

**DiPasquale v Gutfleish**

2008 NY Slip Op 32450(U)

September 4, 2008

Supreme Court, New York County

Docket Number: 0602045/2007

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn  
Justice

PART 4am

Douglas DiPasquale

INDEX NO. 602045/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

- v -

Ronald Guttleish et al

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED  
**FILED**  
SEP 18 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE . . . . .**

Dated: 9/4/08

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 49

-----X  
DOUGLAS DIPASQUALE.

Plaintiff,

-against-

Index No. 602045/07

RONALD GUTFLEISH, ELM RIDGE CAPITAL  
MANAGEMENT, LLC, ELM RIDGE VALUE  
ADVISORS, LLC, ELM RIDGE PARTNERS, LLC,  
and ELM RIDGE MANAGEMENT, LLC,

Defendants.  
-----X

**FILED**  
SEP 08 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**Herman Cahn, J.:**

Motion sequence numbers 002, 003, and 004 are consolidated for disposition.

In motion sequence number 002, plaintiff Douglas DiPasquale moves to dismiss defendants' ninth affirmative defense as barred by a general release, and for an award of reasonable attorneys' fees and costs, CPLR 3211 (b).

In sequence number 003, plaintiff moves for partial summary judgment in his favor on the 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup>-8<sup>th</sup>, 10<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, and 18<sup>th</sup> causes of action asserted in the amended complaint for breach of contract, and other related claims, CPLR 3212.

In sequence number 004, defendants Ronald Gutfleish (Gutfleish), Elm Ridge Capital Management, LLC (ERCM), Elm Ridge Value Advisors, LLC (ERVA), Elm Ridge Partners, LLC (ERP), and Elm Ridge Management, LLC (ERM) (collectively, the Elm Ridge entities) move for partial summary judgment in their favor on plaintiff's claims asserted in the amended complaint seeking damages allegedly accruing after July 1, 2006, and dismissing those claims,

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\* 3 ]  
CPLR 3212.<sup>1</sup>

In this action, plaintiff alleges that, from 2001 through June 27, 2005, he and Gutfleish managed and operated hedge funds as managing members of ERVA and ERCM. Gutfleish created ERVA and ERCM to manage funds based in the United States (Elm Ridge Value Partners, L.P. and Elm Ridge Capital Partners, L.P. [collectively, the onshore funds]) and offshore (Elm Ridge Offshore Master Fund, Ltd. [the offshore fund]). ERVA was the onshore funds' general partner until June 30, 2005 and, as such, received a "performance allocation," equal to approximately 20% of the funds' annual profits. ERCM was designated by ERVA as the management company for both the onshore and offshore funds and, as such, earned a "management fee" equal to approximately 1.5% of the funds' annual profits. As of June 2005, there was approximately \$1.5 billion in aggregate investor assets in the funds.

Gutfleish was, and remains, the portfolio manager for the three funds. Plaintiff, from September 2001 until June 30, 2005, was the funds' head trader and a limited partner investor. Nonparty Lee Atzil was the funds' senior analyst until his resignation in August 2005.

As managing members, plaintiff and Gutfleish each received a base salary and, pursuant to the corporate documents governing profit sharing, plaintiff held a 15% interest and Gutfleish an 85% interest in the profits of ERVA and ERCM. Plaintiff alleges that, for the year 2004, the total profits were approximately \$36.6 million, of which plaintiff received approximately \$5.5 million.

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<sup>1</sup> Defendants have voluntarily withdrawn that branch of their motion for partial summary judgment on the branches of the claims concerning payment of management fees from the onshore and offshore funds, and concede that plaintiff has raised a triable issue concerning whether defendants replaced ERCM or whether that entity still continues to do business through ERM (see Defendants' Reply Memo, Mar. 14, 2007, § II).

In February 2005, plaintiff decided to leave ERVA and ERCM. Plaintiff alleges that he and Gutfleish agreed to separate and to a payout of plaintiff's interest. They memorialized the agreed-upon terms in June 2005 in a separation agreement executed by ERVA, ERCM, and plaintiff and in revised operating agreements for ERVA and ERCM. Pursuant to the three agreements, plaintiff resigned his position as a managing member, becoming a non-managing member, and Gutfleish remained as the sole managing member. The agreements, when construed together, provide that plaintiff is entitled to receive a 15% share of the profits generated by ERVA and ERCM through December 31, 2005, a 12.5% share of those profits for 2006, and a 7.5% share through the end of 2007.

On April 1, 2006, Gutfleish created ERP as a co-general partner, along with ERVA, of the onshore funds. On June 30, 2006, Gutfleish caused ERVA to resign as a co-general partner of the onshore funds and ERP to become the sole general partner of those funds. Since that time, ERP has received the funds' performance allocation. Effective July 1, 2006, Gutfleish caused ERP to designate ERM as the receiver of the onshore funds' management fees, while ERP received the offshore fund performance allocation and management fee.

There is no dispute that these changes in the Elm Ridge entities' structure resulted in the cessation of payments by the onshore and offshore funds to ERVA and ERCM, which in turn resulted in the evisceration of plaintiff's right to receive a percentage of those payments in 2006 and 2007.

Following defendants' cessation of payments to plaintiff, he commenced the instant action. In the complaint, he alleges that Gutfleish breached the separation agreement and the revised operating agreements by failing to pay, and by causing ERVA and ERCM to fail to pay,

the amounts contractually due plaintiff. On these allegations, plaintiff asserts causes of action for breach of the separation agreement sections 2.02, 2.03, 2.07, 5.04, 5.06, breach of the fifth ERVA operating agreement and the fourth ERCM operating agreement, breach of fiduciary duty, breach of Debtor and Creditor Law §§ 273 and 276, anticipatory repudiation, breach of the implied covenant of good faith and fair dealing in all three contracts, and unjust enrichment. Plaintiff seeks compensatory and punitive damages in an amount to be determined at trial and reimbursement of his costs and reasonable attorneys' fees in commencing and prosecuting this action. Plaintiff estimates that his damages to be approximately \$10 million and contends that an accounting will be necessary to determine the exact figure.

In the answer, defendants deny all allegations of misconduct and assert affirmative defenses. In sum, defendants contend that they were permitted by section 5.04 of the separation agreement to change the Elm Ridge entities' structure, without continuing payments to plaintiff, at the time that they made the changes.

Motion Sequence 002:

In motion sequence number 002, plaintiff seeks dismissal of the ninth affirmative defense insofar as it asserts rights to funds paid by any defendant to plaintiff prior to June 27, 2005, on the ground that such offset is barred by the general release set forth in the separation agreement. Plaintiff also seeks reimbursement of his costs and reasonable attorneys' fees, incurred in making the motion.

In partial opposition, defendants contend that, by letter and stipulation dated March 6, 2008, they offered to stipulate to the dismissal of that branch of the ninth affirmative defense relating to time periods prior to June 27, 2005, and should not be held liable for plaintiff's costs

in making the motion to dismiss.

That branch of the motion to dismiss the ninth affirmative defense in part is granted without opposition. In the ninth affirmative defense, defendants claim that “[t]he sums claimed by the Plaintiff are offset or exceeded by sums owed by the Plaintiff to the Defendant as a result of, among other things, the payment of compensation far in excess of sums to which he was entitled during 2005 and prior years” (Ans., ¶ 180). There is no dispute that the mutual general releases of all rights and claims between plaintiff and Gutfleish in existence as of June 27, 2005 precludes Gutfleish from seeking an offset based on amounts allegedly overpaid to plaintiff prior to that date (see Separation Agrmt., § 4.01 [b]). In addition, there is no dispute that ERP and ERM were not created until 2006, well after the time as to which the offset is sought. Therefore, the branch of the ninth affirmative defense in which defendants assert rights to funds paid by any defendant to plaintiff prior to June 27, 2005 is dismissed.

Reimbursement of Attorneys’ Fees:

Next, plaintiff seeks reimbursement of the costs and attorneys’ fees that he actually incurred in connection with seeking dismissal of the ninth affirmative defense, contending that, pursuant to section 4.02 (b) of the separation agreement, defendants are contractually obligated to reimburse him.

In opposition, defendants contend that plaintiff’s own improper conduct in mischaracterizing the nature of the proposed motion to dismiss, in waiting five months before making the motion, and in refusing to stipulate to dismissal of a part of the affirmative defense resulted in his incurrence of the fees. Defendants also contend that the fees sought are not reasonable.

That branch of the motion to recover costs and reasonable attorneys' fees, incurred in seeking dismissal of part of the ninth affirmative defense, is granted, in accordance with the express terms of section 4.02 (b) of the separation agreement.

The well-established law of contract interpretation provides that:

In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement. Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied.

(American Express Bank Ltd. v Uniroyal, Inc., 164 AD2d 275, 277 [1st Dept 1990], appeal denied 77 NY2d 807 [1991] [internal citations omitted]; Sonitrol Holding Co. v Marceau Investissements, 607 A2d 1177, 1183-84 [Del 1992]). Further, "[w]hether or not a writing is ambiguous is a question of law to be resolved by the courts" (W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, 162 [1990]).

Section 4.02 (b) of the separation agreement provides, in relevant part, that:

[T]he Elm Ridge Entities and Gutfleish covenant and represent that they will not bring any action, complaint, claim, charge, lawsuit, arbitration or proceeding of any kind, at law or in equity, against any of the DiPasquale Released Parties arising out of, in connection with or relating in any way to DiPasquale's employment, the [Third Amended and Restated Operating Agreement of ERCM and the Fourth Amended and Restated Operating Agreement of ERVA], or the termination of DiPasquale's employment or any of the claims being released in Section 4.01 (b) herein, based on any act or omission that occurred before [June 27, 2005]. In the event that any of the Elm Ridge Entities or Gutfleish violates this Section of the Separation Agreement, such entity or Gutfleish agrees to pay all costs

and expenses of defending against any such action, complaint, claim, charge, lawsuit, arbitration or proceeding incurred by any of the DiPasquale Released Parties, including reasonable attorneys' fees

(Separation Agrmt., § 4.02 [b]).

Pursuant to the clear and unambiguous language of this provision, defendants voluntarily waived whatever rights they might otherwise have had to assert any claim or affirmative defense based on overpayments they might have made to plaintiff prior to June 27, 2005. Thus, when they asserted the ninth affirmative defense, they breached their covenant not to assert such rights. Further, given the precise language of section 4.02 (b), it is clear that defendants should never have asserted that branch of the ninth affirmative defense.

Having breached the provision, defendants are now obligated by the express terms of the section to pay plaintiff's costs and reasonable attorneys' fees incurred in connection with obtaining a dismissal of the relevant branch of the ninth affirmative defense (see A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1, 5 [1986]).

However, a hearing is required in order to determine the amount of reasonable attorneys' fees owed by defendants. The issue of reasonable amount of attorneys fees incurred by plaintiff in making the within motion, is respectfully referred to a Special Referee to hear and report. Pending receipt of the Special Referee's report, and a motion to confirm or vacate the same, this motion (002), is held in abeyance.

Motion Sequence 003:

In motion sequence 003, plaintiff seeks partial summary judgment on the 10<sup>th</sup> and 15<sup>th</sup> causes of action against Gutfleish, ERVA, ERCM, and ERP for breach of section 5.04 (b) of the separation agreement. Specifically, plaintiff contends that Gutfleish improperly and unilaterally

manipulated ERVA's structure and finances in order to redirect plaintiff's share of ERVA's profits to himself. He did this by directing ERVA to transfer its business to ERP, an entity wholly owned and controlled by Gutfleish, without causing ERP to assume ERVA's payment obligations to plaintiff. Plaintiff also alleges that ERP was ERVA's legal successor by operation of law, and, therefore, obligated to pay him a percentage of its profits, which it did not do. Plaintiff also contends that Gutfleish improperly redirected millions of dollars of fees owed to ERCM to be received, instead, by ERP and ERM.

Motion Sequence 004:

In motion sequence 004 and in opposition to plaintiff's motion, defendants seek partial summary judgment in their favor on all 23 of plaintiff's claims asserted in the amended complaint, to the extent that they seek damages accruing beginning July 1, 2006, on the ground that their actions in restructuring the Elm Ridge entities were not prohibited by separation agreement section 5.04 (b) and, instead, were authorized under sections 5.04 (c) through (f) of that agreement.

Section 5.04 of the separation agreement provides in relevant part that:

(a) This Separation Agreement shall be binding on and shall inure to the benefit of DiPasquale's heirs, executors, administrators, representatives and assigns and the successors in interest and assigns of the Elm Ridge Entities. DiPasquale may not assign any of his rights or duties hereunder, except with the written consent of ERCM and ERVA.

...

(c) In the event that ERVA, prior to the Cutoff Date, (i) causes the termination of the payment of the Management Fee to ERCM from either the Value Fund or the Capital Fund, and (ii) causes such fund to pay the Management Fee to a person or entity controlled, directly or indirectly, by Gutfleish, then ERVA shall require that such new person or entity agree, in writing, to assume the obligations of ERCM

under this Agreement.

(d) In the event that, prior to the Cutoff Date, (i) ERVA is terminated as general partner to either of the Value Fund or the Capital Fund, and (ii) such fund with which ERVA was so terminated appoints as the new general partner a person or entity controlled, directly or indirectly, by Gutfleish, then Gutfleish shall require that such entity agree, in writing, to assume the obligations of ERVA under this Agreement.

(e) In the event that, prior to the Cutoff Date, (i) ERCM is terminated as the investment manager under the Investment Manager Agreement, as amended as of July 1, 2005, and (ii) the Master Fund and the Offshore Fund enter into an investment management agreement with a person or entity controlled, directly or indirectly, by Gutfleish, then Gutfleish shall require that such entity agree, in writing, to assume the obligations of ERCM under this Agreement.

(f) The term "Cutoff Date" shall mean the later of (i) June 30, 2006, and (ii) the earlier of (A) the first day Lee Atzil ceases to be employed by any entity controlled by Gutfleish and (B) December 31, 2007

(Separation Agrmt., § 5.04 [a], [b-f]).

The language of sections 5.04 (c) through (e) require him to do certain things to protect DiPasquale, if certain other actions were taken "prior to the Cutoff Date." Thus, the cutoff date effectively operates as a maximum limitation on Gutfleish's contractual obligation to maintain the mid-2005 structure of the Elm Ridge entities. These sections effectively provide that ERVA's and ERCM's financial obligations to plaintiff will attach to new entities controlled directly or indirectly by Gutfleish, if certain restructuring actions are taken prior to, but not after, the cutoff date, which can be set by following the formula set forth in subsection 5.04(f).

The language of these provisions demonstrates the parties' intent that, in the event that the Elm Ridge entities were reorganized after the cutoff date, the defendants' financial obligations to plaintiff would not continue. A contrary interpretation would be a tortured interpretation of subsections 5.04 (c) through (e), which set forth ERVA's and Gutfleish's

obligations in terms of reacting to actions which took place prior to the cutoff date. Nothing is mentioned as to actions which took place at the time of, or after, the cutoff date. This leads to the inescapable conclusion that defendants' obligations under these subsections were limited to before the cutoff date. A contract must be construed in such a manner as to give full force and effect to all its terms (Swartz v City of Corning, 46 AD3d 1364, 1367 [4th Dept 2007], lv dismissed 10 NY3d 837 [2008]; Sonitrol Holding Co. v Marceau Investissements, 607 A2d at 1183). No cutoff date would be necessary, were the rights of the parties after the cutoff date intended to be identical to their rights prior to that date.

Further, to hold that the obligations did continue after the cutoff date would be inconsistent with the express terms of the separation agreement.

Inasmuch as the parties' agreement specifically provided that defendants would have the absolute right to decline to enter a contract to sell defendant corporation's assets and would incur no liability to plaintiff broker for so doing, the imposition of liability upon defendants for refusing to negotiate an agreement to sell the assets of defendant corporation to a putative buyer procured by plaintiff would be inconsistent with the terms of the parties' contractual relationship and negate their established intentions

(Rick Consulting Corp. v Associated Food Stores, LLC, 290 AD2d 388, 388 [1st Dept 2002]).

The parties' intent that, in the event that the Elm Ridge entities were reorganized after the cutoff date, then the defendants' financial obligations to plaintiff would cease, is also demonstrated by the terms of section 5.04 (g) of the separation agreement. That section provides that, if the events contemplated under sections 5.04 (c) or (e) occur after the cutoff date, then ERVA will not be obligated to guarantee ERCM's payment obligations to plaintiff (see Separation Agrmt., §§ 5.04 [c, e, g], 2.07 [f]). Section 5.04 (g) thus demonstrates the parties'

recognition that, after the cutoff date, ERCM might no longer be required to make payments to plaintiff and, in that event, ERVA would no longer be required to guarantee that such payments be made. If, as plaintiff argues, defendants were not authorized by section 5.04 to change the general partner and investment advisor of the onshore and offshore funds, then this provision would serve no purpose.

As defined by section 5.04 (f) of the separation agreement, the cutoff date is the later of (1) June 30, 2006 and the earlier of (2) either the date Atzil ceases to be employed by any entity controlled by Gutfleish or (3) December 31, 2007. There is no dispute that Atzil resigned on August 9, 2005. That date is prior to December 31, 2007. Therefore, the cutoff date is fixed at June 30, 2006.

The record demonstrates that defendants' reorganization of the Elm Ridge entities went into effect after the cutoff date. Gutfleish created ERP on April 1, 2006, as a co-general partner, along with ERVA, of the onshore funds. On June 30, 2006, Gutfleish caused ERVA to resign as co-general partner of the onshore funds, leaving ERP as the sole general partner of those funds. Since then, ERP has received the onshore funds' performance allocation. Effective July 1, 2006, Gutfleish caused ERM to receive the onshore and offshore funds' management fees and ERP to receive the offshore fund's performance allocation. There is no dispute that plaintiff has no interest in either ERM or ERP.

Inasmuch as these actions were taken after the cutoff date as defined by the separation agreement, defendants did not bear a contractual obligation to pay plaintiff any portion of the performance allocation and management fee paid by the onshore and offshore funds to any entity controlled directly or indirectly by Gutfleish.

Contrary to plaintiff's contention, subsection "b" of section 5.04 of the separation agreement, which governs the assignments of certain rights by ERVA and ERCM, does not apply in the circumstances presented here. Specifically, plaintiff contends that ERVA and ERCM assigned their rights to receive fees in existence as of June 27, 2005, the date the separation agreement was executed, and, therefore, were contractually obligated to cause the assignees to agree in writing to be bound by their respective obligations under the separation agreement. Plaintiff further contends that, by failing to take this action, both ERVA and ERCM breached the subsection.

The subsection provides, in relevant part, as follows:

In the event of an assignment (but not re-allocations) by ERVA of its rights to a Performance Allocation from the Value Fund or the Capital Fund in effect as of the Execution Date, then ERVA shall cause the assignee to agree, in writing, to assume the obligations of ERVA under this Agreement. In the event of an assignment by ERCM (but not a re-allocation) of its right to . . . the Fixed Fee or Performance Allocation from the Offshore Fund and the Master Fund in affect [sic] as of the Execution Date, then ERCM shall cause the assignee to agree, in writing, to assume the obligations of ERCM under this Agreement

(Separation Agrmt., § 5.04 [b]).

By its terms, the section applies only when there is an assignment by ERVA or ERCM of the right to receive certain fees. Here, no such assignment occurred. Contrary to plaintiff's contention, there is no evidence that ERVA assigned its right to receive a performance allocation to ERP. Instead, the record demonstrates that Gutfleish created ERP as an additional general partner of the onshore funds and that ERP became the sole partner with the sole right to receive those funds when ERVA withdrew as general partner. Similarly, and contrary to plaintiff's

characterization, there is no evidence of an assignment by ERCM to ERM and ERP of ERCM's right to receive the offshore fund management fee. Instead, the record demonstrates that the Elm Ridge entities were reorganized in a manner contemplated by subsections "c" through "f" of section 5.04 of the separation agreement.

For these reasons, the branches of plaintiff's motion for partial summary judgment on the 10<sup>th</sup> and 15<sup>th</sup> causes of action for breach of separation agreement section 5.04 by failing to pay plaintiff sums accruing after June 30, 2006 is denied, and defendants' motion for partial summary judgement on these causes of action, is granted.

Each side contends that it is entitled to summary judgment in its favor on the sixth, seventh, and eighth causes of action for breaches of separation agreement sections 2.02 (a) and 2.03 (a) and section 8 (d) of the fifth ERVA operating agreement.

Sections 2.02 (a) and 2.03 (a) of the separation agreement set forth the percentages of profits that ERVA and ERCM will pay plaintiff in the 2006 and 2007 calendar years, subject to section 8 of the ERVA and ERCM revised operating agreements and section 5.06 (a) of the separation agreement. Section 5.06 (a) sets forth plaintiff's agreement to execute the revised operating agreements and to "do all other acts, as may be necessary or appropriate in order to carry out the purposes and intent of this Separation Agreement."

In the sixth, seventh, and eighth causes of action, plaintiff alleges that ERP is liable for breach of these contract provisions because, as the successor of ERVA, ERP failed to pay the percentages of its profits to plaintiff that it was contractually bound to pay and that ERVA is similarly liable for breach of these provisions because it unlawfully prevented the condition precedent to its obligation to pay plaintiff, the realization of profits, from arising by resigning as

general partner of the onshore funds. Plaintiff also alleges that, in causing ERVA to resign, Gutfleish breached section 8 (d) of the fifth ERVA operating agreement which required him to share ERVA's profits with plaintiff.

Contrary to plaintiff's threshold assumptions, the law of successor liability, alter ego analysis, and the de facto merger doctrine are not relevant to the issues presented here. As discussed at length above, the clear and unambiguous terms of subsections 5.04 (c) through (f) of the separation agreement govern the resolution of these issues. Defendants' restructuring of the Elm Ridge entities was permissible under the separation agreement because it was done after the cutoff date, as defined by contract.

Plaintiff also contends that ERVA's resignation from its position as general partner of the onshore funds amounts to nothing more than ERVA's voluntary prevention of a condition precedent to its obligation to pay plaintiff. This contention is without merit. Certainly, it is well settled that "a party may not frustrate the performance of an agreement by bringing about the failure of a condition precedent" (Rachmani Corp. v 9 East 96<sup>th</sup> St. Apt. Corp., 211 AD2d 262, 269 [1st Dept 1995] [internal citation omitted]). However, here, defendants acted in accordance with the separation agreement when Gutfleish caused ERVA to resign after the cutoff date.

Significantly, the record is devoid of any credible evidence that Atzil's resignation was not voluntary, that defendants somehow coerced Atzil into resigning earlier than he originally planned, or that defendants misrepresented to plaintiff Atzil's intention to remain with the Elm Ridge entities for a specific period of time. While plaintiff alleges that Gutfleish contacted a potential replacement for Atzil prior to May 31, 2005, that allegation, even if proven, is not enough to raise a triable issue regarding the existence of fraud or fraudulent inducement to

execute the separation agreement. Contrary to plaintiff's contention, the contacting of a potential replacement does not demonstrate the existence of a scheme by defendants to force Atzil out at plaintiff's financial expense, but instead demonstrates, at most, that Gutfleish was aware of the possibility that Atzil might resign in 2005 and took steps to protect his business. There is no dispute that Gutfleish did not offer the position to any individual until after Atzil resigned. In addition, plaintiff does not deny defendants' allegations that Gutfleish did not attempt to keep plaintiff and Atzil from speaking and that, in addition to being co-workers in the same office, plaintiff and Atzil, and their families, were personal friends and frequently met outside the office during the relevant time period. The Court notes that neither side chose to depose Atzil, although given the opportunity prior to making the instant motions to conduct discovery limited to the circumstances surrounding Atzil's resignation.

Next, plaintiff contends that, when Gutfleish caused ERVA to resign as the sole managing member of the onshore funds, and, thereby, give up its only source of income and eviscerate plaintiff's right to a percentage of that income, he breached section 8 (d) of the fifth ERVA operating agreement. Here, again, the record conclusively demonstrates that Gutfleish acted in accordance with the terms of the separation agreement and, therefore, did not breach the operating agreement.

Section 8 (d) of the fifth ERVA operating agreement provides, in relevant part, that "[ERVA's] net profits or net losses, if any, for each fiscal year, including the incentive allocation received from the Value Fund, the Capital Fund and the [Offshore] Fund . . . shall be allocated among the Members in proportion to the Participating Percentages of the Members in effect for that fiscal year" (Fifth ERVA Operating Agrmt., § 8 [d] [emphasis added]).

Pursuant to the section, then, as the sole managing member, Gutfleish was obligated to ensure through ERVA that plaintiff received a percentage of ERVA's profits for 2006 and 2007 in accordance with the terms of the separation agreement. As discussed at length above, the terms of the separation agreement permit ERVA to resign as a general partner of the onshore funds, without ensuring that payments were made to plaintiff, so long as it resigned after the cutoff date.

For these reasons, those branches of plaintiff's and defendants' motions for partial summary judgment on the sixth, seventh, and eighth causes of action asserted in the amended complaint for damages accruing after July 1, 2006, are granted in favor of defendants, and plaintiff's motions are denied.

The parties next dispute whether plaintiff or defendants are entitled to partial summary judgment on the first and second causes of action for the breach of fiduciary duty claims asserted against Gutfleish under Delaware law.

In these claims, plaintiff alleges that, after his resignation, effective July 1, 2005, Gutfleish became the sole managing member of ERVA and ERCM, each of which was obligated by the separation agreement to pay plaintiff a certain percentage of profits realized in 2005, 2006, and 2007. Plaintiff further alleges that Gutfleish breached the fiduciary duty that he owed plaintiff as the managing member of ERVA, by causing ERVA to transfer its business and right to receive fees to ERP, and as the managing member of ERCM, by instructing the offshore fund to pay to ERP.

As a threshold matter, the parties agree that, inasmuch as ERVA and ERCM were established under Delaware law, the law of that state governs the internal affairs of these

companies. "It is well settled that the law of the state in which an entity was incorporated (here, Delaware) is controlling as to matters relating to its internal affairs" (Venturetek, L.P. v Rand Publ. Co., 39 AD3d 317, 317 [1st Dept 2007], lv denied 10 NY3d 703 [2008]). In addition, it is the policy of New York to give effect to choice-of-law provisions (Welsbach Elec. Corp. v MasTec N. Am., Inc., 7 NY3d 624, 629 [2006]). Here, the governing law provision of the relevant revised operating agreements each provide that the agreement is governed by, and must be construed in accordance with, Delaware law (see Fifth ERVA Operating Agrmt., § 18; Fourth ERCM Operating Agrmt., § 19).

Under Delaware law, the manager of a limited liability corporation owes a fiduciary duty to, among others, the members of the corporation (VGS, Inc. v Castiel, 27 Del J Corp L 454, 2000 WL 1277372, \*4, 2000 Del Ch LEXIS 122 [Del Ch Ct Aug. 31, 2000], affd 781 A2d 696 [Del 2001], citing Limited Law Corp. Act § 18-404 [d]). However, a corporate fiduciary may take actions that would otherwise constitute a violation of a fiduciary duty, if the actions are authorized by the relevant contract (R.S.M. Inc. v Alliance Capital Management Holdings L.P., 790 A2d 478, 497 [Del Ch 2001]; see Wejl v Morgan Stanley DW Inc., 877 A2d 1024, 1035-36 [Del Ch 2005], citing both California and Delaware law). "[F]iduciary duties among and between partners are defaults that may be modified by partnership agreements" (Sonet v Timber Co., L.P., 722 A2d 319, 322 [Del Ch 1998]).

Here, as discussed at length above, the actions taken by Gutfleish were authorized by the clear terms of the separation agreement because they were taken on or after the cutoff date. In agreeing that defendants could not terminate the payment of fees to ERVA and ERCM without requiring the assignee to assume the payment obligations of ERVA and ERCM prior to the cutoff

date, plaintiff demonstrated his intent that such actions could be taken after the cutoff date.

For these reasons, those branches of defendants' motions for partial summary judgment on the first and second causes of action asserted in the amended complaint against Gutfleish for breach of fiduciary duty are granted. Plaintiff's motions for partial summary judgment on these causes of action, are denied.

Next, plaintiff contends that he is entitled to partial summary judgment on the 13<sup>th</sup> and 18<sup>th</sup> causes of action asserted in the amended complaint against Gutfleish for breach of the covenant of good faith and fair dealing implied within the fifth ERVA operating agreement and the fourth ERCM operating agreement.

In opposition, defendants contend that, inasmuch as the revised operating agreements were negotiated at the same time and as part and parcel of the separation agreement, and cross-reference each other's terms, the three agreements must be construed together. Defendants further contend that Gutfleish's actions were in accordance with the terms of the three agreements.

Pursuant to Delaware law, "[a] party may breach the implied covenant of good faith and fair dealing without violating an express term of the contract. The implied covenant is 'designed to protect the spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain'" (PAMI-LEMB I, Inc. v EMB-NHC, L.L.C., 857 A2d 998, 1016 [Del Ch 2004], quoting Chamison v HealthTrust, Inc., 735 A2d 912, 920 [Del Ch 1999], affd 748 A2d 407 [Del 2000]). Further, "the general approach [in] implying obligations based on the covenant of good faith and fair dealing is a cautious enterprise" and where the contract includes unambiguous provisions

governing certain rights, no additional obligations will be inferred (Cincinnati SMSA Ltd. Partnership v Cincinnati Bell Cellular Sys., 708 A2d 989, 992-93 [Del 1998]). Pursuant to Delaware law and the law of New York, “[t]he implied covenant cannot contravene the parties’ express agreement and cannot be used to forge a new agreement beyond the scope of the written contract” (Capital Z Fin. Serv. Fund II, L.P. v Health Net, Inc., 43 AD3d 100, 111 [1st Dept 2007]), quoting Chamison v HealthTrust, Inc., 735 A2d at 921).

Here, the record demonstrates that defendants did not use “oppressive or underhanded tactics,” but rather merely exercised their rights under the separation agreement, the fifth ERVA operating agreement, and the fourth ERCM operating agreement.

Thus, inasmuch as defendants have complied with the terms of the separation agreement regarding plaintiff’s entitlement to a participating percentage for a given year, they are also in compliance with section 8 of each revised operating agreement. For these reasons, those branches of defendants’ motions for partial summary judgment on the 13<sup>th</sup> and 18<sup>th</sup> causes of action asserted in the amended complaint against Gutfleish are granted. Plaintiff’s motions for partial summary judgment as to these causes of action, are denied.

For the foregoing reasons, defendants’ motion for partial summary judgment on the amended complaint is granted. As held above, the cutoff date is June 30, 2006. After that date, defendants were free to take the actions described in subsections 5.04 (c) through (e) of the separation agreement without entitling plaintiff to receive further payments under the separation agreement.

The Court notes that defendants have voluntarily withdrawn that branch of their motion for partial summary judgment on the branches of the claims concerning payment of management

fees from the onshore and offshore funds, and concede that plaintiff has raised a triable issue concerning whether defendants replaced ERCM or whether that entity still continues to do business through ERM (see Def. Reply Br., Mar. 14, 2007, § II).

Therefore, defendants' motion, as amended, is granted to the extent that partial summary judgment is granted in defendants' favor and all of plaintiff's claims are dismissed to the extent that they seek damages accruing on and after July 1, 2006.

The Court has considered plaintiff's remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that motion sequence number 002 for reimbursement of costs and reasonable attorneys' fees incurred in connection with the dismissal of a portion of the ninth affirmative defense is granted in favor of plaintiff; and it is further

ORDERED that the issue of the reasonable amount of attorneys' fees incurred by plaintiff as set forth in this decision, is severed and referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine that issue; and it is further

ORDERED that the branch of the motion for attorneys' fees is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference, or absent such party, counsel

for plaintiff shall, withing 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,<sup>2</sup> upon the Special Referee Clerk in the Motion Support Office in room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's part (Part 50 R) for the earliest convenient date.

ORDERED that motion sequence number 003, as amended, is granted to the extent that summary judgment in favor of defendants is granted and those branches of the first through 23<sup>rd</sup> causes of action asserted in the amended complaint for damages accruing after July 1, 2006 are severed and dismissed; and it is further

ORDERED that those branches of the first through 23<sup>rd</sup> causes of action asserted in the amended complaint for damages accruing between July 1, 2005 and July 1, 2006 and for damages arising out of the payment of management fees from the onshore and offshore funds remain; and it is further

ORDERED that motion sequence number 004 is granted to the same extent.

Dated: September 4, 2008

ENTER:



J.S.C.

**FILED**  
SEP 08 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

<sup>2</sup> Information sheet copies are available in Rm. 119 at 60 Centre Street and on the Court's website.