At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of October, 2019.

PRESENT:

HON. PAMELA L. FISHER,
Justice.

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JUAN CARLOS NUÑEZ,
Plaintiff,

- against -

Index No. 502950/18

MS # 5,6,7,8

ATHLETES' CAREERS ENHANCED AND SECURED, INC., SAM LEVINSON, AND SETH LEVINSON,

Defendants.

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The following e-filed papers read herein:	NYSCEF Docket No.:
Notice of Motion/Cross Motion and Affidavits (Affirmations) and Exhibits Annexed	86, 88, 89, 127 151, 69, 71, 82, 104, 109, 129, 153, 154
Opposing Affidavits (Affirmations)	112 147, 150
Reply Affidavits (Affirmations)	136 161, 166, 167

Upon the foregoing papers, plaintiff Juan Carlos Nuñez moves for an order: (1) pursuant to CPLR 3124 and 3126, compelling defendant Athletes' Careers Enhanced and Secured, Inc. (ACES) to produce documents in response to plaintiff's first request for production of documents; and (2) to the extent that responsive documents are no longer in defendant's possession, custody or control, compelling defendant to make a witness available to testify regarding what happened to such documents and regarding defendant's record

retention policy (motion sequence number 5). ACES moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint (motion sequence number 6). ACES also moves for an order, pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 216.1, granting it leave to seal two unredacted memoranda of law and an affidavit, to file such papers under seal, and to file redacted versions of such papers in the public docket (motion sequence number 7). Finally, ACES moves for an order granting it leave to file sur-reply papers, and that the court consider such sur-reply papers in opposition to plaintiff's motion to compel (motion sequence number 8).

ACES's motion for summary judgment (motion sequence number 6) is granted to the extent that plaintiff's action is dismissed with respect to all finder's fees plaintiff would have been entitled to after December 19, 2014, and dismissed with respect to plaintiff's claim for expenses. ACES's motion is denied with respect to finder's fees to which plaintiff may have been entitled between January 1, 2013 and December 19, 2014. Plaintiff's motion to compel (motion sequence number 5) and ACES's motion (motion sequence number 8) for leave to file sur-reply papers are denied, and plaintiff is directed to serve new document demands as discussed herein within 20 days of service of a copy of this order with notice of entry. ACES's motion to seal (motion sequence number 7) is granted and the clerk is directed to allow ACES to file the two unredacted memoranda of law and an affidavit under seal, and to file redacted versions of such papers in the public docket.

In addition, in view of this court's prior order dismissing causes of action relating to the defendants Seth Levinson and Samuel Levinson, the caption of the action is amended to read as follows:

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JUAN CARLOS NUÑEZ,

Plaintiff,

- against - Index No. 502950/18

ATHLETES' CAREERS ENHANCED AND SECURED, INC.,

Defendant.

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ACES is a sports agency that, among other things, represents professional baseball players in contract negotiations. Seth Levinson is the chief executive officer of ACES and Samuel Levinson is the president of the agency. In the complaint, plaintiff Juan Carlos Nuñez alleges that he is owed finder's fees and other fees for his efforts in helping ACES locate and sign promising baseball players from the Dominican Republic in breach of their Finder's Agreement (Agreement) that was executed on May 30, 2006. With respect to fees, the Agreement provides that:

> "In consideration of Finder's introduction to ACES of a New Prospective Client who becomes a client of ACES within two years after the date of the initial meeting between ACES and the New Prospective Client (each, a "Client"), ACES shall pay to Finder, a finder's fee (a "Finder's Fees") equal to 25% of the amount of any fees (the "Agent Fees") if and when actually received by ACES from such Client for each year with respect to any contract with a Major League baseball club that ACES

> negotiated on behalf of the Client; provided that ACES is the certified agent for such Client at the time such contract is entered into" (Agreement ¶ 2 [a]).

The Agreement allows either party to terminate the Agreement upon 30 days prior written notice, but also provides that no such prior notice is generally required for ACES to terminate plaintiff for cause (Agreement ¶ 3 [a]). Except upon termination for cause by ACES, following any other termination of the Agreement, the Agreement requires ACES to continue to pay finder's fees for clients and new clients introduced by the plaintiff prior to termination (Agreement ¶ 3 [b]). The termination for cause provisions of the Agreement broadly allow ACES to terminate the contract for cause based on, among other things, willful conduct which is materially injurious to ACES, a conviction of any felony, the sale or possession of illegal substances, a breach of the Agreement, gross neglect or gross misconduct (Agreement ¶ 3[b]).[1] Paragraph 3 (c) of the Agreement provides that the

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[1] Paragraph 3 (b) of the Agreement provides, as is relevant here, that:

> "Upon termination of this Agreement (other than termination by ACES for Cause (as defined below)), Finder shall continue to receive any Finder's Fees arising from Clients or New Prospective Clients introduced by Finder to ACES prior to the date of termination; provided, however, that in the event any New Prospective Client that was introduced to ACES prior to the date of termination becomes a Client within two years of the date of such introduction, Finder shall be entitled to receive any Finder's Fee with respect thereto. Upon termination of the Agreement by ACES for Cause, Finder shall forfeit the right to receive any future Finder's Fees and ACES shall have no further obligations to Finder. For purposes of this Agreement, "Cause" shall mean termination based upon: (i) the willful or continued engagement by Finder in conduct which is materially injurious to ACES, monetarily or otherwise, including, but not limited to, the disclosure by Finder of Confidential Information, as defined in Paragraph 4 (a) below; (ii) a conviction or, a plea or nolo contendere, a guilty plea or confession by Employee to an act of fraud, misappropriation or embezzlement or to a felony; (iii) Finder's

termination for cause provisions of paragraph 3, among other paragraphs, survive termination of the agreement.

In the complaint, plaintiff alleges that Samuel and Seth Levinson knew of, were involved in, and, at times, directed plaintiff to engage in improper or illegal conduct to retain players as clients, and to take steps to increase the value of the players contracts, and, in turn, ACES' agency fees. In this regard, plaintiff alleges, among other things, that as of early 2012, plaintiff, with the express approval of Seth Levinson, obtained performance enhancing drugs (PEDs) from Anthony Bosch, of the Biogenesis Clinic in Florida, and brought them to Nelson Cruz, an ACES client, with the hopes of enhancing Cruz's performance. According to the complaint, upon the request of Samuel Levinson made in March 2012, plaintiff also introduced 10 other ACES clients – including players who were eligible for arbitration, were free agents, and were prospects to Bosch – so that they could perform better on the field.

This involvement with Bosch and PEDs, however, ultimately led to trouble for plaintiff. In June 2012, according to the complaint, Samuel Levinson directed plaintiff to try

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habitual intoxication or Finder's use, sale or possession of illegal substances; (iv) a material breach by Finder of this Agreement; or (v) an act of gross neglect or gross misconduct which ACES deems to be good and sufficient cause, including, but not limited to Finder's failure to be truthful with Sam Levinson, Seth Levinson or ACES' management on all business matters. Where practical or potentially correctable, ACES will provide Finder with written notice of any act or omission which would constitute grounds for termination for Cause under sub-section (v) and provide Finder with a period of ten (10) working days to correct his actions prior to termination under such subparagraph."

to avoid a suspension for ACES's client Melky Cabrera, who had tested positive for PEDs, by coming up with a false scheme with Bosch to prove that the positive test was the result of innocent exposure to PEDs. Major League Baseball (MLB) and the Major League Baseball Players Association (MLBPA), however, ultimately discovered this fraudulent scheme and Cabrera was required to serve a suspension from baseball.

It is undisputed that, during MLBPA's investigation into the parties' involvement in PEDs and the Cabrera coverup attempt, ACES, by letter dated August 20, 2012, "suspended" plaintiff from performing work for ACES, but stated that it would continue to make the payments due to plaintiff under the agreement. On October 26, 2012, the MLBPA, although it is said to have cleared ACES with respect to the Cabrera cover-up, sanctioned ACES for failing to properly supervise plaintiff, and banned plaintiff from having player contact.[2] Shortly thereafter, plaintiff submitted his written resignation to ACES by way of a letter dated October 30, 2012. In the complaint, plaintiff alleges that, after his resignation, ACES reached out to him and asked if he would help get an MLB pitcher back as a client for ACES. Plaintiff thereafter contacted the pitcher and convinced him to return to ACES as a client.

The parties do not dispute that ACES ultimately paid all of the finder's fees owed to plaintiff for the year 2012. The check relating to the last payment of finder's fees earned in 2012 was sent to plaintiff in April 2013, along with a letter, dated April 8, 2013, from

[2] Although the court has sealed documents related to actions taken by the MLBPA, these facts relating to the actions taken against ACES and plaintiff were publically reported on as is evidenced by copies of various media reports appended to the Affidavit of Seth Levinson dated May 23, 2019.

ACES's outside counsel addressed to plaintiff's attorney, which stated as follows:

> "As we discussed previously, enclosed is an additional check from ACES to Mr. Nunez for previous services rendered. My understanding is that the payment is consistent with previous payments Mr. Nunez has received and should be credited against the outstanding amount that ACES owes to him. It is also my understanding that with this payment, ACES will have satisfied the amount owed to Mr. Nunez for previous services rendered. If you have any questions, please do not hesitate to contact me."

ACES made no further payments of any kind to plaintiff after this letter was sent.

Thereafter, on December 19, 2014, in the United States District Court for the Southern District of Florida, plaintiff entered a plea of guilty to count one of a superseding indictment charging him with conspiracy to distribute testosterone in violation of 21 USC § 846, a felony. In the plea minutes, plaintiff admitted that his role in the conspiracy extended from November 2011 until June 2012 and consisted of referring MLB players to Anthony Bosch to be placed on a PED program that included testosterone injections, coordinating the players' meetings with Bosch for the purposes of such injections, and providing Bosch with payments for such injections. As a result of this guilty plea, plaintiff was sentenced to two months of imprisonment and supervised release for two years upon his release from prison.

In moving for summary judgment, ACES has submitted an affidavit dated May 23, 2019 from Seth Levinson, who states that after ACES received plaintiff's October 30, 2012, resignation letter, ACES did not immediately terminate plaintiff for cause at that time. Although Seth Levinson asserts that ACES had grounds to terminate plaintiff for cause at that time, it chose not to do so in order to avoid litigation and adverse publicity. ACES

continued to pay the finder's fees owed to plaintiff through the end of 2012. Starting in January 2013, Levinson became aware of news reports appearing in the media at that time which implicated plaintiff in providing MLB players represented by ACES with PEDs supplied by Anthony Bosch. In light of these news reports, as well as a lawsuit commenced near the end of March 2013 by MLB against plaintiff, Bosch and others relating to their involvement with Bosh's Biogenesis Clinic and the distribution of PEDs to MLB players, Seth Levinson states that he and his brother (Samuel Levinson) decided to terminate plaintiff for cause. After determining the amount of finder's fees that they owed plaintiff for the remainder of 2012, Seth Levinson states that ACES then had its outside counsel send the above noted April 8, 2013 letter regarding payments to plaintiff. Seth Levinson concedes that ACES's outside counsel thereafter received a letter from plaintiff's attorney, dated June 13, 2013, which stated that plaintiff had not been terminated for cause, but rather, had voluntarily resigned by way of the October 30, 2012 letter, and was thus still entitled to the finder's fees under the Agreement.[3]

ACES asserts that it is entitled to summary judgment because it appropriately terminated its contract with plaintiff for cause in April 2013. Contrary to plaintiff's arguments in opposition, pursuant to the Agreement's language that the termination provisions survive termination of the agreement (Agreement ¶ 3 [c]), plaintiff's voluntary termination of the Agreement (his resignation) did not preclude ACES from thereafter

[3] Samuel Levinson, in his own affidavit dated May 23, 2019, essentially adopts the assertions of Seth Levinson as his own.

terminating the Agreement for cause. Indeed, ACES's right to terminate the Agreement for cause is similar to the defendant's right to terminate the stock awards at issue in *Rosenberg v Salomon, Inc.* (992 F Supp 513, 517 [D Conn 1997]) and *Creditsights, Inc. v Ciasullo* (2012 WL 12926046, *5 [SDNY 2012]).[4] Even without the express contractual provision providing for the continuation of the for cause termination provisions despite a voluntary resignation, courts have questioned whether an employee can avoid the consequences of wrongful conduct by preemptively resigning before a company has had an opportunity to terminate the employee for cause (*see In Re Allegheny Intern., Inc.*, 158 BR 332, 336 [Bankr WD Pa 1992]; *cf. Manowitz v Senter*, 62 AD2d 898, 902-903 [1st Dept 1978] [defendant could not divest plaintiff of his pension based on cause where the plaintiff voluntarily retired with a right to a pension and the pension plan contained no provision allowing an examination of plaintiff's pre-retirement conduct to divest him of his pension], *appeal dismissed* 45 NY2d 819 [1978] and 45 NY2d 837 [1978]).

Plaintiff also asserts that ACES never effectuated a termination for cause. Termination clauses are enforced as written, and where no prior notice is required by the clause, no such notice will be read into the agreement (*see A.S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 381-382 [1957]; *Naccarato v Commercial Capital Corp*, 19 Misc 3d 1109 [A],

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[4] Plaintiff's reliance on *Stafford v Scientia Health Group, Inc.* (19 Misc 3d 1145 [A], 2008 NY Slip Op 51172, *7-9 [U] [Sup Court, New York County 2008]) in this respect is misplaced, as the court there held that the defendant did not have good cause to terminate the plaintiff, not that plaintiff's earlier voluntary resignation would preclude a later termination based on good cause.

2008 NY Slip Op 50613, *4 [Sup Ct, New York County 2008]). On the other hand, even where no prior notice is required, courts generally require that a termination or discharge be effectuated by some affirmative act communicated to the person or entity being discharged (*see Matter of Finkle*, 44 AD2d 731, 732 [3d Dept 1974]; *see also Chertkova v Connecticut Gen. Life Ins.* Co., 92 F3d 81, 88 [2d Cir 1996]; *Marlene v National Labor Relations Board*, 712 F2d 1011, 1013 n4 [6th Cir 1983]; *Percival v National Drama Corp.*, 181 Cal 631, 637-638, 185 P 972, 974-975 [1919]). The communication regarding the discharge, however, need not identify the correct reason for the discharge or even assign a reason for the discharge as long as a justifiable reason existed (*see Twentieth Century-Fox Film Corp. v Lardner*, 216 F2d 844, 854 [9th Cir 1954], *cert denied* 348 US 944 [1955]; *In re Nagel*, 278 F 105, 109 [2d Cir 1921]).

Here, the Agreement's first four grounds for termination for cause, including termination for "willful or continued . . . engagement in conduct which is materially injurious to ACES" (Agreement at ¶ 3 [b] [i]), do not require notice and there does not appear to be any real dispute that plaintiff's involvement in Bosch's PED scheme constituted willful conduct that was materially injurious to ACES within the meaning of that section.[5] This court finds, however, that the April 7, 2013 letter from ACES's outside counsel to plaintiff's counsel is ambiguous and fails to clearly communicate to plaintiff that ACES was

[5] Although plaintiff opposes ACES's motion on many grounds, he makes no argument that his admitted participation in the PED scheme would not constitute cause for termination under the Agreement.

terminating the contract for cause, or even that it intended to stop paying the finder's fees. Notably, while counsel's statement that "it is my understanding that with this payment, ACES will have satisfied the amount owed to Mr. Nunez for previous service rendered" can be read as indicating that ACES would not pay additional future finder's fees, this statement can also be read as simply indicating that ACES had satisfied the amount owed to plaintiff as of the time of the letter, and would pay additional finder's fees when ACES received the player payments from which finder's fees are taken (Agreement ¶ 2 [a]). Thus, the court finds that ACES has failed to demonstrate, as a matter of law, that the April 7, 2013 letter was sufficient to effectuate the termination for cause as of that date.[6]

Plaintiff also asserts that ACES knew of his involvement with Bosch and PEDs as of the time it accepted his October 30, 2012 voluntary termination, and thus ACES waived its right to rely on such involvement as a grounds for terminating plaintiff for cause. In the termination context, if the employer knows of conduct by the employee that would have justified termination at the time the employee voluntarily resigns or retires, but fails to act on that information in a timely fashion, the employer may be deemed to have waived reliance on that conduct as a ground for termination for cause (*see Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466, 470 [1978]; *Twentieth Century-Fox Film Corp.*, 216 F2d at 852-854; *In re Nagel*, 278 F at 110; *Fitzpatrick v American Intern. Group, Inc.*, 2013 WL 709048, *29

[6] The court notes that even if ACES's termination for cause is deemed effective as of the date of the April 7, 2013 letter, the termination for cause provision only forfeits plaintiff's right to future finder's fees from the time of the termination. As such, plaintiff would still be entitled to fees earned in 2013 prior to any termination for cause.

[U] [SDNY 2013]; *In re Gordon Car & Truck Rental, Inc.*, 59 BR 956, 962-963 [Bankr NDNY 1985]; *see also Stafford v Scientia Health Group, Inc.*, 19 Misc 3d 1145 [A], 2008 NY Slip Op 51172, *9 [U] [Sup Court, New York County 2008]; *cf. CreditSights, Inc. v Ciasullo*, 2007 WL 943352, *9-11 [U] [SDNY 2007]).

ACES, relying on language in *New York Tel. Co. v Jamestown Tel. Corp.* (282 NY 365 [1940]) stating that in "a case where a party to a contract asserts a right given by contract to limit its life by notice that the contract will terminate at a time fixed by the notice in accordance with the provisions of the contract" (*id.* at 372), and that in such case, "the right to terminate is absolute and there can be no question of waiver of previous wrong and no question of right to retain benefits during the interval between notice of termination and the date when termination becomes effective" (*id.* at 373; *see also* 22A NY Jur 2d, Contracts § 484), argues that no waiver can bar a party from exercising its contractual right to terminate under a contract like the one at issue here. The decision in *New York Tel. Co.*, however, is readily distinguishable in that it involved an at-will termination provision under which any issue of cause was irrelevant, and thus, there was no grounds for cause that could be waived by the party seeking termination (*see id.* at 370).

ACES also argues that the waiver/choice of remedies arguments are not a bar to summary judgment because ACES stopped accepting the benefits of plaintiff's services when it suspended plaintiff in August 2012, even before plaintiff's October 30, 2012 termination notice. Putting aside plaintiff's allegations in the complaint that he assisted in getting a

pitcher to re-sign with ACES in December 2012, a date after his resignation, ACES's argument ignores the reality that, like the pension benefits at issue in *Hadden v Consolidated Edison Co. of N.Y.* (34 NY2d 88, 96-97 [1974]), the finder's fees are a form of deferred compensation for services plaintiff already provided to ACES. ACES, in effect, continued to receive the benefit of plaintiff's services anytime it received payment of its agency fees from the players plaintiff introduced to ACES. Importantly, it is these agency fees from which plaintiff's finder's fees are calculated under the Agreement (Agreement ¶ 2 [a]).

Here, plaintiff, in his complaint, alleges that ACES not only knew of plaintiff's conduct relating to the PEDs, but also that ACES was involved in that conduct starting in the spring of 2012. Additionally, plaintiff, as part of his breach of contract claim, stated "if Plaintiff did not perform all his material obligations under the Contract, ACES knowingly failed to declare a breach and terminate the contract. Instead, ACES elected to continue accepting the benefits of Plaintiff's performance and is therefore precluded from using Plaintiff's purported breach as an excuse for its own breach of contract." While perhaps imperfectly stated, this allegation put ACES on notice that plaintiff would oppose an assertion by ACES that it had a right to terminate plaintiff for cause with waiver arguments based on ACES alleged knowledge relating to plaintiff's conduct (*see Bank of Seoul v Norwest Bank Minn.*, 218 AD2d 542, 543 [1st Dept 1995]). As such, ACES, in order to establish its prima facie entitlement to summary judgment, was required to address the waiver issue (*see Citibank, N.A. v Joffe*, 265 AD2d 291, 291 [2d Dept 1999]; *see also Kabia*

v Town of Yorktown, 175 AD3d 1395, 1396 [2d Dept 2019]; *Garcia-DeSoto v Velpula*, 164 AD3d 474, 474-475 [2d Dept 2018]).

ACES, however, did not address the waiver issue in its initial motion papers and, in their initial affidavits submitted in support of ACES's summary judgment motion, neither Seth Levinson nor Samuel Levinson make any assertion controverting the complaint's allegations that they knew of and were involved in plaintiff's PEDs conduct. ACES has also failed to identify an evidentiary basis for the MLBPA's finding that exonerated them in this respect. In their affidavits submitted in reply, Seth Levinson and Samuel Levinson expressly deny any knowledge regarding plaintiff's role with respect to PEDs – beyond issues relating to the Melky Cabrera cover-up learned during the MLBPA investigation in late summer/fall of 2012 – and assert that they did not learn of plaintiff's greater involvement with PEDs until they saw the above noted news reports beginning in January 2013. These evidentiary facts, however, cannot be considered as part of ACES's prima facie showing, as a party cannot demonstrate its prima facie entitlement to summary judgment through evidence submitted for the first time in reply (*see Matthews v Bright Star Messenger Ctr., LLC*, 173 AD3d 732, 733-734 [2d Dept 2019]).

Under these circumstances, ACES has failed to meet its initial summary judgment burden with respect to the waiver issue. It is undisputed that ACES did not reject plaintiff's termination notice and continued to pay plaintiff's finder's fees through the end of 2012. Without evidentiary proof addressing the complaint's allegations that ACES knew the extent

of plaintiff's PED involvement, ACES has failed to demonstrate the absence of factual issues as to whether its failure to reject plaintiff's termination notice and its continued payment of finder's fees constitute a waiver barring it from relying on plaintiff's involvement with PEDs as a ground for subsequently discharging plaintiff for cause (*see Hadden*, 45 NY2d at 470; *Twentieth Century-Fox Film Corp.*, 216 F2d at 852-854; *In re Nagel*, 278 F at 110; *Fitzpatrick*, 2013 WL 709048, *29; *In re Gordon Car & Truck Rental, Inc.*, 59 BR at 962-963). As such, ACES's summary judgment motion in this regard must be denied regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).[7]

Nevertheless, ACES is still entitled to partial summary judgment. Any waiver would be limited to the facts known by ACES at the time plaintiff voluntarily terminated his relationship with ACES (*see Awards.com v Kinko's Inc.*, 42 AD3d 178, 188-189 [1st Dept 2007], *affd* 14 NY3d 791 [2010]; *CreditSights, Inc.*, 2007 WL 943352, *10). Plaintiff's criminal conviction for a felony in December 2014, which provides an independent basis for termination under the contract (Agreement ¶ 3 [b] [ii]), did not occur until well after ACES's actions relevant to waiver, and thus, is not grounds for termination that could have been waived by ACES. Further, regardless of the ambiguities in the April 7, 2013 letter that preclude finding, as a matter of law, that ACES terminated plaintiff for cause as of that date,

[7] In other words, having failed to controvert the allegations of the complaint in this respect, ACES cannot rely on a failure by plaintiff to present evidentiary proof in opposition as a grounds for granting the motion in ACES's favor.

plaintiff must be deemed to have had notice that ACES considered him to have been terminated for cause by December 2014 in view of ACES's continued failure to pay finder's fees under all of the circumstances here. Accordingly, ACES is granted partial summary judgment to the extent that plaintiff seeks finder's fees earned after his criminal conviction in December 2014.

ACES is also entitled to partial summary judgment to the extent that plaintiff seeks reimbursement for expenses. The Agreement expressly provides that plaintiff is responsible for his own expenses, and that, even if ACES agreed to pay any of his expenses, it could deduct those expenses from his finder's fees (Agreement ¶ [2] [d]). In view of the Agreement's no oral modification clause (Agreement ¶ 7), ACES could only be held liable for plaintiff's expenses if plaintiff demonstrated that the parties entered into a writing modifying this portion of the agreement or that exceptions to the writing requirement based on principles of equitable estoppel or partial performance were applicable (*see Empire Natl. Bank v Genard Group, Inc.*, 170 AD3d 959, 960 [2d Dept 2019]; *Bank of Smithtown v 264 West 124 LLC*, 105 AD3d 468, 469 [1st Dept 2013]; *Lake Anne Realty Corp. v Lake Anne at Monroe Assoc., LLC*, 29 AD3d 866, 866 [2d Dept 2006]). Plaintiff has not only failed to plead the existence of such a writing or exceptions thereto, he has also failed to submit any evidentiary facts in opposition that would demonstrate the existence of a factual issue with respect to his entitlement to expenses. Finally, in this respect, plaintiff's assertion that summary judgment is premature with respect to this issue because discovery has not yet

occurred is without merit as plaintiff has failed to present a factual basis for finding that discovery would lead to relevant evidence warranting denial of the motion, or that such evidence is within defendant's exclusive control (*see Castro v Rodriguez*, ___ AD3d ___, 2019 NY Slip Op 07566, *1 [2d Dept 2019]; *Cajos-Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013]; *Lake Anne Realty Corp.*, 29 AD3d at 867).

Plaintiff's motion to compel is denied as plaintiff's discovery demands are palpably improper in that they seek irrelevant information, are overbroad and burdensome, or fail to specify with reasonable particularity many of the documents requested (*see Pascual v Rustic Woods Homeowners Assn., Inc.*, 173 AD3d 757, 758 [2d Dept 2019]). For example, among other things, in his November 8, 2018 document demands, plaintiff requests all documents relating to him, all documents relating to certain players, all documents relating to the Agreement, all documents relating to the allegations of the complaint, and only limits these requests to the extent that they relate to material created after May 1, 2006. While the court does not necessarily agree with ACES's arguments regarding the scope of material to which plaintiff is actually entitled, the court, rather than attempting to prune these facially overbroad demands (*id.* at 758), directs plaintiff to submit new discovery demands, taking into account that the scope of the action has been limited by the court's grant of partial summary judgment to ACES. ACES's motion requesting that the court consider certain sur-reply papers is thus denied as academic.

Finally, ACES's motion to seal certain material is granted, as the sealing request relates to references in the papers submitted in support of ACES's summary judgment motion

that refer to material for which this court has already granted sealing in its order dated October 9, 2018.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

KINGS COUNTY CLERK
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Hon. Pamela L. Fisher, J.S.C.