| **Kane v Northwell Healthcare, Inc.** |
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| 2025 NY Slip Op 34734(U) |
| December 10, 2025 |
| Supreme Court, New York County |
| Docket Number: Index No. 650166/2025 |
| Judge: Anar Rathod Patel |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 45

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| JOHN KANE, individually and on behalf of NORTH SHORE-LIJ CONTRACT RESEARCH ORGANIZATION, LLC, | **INDEX NO.** | 650166/2025 |
| Plaintiff, | **MOTION DATE** | 08/13/2025, 09/29/2025 |
| - v - | **MOTION SEQ. NO.** | 002 003 |
| NORTHWELL HEALTHCARE, INC., | | |
| Defendant. | **DECISION + ORDER ON MOTIONS** | |

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**HON. ANAR RATHOD PATEL:**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 54–62, 64, 69, 71, 82–90, 136 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 91–135 were read on this motion to/for PRECLUDE.

Defendant moves to dismiss Counts I–III of the Amended Complaint pursuant to CPLR § 3211(a)(1) as barred by documentary evidence and CPLR § 3211(a)(7) for failure to state a cause of action.

Plaintiff moves pursuant to CPLR § 3126 by order to show cause for relief (1) resolving all issues of liability under the Amended Complaint in favor of Plaintiff and against Defendant; (2) permitting Plaintiff to take discovery with respect to the amount of damages; (3) directing an inquest on the amount of Plaintiff's damages, and (4) granting such other and further relief as the Court may deem just and proper.

For the reasons set forth below, Defendant's motion is granted, and Plaintiff's motion is denied.

## Relevant Factual and Procedural Background

The following allegations are taken from the Amended Complaint and are presumed as true for purposes of resolving the instant motions. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). Plaintiff Dr. John Kane ("Plaintiff" or "Kane"), a psychiatrist and researcher affiliated with Defendant Northwell Healthcare, Inc. ("Northwell Healthcare") or its parent company, Northwell Health Inc. ("Northwell"), brings claims individually and derivatively on behalf of North Shore-LIJ Contract Research Organization, LLC, d/b/a Vanguard Research Group ("Vanguard"). NYSCEF Doc. No. 41 ("Am. Compl.") at ¶¶ 4, 14, 16.

Plaintiff and North Shore-Long Island Jewish Health Care, Inc. ("North Shore-LIJ"), now succeeded by Northwell Healthcare, formed Vanguard in November 2013. *Id.* at ¶ 1. Vanguard was formed to manage clinical trials for neuropsychiatric and other medical research to "bridge[] the gap between entities conducting clinical research on treatments for severe mental health conditions and community-based clinical settings where individuals with such conditions are treated." *Id.* at ¶ 3. On December 29, 2014, Plaintiff and North Shore-LIJ entered into an operating agreement governing Vanguard's operations (the "Operating Agreement"). *Id.* at ¶ 21.

Under the Operating Agreement, North Shore–LIJ held 60% of Vanguard's Class A membership interests and Kane held 40% of the Class B membership interests. *Id.* at ¶¶ 22, 25–26. Although at the time that the parties entered into the Operating Agreement, North Shore-LIJ represented it would make in-kind contributions to Vanguard, such in-kind contributions were never made. *Id.* at ¶ 23. At some point, Defendant assumed North Shore-LIJ's 60% membership interest and its rights and obligations under the Operating Agreement. *Id.* at ¶ 24. Under Section 4.2 of the Operating Agreement, joint approval from both Class A and Class B members is required for "fundamental" business decisions, such as authorizing distributions, making or authorizing expenditures not designated in the operating budget, authorizing capital calls and/or membership fees, and approving strategic plans or operating budgets. *Id.* at ¶ 28. The Operating Agreement also states that Dr. Kane has the right to inspect Vanguard's financial records. *Id.* at ¶ 30.

Plaintiff alleges that Northwell engaged in a pattern of self-dealing and financial misconduct. *See id.* at ¶¶ 31–45. Specifically, between 2014 and 2024, Northwell, or its predecessor, allegedly caused Vanguard to pay approximately $2,732,000 of Kane's salary, even though he was employed by Northwell. *Id.* at ¶ 32. Defendant did not disclose said salary payments in the financial reports that it presented to Kane. *Id.* at ¶ 33. After Plaintiff raised this issue with Defendant, Defendant's general counsel, Laurence Kraemer, acknowledged that said payments appeared to be incorrect and that he would look into it. *Id.* at ¶¶ 35–36.

Plaintiff discovered further unexplained Vanguard expenses relating to administrative fees and rent payments. *Id.* at ¶¶ 38, 40. Plaintiff discovered that Vanguard paid significantly different amounts for rent—$29,000 in 2015, $310,000 in 2016, and $46,000 in 2017—despite Vanguard occupying the same office space throughout that period. *Id.* at ¶ 38. Said rent payments were made to Defendant, Northwell, or their affiliated entities. *Id.* at ¶ 39. In addition, Vanguard incurred over $2 million in "Centralized Admin. Exp." which were neither disclosed to nor approved by Kane. *Id.* at ¶¶ 40–41. Plaintiff repeatedly sought explanations and financial records from Laurence Kraemer, but Defendant only produced a single one-page spreadsheet titled "Vanguard Financial Performance." *Id.* at ¶¶ 42–44. Plaintiff argues that demand would have been futile because of Defendant's self-interest in the transactions at issue, which are "underlined by [Defendant's] failure to respond to Plaintiff's multiple requests for material and necessary information, which suggests that there is no legitimate explanation for these expenses." *Id.* at ¶ 46.

Plaintiff's Amended Complaint asserts four causes of action. *Id.* at ¶¶ 48–65. First, in the derivative claim for breach of fiduciary duty, Plaintiff alleges that Northwell violated its duties of loyalty, care, and good faith to Vanguard by engaging in self-interested transactions that benefited Northwell and its affiliates at Vanguard's expense, causing losses of at least $1 million. *Id.* at ¶¶ 48–51. Second, Plaintiff alleges an individual claim for breach of the Operating Agreement

asserting that Northwell made unauthorized expenditures, approved budgets and administrative fees, and entered into contracts without Kane's required consent. *Id.* at ¶¶ 52–56. Plaintiff further alleges that Defendant failed to provide Plaintiff with access to financial records. *Id.* at ¶ 55. Third, Plaintiff asserts a direct claim for unjust enrichment alleging that if the Operating Agreement is deemed invalid, Northwell was unjustly enriched by shifting its expenses to Vanguard. *Id.* at ¶¶ 57–60. Lastly, Plaintiff asserts a claim for inspection of records. *Id.* ¶¶ at 61–65. Plaintiff seeks an order compelling Defendant to allow Plaintiff to examine Vanguard's financial and corporate records pursuant to the Operating Agreement and New York's Limited Liability Company Law. *Id.* Plaintiff seeks damages for himself and on behalf of Vanguard, an accounting and inspection of records, attorneys' fees, and other equitable relief the Court deems appropriate.

On August 13, 2025, Defendant moved to dismiss three of the four causes of action under CPLR §§ 3211(a)(1) and (7). NYSCEF Doc. No. 62, Def.'s Mem. of Law. Defendant primarily argues that Plaintiff's second and third causes of actions must be dismissed as improper direct actions because Plaintiff has not alleged any duty owed to him independent of his status as a member of Vanguard, or that he suffered a loss independent from his membership interest in Vanguard. *Id.* at 7–16. Additionally, Defendant argues that Plaintiff's derivative claims must be dismissed because Plaintiff failed to allege with particularity that he either made demand on Defendant's board of managers ("Board"), or that doing so would have been futile. *Id.* at 16–18. In opposition, Plaintiff contests that the Amended Complaint sufficiently states that Plaintiff suffered direct damages due to Defendant's breach of the Operating Agreement. NYSCEF Doc. No. 90, Pl.'s Mem. of Law in Opp. at 8–10. Plaintiff further argues that demand would have been futile under the instant circumstances. *Id.* at 10–13.

On September 29, 2025, Plaintiff moved by order to show cause to seek relief pursuant to CPLR § 3126 due to Defendant's repeated and willful failure to comply with its discovery obligations and multiple Court orders. NYSCEF Doc. No. 92, Pl.'s Mem. of Law in Supp. of OSC. Plaintiff seeks an order resolving all issues of liability under the Amended Complaint in his favor, allowing discovery to take place solely on damages, and directing an inquest into the amount of Plaintiff's damages. *Id.* at 1. Plaintiff argues that Defendant engaged in a consistent pattern of delay and minimal disclosure, producing only 384 pages of documents five days before the Court-imposed discovery deadline. *Id.* at 3–4; NYSCEF Doc. No. 93, Aff. of Emily A. Poler ("Poler Aff.") at ¶ 10.

In a joint letter to the Court, Defendant stated that it provided "ample documentation" as to Vanguard's income and expenses. NYSCEF Doc. No. 13. On March 18, 2025, the Court instructed Defendant to clarify "what ample documentation you are referring to." NYSCEF Doc. No. 22 at 10:15–20. Plaintiff argues that Defendant has refused to conduct proper e-discovery, contrary to its stipulation to search both electronic and hardcopy materials. *See* Pl.'s Mem. of Law in Supp. of OSC at 4–6. After a status conference on August 7, 2025, the parties exchanged communications with respect to search terms and custodians. *See* NYSCEF Doc. No. 106, Ex. M ("Ex. M"); Poler Aff. ¶¶ 20–23. Defendant performed additional discovery searches, which yielded approximately 67,000 hits, but relayed to Plaintiff that it was working to narrow down the results. *See* Ex. M. Plaintiff responded with several follow-up questions, but never received a "substantive" response. *See* Pl's. Mem. of Law in Supp. of OSC at 7. After Plaintiff filed a Rule 14 letter, the Court scheduled a status conference on August 28, 2025, whereby the Court directed

Defendant to respond to Plaintiff's discovery letters and identify a production date for the discoverable documents. *Id.* at 8; *see also* NYSCEF Doc. No. 81. Defendant responded to Plaintiff's August 4, 2025 discovery letter stating it would produce all the relevant documents on or before September 19, 2025, but in subsequent communications delayed the full production until the end of September and into early October. *See* NYSCEF Doc. Nos. 109–113.

In opposition to Plaintiff's CPLR § 3126 motion, Defendant argues that Plaintiff's request for an order resolving all liability issues in his favor is baseless, extreme, and procedurally defective. NYSCEF Doc. No. 135, Def.'s Opp. to OSC at 1–2. Defendant argues that the sanction of preclusion is warranted only for "willful, deliberate [or] contumacious" conduct, which is not the case here as Defendant has substantially complied or faced legitimate logistical issues. *Id.* at 2, 11–14. Defendant further emphasizes that in just over six months, it has filed two motions to dismiss, participated in mediation, and undertaken two rounds of document collection and review, including a broad search of approximately 60,000 e-mails and over 81,000 pages from six custodians. *Id.* at 1–2; NYSCEF Doc. No. 117, Aff. of Marc A. Sittenreich in Opp. to Order to Show Cause ("Sittenreich Aff.") at ¶ 3. Defendant maintains that both parties agreed to perform self-searches of ESI to reduce costs and that Plaintiff produced fewer than 1,000 pages in total, with more than half produced only a week before filing the motion. *Id.* at ¶¶ 2, 5.

Defendant further contends that Plaintiff has failed to search his own "northwell.edu" e-mail account, which contains relevant communications, and has disregarded his own discovery obligations all while accusing Northwell Healthcare of delay. *See id.* Defendant attributes the discovery delays of the second ESI search to vacations, an office relocation, and religious holidays, rather than bad faith. Def.'s Opp. to OSC at 12; *see also* Sittenreich Aff. at ¶¶ 24, 34. Summarily, Defendant argues that it followed all Court orders, timely responded to Plaintiff's deficiency letters, and conducted an expansive second ESI search upon the Court's directive. Sittenreich Aff. at ¶¶ 21–27, 39–47; *see also* Def.'s Opp. to OSC at 5–9. Additionally, Defendant argues that Plaintiff failed to properly serve the signed Order to Show Cause and supporting papers as required by the Court's directions, thereby depriving the Court of jurisdiction to consider the motion. *Id.* at 15.

## <u>Legal Analysis</u>

### I. Motion to Dismiss (Mot. Seq. No. 002)

On a motion to dismiss brought pursuant to CPLR § 3211, "the pleading is to be afforded a liberal construction" and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs 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 N.Y.2d at 87–88 (internal citations omitted). A court will dismiss an action pursuant to CPLR § 3211(a)(1) "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Id.* at 88 (internal citations omitted). Dismissal of a complaint pursuant to CPLR § 3211(a)(7) "is warranted if the [movant] fails to assert facts in support of an element of the claim, or if the factual allegations and inferences drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc.*, 75 N.E.3d 1159, 1162 (N.Y. 2017) (internal citations omitted). Moreover, courts will grant a motion to dismiss where a movant states

a cognizable cause of action but fails to assert a material fact necessary to meet an element of the claim. *See e.g., Arnon Ltd v. Beierwaltes*, 3 N.Y.S.3d 31, 33 (1st Dept. 2015).

*Derivative Claim for Breach of Fiduciary Duty (Count I)*

Defendant moves to dismiss Plaintiff's derivative claim for breach of fiduciary duty because Plaintiff failed to allege with particularity that he made demand on the Board or that such demand would have been futile. Def.'s Mem. of Law at 23. The Court finds that the Amended Complaint fails to sufficiently plead a derivative claim for breach of fiduciary duty.

To bring a shareholders' derivative action under Business Corporation Law § 626(c), the complaint must allege with particularity either that the plaintiff made demand on the board of directors to take action, or that such demand would be futile. *Marx v. Akers*, 88 N.Y.2d 189, 193 (1996); *Wandel ex rel. Bed Bath & Beyond, Inc. v. Eisenberg*, 60 A.D.3d 77, 79 (1st Dept. 2009). "The demand requirement of Business Corporation Law §626(c) also applies to members of New York limited liability companies." *Barone v. Sowers*, 128 A.D.3d 484, 484 (1st Dept. 2015) (internal citation omitted). The demand requirement is excused as futile when a complaint specifically alleges that "(1) 'a majority of the board of directors is interested in the challenged transaction'; or (2) 'the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances'; or (3) 'the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors.'" *Id.* at 484 (citing *Marx v. Akers*, 88 N.Y.2d at 193).

"Directors are self-interested in a challenged transaction where they will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally." *Marx v. Akers*, 88 N.Y.2d at 202. To sufficiently plead that demand is excused because the board is self-interested, a plaintiff must specifically allege that a majority of the individual board members are either self-interested in the particular transaction or have lost their independence because they are controlled by a self-interested director. *Bansbach v. Zinn*, 1 N.Y.3d 1, 9 (2003). "Simply naming a majority of the board as defendants with conclusory allegations of wrongdoing or control is insufficient to circumvent the requirement of demand." *Id.* at 11 (internal citation omitted). Furthermore, "conclusory claims of wrongdoing are not sufficient to establish demand futility." *Berardi v. Berardi*, 108 A.D.3d 406, 407 (1st Dept. 2013) (internal citation omitted).

The Court finds the First Department's holding in *Soho Snacks Inc. v. Frangioudakis*, 129 A.D.3d 636, 637 (1st Dept. 2015) to be pertinent. The plaintiffs in *Soho Snacks Inc.* alleged that the defendants, **as both majority shareholders and controlling officers and directors**, were self-interested in transactions in which they diverted business assets from the company to themselves, therefore rendering demand futile. *Id.* (emphasis added). Upon the appeal of the trial court's decision, which granted a motion to dismiss the derivative causes of action for the failure to allege that demand would be futile, the First Department reversed and held that the plaintiffs sufficiently alleged that the individual directors were self-interested in a transaction where "they received a personal benefit as the owners of the corporations to which they diverted corporate opportunities." *Soho Snacks Inc.*, 129 A.D.3d at 637.

Here, Plaintiff does not allege that he made demand upon Vanguard's Board, but instead pleads demand futility because of Defendant's self-interest.[1] The Amended Complaint alleges that Defendant, as the majority owner of Vanguard's membership interests, caused Vanguard to incur $3 million in expenses through various undisclosed transactions that personally benefited Defendant and/or its affiliated entities. Am. Compl. at ¶¶ 4–5, 22. Plaintiff further alleges that these undisclosed and unapproved expenses (1) allowed Defendant to offset responsibility for Plaintiff's salary onto Vanguard; and (2) resulted in payments of rent and "Centralized Admin. Exp." to Defendant or its affiliated entities. *Id.* at ¶¶ 34, 38–40.

Notably, Plaintiff fails to identify any of the individual members of Vanguard's Board except for a single reference to Laurence Kraemer, who also acts as Defendant's general counsel. *Id.* at ¶ 35. Moreover, while Plaintiff includes a "Demand Would be Futile" section in the Amended Complaint, it is limited to three brief sentences alleging demand futility because of Defendant's self-interest as demonstrated by "its failure to respond to Plaintiff's multiple requests for material and necessary information" and that "Defendant, without even informing Plaintiff, has, on information and belief, caused Vanguard to be represented by Defendant's counsel in this action." Am. Compl. at ¶¶ 46–47.

The Court finds that while Plaintiff's allegations may adequately plead self-interest with respect to Defendant, Plaintiff failed to allege demand futility with the requisite particularity as to Vanguard's Board, as required under New York law. *C.f. In re Bank of New York Derivative Litig.*, No. 99CIV.10616(DC), 2000 WL 1708173, at *2 (S.D.N.Y. Nov. 14, 2000) (complaint sufficiently pleaded demand futility by devoting five pages directly to why demand on the board would be futile and further including specific allegations as to the individual directors). Indeed, Plaintiff failed to allege, let alone with particularity, how any of the individual members of Vanguard's Board were self-interested in the disputed transactions and/or were dominated by a self-interested director. *Bansbach v. Zinn*, 1 N.Y.3d at 11–12.

Accordingly, the Court denies Plaintiff's derivative claim for breach of fiduciary duty.

*Breach of the Operating Agreement (Count II)*

Defendant has established that Plaintiff failed to allege his direct claim for breach of Vanguard's Operating Agreement because he has not alleged that he suffered an injury separate and distinct from any injury to Vanguard.

Shareholders ordinarily do not have individual causes of action against a corporation regardless of whether "the wrongful acts may have diminished the value of the shares of the corporation, or that the shareholder incurs personal liability in an effort to maintain the solvency of the corporation." *Serino v. Lipper*, 123 A.D.3d 34, 39 (1st Dept. 2014) (internal citations omitted). However, a narrow exception exists where there has been a breach of a shareholder's individual right, which is independent of any duty owed to the corporation. *Id.*; *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985). Nevertheless, a complaint that conflates a shareholder's individual

[1] The Court observes that Plaintiff improperly raises the alternative argument that Plaintiff's requests for an explanation or corrective action constitute demand for the first time in its opposition to this motion.

and derivative rights must be dismissed. *Serino v. Lipper*, 123 A.D.3d at 39–40; *Yudell v. Gilbert*, 99 A.D.3d 108, 115 (1st Dept. 2012).

While New York courts generally determine whether a claim is direct or derivative on a case-by-case basis, the First Department has held that Delaware law established in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004) provides a relevant framework that is consistent with New York law. *Serino v. Lipper*, 123 A.D.3d at 40. Under *Tooley*, a shareholder "must demonstrate that … he or she can prevail without showing an injury to the corporation," and a court shall consider "(1) who suffered the alleged harm (the corporation or the stockholders); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually)." *Tooley*, 845 A.2d at 1039; *Yudell v. Gilbert*, 99 A.D.3d at 114.

Plaintiff alleges that Defendant breached the Operating Agreement by "authorizing and approving administrative fees, strategic plans, contracts, capital budgets and/or operating budgets without Plaintiff's knowledge and/or consent" and "by failing to make financial records available to Plaintiff." Am. Compl. at ¶¶ 54–55. Plaintiff further asserts that he "has been damaged as a result of Defendant's breaches in an amount to be determined at trial." *Id.* at ¶ 56. Plaintiff contends in his opposition that these allegations sufficiently demonstrate that Defendant owed duties to Plaintiff that were independent from the duties it owed to Vanguard. Pl.'s Mem. of Law in Opp. at 11.

Plaintiff has failed to adequately plead that said alleged independent duties do not derive from the same breach of duty and harm to Vanguard as alleged in its derivative claim for breach of fiduciary duty. *Abrams v. Donati*, 66 N.Y.2d at 953; *Yudell v. Gilbert*, 99 A.D.3d at 114; *see also Solutia Inc. v. FMC Corp.*, 385 F. Supp. 2d 324, 331 (S.D.N.Y. 2005) ("the duty must derive from 'circumstances independent of and extrinsic to the corporate entity'") (internal citation omitted).

Plaintiff's reliance on *BML Properties, Ltd. v. China Construction Am., Inc.*, 226 A.D.3d 582, 583 (1st Dept. 2024) is misguided. In *BML Properties*, the trial court held that the plaintiff had direct claims because it suffered disproportionate losses not shared by the company, stemming from breaches of duty and contract that the defendant independently owed to the plaintiff. *BML Props. Ltd. v. China Constr. Am., Inc.*, 78 Misc. 3d 1242(A), 188 N.Y.S.3d 916 (N.Y. Sup. Ct. 2023). The First Department affirmed, finding that the defendant breached duties to the plaintiff, independent of any duties it owed to the company, and that the investors agreement "specifically authorized plaintiff to bring suit individually." *BML Properties,* 226 A.D.3d at 583. The court did not address the issue of disproportionate loss in its decision. *BML Properties, Ltd. v. China Construction Am., Inc.*, 226 A.D.3d at 583.

Here, Plaintiff has not sufficiently alleged that Defendant owed Plaintiff any individual duty or duties separate from his role as a member of the LLC. *See Solutia Inc.*, 385 F. Supp. 2d at 331 (holding that the plaintiff could only maintain its direct claims insofar as they stemmed from its role as a potential investor or occurred prior to the incorporation of the company, whereby the defendant owed the plaintiff independent duties, rather than its role as a shareholder, to which it was only harmed indirectly through the corporation). Plaintiff's alleged rights—to authorize and

approve certain transactions and to inspect financial records—belong to all membership interest holders of Vanguard, through Vanguard's Operating Agreement. Am. Compl. at ¶¶ 27–30. The Amended Complaint is void of any allegations of Plaintiff's individual duties owed to it by Defendant, exclusive from their roles as members of Vanguard.

Even if the Court were to find that Vanguard's members' rights to vote on certain transactions and to inspect books and records grant Plaintiff individual duties, in applying the *Tooley* framework, the Court finds that based on Plaintiff's allegations, Vanguard suffered the alleged harm, and, in the same light, Vanguard would receive the benefit of any recovery. *Tooley*, 845 A.2d at 1039; *see* Am. Compl. at ¶¶ 4–6, 31–34, 38–40, 50–51, 54–56.

The crux of the Amended Complaint is that Defendant caused Vanguard to engage in transactions, without Plaintiff's consent, which caused Vanguard to incur expenses to the benefit of Defendant. Am. Compl. at ¶¶ 4–6, 49, 54. Any alleged injuries to Plaintiff are inextricably intertwined with those of Vanguard, as Plaintiff has failed to demonstrate how the decision to engage in the disputed transactions without Plaintiff's consent, or the refusal to provide financial records regarding said transactions, resulted in an individual harm to Plaintiff, independent of any injury incurred by Vanguard from the transactions themselves. *See Yudell v. Gilbert*, 99 A.D.3d at 115 ("[t]o the extent, if any, that plaintiffs have asserted direct claims, they are embedded in an otherwise derivative claim for partnership waste and mismanagement").

Therefore, the Court finds that Plaintiff failed to adequately plead that the narrow exception articulated in *Abrams* shall apply here. *Abrams v. Donati*, 66 N.Y.2d at 953; *Serino v. Lipper*, 123 A.D.3d at 39–40 ("This is a narrow exception, and Lipper's cross claim must be factually supportable by more than complaints that conflate his derivative and individual rights. In addition, Lipper may not obtain a recovery that otherwise duplicates or belongs to the corporation"). Accordingly, the Court grants Defendant's motion to dismiss Plaintiff's claim for breach of the Operating Agreement.

*Unjust Enrichment Claim (Count III)*

Defendant moves to dismiss Plaintiff's unjust enrichment claim because it duplicates the breach of contract claim. It is well settled that an "unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012). Additionally, "the dismissal of [an] unjust enrichment claim [is] proper" where, as here, there is an "agreement[] governing the subject matter." *Crestview SPV, LLC v. Crestview Financial, LLC*, 217 A.D.3d 473, 474 (1st Dept. 2023). The parties do not dispute that the Operating Agreement governs the parties' relationship as co-members of Vanguard, and "Plaintiff does not oppose Defendant's motion to dismiss this cause of action, which was pled in the alternative." Def.'s Mem. of Law at 19–20; Pl.'s Mem. of Law in Opp. at 10. Accordingly, Plaintiff's claim for unjust enrichment is dismissed with prejudice.

## II. Motion to Preclude (Mot. Seq. No. 003)

A discovery sanction of preclusion pursuant to CPLR § 3126(1) "is a drastic one, which requires the moving party to demonstrate 'a pattern of deliberate, contumacious delay' as opposed to aberrant behavior in the context of otherwise substantial compliance with discovery demands,

or a failure to comply based upon a mistaken interpretation of what was required to be produced." *Sherman v. Zampella*, No. 2023-01470, 2025 WL 3236030, at *1 (1st Dept. 2025) (internal citations omitted). "Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses." *Henderson-Jones v. City of New York*, 87 A.D.3d 498, 503, 928 N.Y.S.2d 536 (1st Dept. 2011) (internal citation omitted). Further, "[e]ven if the proferred excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits." *Youwanes v. Steinbrech*, 193 A.D.3d 492, 493 (1st Dept. 2021).

Here, Plaintiff has failed to establish that Defendant's conduct was willful and contumacious, warranting the drastic relief sought under CPLR § 3126. Plaintiff fails to identify Defendant's lack of compliance with any specific court order, instead opting to state as such in a conclusory manner. *Henderson-Jones*, 87 A.D.3d at 503. Moreover, Plaintiff himself asserts that Defendant offered excuses such as "vacation schedules, religious holidays, [and] an office move[.]" Pl.'s Mem. of Law in Supp. of OSC at 15; *Youwanes v. Steinbrech*, 193 A.D.3d at 493. Defendant has produced more than 13,000 documents and 85,000 pages, hardly constituting the "pattern of deliberate, contumacious delay" necessary to establish entitlement to relief under CPLR §3126. Northwell Healthcare Opp. to OSC at 16; Sittenreich Aff.; *Martinez v. Goldrose Mgmt., Inc.*, 49 A.D.3d 466, 853 N.Y.S.2d 558, 559 (1st Dept. 2008).

Accordingly, the Court declines to award Plaintiff the drastic relief he seeks and Plaintiff's motion to preclude is denied.

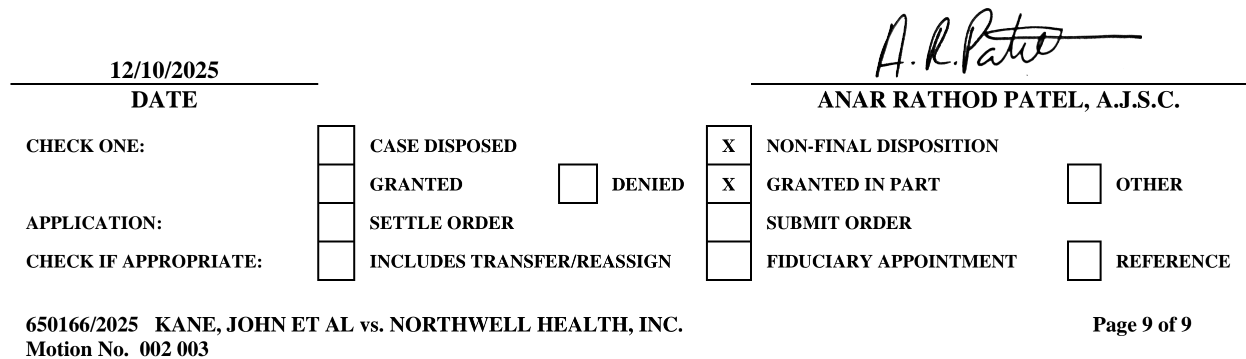
The Court has considered the parties' remaining contentions and finds them to be unavailing.

Accordingly, it is hereby

**ORDERED** that Defendant's Motion to Dismiss Counts I, II, and III of the Amended Complaint (Mot. Seq. No. 002) is GRANTED; and it is further

**ORDERED** that Plaintiff's Motion to Preclude pursuant to CPLR § 3126 (Mot. Seq. No. 003) is hereby DENIED.

The foregoing constitutes the Decision and Order of this Court.



| **12/10/2025** | | | | | **ANAR RATHOD PATEL, A.J.S.C.** | | |
|---|---|---|---|---|---|---|---|
| **DATE** | | | | | | | |
| **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** | |