley*, 845 A2d at 1039, accord *El Paso Pipeline GP Co., v Brinckerhoff*, 152 A3d 1248, 1261 (Del 2016) (claim is derivative if recovery "flows to the corporation."); *see also Sternberg v O'Neil*, 550 A2d 1105, 1107 n.1 (Del 1988); *see Pokoik v 575 Realties, Inc.*, 143 AD3d 487, 489 (1st Dept 2016) ("where the parent controls the subsidiary, a shareholder may bring a 'double' derivative action not only for wrongs inflicted directly on the corporation in which he holds stock, but for wrongs done to that corporation's subsidiaries which make indirect, but nonetheless real, impact upon the parent corporation and its stockholders.") (citation and quotation marks omitted).[26]

Since Forefront's claims are derivative, it must either allege that it made a demand on the Board[27] that was wrongfully rejected or that making such a demand would be futile. *Rales v Blasband*, 634 A2d 927 (Del 1993); *Aronson v Lewis*, 473 A2d 805 (Del 1984). Forefront alleges the latter. The Omanoff Defendants do not (as they plausibly cannot) contend that

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[26] *See also Sagarra Inversiones, S.L. v Cementos Portland Valderrivas, S.A.*, 34 A3d 1074, 1080 (Del 2011) (where "the wholly-owned subsidiary pre-existed the alleged wrongdoing ... and the plaintiff owns stock only in the parent ... [a demand can] only be made—and a derivative action [can] only be brought—at the parent, not the subsidiary, level."), quoting *Lambrecht v O'Neal*, 3 A3d 277, 282 (Del 2010).

[27] As noted earlier, the Company has a board of managers even though it is an LLC.

Forefront has not pleaded demand futility.[28] Instead, they argue that since sections 5.2 and 5.4 of the Operating Agreement require unanimous Member consent before Members may act on behalf of the Company, Forefront lacks the authority to unilaterally commence suit on the Company's behalf. The Omanoff Defendants do not, however, address whether, under Delaware law, a member may commence a derivative action on behalf of the LLC where the operating agreement contains such a unanimous consent provision but where it does not specifically address the commencement of a derivative lawsuit or specifically indicate the intent to displace the default rules of demand futility. Under these circumstances, the Omanoff Defendants' argument would inherently immunize managing members who commit wrongdoing.

The Omanoff Defendants do not support their position with any controlling Delaware authority in their moving brief, and plaintiffs' opposition brief fails to meaningfully grapple with the issue. In reply, the Omanoff Defendants attempt to buttress their arguments with Delaware law. They suggest that the Operating Agreement's unanimity provisions displace Delaware's default standards for maintaining a derivative action by noting that Delaware operating agreements ordinarily displace default LLC statutory rules.[29] They cite only a single case that purports to support their position, and that case merely permits members to agree in an operating agreement not to seek dissolution. *See R & R Capital, LLC v Buck & Doe Run Valley Farms,*

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[28] The court, therefore, will not engage in the usual demand futility analysis under Delaware law. *See Park Employees' & Ret. Bd. Employees' Annuity & Benefit Fund of Chicago v Smith*, 2017 WL 1382597, at *5 (Del Ch 2017). Suffice it to say that Forefront has pleaded non-exculpated claims concerning conflicted transactions that give rise to a credible threat of the imposition of liability on the other Members. *See Beam v Stewart*, 845 A2d 1040, 1049 (Del 2004); *In re Qualcomm Inc. FCPA Stockholder Deriv. Lit.*, 2017 WL 2608723, at *2 (Del Ch 2017).

[29] *See Estate of Calderwood v ACE Group Int'l LLC*, 157 AD3d 190 (1st Dept 2017), citing *Achaian, Inc. v Leemon Family LLC*, 25 A3d 800, 802-03 (Del Ch 2011) ("the parties to an LLC agreement have substantial authority to shape their own affairs and that in general, any conflict between the provisions of the Act and an LLC agreement will be resolved in favor of the LLC agreement.").

LLC, 2008 WL 3846318, at *7 (Del Ch 2008). It does not follow that members' ability to agree to forgo their substantive rights means they may also agree not to sue derivatively if bad faith and circumstances of demand futility are present. Notably, the portion of the Delaware LLC law that addresses a member's right to sue derivatively upon a showing of demand futility – 6 *Del C* § 18-1001 – is not prefaced by the "magical phrase" of "[u]nless otherwise provided" in the operating agreement.[30]

In the absence of the parties' citation to controlling authority, the court need not and will not express an opinion on the question of if and how an operating agreement may disclaim the right to sue derivatively because the Operating Agreement in this case does not expressly purport to do so.[31] The Omanoff Defendants appear to take the position that an agreement to always act with unanimous consent is a *per se* wavier of the right to sue derivatively based on demand futility. Given the importance of the derivative action as a mechanism for holding managing members accountable to the minority, and since "[w]aiver is an ***intentional*** relinquishment of a

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[30] Thus, the question of whether § 18-1001 is mandatory or permissive is not clear. *See R & R Capital,* 2008 WL 3846318, at *5, citing *Elf Atochem N. Am., Inc. v Jaffari*, 727 A2d 286, 292-96 (Del 1999), accord *Estate of Calderwood*, 157 AD3d 190.

[31] There is some Delaware caselaw that addresses who may bring derivative actions on behalf of LLCs governed as corporations (such as the Company), but the court could not find any that squarely address this issue. *See Obeid v Hogan*, 2016 WL 3356851, at *15-17 (Del Ch 2016) (addressing who may bring derivative action on behalf of "Corporate LLC" where operating agreement provides for special litigation committee). There also is recent Appellate Division authority (albeit involving New York law) that addresses limitations on derivative actions where the operating agreement contains a unanimous consent provision, but that case involved a provision that *expressly* addressed the authority to maintain legal proceedings and merely ruled on the propriety of the appointment of a special litigation committee given the terms of that specific operating agreement. *See LNYC Loft, LLC v Hudson Opportunity Fund I, LLC*, 154 AD3d 109, 111-15 (1st Dept 2017). *LNYC* does not answer the question of whether a general unanimous consent provision absolutely forecloses the possibly of a member maintaining a derivative action under circumstances of demand futility. The court does not believe such an intent can be clearly inferred merely from a general unanimous consent provision that does not expressly address the subject.

known right and should not be lightly presumed [*Gilbert Frank Corp. v Fed. Ins. Co.*, 70 N.Y.2d 966, 968 (1988) (emphasis added)],[32] the court does not agree with the Omanoff Defendants. Ergo, Forefront has standing to sue derivatively by virtue of its unchallenged demand futility allegations.

Turning to the merits, the court dismisses the cause of action for unjust enrichment, which cannot be maintained because there are written agreements that govern. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). That some of the defendants are not parties to some of the contracts is of no moment. *Capone v Castelton Commodities Int'l LLC*, 148 AD3d 506, 507 (1st Dept 2017); *see AM Gen. Holdings, LLC v Renco Group, Inc.*, 2013 WL 5863010, at *15 (Del Ch 2013).

Regarding the breach of contract claims, the Omanoff Defendants correctly aver that Forefront's claim for breach of the Operating Agreement can only be maintained on behalf of the Company, and not the Subsidiaries, because the Subsidiaries are not parties to the Operating Agreement. *See LNR Partners, LLC v C-III Asset Mgmt. LLC*, 2014 WL 1312033, at *9 (Del Ch 2014). As discussed, the Operating Agreement expressly disclaims any rights inuring to non-signatories. Accordingly, Forefront's claim for breach of the Operating Agreement is restricted to breaches affecting the Company.[33]

The Omanoff Defendants also seek dismissal of the claim for breach of the Operating Agreement as asserted against OAT and Mudmonth. They rely on section 5.5 of the Operating

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[32] *See Amirsaleh v Bd. of Trade of City of N.Y., Inc.*, 27 A3d 522, 529 (Del 2011) (similar).

[33] Because the default rules under Delaware law governing the internal affairs of an LLC apply in the absence of an operating agreement, Forefront may be able to assert broader claims for breach of the duty of loyalty regarding conduct affecting the Subsidiaries because, unlike the Company's Operating Agreement, the Subsidiaries lack an operating agreement with any fiduciary duty waivers and exculpatory clauses.

Agreement, which is an exculpatory clause. That clause limits the nature of wrongs for which *Managers* might be held liable. *See Capone*, 148 AD3d at 506-07. The Omanoff Defendants *do not* argue that section 5.5 exculpates them for the *type* of conduct alleged in the AC, but claim, instead, that since section 5.5 does not address *Member* liability, OAT and Mudmonth cannot be sued for breaching the Operating Agreement. They cite no authority in support of this incongruous argument. Section 5.5 *does not* state (and cannot be read to imply) that the Company's Members *cannot* be sued for breaching their obligations under the Operating Agreement. Nonetheless, the court agrees with the Omanoff Defendants that the AC lacks any allegation suggesting that OAT and Mudmonth breached any particular provision of the Operating Agreement. While OAT and Mudmonth, by virtue of the acts of Omanoff and Proto, are alleged to have breached their fiduciary duty of loyalty, they are not alleged to have engaged in acts that are expressly prohibited by the Operating Agreement. And while the court is not certain which provision(s) of the Operating Agreement Omanoff and Proto are alleged to have breached, dismissal of this cause of action is not sought on this ground. *See* Dkt. 88 at 17.

That said, the claims against the Omanoff Defendants for breaching their fiduciary duties based on their failure to conduct due diligence on the Bolotel Transactions are dismissed, without prejudice, for lack of particularity. CPLR 3016(b); *Herrmann v CohnReznick LLP*, 155 AD3d 419, 420 (1st Dept 2017). The AC does not clearly explain what exactly the Omanoff Defendants did wrong. The AC's pattern of group pleading inhibits the court from understanding who exactly did what. Nor is it clear whether Forefront is alleging a *Caremark* claim[34] or some sort of conspiracy claim involving Ross. The former is likely extremely difficult

[34] *See generally Reese v Andreotti*, 57 Misc3d 1210(A), at *2 n.2 (Sup Ct, NY County 2017) ("This type of claim 'charges the director defendants with breach of their duty of attention or care in connection with the on-going operation of the corporation's business'" and is "possibly

to plead given the Operating Agreement's exculpatory clause,[35] while the latter seems nonsensical for the reasons discussed earlier. Nevertheless, the court will permit Forefront to move for leave to amend if it can plead these possibly non-exculpated claims with the requisite specificity. Forefront may not go on a fishing expedition in discovery absent its ability to first meet the applicable, well-settled pleading standards. *See Lerner*, 119 AD3d at 130 ("the purpose of discovery is to find out additional facts about a well-pleaded claim, not to find out whether such a claim exists.").

Likewise, the claims against Lara and his company, InTouch, are dismissed without prejudice. These claims are pleaded in conclusory fashion and without the requisite specificity. The few facts pleaded in the AC regarding Lara and InTouch, such as their monitoring of calls routed by Bolotel [*see* AC ¶ 58], do not explain their role with any clarity. The AC provides no nonconclusory explanation for how they aided the other defendants' misconduct. Merely implying Lara was somehow in cahoots with Rahman is not sufficient to state a claim for aiding and abetting breach of fiduciary duty.

In contrast, the portion of Forefront's breach of fiduciary duty claim that concerns the Manager Defendants' alleged wrongful competition with the Company through the VoIP

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the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."), quoting *In re Caremark Int'l Inc. Deriv. Lit.*, 698 A2d 959, 967 (Del Ch 1996); *see Stone v Ritter*, 911 A2d 362, 365 (Del 2006) ("we hold that *Caremark* articulates the necessary conditions for assessing director oversight liability."). To plead a *Caremark* claim, "a plaintiff must plead facts that allow a reasonable inference that the directors acted with scienter which, in turn, requires [not only] proof that a director acted inconsistently with his fiduciary duties, but also most importantly, that the director *knew* he was so acting." *Id.* (citation and quotation marks omitted; emphasis in original). *Horman v Abney*, 2017 WL 242571, at *7 (Del Ch 2017), quoting *Stone*, 911 A2d at 370. The AC most certainly does not (nor does it purport to) properly plead a *Caremark* claim, as it does not allege any facts permitting a reasonable inference of scienter as opposed to negligent due diligence.

[35] *See Ryan v Armstrong*, 2017 WL 2062902, at *15 (Del Ch 2017).

Companies survives. Absent an express agreement in the Operating Agreement to permit managing members to engage in direct competition (which is lacking here), managers who steal corporate opportunities from the LLC violate their fiduciary duty of loyalty. *McKenna v Singer*, 2017 WL 3500241, at *16 (Del Ch 2017), citing *Guth v Loft, Inc.*, 23 Del Ch 255, 271 (Del 1939) ("The rule, referred to briefly as the rule of corporate opportunity, is merely one of the manifestations of the general rule that demands of an officer or director the utmost good faith in his relation to the corporation which he represents."); *see Dweck v Nasser*, 2012 WL 161590, at *12 (Del Ch 2012) ("Most basically, the duty of loyalty proscribes a fiduciary from any means of misappropriation of assets entrusted to his management and supervision. The doctrine of corporate opportunity represents ... one species of the broad fiduciary duties assumed by a corporate director or officer.") (citations and quotation marks omitted). "The [Delaware] Supreme Court in [*Broz v Cellular Information Sys., Inc.*, 673 A2d 148, 155 (1996)] explained the corporate opportunity doctrine as follows:

> [A] corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation.

McKenna, 2017 WL 3500241, at *16.[36]

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[36] This claim is not duplicative of the breach of contract claim because the Operating Agreement does not expressly address competition. The duty not to steal corporate opportunities arises from Delaware's default fiduciary duties, and, thus, is not considered duplicative under Delaware law. *Parfi Holding AB v Mirror Image Internet, Inc.*, 817 A2d 149, 157 (Del 2002); *AM General Holdings LLC v Renco Group, Inc.*, 2013 WL 5863010, at *10 (Del Ch 2013); *see Nineteen Eighty-Nine, LLC v Icahn*, 96 AD3d 603, 604 (1st Dept 2012), citing *Solow v Aspect Resources, LLC*, 2004 WL 2694916, at *4 (Del Ch 2004) (question of whether breach of fiduciary duty claim is duplicative turns on whether duty arises "from general fiduciary principles" or "from specific contractual obligations."). While the Omanoff Defendants take the position that they owe no duties to the Subsidiaries and cite non-Delaware federal cases to

The court rejects the Omanoff Defendants' contention that the business of the VoIP Companies does not fall within the scope of a corporate opportunity under *Broz* and its progeny. The VoIP Companies allegedly engage in the same telecom factoring as the Company and are financed by Ross and his companies, who, as discussed, were the Company's primary source of funding under the PSA and who were bound by a non-compete.[37] Even if there are some differences in the VoIP Companies' business, that does not matter if the business could have been exploited by the Company. *See In re Riverstone Nat'l, Inc. S'holder Lit.*, 2016 WL 4045411, at *10 (Del Ch 2016) ("the nature of the corporation's business should be interpreted broadly, giving latitude to the corporation for development and expansion."). To wit, the very name of VoIP Companies aligns with the exact type of business covered by section 18: "finance or factoring services to telecommunications carriers in connection with **voice over internet protocol (VoIP)** services)." *See* Dkt. 70 at 20-21 (emphasis added). The scope of the PSA's restrictive covenants presumably was meant to encompass the scope of the Company's business. It follows that if DLT TC cannot fund the VoIP Companies, the Managers cannot divert the Company's business to it. To the extent the Omanoff Defendants contend the Company's dire financial straits would have prevented it from capitalizing on the allegedly stolen corporate

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suggest this may be true under certain circumstances [*see* Dkt. 88 at 28], here, the Operating Agreement expressly addresses how the Company's subsidiaries would be formed and used to conduct the Company's business. *See* Dkt. 63 at 4-5. In practice, the Company's managers were the managers of the subsidiaries. Hence, they have fiduciary duties of loyalty to these subsidiaries. *See CSH Theatres, LLC v Nederlander of San Francisco Assocs.*, 2015 WL 1839684, at *11 (Del Ch 2015) ("In the absence of language in an LLC agreement to the contrary, the managers of an LLC owe traditional fiduciary duties of care and loyalty."), citing *Feeley v NHAOCG, LLC*, 62 A3d 649, 660 (Del Ch 2012).

[37] Indeed, by working with Ross on behalf of the VoIP Companies, the Manager Defendants are helping DLT TC violate the PSA's restrictive covenants. Even if the Company had no claim for breach of fiduciary duty for the alleged wrongful competition, TCP II could still sue the Omanoff Defendants for causing the wrongful competition prohibited by section 18 of the PSA. But as noted earlier, Forefront does not plead a cause of action for tortious interference with contract.

opportunities, such a fact-laden, disputed contention cannot be decided on a motion to dismiss. Nonetheless, the court notes that the Omanoff Defendants conflate Reifler's financial condition with that of the Company. *See Riverstone*, 2016 WL 4045411, at *9 ("In order to plead a claim for usurpation of corporate opportunities, **the corporation** must be financially able to exploit the opportunity at issue.") (emphasis added). There is no documentary evidence in the record that shows that the Company's other members could not have pursued the VoIP Companies' business (as they did) on behalf of the Company had they not jumped ship. Accordingly, it is

ORDERED that defendants' motions to dismiss the amended complaint are granted to the following extent: (1) the first cause of action for breach of the Operating Agreement is limited to a derivative claim by Forefront on behalf of the Company, and the portion of this cause of action asserted against OAT and Mudmonth is dismissed; (2) the second cause of action for breach of fiduciary duty is limited to a derivative claim by Forefront on behalf of the Company and a double derivative claim on behalf of the Subsidiaries concerning the VoIP Companies, and the portion of this cause of action concerning the Bolotel Transaction is dismissed without prejudice; (3) the third cause of action against Lara and InTouch for aiding and abetting breach of fiduciary duty is dismissed without prejudice; (4) the portion of the fourth cause of action alleging unjust enrichment is dismissed with prejudice, and the portion of this cause of action concerning misappropriation of corporate opportunity is limited to a derivative claim by Forefront on behalf of the Company and a double derivative claim on behalf of TCP II; (5) the fifth cause of action for breach of section 18 of the PSA is limited to a double derivative claim by Forefront on behalf of TCP II against DLI TC; (6) the sixth cause of action for aiding and abetting breach of fiduciary duty is limited to a derivative claim by Forefront on behalf of the Company and a

double derivative claim on behalf of TCP II; and (7) defendants' motions are otherwise denied; and it is further

ORDERED that this action shall now bear the following caption:

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FOREFRONT PARTNERS LLC, Index No.: 650973/2017

Plaintiff,

-against-

RODNEY OMANOFF, OMANOFF AMERICA TELECOM, LLC, BRENDAN ROSS, MARK PROTO, MUDMONTH, LLC, JOSEPH RAHMAN a/k/a YOUSSEF RAHMAN, CHRISTOPHER LARA, INTOUCH TELECOM, INC., DLI TC, LLC, VOIP GUARDIAN PARTNERS I LLC, VOIP GUARDIAN LLC, DIRECT LENDING INVESTMENTS LLC, and DIRECT LENDING INCOME FUND, L.P.,

Defendants,

-and-

TALKING CAPITAL LLC, TALKING CAPITAL PARTNERS II, LLC, TALKING CAPITAL PARTNERS III, LLC,

Nominal Defendants.

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And it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on April 5, 2018 at 11:30 a.m., and the parties' pre-conference joint letter shall be e-filed and faxed to Chambers at least one week beforehand.

Dated: February 23, 2018

ENTER:

J.S.C.

31 SHIRLEY WERNER KORNREICH
J.S.C.