SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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DKSJ, LLC,

Plaintiff,

- v -

JOSEPH S. COHEN,

Defendant.

INDEX NO. 653100/2024

MOTION DATE 03/05/2025

MOTION SEQ. NO. MS 003

AMENDED DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

In this action to recover for breach of a Put Agreement, plaintiff DKSJ LLC moves to renew its prior motion for summary judgment in lieu of complaint pursuant to CPLR 2221 and 3213 on the grounds that its federal lawsuit was dismissed for lack of subject matter jurisdiction. Defendant opposes and cross-moves to (a) disqualify plaintiff's counsel, the law firms Lowenstein Sandler LLP and Michelman & Robinson LLP; and (b) consolidate this action with the related proceeding *Joseph S. Cohen v DKSJ LLC et al*, Index No. 650971/2025. For the reasons below, plaintiff's motion to renew is granted and, upon renewal, summary judgment in lieu of complaint is granted, and defendant's cross-motion is denied in its entirety.

Background

Facts Relevant to Prior Order

As summarized in this court's prior Decision and Order denying plaintiff's motion for summary judgment (NYSCEF # 41, Prior Order), plaintiff claims that on October 15, 2021, it entered into a series of agreements under which it would purchase 1% of the equity of non-party Snow Joe, LLC (Snow Joe) for $10,000,000 (NYSCEF # 4, Katz Aff ¶ 5). [1] Defendant Joseph S. Cohen is the controlling manager of Snow Joe (*id.* ¶ 4). One of the agreements was a "Put Agreement" under which plaintiff could demand repayment of its $10,000,000 from defendant in exchange for plaintiff's equity in Snow Joe (Put Right) (NYSCEF # 6, Put

[1] Snow Joe is allegedly no longer in operation (*id.* ¶ 5).

Agreement § 1[a]). As relevant to the Prior Order, the Put Agreement contained a forum selection clause selecting the United States District Court for the Southern District of New York for any litigation or dispute (*id.* § 13). Plaintiff avers that on January 30, 2023, plaintiff demanded repayment under the Put Agreement, and defendant failed to make repayments (Katz Aff ¶¶ 9-14; *see also* NYSCEF # 7, Put Notice).

Additional Facts Relevant to All Motions

Given the limited scope of the Prior Order, certain additional facts were left out of the recitation of facts that are now necessary to recount. Defendant filed an affidavit with further details about the case. According to defendant, plaintiff first became interested in Snow Joe because the person in charge of plaintiff, non-party Drew Katz, was neighbors with defendant and decided to invest at Snow Joe's peak (NYSCEF # 24, Def's Aff ¶ 8).[2] Katz, plaintiff, and plaintiff's counsel Lowenstein Sandler, LLP (Lowenstein) engaged in "extensive negotiations" that eventually resulted in the $10,000,000 purchase of Snow Joe's equity at issue here (*id.* ¶ 9).

The full phrasing of the Put Agreement's Put Right is relevant to the arguments. The Put Right gives plaintiff "the right, but not the obligation [] to cause [defendant] to purchase" plaintiff's interest in Snow Joe for $10,000,000 in cash (Put Agreement § 1 [a]). However, the Put Right could only be executed before either the third anniversary of the Put Agreement or at any time prior to "the consummation of a Sale of [Snow Joe], a SPAC Transaction or an IPO" (*id.*).

The Put Agreement further states that plaintiff may activate the Put Right by "delivering notice to [defendant] (the 'Put Notice'), specifying (A) [plaintiff's] election to exercise the Put Right with respect to the Put Interests and (B) the date for the Put Closing . . . which shall be on a business day no earlier than twenty-one (21) calendar days and no later than thirty-five (35) calendar days after delivery of the Put Notice . . ." (*id.* § 1 [b]). Defendant must "indefeasibly pay" plaintiff on the date for the Put Closing (*id.*). If defendant does not pay on the Put Closing date, interest accrues at a rate of 8% per month, compounding each month (*id.*). The Put Agreement further states that "[t]he rights and remedies of the parties to this Letter Agreement shall be cumulative, and not alternative" (*id.* § 16).

As mentioned above, the Put Agreement is one of three documents entered at the same time as the equity purchase was made. The other two documents are Snow Joe's Operating Agreement and the Membership Interest Purchase Agreement (MIPA). The terms of these other two documents are irrelevant, however, as the Put Agreement provides as follows:

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[2] According to defendant, plaintiff's sole member is a trust, and Katz is merely one of its three trustees (*id.* ¶ 9).

> "In the event of any conflict or inconsistency between the provisions of the Operating Agreement or [MIPA] with respect to the subject matter hereof and the provisions of this Letter Agreement, as between [plaintiff], the Manager and the Founder Members [including defendant], the provisions of this Letter Agreement shall control."

(*id.* § 17). Finally, the Put Agreement allows the "prevailing party" to recover "reasonable attorneys' fees, costs and necessary disbursements" in connection with any action "to enforce or interpret the terms of [the Put Agreement]" (*id.* § 15).

The parties entered the Put Agreement "[f]or good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged" (*id.* at Intro). It was signed by defendant as "Manager and Member" of Snow Joe (*id.* at Signature Pages).

According to defendant, in the two years following the Put Agreement, Snow Joe's economic standing slowly but surely began to fall due to the geopolitical circumstances at the time (Def's Aff ¶¶ 11-13, 15). Defendant alleges that Katz insisted defendant hire Lowenstein to help Snow Joe through these troubles (*id.* ¶ 16). Defendant did ultimately hire Lowenstein to represent Snow Joe in late 2022 as shown by an Engagement Email from Lowenstein to defendant (NYSCEF # 25, Engagement Email). Notably, the Engagement Email makes clear that Lowenstein's "engagement is limited to the Company [Snow Joe], and [Lowenstein did] not agree[] to represent any other person, or any business entity" (*id.* at 1). The Engagement Email also contains a conflict waiver regarding Katz and his affiliates (*id.* at 3-4).

As previously noted, on January 30, 2023, plaintiff activated its Put Right under the Put Agreement by sending defendant a Put Notice (Katz Aff ¶¶ 9-14; Put Notice). The Put Notice set the Put Closing date as February 21, 2023 (Put Notice at 1). Defendant failed to pay on the Put Closing date, and so plaintiff sent three follow-up notices on March 23, 2023; May 30, 2023; and May 28, 2024 (NYSCEF #s 8-10, Follow-Up Notices). The last of these notices was sent by plaintiff's new counsel at Michelman & Robinson, LLP (Michelman). Defendant again failed to pay.

Defendant further alleges that due to Snow Joe's economic misfortune, on February 6, 2024, the majority of Snow Joe's assets were sold to secured creditor non-party Wells Fargo Bank, National Association (Wells Fargo), which constitutes a sale under the Put Agreement (Wells Fargo Sale) (Def's Aff ¶¶ 20-22).

Prior Order

Plaintiff commenced this action via summary judgment in lieu of complaint on June 20, 2024, seeking to recover $11,121,695.79 and compound interest accruing at the rate of $2437.41 per day since filing, based on breach of the Put

Agreement (NYSCEF # 1, Summons). Defendant opposed the motion on various grounds, including that this action was barred by the Put Agreement's forum selection clause, and cross-moved to disqualify plaintiff's counsel, much like here (NYSCEF # 29, Def's SJILC Opp). Plaintiff asserted that the forum selection clause should not apply because the federal district court did not have subject matter jurisdiction given that there is clearly no federal question and no diversity since the parties are both residents of New York (NYSCEF # 3, Pltf's SJILC MOL at 2 n 1).

On January 22, 2025, the court issued the Prior Order denying summary judgment in lieu of complaint without prejudice (NYSCEF # 41, Prior Order). Finding that the Put Agreement's forum selection clause applied, the Prior Order concluded that plaintiff must first proceed in the SDNY before bringing a claim here (*id.* at 3). In so holding, the court acknowledged that forum selection clauses may be set aside if a plaintiff can show that

> "enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court"

(Prior Order at 2, quoting *Br. W. Indies Guar. Tr. Co., Ltd. v Banque Internationale a Luxembourg*, 172 AD2d 234, 234 [1st Dept 1991] and others).

However, the court further determined that an assertion that the designated court lacks subject matter jurisdiction is not a reason to set aside a forum selection clause unless the designated court already had an opportunity to "resolve issues regarding its own jurisdiction" (Prior Order at 3 citing *Spirits of St. Louis Basketball Club, L.P. v Denver Nuggets, Inc.*, 84 AD3d 454, 456 [1st Dept 2011], and *Micro Balanced Products Corp. v Hlavin Indus. Ltd.*, 238 AD2d 284, 285 [1st Dept 1997]). Constrained by this case law and given that plaintiff had no other argument to avoid the jurisdiction clause, the court denied the motion without prejudice to allow plaintiff to file in the appropriate forum (Prior Order at 3). The court did not reach any other arguments; the cross-motion to disqualify plaintiff's counsel denied as moot (*id.*).

Subsequent Developments: District Court, SDNY Case

Two weeks after the court's Prior Order, on February 6, 2025, plaintiff refiled this action in federal district court in the Southern District of New York (NYSCEF # 46, Federal Complaint). Four days later, the District Court ordered defendant to "advise the Court [by February 21, 2025] whether [he] agrees with Plaintiff that the Court lacks subject matter jurisdiction and, if so, whether he has any objection to the Court dismissing this action *sua sponte*" (NYSCEF # 47, Federal Court Order).

The day before his response was due in District Court, on February 20, 2025, defendant filed a new case against plaintiff in New York state court (the Malpractice Action) (*see* Index No. 650971/2025, *Joseph S. Cohen v DKSJ LLC et al*). He did not, however, file a complaint at that time.

On February 21, 2025, defendant responded to the District Court's order stating that he "has no knowledge of any fact contrary to the assertion by Plaintiff. . . that [SDNY] lacks subject matter jurisdiction" and therefore did "no[t] object[] to the dismissal" of the federal action (NYSCEF # 48, Def's District Court Letter). The District Court dismissed the case five days later (NYSCEF # 49, Dismissal).

On March 5, 2025, plaintiff filed the present motion to renew based on the District Court's dismissal and set the return date for March 25. On March 17, the day before his opposition was due, defendant filed the complaint in the Malpractice Action bringing claims for a declaratory judgment that the Put Agreement was unenforceable against him, breach of fiduciary duty claims against Lowenstein and one of its partners, aiding and abetting breach of fiduciary duty against plaintiff and its principal, and legal malpractice against Lowenstein and its partner along with aiding and abetting legal malpractice against plaintiff and its principal (*see* Index No. 650971/2025, *Joseph S. Cohen v DKSJ LLC et al*, NYSCEF # 3 ¶¶ 134-164). The next day, on March 18, 2025, defendant timely filed his opposition to plaintiff's renewal motion as well as the present cross-motions to disqualify plaintiff's counsel (both Lowenstein and Michelman) and consolidate this action with the Malpractice Action (NYSCEF # 50, Notice of Cross-Motion; NYSCEF # 51, Def's Renewal Opp).

Discussion

I. Motion to Renew

CPLR 2221(e)(2) and (3) provides that a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination.... [and] ... contain reasonable justification for the failure to present such facts on the prior motion." A motion for renewal "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Renewal is also appropriate where the new facts "address[] an issue raised *sua sponte* by the court in the original decision" (*First Mercury Ins. Co. v Nova Restoration of NY, Inc.*, 203 AD3d 598 [1st Dept 2022], quoting *Hernandez v New York City Hous. Auth.*, 129 AD3d 446, 446 [1st Dept 2015]).

Additionally, and alternatively, CPLR 2221(e) provides that a party may move for leave to renew "a change in the law that would change the prior

determination" (CPLR 2221 [e] [2]). Change in law can be a "new statute taking effect or a definitive ruling on a relevant point of law issued by an appellate court that is entitled to stare decisis" (CPLR Practice Commentaries, by Professor Patrick M. Connors, McKinney's Cons. Laws of NY Annotated, CPLR 2221:9A, Time to Make Renewal Motion; 2020, citing Siegel & Connors, New York Practice § 449 [6th ed 2018]).

Here, plaintiff succeeds under both the new fact and new law standards. The Prior Order denied summary judgment in lieu of complaint without prejudice to allow the District Court to rule on its own jurisdiction, and by extension, determine whether the forum selection clause should be enforced. The District Court has since determined that it lacked subject matter jurisdiction. Therefore, the forum selection clause may be set aside (*see Spirits of St. Louis Basketball Club, L.P. v Denver Nuggets, Inc.*, 84 AD3d 454, 456 [1st Dept 2011] [requiring designated court to rule on its own jurisdiction]; *see also Micro Balanced Products Corp. v Hlavin Indus. Ltd.*, 238 AD2d 284, 285 [1st Dept 1997] ["to the extent that the designated court does not possess jurisdiction . . . resort may be had to further proceedings before the courts of this State"]).

In the first of many unsuccessful arguments, defendant argues that plaintiff's renewal motion must be denied because the District Court's decision is not "newly discovered evidence" in that plaintiff knew about the forum selection clause even at the time of the original motion (Def's Renewal Opp at 4). However, the District Court's decision and the existence of the forum selection clause are two completely different facts as is implicitly recognized in the decisions this court cited (*see Spirit*, 84 AD3d at 456; *Micro Balanced Products*, 238 AD2d at 285). It would appear that defendant conflates the forum selection clause and the District Court's decision so to manufacture a procedural hurdle and waste judicial resources and time. It also appears that this argument was made in bad faith given that defendant opposed the original motion on the forum selection grounds only to concede that the federal court had no subject matter jurisdiction. In any event, the District Court's decision constitutes a definitive ruling on the forum selection issue that defendant placed before this and the District Court. In sum, plaintiff's argument fails.

Plaintiff's motion to renew is therefore granted, and upon renewal, the merits of the summary judgment in lieu of complaint motion are addressed here.

II. Summary Judgment in Lieu of Complaint

"CPLR 3213 is intended to provide a speedy and effective means of securing a judgment on claims presumptively meritorious" (*Interman Indus. Prods., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975]). To demonstrate that a written instrument qualifies for summary judgment under CPLR 3213, a plaintiff "must prove a prima facie case by the instrument and a failure to make the payments called for by its terms" (*Maglich v Saxe, Bacon & Bolan, P.C.*, 97 AD2d

19, 21 [1st Dept 1983]; *see also PDL Biopharma v Wohlstadter*, 147 AD3d 494, 494-495 [1st Dept 2017]). If it is necessary to look outside the document for proof of the debt, then CPLR 3213 procedure is inapplicable (*PDL*, 147 AD3d at 495). In other words, the defendant must explicitly acknowledge the indebtedness, and the fact of the debt must be apparent from the agreement alone (*Weissman v Sinorm Deli*, Inc., 88 NY2d 437, 444 [1996]). "Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense" (*Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]).

Based upon a review of plaintiff's submission, plaintiff has established a *prima facie* case for summary judgment in lieu of complaint. The Put Agreement is an instrument for payment of money only and calls for the unconditional repayment and buyout of plaintiff's equity upon a demand notice from plaintiff (Put Agreement § 1 [a]; *see also Nordea Bank Finland PLC v Holten*, 84 AD3d 589, 590 [1st Dept 2011] [holding that put agreement was an instrument for payment of money only]). The Put Agreement further states that no other conditions are necessary to activate the right (Put Agreement § 1 [b]). The amount requested in the Put Agreement is a definite sum (the $10,000,000 price plus compound interest accrued at 8% per month) due upon demand at the time specified in the Put Notice, as well as reasonable attorneys' fees and costs (*id.* §§ 1 [a], 15). As proof of nonpayment, plaintiff submits its January 30, 2023 Put Notice and the three follow-up letters (NYSCEF #s 7-10). Plaintiff also submits an affidavit from its manager Katz stating that defendant has failed to pay (Katz Aff ¶¶ 9-14). All of this is sufficient to establish plaintiff's entitlement to summary judgment under CPLR 3213, shifting the burden to defendant to demonstrate the presence of a triable issue of fact.

Defendant fails to meet this burden.

Defendant first argues that the Put Agreement is not binding on him because he personally did not receive any consideration; instead, all $10 million of the relevant transaction went to Snow Joe (NYSCEF # 29, SJILC Opp at 2). This argument fails. "[I]t is fundamental that a benefit flowing to a third person or legal entity constitutes a sufficient consideration for the promise of another" (*Mencher v Weiss*, 306 NY 1, 8 [1953]). Here, defendant admits that Snow Joe received $10 million as consideration for the promise in the Put Agreement (and the related MIPA), and so that promise is binding (*see* SJILC Opp at 5 ["The additional evidence . . . proves only Snow Joe received consideration"]).[3]

Moreover, the Put Agreement itself says it is for "[f]or good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged" (Put Agreement at Intro). This alone is enough. Defendant's only response is to argue

[3] Defendant argues that plaintiff's "failure" to attach the MIPA in its motion papers "is an incurable omission" that is fatal to the motion, but this too is wrong. The MIPA is not relevant to the enforceability of the Put Agreement given the Put is a complete agreement.

that the Put Agreement "does not set forth the party receiving the consideration," but again, consideration may flow to a third-party.

To the extent defendant may be arguing that he is not bound because he is not personally a signatory to the Put Agreement, this too fails. Defendant signed on behalf of Snow Joe "as Manager and Member" and concedes he was involved in "extensive negotiations" that led to the Put Agreement (*see* Put Agreement, at Signature Page; Def's Aff ¶ 9). He also admits to serving as Snow Joe's "functional chief executive officer" for the entire life of the company (Def's Aff ¶ 5). Defendant, in signing the agreement on behalf of Snow Joe, was clearly aware of its terms and of his obligations under the Put Right. To now claim he is not bound by that right is tantamount to an admission that he fraudulently induced plaintiff to enter the Put Agreement, as he had no intention to be bound by its terms (*Cf. Citibank, N.A. v Plapinger*, 66 NY2d 90, 95 [1985] [allowing a party to claim fraudulent inducement in the face of an unconditional guaranty "would in effect condone defendants' own fraud in 'deliberately misrepresenting their true intention'"]).

Defendant next argues that the Put Agreement's requirement that plaintiff "cause" defendant to buyback plaintiff's interest in Snow Joe should be interpreted to mean that the only way plaintiff could enforce the Put Agreement was by filing an action for specific performance. Because plaintiff failed to file an action before the Wells Fargo Sale in 2024, it cannot now enforce the Put Right through CPLR 3213.

Further, defendant's argument on cause fails for its underdevelopment. Defendant does not explain in his brief why the word "cause" should be interpreted to require an action for specific performance nor why his obligation to buy back plaintiff's equity somehow vanished when Snow Joe's assets were sold. While defendant's affidavit corrects this dearth of explanation, it does nothing for the weakness of the argument. Defendant explains that § 1(a) of the Put Agreement only allows plaintiff to activate the Put Right prior to a "sale" of Snow Joe, meaning the Put Right expired February 6, 2024, when Wells Fargo purchased Snow Joe (Def's Aff ¶¶ 20-21, 33). Defendant argues that although plaintiff timely sent the Put Notice on January 30, 2023, plaintiff did not actually take steps to "cause" defendant to honor the Put Right by, for example, bringing a lawsuit for specific performance as allowed (and in defendant's view, required) under § 16 of the Put Agreement (*id.* ¶¶ 23-26).

Defendant's argument defies the plain text of the Put Agreement. Per § 1(a) of the Put Agreement, "[t]he Put Right shall be exercisable" by plaintiff by delivering defendant the Put Notice (Put Agreement § 1 [a]). Section 1(b) clarifies that after the Put Notice is delivered, the Put Right has been activated "without the need for the execution or exchange of further documents, unless otherwise mutually agreed . . . " (*id.* § 1[b]). Defendant offers no evidence that the parties mutually agreed that anything else—much less resort to a lawsuit for specific performance—

was necessary. Defendant's reference to the remedies in § 16 of the Put Agreement is similarly meritless, as that section clearly states: "The rights and remedies . . . shall be cumulative, and not alternative" (Put Agreement § 16). Defendant, therefore, fails to establish the Put Agreement cannot be enforced or that it can only be enforced via specific performance.

Defendant distinguishes *Nordea Bank* on the grounds that the agreement in *Nordea Bank* expressly stated the promise was "unconditional" (SJILC Opp at 6 discussing *Nordea Bank,* 84 AD3d at 590). With this assertion, defendant appears to be arguing that the Put Agreement is not an instrument for the payment of money only because it does not use the word "unconditional" – that the Put Agreement is not an "instrument for the payment of money only." But, even a generous reading of the Put Agreement cannot escape the unconditional and irrevocable obligation that defendant shall "indefeasibly" pay.

Finally, referring to § 17 of the Put Agreement, defendant argues that the terms of the Put Agreement simply do not control this dispute. Section 17 states that in the event of conflicts between the Operating Agreement, the MIPA, and the Put Agreement, the Put Agreement shall control "as between [plaintiff], the Manager and the Founder Members" the last of which includes defendant (Put Agreement § 17). From this language, defendant argues the Put Agreement controls only if there is a conflict between *all* of the listed parties. Because the conflict here is just between plaintiff and defendant, defendant argues the Put Agreement does not control. Defendant then argues that the MIPA therefore controls and prohibits this lawsuit.

Defendant's reading here undermines the Put Agreement in its entirety. The clear meaning of § 17 is that the Put Agreement controls in case of a conflict with the Operating Agreement or MIPA and where that conflict involves some of the listed parties. The conflict does not need to involve all of the parties. The implication of defendant's argument is that the Put Right, which is the center of the Put Agreement, cannot ever be enforced because the Put Right only references defendant (*see* Put Agreement § 1 [a]). Defendant cannot contort the clear language he negotiated and agreed to in order to eviscerate the heart of the agreement.

In short, none of defendant's arguments have merit. Plaintiff has established a prima facie entitlement to summary judgment in lieu of complaint, and defendant fails to raise any issues of fact or defenses. The motion is therefore granted on renewal.

III. *Cross-Motion to Disqualify Plaintiff's Counsel*

Defendant cross moves to disqualify plaintiff's counsel, both Lowenstein and Michelman. On a motion to disqualify counsel, "the moving party must prove, among other things, the existence of a prior attorney-client relationship between

itself and opposing counsel" (*Campbell v McKeon*, 75 AD3d 479, 480 [1st Dept 2010]). "To determine whether an attorney-client relationship exists, a court must consider the parties' actions . . . . [A]n attorney-client relationship is established where there is an explicit undertaking to perform a specific task. . . . While the existence of the relationship is not dependent upon the payment of a fee or an explicit agreement, a party cannot create the relationship based on his or her own beliefs or actions" (*Pellegrino v Oppenheimer & Co.*, 49 AD3d 94, 99 [1st Dept 2008]).

"A party has a right to be represented by counsel of its choice, and any restrictions on that right must be carefully scrutinized . . . The decision of whether to grant a motion to disqualify rests in the discretion of the motion court" (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6 [1st Dept 2015] [quotation marks omitted]).

Here, defendant's cross-motion to disqualify plaintiff's counsel fails because there was never an attorney-client relationship between defendant and either of plaintiff's law firms. Lowenstein's engagement email makes clear that Lowenstein was only representing Snow Joe, not any other individuals (*see* Engagement Email at 1). This alone is dispositive, as it is well-settled that an attorney representing an organization does not represent the individuals within it, even if they are directors or majority shareholders (*see* 22 NYCRR 1200.0 rule 1.13 [a] ["When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders, or other constituents . . . the lawyer is the lawyer for the organization and not for any of the constituents."]). Nor does defendant allege any conduct by Lowenstein that could have created an attorney-client relationship going beyond that with Snow Joe.

Similarly, defendant does not allege in any way, shape, or form that Michelman ever represented him. Defendant's sole argument is that Lowenstein "undoubtedly" shared Snow Joe's confidential information with Michelman and therefore should be removed (Def's Renewal Opp at 11). However, defendant offers only speculation to support this claim (*id.* at 10-11). These conclusory arguments fail to establish "the existence of a prior attorney-client relationship" (*Campbell*, 75 AD3d at 480).

There is no reason to reach defendant's remaining arguments, including waiver, that plaintiff is not an "affiliate" of Katz for the purpose of waiver, that Lowenstein "created the event that resulted in the Put Right," or any other argument. All else is irrelevant in the face of defendant's failure to establish a former attorney-client relationship with plaintiff's counsel, and so the cross-motion to disqualify must be denied.

IV. Cross-Motion to Consolidate

Finally, given the above ruling granting renewal and summary judgment in lieu of complaint, defendant's motion to consolidate is denied as moot. Even if the court were to reach the merits of this motion, however, it would be denied based on both the lack of commonality with this case and for defendant's bad faith use of the legal system to try to stymie plaintiff's recovery.

The majority of plaintiff's claims and allegations in the Malpractice Action are about legal malpractice and breach of fiduciary duty by plaintiff's counsel, with plaintiff and its principal as supporting players (*see* Index No. 650971/2025, *Joseph S. Cohen v DKSJ LLC et al*, Dkt. No. 3, ¶¶ 134-164). The only exception is defendant's claim for declaratory judgment that the Put Agreement is not enforceable against him (*id.* ¶¶ 134-136). But this claim is now moot given the above ruling granting summary judgment in lieu of complaint on the Put Agreement, so there is no longer any reason to consolidate these actions.

The court is also acutely aware of the timing: defendant filed the Malpractice Action the day before his response in federal court was due, and did not file the complaint until *after* this motion to renew was filed *and* the day before his opposition was due (*see generally id.*). In choosing to act only the day before each relevant deadline, defendant appears to be manufacturing further procedural hurdles in a bad faith attempt to prevent plaintiff's contractually-mandated recovery. For all of the above reasons, defendant's cross-motion is denied as moot.

Conclusion

For the forgoing reasons, it is hereby

ORDERED that plaintiff's motion for leave to renew its motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that, upon renewal, plaintiff's motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of $10,000,000, together with compound interest in the amount of $1,121,695.79, calculated at the rate of 8% compounded monthly from the date of February 21, 2023 through June 20, 2024, and thereafter interest at the rate of $2,437.41 per diem, together with reasonable attorneys' fees, costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff shall submit a proposed judgment; and it is further

ORDERED that defendant's cross-motion to disqualify plaintiff's counsel and/or consolidate this case with *Joseph S. Cohen v DKSJ LLC et al*, Index No. 650971/2025, is denied in all respects; and it is further

ORDERED that that portion of the plaintiff's action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees that plaintiff may recover against the defendant is referred to a Special Referee to hear and report; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the Decision and Order of the court.

7/14/2025
DATE

MARGARET A. CHAN, J.S.C.

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