FOURTH DIVISION
September 3, 2015

No. 1-14-3071

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDWARD BASS, as Trustee of the Edward Bass Discretionary Trust, derivatively on behalf of OVERLAND BOND AND INVESTMENT CORP., an Illinois Corporation, and CAR CREDIT CENTER CORP., a Delaware Corporation, Plaintiffs-Appellants, v. PAUL D. STREICHER; LAUREN F. STREICHER; IAN H. STREICHER; MICHAEL D. STREICHER; NORTHWESTERN MEDICAL GROUP, a/k/a NORTHWESTERN MEDICAL FACULTY FOUNDATION; and DAVID A. BAKER, Defendants-Appellees, (Overland Bond and Investment Corp., an Illinois corporation; and Car Credit Center Corp., a Delaware corporation, Nominal Defendants.)	)	Appeal from the Circuit Court of Cook County. No. 14 CH 6226 The Honorable Kathleen G. Kennedy, Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's dismissal of plaintiff's shareholder-derivative suit affirmed where plaintiff released his right to pursue his claims in earlier settlement between parties. Order dismissing declaratory judgment count regarding potential indemnification of defendants affirmed as to indemnification for damages but vacated and remanded as to indemnification for attorneys' fees and costs. Affirmed in part, vacated in part, and remanded.

¶ 2 Plaintiff Edward Bass, a minority shareholder of Overland Bond and Investment Corporation (Overland) and Car Credit Center Corporation (Car Credit) (collectively, the Companies), brought a derivative suit against his fellow shareholders, defendants Paul, Lauren, Ian, and Michael Streicher (the Streichers), Northwestern Medical Faculty Foundation (NMFF), and David Baker. Defendants moved to dismiss the suit pursuant to section 2-619(a)(6) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(6) (West 2014)), alleging that plaintiff had released his right to pursue this suit in a settlement between plaintiff and defendants executed in 2012. Plaintiff claimed that his release did not foreclose his derivative suit because the settlement related only to disputes in a different probate case, and because he only released his *individual* claims against defendants, not the claims he brought as a shareholder of the Companies. The trial court granted defendants' motions to dismiss, finding that plaintiff had released his claims and finding the remaining issues moot as a result of that ruling.

¶ 3 We affirm the trial court's dismissal of Count I based on the release. Pursuant to the plain language of the parties' settlement agreement, plaintiff released any claims that defendants breached their fiduciary duties to the Companies. Plaintiff cannot avoid that unambiguous language simply by attempting to bring a shareholder-derivative suit in the Companies' names.

¶ 4 Likewise, we affirm the dismissal of Count III, a declaratory-judgment count pertaining to an evidentiary issue. We agree with the trial court that, in light of the resolution of Count I, Count III is moot.

¶ 5 We also affirm the trial court's dismissal of Count II to the extent that it prays for a declaration that defendants could not seek indemnification from the Companies for any damages defendants would be required to pay as a result of this litigation. Given the resolution of Count I, the question of damages is moot. But we vacate the dismissal of Count II insofar as it concerns

potential indemnification for defendants' attorneys' fees and costs. That issue is not moot, as those fees and costs were incurred irrespective of the outcome of the litigation. We remand that portion of Count II to the trial court for further consideration.

¶ 6 I. BACKGROUND

¶ 7 A. The Companies' Ownership History

¶ 8 William Bass was the sole shareholder of the Companies, which performed "Buy Here Pay Here" used-car sales. "Buy Here Pay Here" sales involve customers with poor credit or no credit history, who are given credit for the cars at high interest rates. William and plaintiff, his brother, managed the Companies, with plaintiff assuming most management duties in the late 1960s.

¶ 9 William died in 2003. Plaintiff acted as executor of William's estate. A dispute over William's estate ensued between plaintiff, William's sister Lyle B. Streicher, and NMFF, each of whom claimed a stake in William's estate, including his shares in the Companies. In 2007, Lyle died and left her interest in William's estate to her children, the four Streichers named as defendants in this case.

¶ 10 The Streichers filed a petition to remove plaintiff as the executor of William's estate, alleging that plaintiff had engaged in misconduct in handling the estate. Another dispute later arose over plaintiff's fee for acting as the executor of William's estate.

¶ 11 On April 13, 2011, the Streichers and NMFF entered into a "Stockholders' Agreement," which was to become effective when the stock in the companies was distributed among William's possible legatees. Plaintiff did not sign the agreement. On September 22, 2011, the stock in the Companies' was distributed. Plaintiff, the Streichers, and NMFF each received a one-third interest in the Companies.

¶ 12 Plaintiff and his son, Larry Bass, who also worked for the Companies, both resigned on November 15, 2011. As described more fully below, plaintiff asserted that he was forced out by the actions of the other two groups of shareholders, the Streichers and NMFF.

¶ 13 B. The Settlement

¶ 14 In December 2012, the probate court hearing the disputes over William's estate ordered plaintiff, the Streichers, and NMFF to participate in mediation. That mediation resulted in a "2012 Settlement Agreement" (the Settlement), which the parties signed in early 2013, but was effective as of December 28, 2012.

¶ 15 The Settlement was designed "to resolve all pending litigation in the Estate," including the Streichers' petition to remove plaintiff as the executor. The Settlement provided for plaintiff's fee as executor, attorney fees, and the distribution of various assets of William's estate. In consideration of those payments, the parties executed various releases.

¶ 16 Specifically, plaintiff "forever release[d], waive[d], relinquish[ed], and extinguish[ed] any and all Potential Claims against" the Streichers, NMFF, the Companies, and their "Affiliates." In the same section of the Settlement, the parties defined the terms "Potential Claims" and "Affiliates." The Settlement defined "Potential Claims" as:

> "[A]ll charges, claims, complaints, liabilities, obligations, promises, agreements, controversies, damages, motions, causes of action, suits, rights, demands, costs, losses, debts, and/or expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever, known or unknown, discovered or undiscovered, at law, in equity, or under statute, which a Party and/or its Affiliate now has or claims to have against another Party (in any and all capacities) and/or its Affiliate, or which any Party and/or its Affiliate at any time heretofore had and/or claimed to have, and/or which any Party or its Affiliate

> hereafter may have, arising out of or related to any act, omission, event, fact, and/or other thing which existed on or prior to the Effective Date, arising out of or relating to anything whatsoever, including (without limiting the generality of the foregoing) ***, any act and/or failure to act properly while serving as a director, officer, employee, or agent of the Companies (or either of them), including without limitation *** breach of fiduciary duty, [or] so-called 'self-dealing,['] *** and *** any other act and/or failure to act relating in any way to any property, interest, or injury to *** the Companies[.]"

The Settlement defined "Affiliates" of a party, "in the broadest possible manner," as "that Party's beneficiaries, legatees, predecessors, successors, assigns, affiliates, shareholders, members, counsel, associates, employees, agents, attorneys, husband, wife, children, and/or parents, as well as that Party in any and all capacities (such as executor, trustee, officer, director or agent) in which that Party has served."

¶ 17 C. Derivative Suit

¶ 18 On April 11, 2014, plaintiff filed the derivative suit at issue in this case. In Count I of his complaint, plaintiff alleged that defendants breached the fiduciary duties they owed to the Companies and to plaintiff as a shareholder. He argued that defendants ousted him from his managerial post in the Companies, then made a series of incompetent decisions that resulted in significant losses.

¶ 19 Plaintiff alleged that Baker, NMFF's attorney, presented him with the Stockholders' Agreement on May 19, 2011 and said that "its terms were non-negotiable." According to plaintiff, the terms of the Stockholders' Agreement would have prevented him from exercising any power in managing the Companies and would have imposed a severe non-competition clause on him if he decided to resign. Moreover, plaintiff said that NMFF and the Streichers offered no

additional consideration for signing the Stockholders' Agreement. Plaintiff asserted that he did not sign the Stockholders' Agreement because of its unreasonable terms.

¶ 20 Plaintiff claimed that, in early 2011, Baker identified Garrett Gioulos as a candidate to replace plaintiff as the Companies' president and chief operating officer (COO). Baker, along with other representatives of the Streichers and NMFF, conducted one interview with Gioulos in "spring 2011" and interviewed no other candidates to replace plaintiff. Plaintiff asserted that Gioulos was unqualified to serve as president of the Companies. He had no experience running a "Buy Here Pay Here" car dealership. He had "little to no experience with underwriting, collections, or credit investigations." Gioulos had owned a car dealership that closed "around 2008 due to underperformance." Gioulos then ran a different dealership, which he continued to operate while purportedly serving as the Companies' president. According to plaintiff, this second dealership also failed in late 2012.

¶ 21 Plaintiff alleged that, at the first shareholders' meeting on November 1, 2011, which Baker "led," the representatives of NMFF and the Streichers displayed a lack of "basic information about the Companies." Each of these representatives, including Baker, were "lawyers with little to no experience in auto sales or auto financing businesses." Plaintiff alleged that, after he and Larry left the meeting, the Streichers and NMFF elected the Companies' new directors: Paul Streicher and one of NMFF's directors. Plaintiff claimed that neither of these new directors had sufficient "experience working in the used auto or subprime finance business."

¶ 22 According to plaintiff, he and Larry offered to stay on at the Companies to advise their successors after they resigned on November 15, 2011. Defendants refused, and plaintiff stopped participating in the management of the Companies as of December 2, 2011.

¶ 23 Plaintiff claimed that, after his departure, the new directors of the Companies acted as "nominal 'rubber stamps' who effectively delegated decision-making to Baker." Plaintiff alleged that Baker operated as a *de facto* chief executive officer (CEO) of both of the Companies, supervising and controlling their business affairs, presiding at shareholder meetings, approving and signing the Companies' contracts, deciding whom to hire and fire, and dictating business strategies.

¶ 24 Plaintiff said that, in "mid-2012," Israel Tanon, Overland's "longtime collection manager," told Baker and Gioulos that "the quality of the Companies' underwriting of receivables was deteriorating." Plaintiff also alleged that, "throughout 2012 and 2013," Overland's chief financial officer emailed Baker reports showing that both Companies had experienced "declining performance."

¶ 25 Plaintiff alleged that, as shown by his K-1 tax forms, the Companies experienced a 40% loss in profit in 2012 and a 60% loss in profit in 2013. Plaintiff further alleged that "poor underwriting decisions" meant that the Companies would likely continue to experience losses in 2014 and 2015. Plaintiff attributed the loss to defendants' management of the Companies, as the Companies had reaped handsome profits during plaintiff's tenure, regardless of the economic climate.

¶ 26 Plaintiff alleged that, on October 31, 2013, Baker informed the shareholders that Gioulos would be fired. According to plaintiff, because Gioulos had been hired under a three-year contract, his termination "meant the Companies had to pay [Gioulos] a substantial severance." Baker also told the shareholders that the employees that Gioulos had hired would also be fired. Baker admitted that he made a mistake in hiring Gioulos and that he "should have watched the Companies more closely when Gioulos was President." Baker told the shareholders that the

Companies' "underwriting and inventory purchasing processes had suffered" and that the number of customer bankruptcies had risen, both of which hurt the Companies' profits.

¶ 27 Plaintiff said that Baker, along with Paul Streicher and other representatives of NMFF, held meetings to replace Gioulos in "late 2013." They met with Tanon, whom plaintiff described as "an extremely able, honest, hardworking, and invaluable executive with [14] years of experience at Overland." They also interviewed Danny Munoz, who had 20 years of experience of negotiating customer contracts at Car Credit. Baker extended Tanon and Munoz offers to run Overland and Car Credit, respectively. According to plaintiff, when Tanon noted that his offer "was below market rate," Baker rescinded his offer to Tanon and "made Munoz President of both Companies." Plaintiff alleged that Munoz lacked experience in running Overland.

¶ 28 Along with mismanaging the Companies, plaintiff also claimed that defendants engaged in self-dealing. Plaintiff alleged the Paul Streicher purchased 1989 Mercedes Benz from Car Credit for $6,100, even though its fair market value was between $15,000 and $20,000, and had Car Credit provide $3,000 to $4,000 worth of repairs at no cost. Gioulos told employees "to be silent on the matter since Streicher was in control." Also, Baker and another of NMFF's attorneys funneled the legal work for the Companies to their law firms and overbilled the Companies for their services. Specifically, plaintiff alleged that, in "early 2012," Baker billed the Companies for legal services he performed for the Streichers and NMFF in the probate proceedings, not for work done for the Companies. When Baker delivered the $56,000 bill to Tanon, Tanon "refused to sign a Company check to pay for it." Baker then "relieved Tanon of all check-signing duties."

¶ 29 Plaintiff claimed that Tanon resigned on December 24, 2013 as a result of Baker's rescission of the offer to run Overland, along with the fact that Baker had relieved Tanon of his

"check-signing duties" in 2012. Plaintiff claimed that these acts "cost[ ] the Companies a valuable employee."

¶ 30 Plaintiff also claimed that defendants deprived him of access to the Companies' books and records. On May 7, 2012, plaintiff requested access to the books and records through his attorney. Defendants did not respond until September 21, 2012, when Baker emailed plaintiff and told him that he could not view the books and records until he agreed to sign a non-competition agreement that would result in plaintiff forfeiting his shares in the Companies if he breached it. On March 12, 2014, plaintiff's attorney sent defendants a "formal demand" for access to the books and records. As of April 10, 2014, plaintiff had still not received "much of the material requested," but Baker did provide plaintiff with "financial statements, insurance policies, tax returns, W-2s for Paul Streicher, and Overland's daily statistical reports."

¶ 31 In Count II of his complaint, plaintiff alleged that defendants could not seek indemnification from the Companies for their expenses in defending against plaintiff's suit. Plaintiff noted that Car Credit's certificate of incorporation provided that it would indemnify any director or officer for expenses incurred in defense of any suit in which the director of officer is involved "by reason of his being or having been a director or officer" of one of the Companies. Similarly, Overland's by-laws provided that it would indemnify any "director, officer, employee, or agent" who incurred costs in defending a "suit by or in a right of the Corporation to procure judgment in its favor." Plaintiff alleged that none of the defendants were directors or officers of the Companies other than Paul Streicher, and that Paul was being sued "solely as a Controlling Shareholder," not in his capacity as a director of the Companies. Moreover, plaintiff argued that Overland's by-laws only permitted indemnification for acts made in good faith in the best interest of Overland, characteristics he would not attribute to defendants' acts.

¶ 32 Finally, in Count III, plaintiff alleged that the Settlement precluded the Streichers or NMFF from raising plaintiff's alleged misconduct in handling William's estate or managing the Companies as a defense to his shareholder-derivative suit. Plaintiff sought a declaration that such evidence would be barred.

¶ 33 Defendants each moved to dismiss the complaint pursuant to section 2-619(a)(6), alleging that the Settlement precluded plaintiff from bringing suit. On September 30, 2014, the trial court granted each of defendants' motions to dismiss. The court found that the Settlement barred plaintiff's "derivative action which relates to injury to the [C]ompanies." The court further found that all of defendants' alleged misconduct either occurred prior to the Settlement's effective date or arose out of the pre-Settlement misconduct. With respect to Counts II and III, the court found that those counts were "essentially mooted by the bar which requires dismissal." Plaintiff appeals.

¶ 34 II. ANALYSIS

¶ 35 A motion to dismiss under section 2-619 admits all well-pleaded facts in the complaint, as well as any reasonable inferences that can be drawn from those facts. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8. The motion should be granted only if the plaintiff can prove no set of facts that would support a cause of action. *Id.* We review the dismissal of a complaint pursuant to section 2-619 *de novo*. *Id.* We interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Id.*

¶ 36 Plaintiff contends that the trial court erred in finding that plaintiff released the claims he brought in his derivative suit in the Settlement. He also contends that the trial court erred in finding that counts II and III of the complaint were moot. We address each contention in turn.

¶ 37 A. Whether Plaintiff Released His Claims Against Defendants

¶ 38 Plaintiff first claims that the release he executed did not foreclose his right to pursue a derivative suit on the Companies' behalf. Rather, plaintiff contends, the Settlement was designed to resolve the outstanding probate matters, not the complaints plaintiff had regarding the management of the Companies.

¶ 39 This issue requires us to determine whether the provisions of the Settlement include plaintiff's release of his claims against defendants in this case. A release is an agreement to abandon an existing claim against another. *Goodman v. Hanson*, 408 Ill. App. 3d 285, 292 (2011). Because a release is a contract, we apply the well-settled rules of contract interpretation. *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447 (1991). Our primary goal is to give effect to the parties' intent in entering the contract. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). We look first to the language of the contract itself to determine the parties' intent. *Id.* Releases are strictly construed against the benefitting party and must spell out the parties' intent with "great particularity." (Internal quotation marks omitted.) *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1014 (2010). However, where a release "is clear and explicit, a court must enforce the agreement as written" and may not resort to extrinsic aids in interpreting it. *Rakowski v. Lucente*, 104 Ill. 2d 317, 323 (1984). We view the contract as a whole, reading all of the provisions together rather than looking at isolated clauses or provisions. *Thompson*, 241 Ill. 2d at 441.

¶ 40 The Settlement's plain language indicates that plaintiff released his claims against the Streichers and NMFF relating to "any act and/or failure to act properly while serving as a director, officer, employee, or agent of the Companies (or either of them), including without limitation *** breach of fiduciary duty, [or] so-called 'self-dealing.' " Count I alleges that the Streichers and NMFF breached their fiduciary duties and engaged in self-dealing while serving the Companies. The Settlement unambiguously bars plaintiff from bringing such claims.

¶ 41 Likewise, plaintiff released his claims against Baker relating to his management of the Companies. Along with releasing the Streichers and NMFF, plaintiff released any "Affiliates" of the Streichers or NMFF, and the definition of "Affiliates" expressly included attorneys. Baker was NMFF's attorney at the time he participated in the Companies' management. Thus, the Settlement applies to Baker to the same extent it applies to NMFF, and plaintiff's claims against Baker are barred.

¶ 42 Plaintiff also argues that he could not release his claims because the derivative suit he filed belonged to the Companies, not to him. Plaintiff claims that he could not release a right that the Companies possessed independent of him. A derivative suit is a device whereby shareholders can protect themselves against abuses by a corporation, its officers, and its directors. *Brown v. Tenney*, 125 Ill. 2d 348, 355 (1988). The injury asserted must be to the company, and if the suit is successful, the recovery is to the company. *Feen v. Ray*, 109 Ill. 2d 339, 345 (1985); *Metropolitan Sanitary District of Greater Chicago ex. rel O'Keeffe v. Ingram Corp.*, 85 Ill. 2d 458, 472 (1981).

¶ 43 While these general rules support the notion that plaintiff could not contract away the Companies' right to sue its directors or officers, plaintiff did not release that right. Rather, pursuant to the plain language of the Settlement, plaintiff released *his* right as a shareholder to pursue this derivative suit against defendants. The Companies could still sue their directors, but plaintiff relinquished his right to be the plaintiff-shareholder filing that suit.

¶ 44 If we did not interpret plaintiff's release in this way, then his release of all claims against defendants for their acts "while serving as a director, officer, employee, or agent of the Companies *** including *** breach of fiduciary duty" that "relate[e] in any way to any *** injury to *** the Companies" would be rendered meaningless. After all, a shareholder-derivative

suit is the only avenue by which plaintiff could seek redress for defendants' breach of fiduciary duty that causes injury to the Companies. See *Sterling Radio Stations, Inc. v. Weinstine*, 328 Ill. App. 3d 58, 62 (2002) ("[A] shareholder seeking relief for an injury to the corporation *** must bring his or her suit derivatively on behalf of the corporation."). If plaintiff did not surrender his right to pursue such a suit, then his promise not to sue defendants for their acts in service of the Companies, which caused injury to the Companies, would be empty words on a page. In interpreting the Settlement, we must try to avoid such a result. See *Thompson*, 241 Ill. 2d at 442 ("A court will not interpret a contract in a manner that would nullify or render provisions meaningless[.]").

¶ 45 Plaintiff says that his reading of the release would not render it hollow or illusory, because he did give up something—he gave up his right to sue for *direct* injuries, just not derivative ones. He is correct that a shareholder may, in some instances, file a direct action against defendants where the shareholder has "a direct, personal interest in a cause of action *** even if the corporation's rights are also implicated." *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 746 (2009). But that principle is beside the point; as we have just noted, if the injuries asserted are to the corporation—as here—the action is a derivative one, not a personal one. *Id*. (in determining whether shareholder may pursue direct versus derivative action, court will "focus on the nature of the alleged injury, *i.e.*, whether it is to the corporation or to the individual shareholder that injury has been done.") (internal quotation marks omitted); *Sterling Radio Stations, Inc.*, 328 Ill. App. 3d at 62 (shareholder seeking relief for injury to corporation must bring derivative action). Regardless of whether plaintiff released his direct claims, the relevant question before us is whether he released any derivative claims. Because he released

defendants from any acts that caused "injury to *** the Companies," he plainly released those derivative claims.

¶ 46 Plaintiff also claims that the Settlement did not bar his derivative suit because he lacked sufficient knowledge of his claims at the time he entered into the Settlement. Plaintiff notes that some of defendants' misconduct occurred after the Settlement was executed, and that defendants had refused to turn over his tax documents or the books and records of the Companies, which were necessary for him to determine how much defendants' misconduct had diminished the Companies' earnings.

¶ 47 A release, no matter how broad its terms, may not be construed to include claims "not within the contemplation of the parties." *Chubb v. Amax Coal Co., Inc.*, 125 Ill. App. 3d 682, 686 (1984). Where the language of a release specifically identifies the claim at issue, that language shows that the parties contemplated the existence of such a claim. See, *e.g.*, *Goodman*, 408 Ill. App. 3d at 297 (parties contemplated legal-malpractice claim relating to preparation of estate plan where release stated that plaintiff released claims related to the " 'obligations, duties and management or administration of the Estate and/or Trust.' "); *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 23 (2003) (parties contemplated claims of breach of fiduciary duty in operating partnership where release included specific language relating to such claims).

¶ 48 Here, plaintiff released all claims "known or unknown, discovered or undiscovered," based on any act that occurred, or fact that existed, on or before December 28, 2012. The complaint alleges that, long before he entered into this Settlement, plaintiff was being denied information and complained about it. That being the case, perhaps he should not have released claims "unknown" or "undiscovered." But he did, and it is not our place to re-write the release.

¶ 49 Moreover, the allegations of the complaint show that the vast majority of defendants' alleged misconduct occurred before plaintiff signed the Settlement. According to the complaint, the Streichers and NMFF "joined forces" against him in April 2011 and took power of the Companies when the stock was distributed in September 2011. Plaintiff and Larry were "forced out" of the Companies in November 2011. In late 2011, Baker began to run the Companies and installed Gioulos, who plaintiff claims was unqualified, as the new president of the Companies. By mid-2012, the Companies experienced a "declining performance." The self-dealing alleged by plaintiff all occurred in 2012. Plaintiff cannot seriously claim that these acts were not in his contemplation at the time he executed the Settlement on December 28, 2012.

¶ 50 While plaintiff alleged that defendants failed to provide him with the necessary tax documents and corporate books and records to assess the damage done to the Companies before he signed the Settlement, he did not allege that he was unaware of defendants' poor management until that time. To the contrary, plaintiff claims that he was integral to the Companies' success and that his replacements had no experience in running a "Buy Here Pay Here" used-car dealership. Even assuming that plaintiff did not know the full measure of the Companies' losses at that time, the possibility that defendants would mismanage the Companies should have been within plaintiff's contemplation. Had he desired to reserve his right to pursue a derivative suit against defendants, he should not have signed the Settlement, which included a provision plainly releasing such claims.

¶ 51 Plaintiff also contends that he raised claims based on misconduct that occurred after he executed the release, and that the release does not bar claims relating to that post-December 28, 2012 misconduct. The only acts that allegedly occurred after the effective date of the Settlement were: (1) Baker fired Gioulos on October 31, 2013, before his employment contract had expired;

(2) defendants failed to hire Tanon as the president of Overland, which led to Tanon resigning in December 2013; (3) plaintiff was denied access to the Companies' books and records in March, 2014. We will take each of these in turn.

¶ 52 But first, we emphasize that, in the Settlement, plaintiff released claims "arising out of or related to any act, omission, event, fact, and/or other thing which existed on or prior to the Effective Date" of the Settlement. With respect to the first alleged post-December 2012 act, the firing of Gioulos, plaintiff's problem with defendants in fact relates to something that occurred before December 28, 2012. Plaintiff does not allege that Baker should not have fired Gioulos, whom plaintiff claims was unqualified to run the Companies. Rather, plaintiff claims that Baker should not have *hired* Gioulos in the first place in 2011. The fact that the Companies had to make severance payments to Gioulos clearly "arose out of" Baker's allegedly poor decision to sign Gioulos to a three-year contract in 2011 and is thus barred by the release.

¶ 53 As to the second alleged post-December, 2012 act, we would likewise note that Tanon's resignation in 2013 arose out of two events, one of which occurred before plaintiff signed the release. Plaintiff alleged that Baker's animosity toward Tanon began in "early 2012"—which certainly must mean before December 28, 2012—when Baker gave Tanon a bill for services that Baker's law firm performed for the Companies, Tanon refused to sign the check, and Baker relieved Tanon of his authority to issue checks for the Companies. According to the complaint, relieving Tanon of his check-issuing duties "contributed to Tanon's later decision to leave," along with Baker's rescission of his offer to appoint Tanon as president of Overland in 2013. The two events relating to Tanon cannot be viewed in isolation, as, according to plaintiff, they equally contributed to Tanon's departure.

¶ 54 But even if we separated the two supposedly improper acts and found that the release did not bar the claim relating to Baker's offer to Tanon of a promotion to president in 2013, this claim would have been subject to dismissal in any event under the business-judgment rule. While this was not the trial court's basis for dismissal, we may affirm a dismissal on any basis in the record. *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 31.

¶ 55 The complaint alleges that Baker offered Tanon a promotion, Tanon declined it as offered, and Baker then hired someone else. Notably absent from the complaint, however, is any allegation that Baker failed to make an informed judgment in hiring Munoz over Tanon or that the decision was the product of any fraud, illegality, conflict of interest, or bad faith. The business judgment rule precludes second-guessing of a corporate director's or officer's business decisions, unless those decisions are the product of a failure to exercise due care or bad faith, fraud, illegality, or gross overreaching. *Stamp v. Touche Ross & Co.*, 263 Ill. App. 3d 1010, 1015-16 (1993); see also *Selcke v. Bove*, 258 Ill. App. 3d 932-935-36 (1994) (business-judgment rule applies to officers as well as directors). The mere fact that a director or officer has made an honest mistake in judgment is insufficient to overcome the business-judgment rule. *Stamp*, 263 Ill. App. 3d at 1015. It is plaintiff's burden to allege facts showing that the business-judgment rule does not apply. See, *e.g.*, *id.* at 1017 (affirming dismissal of complaint where shareholder failed to allege that directors "did not make informed judgments" or engaged in "fraud, illegality, conflict of interest or bad faith").

¶ 56 At most, plaintiff alleged that defendants should have hired Tanon to run Overland instead of Munoz. Plaintiff failed to allege that Baker, or any other defendant, ignored relevant information in rescinding Tanon's offer or rescinded the offer out of bad faith. Indeed, we are giving plaintiff every benefit of the doubt in even considering the offer as having been "revoked"

by Baker when, in fact, the complaint plainly states that Baker offered the promotion to Tanon and Tanon *rejected* it or, at the very least, requested a modification to that offer. Regardless, the mere fact that Baker offered the presidency of Overland to Tanon in the first place belies the notion that the "revocation" of the offer was a bad-faith attempt to oust Tanon from Overland, when in fact, Baker had been trying to *promote* him. Thus, even if plaintiff had not released his claim relating to the decision to hire Munoz rather than Tanon, the business-judgment rule would bar it.[1]

¶ 57 The third and final post-December, 2012 act of which plaintiff complains concerns the denial of books and records. Defendants argue that the alleged denial of books and records began before December 28, 2012, and thus plaintiff released any claim regarding that conduct. We do not agree. First, the complaint and exhibits attached thereto show that a new demand was made on the corporation for records in 2014. Second, we do not read the release as allowing defendants to deny plaintiff access to records, and certainly not in *perpetuity*. Here, a fresh demand was made in 2014, long after the date of the release, and that claim is not barred by reason of the release.

¶ 58 The problem with this final claim, however, is twofold. First, it is not really an independent "claim" at all. Rather, plaintiff simply cited the denial of his access to books and records as a reason why his request for damages was not more specific. Plaintiff did not allege that he was denied access to the books and records as a separate claim for relief in his complaint,

[1] We acknowledge that Baker was not formally a director or officer of either of the Companies. But, in order to bring his derivative suit against Baker, plaintiff alleged that Baker acted as a *de facto* officer of the Companies. For purposes of our analysis of the business-judgment rule, we assume, without deciding, that plaintiff could establish that Baker was a *de facto* corporate officer.

nor did he count it among the examples of defendants' breach of their fiduciary duties. Nor could he, as plaintiff's shareholder-derivative suit would be an inappropriate avenue to sue defendants for denying him access to the books and records. See 805 ILCS 5/7.75(c) (West 2012) ("If the corporation refuses examination [of books and records], the *shareholder* may file suit *** to compel *** such examination as may be proper." (Emphasis added.)); 8 Del. Code § 220(c) (2012) ("If the corporation *** refuses to permit examination an inspection [of the books and records], the *stockholder* may apply to the Court of Chancery for an order to compel such inspection." (Emphasis added.)). As we noted above, plaintiff has steadfastly maintained that this suit is a derivative suit brought on behalf of the corporation *alone*. Thus, the inclusion of this allegation does not save plaintiff's shareholder-derivative complaint from dismissal.

¶ 59 Plaintiff also argues that extrinsic evidence of the Settlement's negotiations supports the notion that the release did not include plaintiff's right to pursue a derivative suit. As the language of plaintiff's release is clear and unambiguous, however, we may not resort to extrinsic evidence of the parties' intent. *Rakowski*, 104 Ill. 2d at 323. We affirm the trial court's dismissal of Count I.

¶ 60 B. Whether Counts II and III of Plaintiff's Complaint are Moot

¶ 61 Plaintiff also contends that the trial court erred in dismissing Counts II and III as moot once it determined that the Settlement barred Count I. Count II of plaintiff's complaint requested a declaration that defendants could not seek indemnification from the Companies for their expenses in defending the suit. Count III sought a declaration that, pursuant to the Settlement, defendants could not introduce evidence regarding plaintiff's performance as the executor of William's estate or of his performance as the president of the Companies. According to plaintiff, the indemnification issue was not moot because defendants could still try to recover their

expenses in defending the suit, and the evidentiary issue was not moot because, in deciding that the Settlement barred his substantive claim, the trial court was required to consider the evidence that Count III attempted to bar.

¶ 62 An issue is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief. *Dixon v. Chicago and North Western Transportation Co.*, 151 Ill. 2d 108, 116 (1992). Count III is plainly moot because, once plaintiff's substantive claim was dismissed, whether defendants could introduce evidence in defending against that claim was no longer an issue. Our dismissal of Count I did not depend in any way on any "defenses" defendants raised other than the plain language of the release.

¶ 63 Likewise, Count II is moot as to defendants' right to seek indemnity for any damages they would have been required to pay as a result of plaintiff's suit because, once plaintiff's suit was dismissed, there was no possibility that defendants would have incurred any liability as a result of the suit's outcome. As we have affirmed that dismissal, Count II thus remains moot as to the right of defendants to seek indemnification for any *damages* resulting from the lawsuit. To that extent, the dismissal of Count II is affirmed as moot.[2]

¶ 64 But to the extent that Count II seeks a declaration that defendants could not seek indemnification for the legal fees and costs they incurred in filing their motions to dismiss the complaint (and now in defending this appeal), Count II is not moot, and to that extent it should not have been dismissed. Even if defendants would not have been required to pay any damages as a result of plaintiff's suit, they certainly incurred attorney fees. Car Credit's certificate of

[2] It is not entirely clear that Count II seeks a declaration concerning indemnification for "damages," especially considering the prayer for relief in Count II. But the paragraph of Car Credit's By-Laws it cites refers not only to indemnification for costs and expenses but also for "liabilities," which we take to mean damages.

incorporation and Overland's by-laws both had provisions by which defendants could arguably recover their attorney's fees and costs.

¶ 65 Whether defendants could do so remains an open question on which the trial court might be able to grant meaningful relief. We say "might" because the status of this matter is not clear to us. We do not know if any of the defendants (other than Baker, who tells us he has not) have attempted to obtain indemnification from the Companies, nor do we know if any of them will do so in the future. We decline to take up this issue for the first time on appeal. We express no opinion on the ripeness of this question or on the merits; we hold only that Count II is not moot insofar as it concerns potential indemnification for attorney's fees and costs and remand to the trial court to sort through the remaining issues. See *Buchaklian v. Lake County Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195, 205 (2000) (remanding for decision on merits where trial court erroneously found issue moot); *In re Marriage of Robinson*, 184 Ill. App. 3d 235, 240 (1989) (remand required where trial court did not reach merits of issue because "the trial court must be given a chance to determine it" first).

¶ 66 We also decline plaintiff's request that we instruct the trial court to expedite this case on remand. Plaintiff does not allege that the trial court erred in denying his motion to expedite the case on May 14, 2014, nor does he appeal from any such order—indeed, the trial court never ruled on any such motion. Rather, plaintiff asks this court to order the trial court to expedite this matter. But it is well established that trial courts possess the "inherent power" to manage their own dockets and set their own calendars. *National Underground Construction Co. v. E.A. Cox Co.*, 273 Ill. App. 3d 830, 836 (1995). We will not encroach on the trial court's authority to set a schedule for this case on remand.

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated above, we affirm the trial court's dismissal of Count I because plaintiff released the same claims he attempted to bring in his derivative complaint, and because those few issues that involve post-release conduct were properly dismissed on other grounds. And we affirm the trial court's dismissal of Count III of plaintiff's complaint. We affirm the dismissal of Count II insofar as it concerns indemnification for any damages sought by defendants. We vacate the dismissal of Count II insofar as it concerns potential indemnification for attorneys' fees and costs.

¶ 69 Affirmed in part, vacated in part, and remanded.