SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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JAMES QUALLEN,

Plaintiff,

- v -

IMPENDI ANALYTICS, LLC,

Defendant.

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INDEX NO. 651897/2020

MOTION DATE 07/03/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, and 11

were read on this motion for DISMISSAL.

LOUIS L. NOCK, J.

Upon the foregoing documents, defendant's motion to dismiss the second cause of action is granted in part, in accord with the following memorandum decision.

Background

Plaintiff James Quallen ("Plaintiff") commenced this action against defendant Impendi Analytics, LLC ("Defendant"), his former employer, for alleged breach of contract and violations of New York Labor Law §§ 193, 195, 198 (NYSCEF Doc 1 [Complaint] ¶¶ 63, 76, 80,).[1] As pled in the complaint, Plaintiff commenced employment with Defendant on or about January 1, 2019, following execution of an Amended and Restated Operating Agreement ("Operating Agreement") between the parties (*id.* ¶¶ 4-6). On or about March 10, 2019, Plaintiff executed a Partner Offer Letter ("Offer Letter"), which provided additional employment terms (*id.* ¶ 8). Pursuant to the Offer Letter, Plaintiff would receive annual base compensation in the

[1] The facts recited here are as alleged in the complaint and are accepted as true for the purposes of this motion, as required on a motion to dismiss.

amount of $400,000 (NYSCEF Doc No. 7 at 1-2). Additionally, Plaintiff would receive "annual distributions from the company pursuant to the terms of the Profit Sharing Plan" as set forth in the Operating Agreement (Complaint ¶ 43). The Offer Letter detailed Plaintiff's entitlement to reimbursement for business expenses and to "Common Profit Units" as follows:

> **Business Expenses**
>
> The Company shall reimburse all reasonable, ordinary, and necessary expenses incurred by you for business activities on behalf of the Company in the performance of your duties and in accordance with the Company's travel and entertainment policies. . . .
>
> **Grant of Common Profit Units**
>
> The Member Committee has approved the grant to you of 333,333 Common Profits Units "Units"). . . .
>
> All of the Units shall be initially be unvested. You shall have no rights with respect to the Units until and except to the extent that the Units have vested. For as long as you continue uninterrupted to be a Working Member (as that term is defined in the Operating Agreement), and subject to any applicable purchase, forfeiture, or other applicable terms hereof or the Operating Agreement, the Units shall vest over the four-year period following January 1, 2019 (the "Vesting Start Date") . . . .

(NYSCEF Doc No. 7.)

Plaintiff's employment with Defendant was terminated on February 13, 2020, as memorialized by a letter of the same date (the "Termination Notice") (Complaint ¶¶ 36-39). The Termination Notice states that Plaintiff was terminated for "cause" (*id.*, ¶ 40), which Plaintiff disputes (*id.*, ¶ 42). The Termination Notice states that, as a result of the termination for cause, Plaintiff "will no longer be entitled to receive from the Company any (i) guaranteed or compensatory payments . . . [and] any vested Common Profit Units will be deemed surrendered to the company without consideration and without any further action from the Company (*id.*, ¶ 41). Plaintiff's total 2019 Profit Share, as calculated by Defendant, was $179,010 (*id.*, ¶ 45). On

December 31, 2019 and February 6, 2020, respectively, Defendant paid a portion of Plaintiff's Profit Share in two separate payments of $112,562 and $19,326 (*id.*, ¶ 47). Because of Plaintiff's termination, Defendant refuses to pay Plaintiff the remaining $38,653 of the Profit Share (*id.*, ¶¶ 48-49). Of the 333,333 Common Profit Units provided for in the Offer Letter, 25%, or 83,333 Units, vested prior to Plaintiff's termination and were also canceled because of the termination (*see, id.*, ¶ 62). Defendant also refuses to reimburse Plaintiff for business expenses totaling $39,240.55 or compensate him for twenty accrued but unused vacation days, which he values at $34,000 (*id.*, ¶¶ 50, 53).

Thereafter, Plaintiff commenced this action to recover amounts owed for his allegedly improper termination. The complaint interposes three causes of action. The first cause of action, for breach of contract, alleges that Defendant has breached its obligations under the Operating Agreement and Offer Letter by terminating Plaintiff's employment without cause and without proper notice, canceling 83,333 vested Common Profit Units, and failing to pay Plaintiff's entire profit share for the year 2019 (*id.* ¶¶ 56-63). The second cause of action alleges violations of Labor Law §§ 198 (3), 193, and 195 (5) for failure to pay the remaining $38,653 of Plaintiff's 2019 Profit Share, cancellation of the 83,333 vested Common Profit Units, Defendant's failure to reimburse Plaintiff's business expenses, the failure to provide Plaintiff with a written notice of its vacation policy, and for Defendant's failure to pay Plaintiff for accrued but unused vacation days. Finally, the third cause of action, for failure to provide wage notice, alleges a violation of Labor Law § 195 (1) for failure to provide complete information on Plaintiff's compensation while employed with Defendant.

By this pre-answer motion, Defendant moves pursuant to CPLR § 3211 (a) (7) to dismiss the second cause of action on the grounds that Labor Law § 198 does not provide an independent

cause of action, Labor Law § 193 does not permit recovery for a wholesale withholding of wages, Labor Law § 198-c precludes recovery for business expenses and vacation pay under any provision of Article 6 of the Labor Law, and because Plaintiff cannot assert a claim for vacation pay under Labor Law § 195 (5) as a matter of law. Plaintiff opposes the motion.

Standard of Review

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232 Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]) and "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Discussion

A. Labor Law §§ 193 and 198

Plaintiff alleges that Defendant's failure to pay the full 2019 Profit Share, cancellation of the vested Common Profit Units, and failure to reimburse his business expenses and accrued but unused vacation days constitute violations of Labor Law § 193. Defendant argues that these claims fail because they do not allege a specific "deduction" from Plaintiff's wages and, with respect to his claims for unpaid business expenses and accrued by unused vacation days, because Labor Law § 198-c excludes Plaintiff from protection under section 193.

Section 193 of the Labor Law prohibits "any deduction from the wages of an employee," except under certain circumstances enumerated in the statute, including deductions made in accordance with certain laws, rules and regulations, or those that are "are expressly authorized in writing by the employee and are for the benefit of the employee" (Labor Law § 193 [a]-[b]). New York courts have long been divided on the issue of whether a complete failure to pay wages constitutes an unlawful "deduction" from wages under section 193 (*see Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 [1st Dept 2017] ["A wholesale withholding of payment is not a 'deduction' within the meaning of Labor Law § 193"], *cf. Zinno v Schlehr*, 175 AD3d 843, 844 [4th Dept 2019] [failure to pay the plaintiff "the full amount of the additional compensation that plaintiff had earned, as required by the parties' agreement, constituted a deduction from wages in violation of Labor Law § 193 (1)"]).

Citing these discrepancies, the New York State Legislature passed an amendment to section 193 and section 198 of the Labor Law in August 2021 by virtue of the "No Wage Theft Loophole Act" (the "Act") (2021 NY Senate-Assembly Bill S858, A1893; *see*, 2021 McKinney's Session Law News of NY, ch 397 [S.858]). The amended statute added a provision

to each section that states, "There is no exception to liability under this section for the unauthorized failure to pay wages, benefits or wage supplements" (Labor Law §§ 193 [5], 198 [3]). The Legislative Findings of the Act state, in relevant part, that "[t]he purpose of this remedial amendment is to clarify that: (a) the unauthorized failure to pay wages, benefits and wage supplements has always been encompassed by the prohibitions of section 193, *see, e.g.*, *Ryan v Kellogg Partners Institutional Servs.*, 19 NY3d 1, 16 (2012) (correctly holding that employer's neglect to pay sum that constitutes a 'wage' violated section 193)" (2021 McKinney's Session Law News of NY, ch 397 [S.858], § 1). The case cited by the Legislature, *Ryan v Kellogg Partners Institutional Servs.*, is pertinent to the dispute currently before this court.

Section 190 (a) of the Labor Law defines "wages" generally as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission, or other basis" (Labor Law § 190 [1]). In *Ryan*, the Court of Appeals held that the term "wages" also encompasses certain non-discretionary bonuses (*Ryan v Kellogg Partners Institutional Servs.*, 19 NY3d at 16). A bonus is non-discretionary where it is "expressly linked" to the "labor and services personally rendered" and is earned and vested prior to the employee's separation from employment (*id.*). Conversely, discretionary bonuses fall outside protection of the statute (*id.*, *citing Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 224 [2000] ["Discretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneurship, falls outside the protection of the statute."]). Where a bonus constitutes "wages" within the meaning of Labor Law § 190 (1), failure to pay the bonus is a violation of Labor Law § 193 (*Ryan*, 19 NY3d at 16

["Since Ryan's bonus therefore constitutes "wages" within the meaning of Labor Law § 190(1), Kellogg's neglect to pay him the bonus violated Labor Law § 193"]).

Plaintiff's cause of action under Labor Law § 193 alleges, among other things, that Defendant's failure to pay Plaintiff the 2019 Profit Share, and Defendant's cancellation of the vested Common Profit Units, constitute violations of Labor Law § 193. Regarding payment of the Profit Share, the Offer Letter states the following:

> Profit Share Distributions. In addition to the base compensation set forth above, you shall receive annual distributions from the Company pursuant to the terms of a Profit Sharing Plan (per the terms set forth in Section 4.6 of the Operating Agreement) to be developed by the Operating Committee and approved and administered by the Member Committee. Your "Profit Share Distributions" shall be based on your business origination, revenues generated, services provided in support of clients generated by other individuals, and such other criteria as are included in the Profit Sharing Plan.

(NYSCEF Doc No. 7 at 2.) Neither the Operating Agreement, nor the Profit Sharing Plan, are currently before the court. With respect to the Common Profit Units, the Offer Letter states, in part:

> The Member Committee has approved the grant to you of 333,333 Common Profits Units ("Units"). The grant of the Units shall be effectuated by and be subject to the terms and conditions set forth in the Common Profits Unit Grant Agreement attached hereto as Exhibit B. . . .
>
> All of the Units shall initially be unvested. You shall have no rights with respect to the Units until and except to the extent that such Units have vested. For so long as you continue uninterrupted to be a Working Member (as that term is defined in the Operating Agreement), and subject to any applicable purchase, forfeiture, or other applicable terms hereof or of the Operating Agreement, the Units shall vest over the four-year period following January 1, 2019 (the "Vesting Start Date") in accordance with the following schedule: . . . .

(NYSCEF Doc No. 7 at 2.) The Offer Letter then sets forth a vesting schedule and additional information regarding vesting (*see id.*, at 3). The Common Profits Grant Agreement referenced in the letter is not currently before the court.

The Offer Letter suggests that the Profit Share Distributions, which are based upon Plaintiff's "business origination, revenues generated, services provided in support of clients generated by other individuals, and such other criteria as are included in the Profit Sharing Plan," and the Common Profit Units, may constitute non-discretionary bonuses (NYSCEF Doc No. 7 at 2). However, within the context of this motion to dismiss, the court at this time cannot make a factual determination regarding whether or not the 2019 Profit Share Distributions or Common Profit Units were non-discretionary bonuses based solely on the contents of the Offer Letter and in the absence of the Profit Sharing Plan, Operating Agreement, and Common Profits Unit Grant Agreement that are referenced in that Letter (*see, Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002] [dismissal under CPLR 3211 (a) (1) is warranted "only where the documentary evidence *utterly refutes* plaintiff's factual allegations, *conclusively* establishing a defense as a matter of law"] [emphasis added]).

Defendant has argued that this court should disregard the Court of Appeals' 2012 holding in *Ryan* because the First Department's 2017 holding in *Perella* reasserted that "[a] wholesale withholding of payment is not a 'deduction' within the meaning of Labor Law § 193" and noted that "[t]his issue was not addressed by the Court of Appeals in *Ryan*" (NYSCEF Doc No. 11 at 8 n 5); but the facts of *Perella* did not concern the failure to pay a non-discretionary bonus (which *is* a possible concern in this action [*see supra*]), and the Court of Appeals clearly held that a non-discretionary bonus withholding "*is* a violation of Labor Law § 193" (19 NY3d 1 [emphasis added]). To the extent that the First Department's holding in *Perella* is at odds with the Court of Appeals' holding in *Ryan*, this court is bound to follow the higher authority – *Ryan* – particularly in light of the recent amendment to the statute, and its legislative history that specifically

references *Ryan* as the overall paradigm.[2] Therefore, it is the determination of this court that for the purposes of this pre-answer motion to dismiss, Plaintiff has stated a cause of action under Labor Law § 193 with respect to the Profit Sharing Plan and Common Units. Consequently, because Plaintiff has stated a cause of action under Article 6 of the Labor Law, he can also pursue a cause of action for an award of attorneys' fees pursuant to Labor Law § 198 (*see Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609 [parties who successfully allege a violation of a substantive provision of Article 6 can collect attorneys' fees under Labor Law § 198], *rearg denied* 11 NY3d 751 [2008]).

Nevertheless, Plaintiff's recovery of his business expenses is limited by Labor Law § 198-c (2). Labor Law § 190 lists four categories of workers that are expressly protected by Article 6 (Labor Law § 190 [4]-[7]). These categories are manual workers, railroad workers, commissioned salesmen, and "clerical or other worker[s]" (*id.*). The latter category includes "all employees not included in [the previous subdivisions], except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week" (Labor Law § 190 [7]). In *Pachter v Bernard Hodes Group, Inc.* (*supra*), the Court of Appeals examined whether, in light of this apparent exclusion, executives may assert claims under Article 6 of the Labor Law (10 NY3d at 616). The Court of Appeals held that "executives are employees for purposes of Labor Law article 6, except where expressly excluded," and also made it clear that executives may assert claims under Labor Law § 193 (*id.* at 616-17 [noting that the executive plaintiff in that case would have a viable claim under § 193 if certain deductions had been made after her wages were earned]).

[2] This court is also aware of one post-amendment First Department decision regarding Labor Law § 193 – *Vergara v Mission Capital Advisors, LLC* (__ AD3d __, 155 NYS3d 68 [Mem], 2021 WL 5774149 [1st Dept, Dec. 7, 2021]) – which relies exclusively on *Parella* (*see* 155 NYS3d at 68-69); but *Vergara* also does not address the issue of non-discretionary bonuses.

The definition of "wages" set forth in Labor Law § 190 includes "benefits or wage supplements," which are defined in section 198-c to include "reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay." However, section 198-c (3) states that "[t]his section shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of nine hundred dollars a week." In *Pachter*, the Court of Appeals noted that section 198-c (3) contains an executive exclusion relating to benefits and wage supplements (*Pachter*, 10 NY3d at 616); and in analyzing the interplay between these sections, it has been reasoned that section 198-c (3) operates as a limitation on the protection of benefits and wage supplements under section 193 by expressly excluding certain classes of employees from the protections thereunder (*see, Naderi v North Shore-Long Island Jewish Health Sys.*, 2014 WL 840417 [Sup Ct, NY County 2014], *affd* 135 AD3d 619 [1st Dept 2016]). Affirming the holding in *Naderi*, the First Department held that "professionals . . . who earn more than $900 a week are not entitled to paid time off, or any other benefit or wage supplement, under the Labor Law" (*Naderi*, 135 AD3d 619 [1st Dept 2016], *citing* Labor Law 198-c [3] and *Pachter*).

Plaintiff's position with Defendant was as a partner and his duties outlined in the Offer Letter include, *inter alia*, business development, managing client work and supervising client projects, and assumption of "a strategic role in the overall management of the Company" (NYSCEF Doc No. 7). The complaint also details that his responsibilities included managing other employees (NYSCEF Doc No. 1 ¶ 17). Accepting the allegations as true, Plaintiff unquestionably worked in a *bona fide* executive or professional capacity while in the employ of Defendant, and there is no dispute that he earned in excess of nine hundred dollars a week. Therefore, Plaintiff cannot state a claim under this section for unreimbursed business expenses

and accrued but unused vacation time as a matter of law.[3] As such, that portion of Plaintiff's claim that pertains to his business expenses and unused vacation days is dismissed.

B. Labor Law § 195 (5)

Defendant also moves to dismiss that portion of the second cause of action that asserts a claim under Labor Law § 195 (5) on the ground that the statute does not provide for a private right of action. Labor Law § 195 (5) requires, *inter alia*, that employers "notify [their] employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours." Labor Law §§ 198 (1-b) and (1-d) specifically authorize a private right of action to enforce subdivisions (1) and (3) of section 195 of the Labor Law, but Article 6 is silent regarding subdivision (5) of section 195. "Where a statute fails to expressly prescribe a private right of action, one can nevertheless be implied, provided that it is consistent with the legislative intent" (*Rhodes v Herz*, 84 AD3d 1, 9 [1st Dept], *appeal dismissed* 18 NY3d 838 [2011]). "A private right of action will be implied if (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the recognition of such right promotes the legislative purpose which undergirds the statute; and (3) the creation of such right is consistent with the legislative scheme for the statute" (*id.*, *citing Sheehy v Big Flats Community Day, Inc.*, 73 NY2d 629, 633 [1989]). If any one part of the test fails, the statute does not provide a private right of action (*Sheehy*, 73 NY2d at 634). Applying these principles, the Fourth Department has held that "no private right of action exists to enforce section 195 (5)" (*Salahuddin v Craver*, 163 AD3d 1508, 1510 [4th Dept 2018). This court agrees and, therefore, that portion of the second cause of action that seeks relief under Labor Law § 195 (5) is dismissed.

[3] Defendant also argues at length in its opposition that Plaintiff is excluded from coverage under Labor Law § 191, but the court need not address these arguments because Plaintiff has not pled a claim under this section.

Accordingly, it is

ORDERED that Defendant's motion to dismiss the second cause of action is granted in part, and that portion of the second cause of action that pertains to business expenses and unused vacation days is dismissed; and it is further

ORDERED that Defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed, within 30 days of the service of Defendant's answer, to meet and confer regarding discovery and submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-CD.pdf, to the Clerk of this Part (Part 38) at SFC-Part38-Clerk@nycourts.gov.

This shall constitute the decision and order of the court.

ENTER:

12/20/2021
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		**CASE DISPOSED**			**X**	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	**X**	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**