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|--------------------------------|---|---------------------------|
| DOCKET NO. FST-CV-155014808-S  | ) | SUPERIOR COURT            |
|                                | ) |                           |
| WILLIAM A. LOMAS               | ) | J. D. OF STAMFORD/NORWALK |
|                                | ) |                           |
| v.                             | ) |                           |
|                                | ) | AT STAMFORD               |
| PARTNER WEALTH MANAGEMENT, LLC | ) |                           |
| ET AL.                         | ) |                           |
|                                | ) | APRIL 20, 2016            |

**REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS'  
MOTION TO STRIKE PLAINTIFF'S AMENDED COMPLAINT**

Lomas's opposition offers no disagreement with our assessment of certain allegations in the amended complaint that are key to the present motion, which can be summarized as follows:

| <b>Party</b> | <b>Membership Interest</b> | <b>LLC Manager</b> | <b>LLC Officer</b> |
|--------------|----------------------------|--------------------|--------------------|
| Lomas        | 25%                        | ✓                  | ✓                  |
| Burns        | 25%                        | ✓                  | ✓                  |
| Pratt-Heaney | 25%                        | ✓                  | ✓                  |
| Loftus       | 25%                        | ✓                  | ✓                  |

More fully, all four LLC members were sophisticated, experienced investment advisors who had equal 25% equity interests in PWM, constituting one membership class. All were members of the management committee, with equal voting rights there, too. All were company officers, with titles intended to rotate among them regularly. All had a vote, but none had a veto. The dominance-dependence imbalance that characterizes fiduciary relationships is thus absent here.

Lomas's breach-of-fiduciary-duty claim, and his other add-on claims, should be stricken.

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## ARGUMENT

**I. Lomas fails to state a breach-of-fiduciary-duty claim because none of PWM's sophisticated, equally empowered members dominated any other.**

Lomas's Count II alleges that the Individual Defendants breached fiduciary duties to Lomas because his equity's value went down when PWM amended its operating agreement. (AC ¶¶42, 44, 48). But the Individual Defendants were not fiduciaries as a matter of law and Lomas fails to allege facts that might make them fiduciaries. In particular, Lomas's opposition posits three alternative theories: (1) the Individual Defendants were fiduciaries under PWM's Operating Agreement because they were managers; (2) all LLC members are fiduciaries as a matter of law; or (3) PWM's members are fiduciaries as a matter of alleged facts. Opp'n at 8-9. All three theories fail to state a breach-of-fiduciary-duty claim.

**Lomas's managers-are-fiduciaries theory is inapposite.** Burns, Loftus, and Pratt-Heaney—and Lomas—were acting as members, not managers, when PWM amended its Operating Agreement. The original agreement includes a provision authorizing 65% of the members' ownership interests to amend it at any time. (AC Ex. A at Article VII (last sentence)). Lomas recognizes this. Opp'n at 4 (citing AC ¶36). Whether LLC managers have fiduciary duties is therefore irrelevant and cannot enable Lomas to state a breach-of-fiduciary-duty claim.

Even if the Court considers relevant the allegations that PWM's members were managers, there still can be no fiduciary-duty breach because Lomas would also owe fiduciary duties to the Individual Defendants and PWM. Lomas was also a member of PWM's Management Committee

and thus was every bit a manager as were the Individual Defendants. (AC Ex. A at §3.2, Schedule B). If the Individual Defendants had to put Lomas's interests ahead of their own, Lomas had to put the others' interests ahead of his own. Lomas cites no authority and provides no rationale to choose between these opposing fiduciary interests. Somewhat akin to matter and antimatter colliding, nothing is left but hot air. There can therefore be no breach of fiduciary duty.

**Lomas's all-members-are-fiduciaries theory is contrary to Connecticut law.** The two cases that Lomas relies on fail to support his position that all LLC members are fiduciaries. *See* Opp'n at 7. In *Ruotolo*, the proposition that every LLC member has fiduciary duties is dictum; the defendant there was the one and only manager of two LLCs. *See Ruotolo v. Ruotolo*, No. CV095026804, 2009 WL 5698124, \*5 (Conn. Super. Ct., Dec. 29, 2009) (holding that, as managing member of two LLCs, defendant had special relationship with plaintiff member). And the court in *Papallo* held *after a bench trial* only that—"under certain circumstances"—an LLC member "may have a fiduciary duty" to other members. *See Papallo v. LeFebvre*, No. CV13500-74455, 2015 WL 7709030, \*3 (Conn. Super. Ct. Nov. 2, 2015) (ruling "the facts establish" that defendant LLC member had fiduciary duty where he had sole control of business for three years and plaintiff trusted him to run business legally).

In contrast, Defendants' opening memorandum explains (without "misleading," Opp'n at 7) that while the Connecticut Supreme Court has not spoken on the issue, several cases have held that LLC members are not fiduciaries as a matter of law. Memo. at 5-6 (citing *Kasper v.*

*Valluzzo*, 2011 Conn. Super. LEXIS 3245 (Stamford–Norwalk Jud. Dist., Dec. 23, 2011); *Calpitano v. Rotundo*, 2011 Conn. Super. LEXIS 1894, at \*19 (New Britain Jud. Dist., Aug. 3, 2011)). Defendants submit that *Kasper* should be controlling given the circumstances. If not, where the two opinions that Lomas cites might be apposite, both *Kasper* and *Calpitano* are better reasoned.

Lomas also alludes to (without citing any provision of) the Uniform LLC Act.<sup>1</sup> Opp’n at 8. The only thing “instructive” about the model statute is that, as Lomas concedes, “Connecticut has not yet adopted the ULLCA.” Opp’n at 8 n.2. Indeed, in the Connecticut General Assembly a bill was introduced this past February to enact one version of the Uniform LLC Act.<sup>2</sup> Unless and until a bill imposing fiduciary duties on all LLC members becomes future law, this Court should refrain from finding such duties in current law. *See* General Statutes § 34-141; *see also Kasper*, at \*5 (“On its face Gen. Stat. § 34-141 imposes a duty of good faith, not a fiduciary duty.”); *id.* (“[T]he appellate case law does not support conclusions recited [by some trial courts] that a LLC member is similar to a partner in a partnership. The [ULLCA] provides that members of a member-managed LLC owe a fiduciary duty of loyalty and care to the company and its other members. Connecticut has not adopted the ULLCA.”); *Calpitano*, at \*6 (“General Statutes § 34-

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<sup>1</sup> *See* Uniform Limited Liability Company Act (2006, last amended 2013) (available at <http://uniformlaws.org>, search for “limited liability” under “Find an Act”).

<sup>2</sup> *See* House Bill No. 5259, 2016 Sess., entitled “An Act Concerning Adoption of the Connecticut Uniform Limited Liability Company Act.” That bill is substantially incorporated in another. *See* House Bill No. 5639, 2016 Sess., entitled “An Act Concerning Connecticut’s Leadership in Corporation and Business Law.”

141 sets forth a duty of good faith which is not the same as the duty of a fiduciary, which goes beyond good faith, and requires the fiduciary to put the interests of those to whom the fiduciary duty is owed ahead of the interests of the fiduciaries. ... The legislature provided for the establishment of LLCs which are individual legal entities, and the courts are not free to ignore the rights and protections created by this legislation.”).

**Lomas’s allegations cannot establish that PWM’s members might be fiduciaries.** The Court might expect Lomas in his opposition to identify specifically any allegations in the amended complaint that describe how exactly it could be that any of PWM’s members with respect to any other supposedly (1) had a unique degree of trust and confidence, (2) had superior knowledge, skill, or expertise, and (3) was under a duty to represent the interests of the other members. *See Dunham v. Dunham*, 204 Conn. 303, 322 (1987), *overruled in part by Santopietro v. New Haven*, 239 Conn. 207 (1996). But he fails do so, presenting only unsupported legal conclusions. Opp’n at 9 (citing AC ¶¶44-48).

The nonconclusory facts alleged regarding Lomas and the Individual Defendants describe equally empowered, experienced, sophisticated investment advisors. Lomas and each of the Individual Defendants were: (1) equal 25% owners of PWM and constituted one membership class (AC Ex. A at §§2.1, 3.7(a), Schedule A); (2) members of the management committee, here again having equal voting rights (*id.* at §3.2, Schedule B); and (3) officers in the company having titles intended to rotate among them periodically (*id.* at §4.3). Thus, absent from Lomas’s

amended complaint are the kinds of factual allegations that might establish the “dominance–dependence imbalance found in fiduciary arrangements.” *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 42 (2000) (internal quotation marks and citation omitted).

Even if Lomas’s crucial allegations on breach of fiduciary duty (AC ¶¶44-48) are not considered conclusory, his Count II fails to state a claim. The grievance central to this claim—and all of Lomas’s claims, explicitly or implicitly—is that PWM’s members amended the LLC’s operating agreement over his objection. But in that matter and most, if not all, others under the Operating Agreement, Lomas had a vote but not a veto. To state the obvious, minorities generally lose votes and may be disappointed. And so giving credence to Lomas’s grievance about losing the vote on amending the Operating Agreement would be untenable: Practically every time an LLC agreement is amended without unanimous approval, a member in the minority who can allege that the amendment was contrary to his or her interests would state a breach-of-fiduciary-duty claim against the majority. This is not and should not be the law in Connecticut.

Lastly, Lomas suggests that the Individual Defendants were fiduciaries because they were “effectively partners in a partnership,” based on allegations that they and their CFO occasionally referred to the members as “partners” and to the Operating Agreement as a “partnership agreement.” Opp’n at 10. But Lomas cites no authority or rationale for this proposition. Treating businessmen who deliberately form an LLC with an operating agreement as having instead inadvertently formed a partnership, merely when they or an officer colloquially uses the terms

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“partner” or “partnership,” is unfair and, indeed, nonsensical. How many LLC members or officers, how often, have to say the magic word for this metamorphosis to happen? If partners call their firm a “company,” do they no longer have a partnership? Lomas’s suggestion offers no answers, no principled answers exist, and this Court should therefore reject the suggestion.

**II. Lomas’s other add-on claims should also be stricken.**

**Willful and wanton misconduct is absent because the Operating Agreement was amended in accordance with its terms.** As noted, all of Lomas’s claims explicitly or implicitly quarrel with the fact that PWM’s members amended the Operating Agreement. Just as Lomas cites no authority for the proposition that amending an agreement in accordance with its terms can breach a fiduciary duty under the facts alleged, Lomas cites no authority for the proposition that such an amendment can constitute misconduct that would justify a punitive-damages award.

Lomas does point out that all the members “agreed to equal ownership in PWM” (Opp’n at 13), [REDACTED]

And Lomas’s reliance on ¶44 of the amended complaint (*e.g.*, Opp’n at 9, 13, 16) is also unavailing. That paragraph quotes from the amended Operating Agreement, thus effectively incorporating it by reference. But the four allegations in ¶44 cannot be sustained as a matter of law upon examining the amended agreement, attached (without irrelevant, highly confidential Schedules C-E) as Exhibit 1 to this Reply. We separately move to seal this Reply and Exhibit 1.

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First, Lomas alleges that the amended Operating Agreement changed Defendants' obligations to him by changing equity valuation when a PWM member withdraws. (AC ¶44(a)). But the facts alleged cannot warrant punitive damages. *See Corbett v. Hartford Financial Services Group*, 2012 Conn. Super. LEXIS 1878, at 6-7 (July 26, 2012). Lomas tries to distinguish *Corbett* by pointing out that the amended agreement there concerned compensation and affected not only the plaintiff but others as well. Opp'n at 14. [REDACTED]

[REDACTED] (Compare AC Ex. A at §§8.7(b), 8.8 with Ex. 1 at §7.5(b)). And just as in *Corbett*, Lomas alleges that the Individual Defendants were motivated by self-interest or self-help. (AC at ¶¶39, 50). But such motivations "do not include facts that indicate that the defendant intended to harm the plaintiff and are not sufficient to support an award of punitive damages." *Corbett*, at \*7.

Second, Lomas alleges that the amended agreement made changes regarding the closing date for purchasing a withdrawing member's equity. (AC ¶44(b)). [REDACTED]

[REDACTED] (Compare AC Ex. A at §8.7(a) ("For purchases made as a result of a withdrawal without cause ...") with Ex. 1 at §7.6 [REDACTED])

Third, Lomas alleges that Defendants changed their obligations by "making the amended agreement effective and enforceable" for all the members, thus superseding the original

Operating Agreement; and fourth, he alleges that the amended Operating Agreement listed him as a 25% member of the Management Committee. (AC ¶44(c), (d)). [REDACTED]

[REDACTED] (Compare AC Ex. A at §§2.1, 3.2, 3.7(a), Schedules A & B with Ex. 1 at §§2.1, 2.2, 4.2, Schedules A & B).

**Oppression is absent because the one-time amendment of the Operating Agreement retained equality for all members.** Because Lomas does not allege that Defendants “altered the equal ownership interest structure” (Opp’n at 17), and because [REDACTED] [REDACTED] (Ex. 1 at Schedule A), Lomas’s reliance on *Booth* is unavailing. *See Booth v. Waltz*, No. CV10 6011749S, 2012 WL 6846552, \*25 (Conn. Super. Ct. Dec. 14, 2012) (finding vote to alter equal ownership interest defeated plaintiff’s reasonable expectation). Lomas also suggests that he had no reasonable expectation that PWM’s members would amend the Operating Agreement. Opp’n at 18. But amending an agreement as provided by its terms is consistent with a party’s reasonable expectations. Relatedly, the Supreme Court of Delaware has explained that parties to a contract should “have no expectations inconsistent with the contract language.” *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del.1997). Connecticut law is in accord. *See, e.g., Levine v. Advent, Inc.*, 244 Conn.

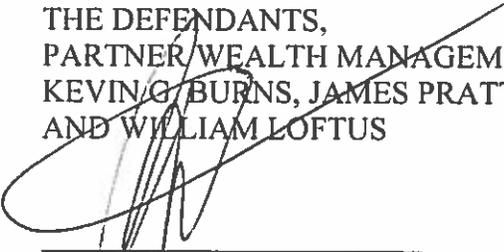
732, 745-46 (1998) (“The intention of the parties to a contract governs the determination of the parties’ rights and obligations under the contract. Analysis of the contract focuses on the intention of the parties as derived from the language employed.”) (citations omitted). The parties’ intention here clearly permitted 65% of the members’ voting shares to amend the Operating Agreement in any manner. (AC Ex. A at Article VII (last sentence)). And Lomas does not—in his breach-of-contract claim in Count I or elsewhere—allege that the amendment provision is unclear or was breached when the Operating Agreement was amended. The one-time amendment was therefore consistent with his reasonable expectations and not oppressive.

**Accounting claims are unwarranted.** Lomas contends that claims for an accounting are warranted (Opp’n at 19-20) because “Defendants owed Lomas fiduciary duties and that they acted in their own self-interest,” relying on *Mankert v. Elmatco Prods., Inc.*, 84 Conn. App. 456, 460, *cert. denied*, 271 Conn. 925, 859 A.2d 580 (2004). But as explained above, here no fiduciary duties are implicated and self-interest is of no moment. This action should be simplified by dismissing Lomas’s accounting claims because Lomas fails to demonstrate a “fiduciary relationship, or the existence of a mutual and/or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction such as fraud.” *Id.*

**CONCLUSION**

The Defendants respectfully request that the Court grant this motion to strike.

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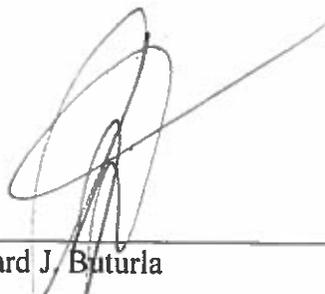
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was e-mailed and mailed to all counsel of record on this 20<sup>th</sup> day of April, 2016.

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# **EXHIBIT A**

**Per Practice Book § 7-4C**

**Document has been lodged with the Court**