COPY MAILED / FAXED TO:
COUNSEL FOR PLTFF(S): ✓
COUNSEL FOR DFT(S): ✓✓✓
PLTFF PRO SE:
DFT. PRO SE:
DATE: 9/25/04
BY: 8P

119

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN L. SABRE, ALEXANDER BOLEN, And ANDREW H. MARSHAK,

Plaintiffs,

v.

FIRST DOMINION CAPITAL, LLC, a Delaware limited liability Company,

Defendant,

JOHN G. POPP and MICHAEL A. MONTELEONE,

Defendants Joined As Aligned With the Interests of Plaintiffs.

01 Civ. 2145(BSJ)

Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiffs John L. Sabre ("Sabre"), Alexander L. Bolen ("Bolen"), and Andrew H. Marshak ("Marshak") brought this diversity action for breach of contract against Defendant First Dominion Capital, LLC ("First Dominion").[1] Pursuant to an order dated November 9, 2001, John G. Popp ("Popp") was joined as a defendant aligned with the interests of Plaintiffs. Popp has

[1] Although Michael A. Monteleone was originally a plaintiff in this action, he served a notice of dismissal without prejudice dated April 24, 2002. Pursuant to an order dated May 21, 2002, however, he was re-joined as a defendant with interests aligned with the interests of Plaintiffs.

asserted counterclaims against First Dominion for indemnification of his costs and expenses in a New York state court action brought against him by Plaintiffs Sabre and Bolen (the "State Action"). Currently before the Court are (1) First Dominion's motion to dismiss Popp's counterclaims, (2) Popp's motion for summary judgment on his counterclaims, and (3) First Dominion's motion for partial summary judgment on Plaintiff's claims.

Plaintiffs' Complaint consists of five causes of action: (1) breach of contract (Count One); (2) declaratory judgment (Count Two); (3) accounting (Count Three); specific performance with respect to information and valuations (Count Four); and costs of enforcement (Count Five). Popp's counterclaims are for common law indemnification and contractual indemnification.

FACTS

The following facts are undisputed unless otherwise indicated. In 1997, Plaintiffs and Popp, all citizens of New York, together with Dominion Capital Venture Corporation ("DCVC"), a subsidiary of Dominion Capital, Inc. ("Dominion Capital"), formed First Dominion, a merchant banking and asset management business. First Dominion is a Delaware limited liability company which maintains its principal office in Virginia. (Am. Compl. at ¶ 6).

The First Dominion Operating Agreement (the "Operating Agreement"), dated October 31, 1997, governed the rights and obligations of the "Members" of First Dominion, and reflected their ownership interests therein. DCVC was a Member holding the majority interest in First Dominion. Plaintiffs and Popp were Members, senior officers, and employees with management positions at First Dominion. As Members of First Dominion, Plaintiffs were issued Class C Units pursuant to § 3.03(c) of the Operating Agreement. (Am. Compl. at ¶ 13). Specifically, Plaintiffs were issued Class C Units with respect to Equity Investments characterized as Collateralized Debt Obligations ("CDO") and known as First Dominion Funding ("FDF") I, FDF II, and FDF III. (Id.).

First Dominion had two committees which were used to identify, recommend, and approve Capital Investments: the Supervisory Committee and the Underwriting Committee. (Aff. of Mark M. Mikuta ("Mikuta Aff.") at ¶ 8). There is dispute between the parties as to the proper procedure by which First Dominion designated certain investments as Equity Investments.

In December 1999, Dominion Capital announced that it was looking for suitable buyers for Dominion Capital, including certain assets of First Dominion. (First Dominion's 56.1 Statement at ¶ 8). First Dominion retained Goldman Sachs & Co. ("Goldman") to assist in its effort to sell the assets.

Plaintiffs and Popp began to investigate the possibility of acquiring certain First Dominion assets for themselves. In the State Action, Plaintiffs allege that they and Popp formed a joint venture (the "Joint Venture") to make a joint bid for the assets. (State Action Compl. at ¶ 9). In March 2000, Popp was instructed by a Dominion Capital officer and by Goldman "(a) to cooperate with the Donaldson Lufkin & Jenrette Asset Management Group ("DLJ") in its inquiries into the possibility of purchasing certain of the assets of First Dominion, (b) to encourage DLJ [] to make an offer to purchase certain of the assets of First Dominion, and (c) to maintain such cooperation, inquiries, and encouragement in confidence." (Cross-Compl. at ¶ 15). In particular, it appears that Hayden McMillian ("McMillian"), the Vice Chairman of First Dominion, instructed Popp not to allow Plaintiffs Sabre and Bolen to discover such negotiations with DLJ. (Deposition of McMillian ("McMillian Dep.") at 701:15-702:12, 707:8-24). In September 2000, DLJ purchased certain of First Dominion's assets; the Joint Venture between Plaintiffs and Popp never acquired any of First Dominion's assets.

In its acquisition, DLJ purchased the asset management business in which Plaintiffs Popp and Marshak were employed; Popp and Marshak were then offered employment with DLJ. (Cross-Compl. at ¶ 17). Sabre and Bolen were employed in the merchant banking business; the merchant banking business was not acquired by DLJ and Sabre and Bolen were not extended employment offers. (Compl. at ¶¶ 16, 17).

These events led to a series of lawsuits, including a predecessor action to this one which Sabre brought against First Dominion in New York State Supreme Court, the State Action, and this action.[2] In the State Action, Sabre and Bolen have sued Popp, alleging that Popp wrongfully frustrated their mutual efforts to acquire certain assets of First Dominion.

DISCUSSION

I. The Amended Complaint

The Amended Complaint sets forth five claims, many of which seek the same relief. Plaintiffs allege breach of the Operating Agreement (Count One); a right to declaratory relief as to particular provisions in the Operating Agreement (Count Two); a right to accounting (Count Three); specific performance (Count Four); and costs of enforcement pursuant to § 13.16 of the Operating Agreement (Count Five).

Plaintiffs' breach of contract claim (Count One) is premised on three alleged breaches: (1) failure to "perform valuations" under the Operating Agreement; (Am. Compl. at ¶¶ 18,

[2] The action brought in the New York State Supreme Court was dismissed on stipulation.

27); (2) failure to "make distributions to C Unitholders pursuant to the Operating Agreement, including following each Liquidation Event" (Am. Compl. at ¶ 27); and (3) failure to "provide information except pursuant to the discovery rules of this Court" (Am. Compl. at ¶ 28).

Plaintiffs' claim for declaratory relief (Count Two) addresses issues similar to the breach of contract claim. Plaintiffs seek a declaratory judgment that: (1) First Dominion "is required to perform a valuation on every Valuation Date, as defined in the Operating Agreement, including after each Liquidation Event (Am. Compl. at ¶ 30(c)); (2) "[d]istributions by FDF I, FDF II, and FDF III are Liquidation Events under the Operating Agreement" (Am. Compl. at ¶ 30(a)); and (3) Plaintiffs "are entitled to receive information regarding the Equity Investment in respect to which of their C Units were designated" (Am. Compl. at ¶ 30(b)).

In an order dated June 10, 2002, this Court dismissed Plaintiffs' claim for accounting (Count Three).

Plaintiffs' claim for specific performance (Count Four) addresses two of the same issues as the breach of contract and declaratory judgment causes of action. Plaintiffs seek specific performance of First Dominion's alleged obligations (1) "to provide information about the Equity Investments;" and (2) to perform valuations on each Valuation Date, as defined in the

Operating Agreement, including after each Liquidation Event." (Am. Compl. at ¶ 36).

Finally, Plaintiffs' claim for costs of enforcement (Count Five) is also based on § 13.16 of the Operating Agreement. (Am. Compl. at ¶¶ 24, 41). Plaintiffs seek unspecified costs, including "costs and legal fees incurred by [P]laintiffs in bringing this action." (Am. Compl. at ¶ 41).

II. First Dominion's Motion to Dismiss and Popp's Motion for Summary Judgment

In his complaint, Popp sets forth claims for both common law indemnification and contractual indemnification against First Dominion. First Dominion has moved to dismiss both claims, while Popp has moved for summary judgment on both claims.[3] In its opposition to Popp's motion for summary judgment, First Dominion argues that not only should Popp's motion be denied, but also that summary judgment should be granted in favor of First Dominion.

A. Counterclaims versus Cross-claims

When examining the motion to dismiss, it is critical for the Court to first evaluate whether Popp's claims against First

[3] Popp originally also moved for summary judgment on his claim for costs and expenses associated with this action, but that portion of the summary judgment motion was withdrawn in a letter to the Court dated July 2, 2002.

Dominion are counterclaims or cross-claims. In order to make this assessment, the Court must review the procedure by which Popp was joined in this action.

In the Stipulation and Order of Joinder signed by the parties and Magistrate Judge Henry B. Pitman on November 9, 2001 (the "Stipulation"), it appears that Popp was joined as a defendant under Fed. R. Civ. P. 19(a) which allows for the joinder of a party if his absence would "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."[4] Fed. R. Civ. P. 19(a)(2)(ii). That is, Popp's absence from this action exposed First Dominion to the possibility of inconsistent obligations.

Rule 19 further states that the court may order such a party joined in the action. "If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff." Fed. R. Civ. P. 19. However, the rule does not state what would be a "proper" case for the joinder of an involuntary plaintiff. Courts have generally followed Independent Wireless Telegraph Co. v. Radio Corp. of Am., 269 U.S. 459 (1926) for guidance on determining "proper" cases. Generally, those parties which are

[4] The Stipulation does not specifically state that Popp was joined under Fed. R. Civ. P. 19(a), but it does utilize the specific language of the rule.

subject to the court's jurisdiction should be served as defendants.[5] Dame v. Gimbel, 1989 U.S. Dist. LEXIS 8297 at * 5 (S.D.N.Y. July 12, 1989). If the joinder of such a party would destroy diversity jurisdiction, the court may realign that party's interests with the plaintiff's for diversity purposes. 7 Charles A. Wright et al., Federal Practice & Procedure, Civ. § 1605 (3d ed. 2001). As Popp and Plaintiffs are all New York citizens, the joinder of Popp as a defendant would have destroyed diversity jurisdiction. Accordingly, it appears that Popp was joined as a defendant aligned with the interests of Plaintiffs under Rule 19.[6]

Popp is clearly aligned with Plaintiffs in this case. Indeed, Popp's identification as a defendant rather than as a plaintiff in this action is due solely to the fact that he declined to voluntarily join the action. Thus, First Dominion is more aptly described as Popp's opposing party than his co-party. Fed. R. Civ. P. 13 defines counterclaims as claims against an opposing party and cross-claims as claims against a co-party. Accordingly, the Court concludes that Popp's claims

---

[5] Parties which are not subject to the court's jurisdiction should be asked to voluntarily join the action; only once such a party refuses to join the action may the court join him as an involuntary plaintiff. Cilco v. Copeland Intralenses, Inc., 614 F. Supp. 431, 433 n.2 (S.D.N.Y. 1985).

[6] The Court gives such a detailed analysis of Popp's joinder under Rule 19 not only for the benefit of its own analysis, but also because the parties themselves appear to be mistaken about Popp's exact status in this case.

against First Dominion are properly denominated as counterclaims.

B. Counterclaims under § 1367

Until recently, in order to establish whether a district court had jurisdiction over a particular counterclaim, it was necessary for the court to determine whether a counterclaim qualified as either compulsory or permissive. This determination was critical because courts were permitted to exercise jurisdiction over permissive counterclaims only if those counterclaims had an independent basis for federal jurisdiction. However, in Jones v. Ford Motor Credit Company, 358 F.3d 205, 210-14 (2d Cir. 2004), the Second Circuit criticized this rule and stated that Congress's 1990 passage of 28 U.S.C. § 1367 "has displaced, rather than codified, whatever validity inhered in the earlier view that a permissive counterclaim requires independent jurisdiction (in the sense of federal question or diversity jurisdiction)." Thus, the court explained that district courts must analyze all counterclaims, whether compulsory or permissive, under the standards for supplemental jurisdiction laid out in § 1367. The Court will therefore analyze Popp's counterclaims under the three subsections of § 1367.

i. §1367(a)

Subsection (a) of § 1367 requires that in order for a district court to exercise supplemental jurisdiction, the claims must be "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The Court finds that Popp's counterclaims constitute part of the same "case or controversy" in satisfaction of § 1367(a).

Courts have long held that the Supreme Court's decision in United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966) provided the proper test for determining whether a counterclaim was part of the same "case or controversy" for purposes of § 1367(a). Under that test, supplemental jurisdiction was available if the counterclaim arose from "a common nucleus of operative fact." Id. 383 U.S. at 725. However, in Jones v. Ford Motor, the Second Circuit suggested that the Gibbs standard no longer applies to the § 1367 analysis. 358 F.3d at 213 (supporting the Seventh Circuit decision in Channell v. Citicorp Nat'l Srvs., 89 F.3d 379, 385 (7th Cir. 1996), which "viewed section 1367's reach to the constitutional limits of Article III as requiring only '[a] loose factual connection between the claims,' a standard that appears to be broader than the Gibbs test of 'a common nucleus of operative facts,' appropriate for permitting joinder of a plaintiff's non-federal claim").

As in Jones v. Ford Motor, regardless of whether the Gibbs test applies in this case, Popp's counterclaims and Plaintiff's underlying claims "bear a sufficient factual relationship (if one is necessary) to constitute the same 'case' within the meaning of Article III and hence of section 1367." 358 F.3d at 214.[7] Plaintiff's claims and Popp's indemnification counterclaims all arise from the attempt and subsequent failure of Plaintiffs and Popp's joint venture to acquire certain of First Dominion's assets. Indeed, both the State Action, for which Popp seeks indemnification, and this action arise from that occurrence. Therefore, the Court finds that Popp's counterclaims are part of the same "case or controversy" within the meaning of § 1367(a).

ii. § 1367(b)

Subsection (b) of § 1367 creates certain exceptions to subsection (a) in diversity cases. In particular, § 1367(b) states:

> "In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 .... or over claims by persons proposed to be joined as plaintiffs under Rule

[7] The Second Circuit also made it clear that the relationship between counterclaims and underlying claims may satisfy the Gibbs standard, "even though the relationship is not such as would make the counterclaims compulsory." Jones v. Ford Motor, 358 F.3d at 213 (citing Channell, 89 F.3d at 385-86).

> 19 of such rules ... when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirement of section 1332."

28 U.S.C. § 1367(b).

§ 1367(b)'s restrictions on the use of § 1367(a) when parties are joined under Rule 19 do not apply in this case because it does not involve claims by Plaintiffs against Popp and Popp is not joined as a plaintiff. As the Second Circuit noted, "§ 1367(b) reflects Congress' intent to prevent original plaintiffs – but not defendants or third parties – from circumventing the requirements of diversity." Viacom Int'l, Inc. v. Kearney, 212 F.3d 721, 726-27 (2d Cir. 2000). Therefore, § 1367(b) does not prevent this Court from exercising supplemental jurisdiction over Popp's counterclaims.

iii. § 1367 (c)

Finally, the court must examine the claim under subsection (c) of § 1367 which provides:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –
> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). In addition, "where at least one of the subsection 1367(c) factors is applicable, a district court should not decline to exercise supplemental jurisdiction unless it also determines that doing so would not promote the values articulated in Gibbs, 383 U.S. at 726: economy, convenience, fairness, and comity." Jones v. Ford Motor, 358 F.3d at 214.

Clearly, the first three grounds listed under § 1367(c) are inapplicable in this case; that is, (1) the claims do not raise a novel or complex issue of state law; (2) the claims do not substantially predominate over the claims over which this Court has original jurisdiction; and (3) the claims over which this Court has original jurisdiction have not been dismissed. The Court also finds that subsection § 1367(c)(4) is inapplicable in this case as the Second Circuit has clearly expressed that courts should use caution when using that subsection: "declining jurisdiction outside the ambit of 1367(c)(1)-(3) appears as the exception rather than the rule." Itar-Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d 442, 448 (2d Cir. 1998). There are simply no "exceptional circumstances" that could lead to the Court's refusal to exercise jurisdiction in this case.

Accordingly, under § 1367, this Court has supplemental jurisdiction over Popp's counterclaims.

C. Ripeness of the Counterclaim

First Dominion also claims that Popp's claims are not ripe for adjudication at this time. The Indemnification Clause of the Operating Agreement states:

> The Company shall indemnify each Manager, Member, and each Person serving as an officer of employee ... of the Company ... from and against any and all Indemnified Losses asserted against, imposed on or incurred by such Person at any time as a result of such Person's capacity as a Manager, Member, officer, employee ... including, without limitation, in connection with the actions or inactions of such Person hereunder ... The indemnification contained in this Article VIII shall survive termination of this Agreement."

Operating Agreement at § 8.02. "Indemnified Losses" include:

> All liabilities, judgment, obligations, losses damages, taxes and interest and penalties thereon ... claims, actions, suits or other proceedings (whether civil or criminal, pending or threatened, before any court or administrative or legislative body, in which an Indemnified Party may be or may have been involved as a party or otherwise or with which he, or it may be or may have been threatened, while in office or thereafter) and, as the same are accrued, all costs, expenses and disbursement (including, without limitation, reasonable legal and accounting fees and expenses) of any kind and nature whatsoever incurred in connections with the foregoing."

Operating Agreement at § 1.01.

"'A justiciable controversy' may not be 'hypothetical or abstract' in nature, but rather must be 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'"

FSP, Inc. v. Societe Generale, 2003 U.S. Dist. LEXIS 493 at * 12 (S.D.N.Y. Jan. 14, 2003) (quoting Aetna Life Ins. Co. of Hartford, Conn. V. Haworth, 300 U.S. 227, 240-42 (1937)). Thus, "[t]he ripeness doctrine cautions courts against adjudicating contingent future events that may not occur as anticipated, or indeed may not occur at all." United States v. Broad. Music, Inc., 275 F.3d 168, 178 (2d Cir. 2001)(citation omitted).

First Dominion asserts that Popp's claim for indemnification is not yet ripe for review as an action for indemnity arises only upon payment of the primary liability by the party seeking indemnification. Indeed, New York courts have consistently held that "an action for contribution or indemnification does not exist until the party seeking contribution or indemnification has made payment to a claimant." Plantronics, Inc. v. United States, 1990 U.S. Dist. LEXIS 54 at *2 (S.D.N.Y. Jan. 8, 1990)(citing Mars Assocs., Inc. v. New York City Educ. Constr. Fund, 126 A.D.2d 178, 191, 513 N.Y.S.2d 125, 133 (1st Dep't)); see also Sloane v. Landauer-Metropolitan, Inc., 2001 U.S. Dist. LEXIS 9486 (S.D.N.Y. July 11, 2001) (dismissing as premature a counterclaim for indemnity of any liability or legal expense that defendants might incur in state court actions except to the extent that legal expenses have already been paid).

However, First Dominion fails to address the Indemnification Clause of the Operating Agreement. See American Motorists Insurance Co. v. United Furnace Co., 876 F.2d 293 (2d Cir. 1989) (noting that while district courts may focus ripeness inquiries "on the absence of actual payment or of a mature and final liability," they must also "give effect to the intentions of the parties, as manifested in the indemnification agreement viewed in its entirety"). The Indemnification Clause of the Operating Agreement unambiguously entitles Popp to indemnification not only for costs associated with liabilities and judgments, but also for those losses that are "asserted," "threatened," or "pending" and, with respect to legal fees and litigation costs, "as [they] are accrued." (Operating Agreement at §§ 1.01, 8.02).

Popp argues that "First Dominion is obligated to indemnify Popp by paying the costs and expenses of his defense of the State Action, and, if Popp is found to be liable to [the plaintiffs] in the State Action, then First Dominion is required to pay such judgment." (Answer to Supplemental Compl. and Counterclaim at ¶ 22). Thus, Popp asserts a claim for indemnification of both the costs of the defense of the State Action and the potential judgment in the State Action. "The duties to defend and indemnify are legally distinct." FSP v. Societe Generale, 2003 U.S. Dist. LEXIS 493 at *13; see also

Travelers Property Casualty Corp. v. Fisher Perk-Lane Co., 2002 U.S. Dist. LEXIS 11342 at *15-21 (S.D.N.Y. June 25, 2002) (distinguishing between the duty to defend and the duty to indemnify in analyzing the ripeness of each claim). That is, pursuant to American Motorist's directive to abide by the intentions of the parties, Popp's claim for indemnification of the costs of the defense of the State Action is ripe at this time. However, pursuant to Plantronics's instruction, claims for indemnification of a final judgment are not justiciable until that final judgment has actually been made.

Since the Court has been advised by the parties that they have reached a settlement in the State Action, and that settlement constitutes a final judgment, Popp's claim for indemnification is justiciable. Accordingly, First Dominion's motion to dismiss Popp's claim for indemnification is denied.

D. Common Law Indemnification

i. First Dominion's Motion to Dismiss

First Dominion contends that Popp's common law indemnification claim must be dismissed for two reasons: (1) his contractual and common law indemnification claims are mutually exclusive, and (2) Popp cannot make out a claim for common law indemnification on the merits.

a. Mutual Exclusivity

First, First Dominion argues that Popp's claims for contractual and common law indemnification are mutually exclusive and therefore cannot both be valid. First Dominion is incorrect as a matter of law. Indeed, "[p]lacing an indemnity provision in the contract [does] not alter [the] common-law duty [to indemnify], for the mere existence of an indemnity provision does not indicate an intent to replace common-law liability with contractual liability." Hawthorne v. South Bronx Community Corp., 78 N.Y.2d 433, 437, 576 N.Y.S.2d 203, 205, 582 N.E.2d 586 (1991). See also Monaghan v. SZS 33 Assocs., L.P., 73 F.3d 1276, 1284 (2d Cir. 1996) (the holding of Hawthorne, 78 N.Y.2d 433, that contractual and common law indemnification laws may exist "side by side ... appears to be an accurate statement of New York law"). Indeed, Fed. R. Civ. P. 8 provides that parties may seek relief in the alternative.[8] The Court nonetheless notes that while Popp may be able to "assert both contractual and common law indemnification claims, [he] cannot be indemnified twice for the same losses." Kingdom 5-KR-41, Ltd. v. Star

[8] Even where claims are "not specifically pleaded as 'in the alternative,' [the Second Circuit has] ruled that [Federal] Rule [of Civil Procedure] 8(e)(2) offers sufficient latitude to construe separate allegations in a complaint as alternative theories, at least when drawing all inferences in favor of the nonmoving party as we must do in reviewing orders granting motions to dismiss or for summary judgment." Adler v. Pataki, 185 F.3d 35, 41 (2d Cir. 1999).

Cruises PLC, 2002 U.S. Dist. LEXIS 4636 at *56, n. 17 (S.D.N.Y. March 20, 2002).[9]

Accordingly, the Court finds that Popp's counterclaims for common law indemnification and contractual indemnification are not mutually exclusive.

b. Merits of Common Law Indemnification

First Dominion also argues that Plaintiffs' common law indemnification claim must be dismissed on the merits. "At common law, a party who 'had committed no wrong, but by virtue of some relationship with the tort-feasor or obligation imposed by law, was nevertheless held liable to the injured party,' was entitled to common law indemnification." Houbigant, Inc. v. ACB Mercantile, 914 F.2d 964, 992 (S.D.N.Y. 1995) (quoting D'Ambrosio v. City of New York, 55 N.Y.2d 454, 461, 450 N.Y.S.2d 149, 435 N.E.2d 366 (1982)). Implied or common law indemnification is based on "principles of equity or fairness recognizing that one who was compelled to pay for the wrong of another should be allowed to recover from the actual wrongdoer the damages paid to the injured party." Travelers Indem. Co. v.

[9] First Dominion cites Clark-Fitzpatrick, Inc. v. Long Island R.R., 70 N.Y.2d 382, 389, 516 N.E.2d 190, 193, 521 N.Y.S.2d 653, 656 (1987), for the proposition that the existence of the Indemnification Clause precludes recovery on a common law indemnification claim. However, it appears that such a principle was implicitly abrogated in Hawthorne, 78 N.Y.2d at 437; the reasoning in Hawthorne was subsequently accepted by the Second Circuit in Monaghan, 73 F.3d at 1284.

AMR Servs. Corp., 921 F. Supp. 176, 182 (S.D.N.Y. 1996) (quoting Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs., 109 A.D.2d 449, 492 N.Y.S.2d 371, 374 (1st Dep't 1985)).

There are two theories which may give rise to a claim for common law or equitable indemnification: (1) an implied contract theory, where there is a special duty between the indemnitor and the indemnitee; and (2) an implied in law theory, where the indemnitee is vicariously liable for the wrongdoing of the indemnitor. Peoples' Democratic Republic of Yemen v. Goodpasture, Inc., 782 F.2d 346, 351 (2d Cir. 1986).

The implied contract theory is "based on a relationship between the two parties 'from which a covenant to indemnify could fairly be implied . . . The person cast in judgment obtained indemnity not because of joint breaches of a tort duty to the victim as in tort indemnity, but because of a contractual duty owed by the indemnitor to the indemnitee.'" City of New York v. Black & Veatch, 1997 U.S. Dist. LEXIS 15510 (S.D.N.Y. Oct. 6, 1997) (quoting Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 719 (2d Cir. 1978). First Dominion contends that the implied contract theory does not apply to this case because there is no special relationship between Popp and First Dominion. The Court disagrees.

Popp has set forth sufficient evidence of a special relationship to survive First Dominion's motion to dismiss. Not only was Popp an employee of First Dominion, but Popp engaged in those actions giving rise to the State Action as an agent of First Dominion. Furthermore, evidence of such a special relationship is strengthened both by First Dominion's instructions to Popp to negotiate with DLJ in confidence – and specifically not to allow Sabre and Bolen to discover them – and also by McMillian's deposition testimony in which he admits that he suggested to Popp that Popp would be indemnified for any liabilities arising from his negotiations with DLJ. (McMillian Dep. at 701:15-702:12, 707:8-24, 708:14-709:24, 711:13-712:11). Thus, the Court finds that Popp does have a valid claim for common law indemnification under the implied contract theory.[10]

ii. <u>Popp's Motion for Summary Judgment</u>

Popp also moves for summary judgment on his common law indemnification claim. First Dominion opposes this motion only by reiterating the same arguments it made on behalf of its motion to dismiss this claim. As the Court noted in its analysis of First Dominion's motion to dismiss, Popp has stated a claim for common law indemnification. However, the Court denies Popp's motion for summary judgment on this claim.

---

[10] The Court notes that there is no claim for common law indemnification under the implied in law theory because such a claim typically arises "when the proposed indemnitor has breached a duty to a third party but the proposed indemnitee has paid the third party for the loss attributable to that breach." <u>Peoples' Democratic Republic of Yemen</u>, 782 F.2d at 351. This theory is clearly inapplicable to this case.

Genuine issues of material fact with regard to this claim still exist. In particular, while Popp sets forth sufficient evidence of a special relationship to survive First Dominion's motion to dismiss, the existence of the special relationship is a question of fact for the fact finder. Thus, the Court denies Popp's motion for summary judgment on this claim.

E. Contractual Indemnification

i. First Dominion's Motion to Dismiss

Finally, First Dominion claims that Popp is not covered by the Indemnification Clause of the Operating Agreement. Section 8.02 of the Operating Agreement provides indemnification for "Indemnified Losses asserted against, imposed on or incurred ... as a result of such Person's capacity as a Manager, Member, officer, employee or liquidating trustee."

First Dominion argues that the Indemnification Clause does not cover Popp's costs associated with the State Action because his actions giving rise to that lawsuit were not the result of his "capacity as a Manager, Member, officer, [or] employee" of First Dominion; that is, it argues, Popp's alleged liability in the State Action arose from commitments he made in his personal capacity when he joined the Joint Venture. In contrast, Popp argues that the Indemnification Clause unquestionably covers his costs associated with the State Action because his alleged liability actually arises from First Dominion's demand that he participate in the sale of First Dominion's asset management business.

The Court finds that Popp's allegations that the State Action arose from his actions taken as a First Dominion employee — in particular, his negotiations with DLJ which he was instructed to conceal from Plaintiffs — is sufficient to survive this motion to dismiss.[11]

ii. Popp's Motion for Summary Judgment

In the motion for summary judgment, Popp asks the Court to find that the actions he took which are now the basis of the State Action fit within the Indemnification Clause in the Operating Agreement. A court may grant summary judgment in a contract dispute only where the language of the contract is unambiguous; "when a contract is ambiguous, its interpretation becomes a question of fact and summary judgment is inappropriate." Mellon Bank v. United Bank Corp. of New York, 31 F.3d 113, 116 (2d Cir. 1994). In order to make this determination, "a trial court's primary objective is to give

[11] While it is true, as First Dominion alleges, that there could not be a claim against Popp in the State Action "but for [Popp's] assumption of a duty to [Plaintiffs] in his personal capacity," there could also be no claim against Popp in the State Action but for the actions he was responsible for performing in his position as an employee of First Dominion. (First Dominion's Reply Br. at 5).

effect to the intent of the parties as revealed by the language they chose to use." Seiden Assoc., Inc. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992). When the intent of the parties is not clear by the language of the contract, the court may examine relevant extrinsic evidence to determine the parties' true intent. Sayers v. Rochester Tel. Corp. Supp. Mgmt. Pension Plan, 7 F.3d 1091, 1094 (2d Cir. 1993). Thus, summary judgment should be granted "only where the agreement's language is unambiguous and conveys a definite meaning. If the language is susceptible to different reasonable interpretations, and where there is relevant extrinsic evidence of the parties' actual intent, then the contract's meaning becomes an issue of fact precluding summary judgment." Id. (citations and internal quotations omitted).

Here, it is clear to the Court that the Indemnification Clause is susceptible to two contradictory interpretations: (1) the Indemnification Clause was not intended to cover a situation arising from the actions an employee took in joining such a Joint Venture, or (2) the Indemnification Clause was intended to cover any situation arising from actions that an employee was required to take as an agent of First Dominion. Furthermore, the extrinsic evidence provided by the parties only highlight the ambiguous nature of the clause rather than give it a clear and precise meaning. See Lucente v. Int'l Business Machines

Corp., 310 F.3d 243, 257 (2d Cir. 2002) (quoting Sayers, 7 F.3d at 1094). Accordingly, summary judgment is inappropriate and Popp's motion is denied.

III. First Dominion's Motion for Partial Summary Judgment

Finally, First Dominion seeks partial summary judgment on Plaintiffs' claims (1) involving the CDO Cash Receipts; (2) for specific performance and costs of enforcement; and (3) arising from First Dominion's failure to perform mandatory valuations as allegedly required under the Operating Agreement. First Dominion also seeks a declaratory judgment that its investment in preferred and common stock of A.M. Cosmetics qualifies as an Equity Investment under the Operating Agreement. As First Dominion explains, although it does not move for summary judgment on all of Plaintiffs' claims, "grant of the motion would substantially resolve the parties' dispute." (First Dominion's Supp. Br. at 2).

As the Court explained in its analysis of Popp's motion for summary judgment, the Court may only grant summary judgment if it finds the contract unambiguous. Sayers, 7 F.3d at 1094. Each of the claims upon which First Dominion seeks summary judgment depends upon the interpretation of ambiguous sections of the Operating Agreement. The Court will address each claim and, in turn, explain the conflicting interpretations and extrinsic evidence offered by each party. As "reasonably intelligent person[s] who [have] examined the context of the entire integrated agreement and who [are] cognizant of the customs, practices, usages and terminology as generally understood in [this] particular ... business" could come to these conflicting interpretations of the Operating Agreement, First Dominion's motion for partial summary judgment is denied. Sayers, 7 F.3d at 1095.

A. CDO Cash Receipt Claims

Under Counts One and Two, Plaintiffs seek distributions with respect to the CDO Cash Receipts. All parties agree that under the Operating Agreement Plaintiffs are only entitled to such distributions if the CDO Cash Receipts qualify as Liquidity Events.[12] Thus, First Dominion is requesting this Court to find that the CDO Cash Receipts do not qualify as Liquidity Events as a matter of law.

Under the Operating Agreement, a Liquidity Event is, in relevant part:

> With respect to any Capital Investment a liquidation or distribution by the Company, of such Capital Investment, whether pursuant to a merger, stock sale, asset sale or otherwise and shall also be deemed to

[12] Section 5.02(b) of the Operating Agreement provides that C Unitholders are entitled to distributions "30 days after a Liquidity Event." Absent a Liquidity Event, no distributions are required.

> include an initial public offering of securities constituting such Investment by the relevant Investment Entity ...

(Operating Agreement at § 1.01) (emphases added). Thus, whether the CDO Cash Receipts fall within the definition of a Liquidity Event depends upon the definition of "liquidation." The parties essentially agree that "liquidation" is defined as "[t]he act or process of converting assets into cash." Black's Law Dictionary (7th ed. 1999). However, First Dominion asks the Court to read the definition narrowly, while Plaintiffs urge a broader reading.

First Dominion contends that the Court should define "liquidation" to require that "after a liquidation, whether by stock sale, asset sale, termination of business, or the like, the liquidated asset is no longer owned by the entity liquidating it." (First Dominion's Supp. Br. at 14). If the Court were to accept this definition, the CDO Cash Receipts would not qualify as liquidation because First Dominion continues to own the FDF I, FDF II, and FDF III Notes.

Plaintiffs, on the other hand, urge the Court to define "liquidation" more expansively. In particular, Plaintiffs argue that the CDO Cash Receipts are "self-liquidating" by nature. Because GAAP requires that a portion of the periodic residual cash flow proceeds be treated as a return (or liquidation of) the initial invested capital, Plaintiffs argue the CDO Cash

Receipts qualify as Liquidity Events.[13] (Marshak Aff. at ¶¶ 14-15).

First Dominion further contends that the phrase "by the Company" modifies liquidation, in addition to distribution, and then draws a distinction between liquidations "to" the Company and liquidations "by" the Company. Plaintiffs claim that such an interpretation inaccurately represents the intent of the parties and would lead to an erroneous result by which the Company could receive liquidations but choose not to make distributions to the C Units of such liquidations.

First Dominion has failed to meet its burden of establishing that there are no genuine material issues of fact. In particular, the Court finds that the parties' differing interpretations of a Liquidity Event could both be viewed as sound by an objective, "reasonably intelligent person who has examined the context of the entire integrated agreement."

---

[13] Plaintiffs cite to numerous pieces of evidence in support of their theory that the parties intended to utilize a broad definition of "liquidation." First, in his deposition, Hayden McMillian testified that "what I believe liquidation means in this situation is the sale or divesting or exchange of a capital investment for some sort of proceeds." (McMillian Dep. at 613:18-20). Second, Plaintiffs argue that the inclusion of the phrase "otherwise" in the definition of Liquidity Event was intended to include the self-liquidation of the CDO Equity Investments. Finally, Sherri Snelson, First Dominion's Fed. R. Civ. P. 30(b)(6) witness regarding the negotiation and operation of the Operating Agreement, testified that with regard to the CDOs the return of principal to the holder of the equity tranche could be viewed as a Liquidity Event. (Snelson Dep. at 98:11-99:3).

Sayers, 7 F.3d at 1095 (internal quotations omitted). First Dominion's motion for summary judgment on the issue of the CDO cash receipt claims is therefore denied.

B. Specific Performance and Costs of Enforcement

First Dominion contends that it is entitled to summary judgment on Plaintiffs' claims for specific performance and costs of enforcement. Plaintiffs bring their claims under § 13.16 of the Operating Agreement, which states that "[t]he Company and the Members shall be entitled to enforce their rights under this Agreement specifically, to recover damages by reason of any breach of any provision of this Agreement (including costs of enforcement)..." First Dominion claims that Plaintiff may not bring claims under § 13.16 because they are not "Members" of First Dominion; rather, they are "Terminated Members." "Terminated Members" do not qualify as "Members" and have "no rights" under the Operating Agreement, except as expressly provided. (Operating Agreement at § 7.03(d)).

Plaintiffs argue that because most of the breaches alleged in the Complaint occurred while Plaintiffs were still Members, the Operating Agreement does not bar them from exercising their rights under the contract which accrued prior to their termination as Members. See Western Elec. Co. v. Solitron Devices, Inc, 306 N.Y.S.2d 624, 625 (1st Dep't 1970) ("The alleged termination of the contract, if the contract is valid, cannot affect the rights accrued prior to termination."); Marine Transport Lines v. Int'l Org. of Masters, Mates & Pilots, 609 F.Supp. 282, 284-85 (S.D.N.Y. 1985) (finding that, notwithstanding the termination of the contract, the party was entitled to enforce the arbitration provision for breaches which occurred prior to termination). The Plaintiffs further contend that § 7.03(d) of the Operating Agreement supports such a conclusion:

> [T]he withdrawal or other termination of a Member shall not affect the existence of the Company, and the remaining Members shall continue the business of the Company under the terms of this Agreement. Thereafter, the Terminated Member shall no longer be a Member for purposes of this Agreement and shall have no rights, except as other provided herein ...

(emphasis added). Plaintiffs claim that this particular language suggests that while Terminated Members lose certain rights after termination, the Operating Agreement does not purport to take away those rights that accrued prior to termination.

The Court finds that the Operating Agreement is ambiguous concerning Terminated Members' power to invoke § 13.16 to recover for breaches of the Operating Agreement that occurred while they were Members. Accordingly, the Court denies First Dominion's motion for summary judgment on these claims. **However, Plaintiffs** admit in their opposition brief that not all of the breaches alleged in the Complaint took place while Plaintiffs were "Members" for purposes of the Operating Agreement. (Pls.' Opp. Br. at 32). It is unambiguous that Plaintiffs cannot bring a claim for specific performance as Terminated Members. The Court therefore grants First Dominion's motion for summary judgment as to those claims for specific performance of breaches which occurred after Plaintiffs became Terminated Members.[14]

[14] The Court notes that in its reply brief, First Dominion for the first time raises the argument that it is entitled to summary judgment on Plaintiffs' claim for costs of enforcement because fee shifting provisions do not apply unless the intent of the parties to provide for such an outcome is "unmistakably clear" or "unequivocal" based on the contract's language. Bridgestone/Firestone, Inc. v. Recovery Credit Services, Inc., 98 F.3d 13, 20-21 (2d Cir. 1996). The Court is not required to consider arguments raised for the first time in reply memoranda. See, e.g., Ventre v. Hilton Hotels Corp., 2000 U.S. Dist. LEXIS 10157 at *11 n.3 (S.D.N.Y. July 20, 2000) ("It is well-settled that arguments raised in reply papers are not a basis for granting relief."); Nichols v. American Risk Mgmt., Inc., 2000 U.S. Dist. LEXIS 807 at *9 (S.D.N.Y. Jan. 28, 2000) ("A court need not consider a new argument raised for the first time in a reply brief."). Regardless, even if the Court were to consider this argument, the Court disagrees with First Dominion's contention that the language in the Operating Agreement is "unmistakably clear." Indeed, the language of the Operating Agreement clearly states that "[t]he Company and the Members shall be entitled ... to recover damages by reason of any breach of any provision of this Agreement (including costs of enforcement)..." (Operating Agreement § 13.16). The only remaining question is whether Plaintiffs may exercise rights that were allegedly accrued while they were Members; if the fact finder finds that the contract provides for such recovery, then the provision allowing Plaintiffs to recover the costs of enforcement is in fact "unmistakably clear."

C. Failure to Perform Valuations

First Dominion moves for summary judgment on all claims involving First Dominion's failure to perform mandatory valuations as allegedly required by the Operating Agreement.[15] Two related issues arise concerning Plaintiffs' rights to valuations: first, whether First Dominion has breached the Operating Agreement by failing to perform the valuations, and second, whether Plaintiffs can state a claim for specific performance under the Operating Agreement. The Court will address each of these issues in turn.

ii. The Obligation to Perform Valuations

In support of its motion, First Dominion claims that the Operating Agreement does not require such valuations and assumes that Plaintiffs are bringing these claims under § 10.04 of the Operating Agreement. Under § 10.04, "on each Valuation Date, the Underwriting Committee shall prepare a determination of the Unit Price and Fair Market Value of the assets of the Company in accordance with the terms and conditions of this Agreement." The Operating Agreement provides the Board of Directors with the

---

[15] In particular, Plaintiffs (1) claim that First Dominion breached the Operating Agreement by failing to perform such valuations (Count One); (2) seek a declaratory judgment that First Dominion shall perform such valuations in the future (Count Two); and (3) seek specific performance of First Dominion's obligation to perform valuations (Count Four).

responsibility of managing the company and does not specifically require the appointment of an Underwriting Committee; that is, it is within the Board of Directors discretion to appoint an Underwriting Committee. Since DCVC became the sole member of First Dominion, it has not appointed a new Underwriting Committee. (Mikuta Aff. at ¶ 27). First Dominion thus argues that determinations under § 10.04 are not required because there is no Underwriting Committee in place.

In contrast, Plaintiffs contend that periodic valuations are mandatory under § 5.02(b) of the Operating Agreement which is entitled "Mandatory Distributions to Class C Unitholders" and sets forth a complicated formula by which Plaintiffs' right to payment, as Class C Unitholders, must be calculated every time a Liquidity Event occurs with respect to an Equity Investment. Part of the formula requires First Dominion to ascertain the value of all of the "Equity Investments held by the Company as of the date of such Liquidity Events." (Operating Agreement at § 5.02(b)(ii)).

The Court agrees with First Dominion's interpretation of § 10.04. The Operating Agreement does not specifically require that First Dominion have an Underwriting Committee; if there is no Underwriting Committee, that Committee can have no obligation to perform its duties under § 10.04. However, the Court also agrees with Plaintiffs' interpretation of § 5.02(b). First

Dominion must provide some mechanism to calculate the value of Equity Investment as of a Liquidity Event, as required by § 5.02(b)(ii). The Operating Agreement does not require that such determinations be made by the Underwriting Committee, but it does require that such determinations be made by the Company as a whole. The Court finds that these reasonable but conflicting interpretations of § 10.04 and § 5.02 render this portion of the Operating Agreement ambiguous. First Dominion's motion to dismiss Plaintiffs' claims for valuations on these grounds is therefore denied.

ii. Plaintiffs' Ability to State a Claim for Specific Performance

As explained in section IIIB, supra, First Dominion also argues that Plaintiff cannot state a claim for specific performance under § 13.16 of the Operating Agreement because they are not "Members," and as "Terminated Members" they have no rights under § 13.16. As with First Dominion's argument concerning Plaintiffs' right to claim specific performance and costs of enforcement, the Court finds that the Operating Agreement is ambiguous as to whether Terminated Members can make claims under § 13.16 for breaches that occurred while they were Members.

Moreover, the cases cited by First Dominion to support its contention are easily distinguishable. In Poley v. Sony Music Entertainment, Inc., 222 A.D.2d 308, 309, 636 N.Y.S.2d 10 (1st Dep't 1995), the plaintiff had clearly divested himself of his rights under the contract and transferred those rights to a partnership that he joined with the defendants. In this case, Plaintiffs took no actions to divest themselves of their rights under the Operating Agreement. In Pascal v. Beigel, 202 A.D.2d 483, 485, 609 N.Y.S.2d 72 (2d Dep't 1994), a chiropractor who sold his practice was found to have no right to enforce restrictive covenants against former employees. However, the breaches of those covenants occurred after the chiropractor had sold his practice and given up his rights under the contract; in this case, Plaintiffs are alleging breaches that occurred while they were still Members of the limited liability company.[16]

Accordingly, First Dominion's motion for summary judgment on all claims involving First Dominion's failure to perform mandatory valuations as allegedly required by the Operating Agreement is denied.[17]

---

[16] The Court already noted that Plaintiffs do not have a cause of action for those breaches which occurred after they became "Terminated Members."

[17] Finally, in their reply brief, First Dominion again raises an argument that was not raised in its brief in support of its motion. In particular, First Dominion contends that former members of a limited liability company have no standing to enforce the terms of a limited liability operating agreement.

D. A.M. Cosmetics Securities as an Equity Investment

Along with its motion for partial summary judgment, First Dominion also asks this Court for a declaration that, as a matter of law, its investment in A.M. Cosmetics securities qualifies as an Equity Investment. The Court finds that issues of fact pertaining to the A.M. Cosmetics investment require denial of First Dominion's motion for a declaratory judgment.

First Dominion argues that A.M. Cosmetics securities is an Equity Investment based on a straightforward interpretation of the Operating Agreement. The Operating Agreement defines an Equity Investment as "a Capital Investment in any equity Securities, preferred or common ..." (Operating Agreement at § 1.01, Amendment 3). A Capital Investment is "any investment [made by the Company] in any Person, whether by means of capital contribution, equity investment, debt investment, loan, advance, extension of credit, time deposit or purchase or acquisition of Securities ..." (Id.). A Person includes any individual or entity, including a corporation such as A.M. Cosmetics. (Id.). Finally, securities include "any and all equity interests [and] stock ..." (Id.). First Dominion contends that because its

---

As the Court explained above, the Court need not address arguments which are made for the first time in a party's reply brief. Ventre, 2000 U.S. Dist. LEXIS 10157 at *11 n.3.

purchase of A.M. Cosmetics securities was an investment in a corporation, it was a Capital Investment; further, because the investment falls within the definition of "equity Securities, preferred or common," the investment qualifies as an Equity Investment. (Id.).

In contrast, Plaintiffs urge this Court to interpret the Operating Agreement's definition of Equity Investment not as a designation of what an Equity Investment is, but rather as a designation of what an Equity Investment is not. That is, § 6.02 of the Operating Agreement grants the Underwriting Committee full authority to designate any Capital Investment as an Equity Investment so long as such an investment does not contradict the definition of Equity Investment.[18] If the Court were to accept First Dominion's explanation, Plaintiffs explain, § 6.02 would otherwise be superfluous.[19]

In sum, First Dominion argues that the language of the contract is unambiguous and clearly designates an investment such as the A.M. Cosmetics securities as an Equity Investment. Indeed, when a "contract is clear and unambiguous on its face,

[18] There is one limitation on the Underwriting Committee's authority to designate Capital Investments as Equity Investments, but it is not relevant to this case.

[19] Plaintiffs allege that by asking this Court to designate the A.M. Cosmetics investment as an Equity Investment, First Dominion is attempting to "include [a] losing Non-Equity Investment[] in the Equity Portfolio to prevent the Company Preferred Return from being met and avoid paying monies owed." (Pls.' Opp. Br. at 4).

the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence." RJE Corp. v. Northville Indus. Corp., 329 F.3d 310, 314 (2d Cir. 2003) (quoting De Luca v. De Luca, 300 A.D.2d 342, 342, 751 N.Y.S.2d 766, 766 (N.Y. App. Div. 2d Dep't 2002)). However, the Court must also take into consideration Plaintiffs' demonstration that First Dominion's interpretation of the contract renders § 6.02 of the Operating Agreement superfluous. "In assessing ambiguity, [a court must] consider the entire contract to 'safeguard against adopting an interpretation that would render any individual provision superfluous.'" Id., (quoting Sayers, 7 F.3d at 1095); see also Int'l Multifoods Corp. v. Commercial Union Ins. Co., 309 F.3d 76, 86 (2d Cir. 2002) (listing cases). Contrary to First Dominion's argument, this portion of the contract is ambiguous, particularly given the potential to render § 6.02 superfluous.

Furthermore, Plaintiffs stress that there was no Board Resolution designating C Units in connection with the A.M. Cosmetics securities. Under § 3.03(c) of the Operating Agreement, "[i]mmediately prior to the making of *each* Equity Investment, the Company *shall* designate a new series of Class C Units..." (Operating Agreement at § 3.03(c)) (emphasis added). If the A.M. Cosmetics securities were in fact Equity Investments, as Defendants contend, such a Board Resolution should have been issued.[20] In addition, Plaintiffs contend that in 1999, First Dominion accounted for the restructuring of the A.M. Cosmetics securities as a Non-Equity Investment in order to reduce the bonus pool available to First Dominion employees. The doctrine of equitable estoppel, Plaintiffs argue, should bar First Dominion from now obtaining a declaration that the A.M. Cosmetics securities is an Equity Investment.[21]

It appears from this evidence that even First Dominion has not always accepted or abided by the unambiguous meaning that it now attempts to attribute to the term "Equity Investment." The Court thus denies First Dominion's motion for a declaratory judgment that the A.M. Cosmetics investment is an Equity Investment.

---

[20] Indeed, such a Board resolution was issued for each of the 35 Capital Investments previously designated as Equity Investments. (Aff. of Adam J. Safer, Ex. D). Furthermore, Plaintiffs cite to the differences between the approval memoranda for each of the 35 Equity Investments for which C Units were issued and the memorandum proffered by First Dominion to provide approval for the A.M. Cosmetics Equity Investment.

[21] The elements of equitable estoppel are "(1) conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently seeks to assert; (2) intent that such conduct (representation) will be acted upon; and (3) knowledge, actual or constructive, of the true facts." Health-Loom Corp. v. Soho Plaza Corp., 709 N.Y.S.2d 165, 167 (1st Dep't 2000).

CONCLUSION

First Dominion's motion to dismiss Popp's counterclaims is denied. Popp's motion for summary judgment on his counterclaims is denied. First Dominion's motion for partial summary judgment on Plaintiffs' claims is denied. However, the Court notes that Plaintiffs may not advance claims premised on § 13.16 which are based upon actions that occurred after Plaintiffs became Terminated Members.

The trial in this matter will commence on Monday, November 22, 2004. The parties are directed to submit a joint pretrial order and any motions in limine no later than Monday, November 15, 2004. In the interim, the Court encourages the parties to pursue settlement of their disputes. If the parties wish to hold a settlement conference, Magistrate Judge Pitman is available. If any party requests such a conference, the Court will order it.

SO ORDERED:

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
September 25, 2004

SO ORDERED:

Barbara S. Jones

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
September 25, 2004