

To Be argued by: Robert E. Ganz, Esq
Time Requested: 15 minutes

STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION
THIRD DEPARTMENT

In the matter of the Application for Judicial Dissolution of
BEVERWYCK ABSTRACT, LLC by Douglas Engels and
Peter C. Staniels, Members, as

Petitioners-Appellants,

- vs. -

GATEWAY TITLE AGENCY, LLC,

Respondent- Respondent

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities ii

Preliminary Statement 1

Factual Statement of the Case 1

Questions Presented 6

ARGUMENT

I
FIDUCIARY DUTIES END UPON NOTICE OF INTENTION
TO TERMINATE BUSINESS RELATION AND THE END OF SUCH
DUTIES IS THE PROPER DATE FOR A JUDICIAL ACCOUNTING 7

II
MS. WADE’S FEBRUARY 17, 2003 E-MAIL ALONE WAS SUFFICIENT
NOTICE TO TERMINATE THE PARTIES’ BUSINESS RELATIONSHIP 15

Conclusion 18

TABLE OF AUTHORITIES

<u>Bayer v. Bayer</u> , 215 A.D. 454 [1926]	8
<u>Bitetto v. F. Chau & Assoc., LLP</u> , 10 Misc. 3d 595 [2005]	10
<u>Blue Chip Emerald, LLC v. Allied Partners</u> , 299 A.D.2d 278 [2002]	7
<u>Burger, Kurzman, Kaplan & Stuchin v. Kurzman</u> , 139 A.D.2d 422 [1988]	8
<u>Chimart Associates v. Paul</u> , 66 NY 2d 570 [1986]	14
<u>Conolly v. Thuillez</u> , 26 AD3d 720 (3 rd Dept 2006)	11
<u>Dunay v. Ladenburg, Thalmann & Co.</u> , 170 A.D.2d 335	8
<u>Estate of Quirk v. Commissioner</u> , 928 F.2d 751 (1991)	11
<u>G&B Photography v. Greenberg</u> , 209 A.D.2d 579 [1994]	13
<u>Gardiner Int'l, Inc. v. J.W. Townsend & Assocs.</u> , 13 A.D.3d 246 [2004]	8
<u>In Re: Extreme Wireless, LLC</u> , 299 A.D. 2d 549 [2002]	12
<u>In Re Sheldon Silverberg v. Schwartz</u> , 81 A.D.2d 640 [1981]	9
<u>Madison Hudson Associates, LLC v. Neumann</u> , 8 Misc.3d 10251, 2005 N.Y. Misc. LEXIS 1698 [NY County Sup. Ct. 2005]	8
<u>Mallad Const. Corp. v. County Federal Savings and Loan Assoc.</u> , 32 N.Y. 2d 285 [1973]	14
<u>Morris v. Crawford</u> (304 A.D.2d 1018 [3 rd Dept. 2003]	8
<u>Nuzzi v. Warshaw Const. Corp.</u> , 12 N.Y. 2d 16 [1962]	14
<u>Reiss v. Financial Performance Corp.</u> , 279 A.D.2d 13 [2000]	13
<u>Ronnen v. Ajax Elec. Motor Corp.</u> , 88 N.Y.2d 582 [1996]	13
<u>Rust v. Turgeon</u> , 295 A.D.2d 962 [2002]	17
<u>Salmon v. Feldstein</u> , 20 AD3d 469 [2005]	7

Shubert v. Lawrence, 27 A.D.2d 292 [1967] 17

Weber v. King, 110 F. Supp. 2d 124, 131-132 [EDNY 2000] 7

Wynne v. Gruber (237 A.D.2d 284 [1997]) 8

Zulawski v. Taylor, 11 Misc. 3d 1058A, 2005 N.Y. Misc.
LEXIS 3096 [Erie County Sup. Ct 2004] 7

PRELIMINARY STATEMENT

This Brief is submitted by Appellants on an important issue in the developing law of limited liability company law: when do the fiduciary duties of members owed to each other end in the context of a disintegrating business arrangement. Appellants, the remaining members operating the business, assert, in the context of preparation for a trial on the “accounting” for profits during the winding-up period of the limited liability company’s life, that the court should utilize the actual end date of the jointly run activities of the enterprise. Because Respondent and the lower court focused on the technical date of formal dissolution, this appeal requires appellate development of fiduciary duty law in the limited liability company context.

FACTUAL STATEMENT OF THE CASE

The below statement of the facts underlying this dispute is taken primarily from the factual recitation set forth in the lower court’s Decision and Order (R. 3-10)¹. All references are to such findings of fact which were authorized to be made pursuant to Stipulation (R. 344) unless otherwise noted.

Douglas Engels and Peter Staniels own a real estate brokerage firm (“Weichert Northeast”) as well as a mortgage brokerage firm (“Alumni Funding”). Seeking to expand their real estate related interests, Engels and Staniels teamed up with Attorney Peter Herkenham to form Beverwyck Abstract, LLC (hereinafter “Beverwyck”) as a means of benefitting from title insurance work ancillary to their residential real estate transactions. When Herkenham left the company to join a law

¹R. - All references are to Record on Appeal. The Record numeration is on the bottom center of each page and listed as e.g. “147R” but cited here as “R. 147”)

firm, he signed over his interest in Beverwyck to Engels and Staniels. Since these two lacked the necessary expertise to run a title company on their own, they sought out a professional to replace Herkenham.

Engels and Staniels approached Attorney Elizabeth Wade, who was a principal of Gateway Title Agency, LLC (hereinafter “Gateway”). It was determined that in order to properly share the net economic result of the title insurance business, Gateway would have to become a member of Beverwyck and then the three members could split profits. Gateway was thus made a member of Beverwyck without the need of any investment capital. Beverwyck was to act as a “single source entity” whose clients would be limited to the mortgage brokerage customers of Alumni Funding who chose to use Beverwyck to obtain title insurance. Engels and Staniels urged employees of Alumni Funding to encourage its customers who applied for purchase money mortgages or were refinancing their mortgages to use Beverwyck as their title agency. Gateway would do the title search work, purchase title insurance from the underwriter, and deposit the net fees into a Beverwyck account. Periodically, the profits of Beverwyck would be distributed 50% to Engels and Staniels and 50% to Gateway.

The arrangement worked for nearly two years. It became apparent that the flood of mortgage refinancing transactions that Engels and Staniels steered to Beverwyck exceeded Gateway’s capacity and Gateway was taking far longer than the informal goal of two weeks to perform title work on many transactions. As a result of these delays in processing title work, as well as friction that had developed between Wade and the CEO of Alumni Funding, the working relationship between the parties broke down. Because the CEO of Alumni Funding lost confidence in Wade, he no longer assigned bank closing work to Wade and despite her complaints of this to Engels and Staniels, they

refused to require Alumni Funding to utilize Attorney Wade for closings. Despite the fact that the entire working relationship of Beverwyck involved Gateway absorbing the cost of title searches in exchange for 50% of the net profits (R. 121, ¶16-17), Attorney Wade informed Engels and Staniels that Gateway would begin charging for the cost of title searches prior to splitting profits on a 50-50 basis.

On February 17, 2003, Engels, Staniels and Wade met to discuss their options. Thereafter, she wrote an e-mail to Engels and Staniels which included the following statements:

- “Obviously, it is no surprise to me that the events of the past several months have led to the decision to terminate our business relationship.”
- “All of that said [responding to various complaints about the relationship], we have only now to decide how to handle the details of wrapping up our business together. As agreed this morning, whatever is in the pipeline as a Beverwyck order will stay here as a Beverwyck and we will continue to handle any Beverwyck orders which come in through the end of the month.”
- “Finally, rest assured that our decision to go our separate ways will not in any way affect the high level of service our office has always strived to provide in handling the title orders and the multitude of issues arising therefrom.... I do not want any of the loan officers to feel as if their order is getting less attention because of our decision today.”

(R. 70-71).

Engels and Staniels rehired Tom Herkenham to continue the title work necessary for Beverwyck to operate and housed the operation within the Alumni Funding office. Believing the parties had resolved to terminate Gateway’s ownership in Beverwyck, Engels sent to Gateway forms to assign back Gateway’s interest in the company to Engels and Staniels on March 17, 2003 (R. 73-75). The forms were not signed by Gateway and, on or about April 1, 2003, Beverwyck began operating without any involvement of Gateway whatsoever through the services of Herkenham.

The Appellants, believing that it was necessary to, in the absence of a consensual resolution, judicially dissolve the LLC for the purpose of winding up its affairs, commenced a dissolution proceeding by Notice of Petition and Petition dated December 30, 2003 (R. 116-127). Issue was joined by Gateway's Answer denying Petitioner's right to have the LLC dissolved (R. 129-132). After discovery, a non-jury trial was held before Justice Spargo on March 23 and 28, 2005 (R. 134-343). At the close of the evidence, the Court determined that the LLC was dissolved (R. 25-26; 329-330) but reserved on other issues. Justice Spargo required that the parties prepare final accountings for the period of their administration and financial management of Beverwyck Abstract, LLC when they controlled the financial operations of the entity (R. 44-45).² The parties did file narrative accountant reports (R. 47-54-Appellants' and R. 56-64-Gateway's). Because the two accountants' reports differed by \$155,468.46, primarily due to the different periods for which the parties believed fiduciary duties existed one to the other, the motion resulting in the Order appealed from was brought on to help the Court determine in advance of the trial on such accounting issues what period of time the parties were required to share profits. Justice Platkin being assigned to the case pursuant to CPLR 9002 requested and received a stipulation from the parties (R. 344) permitting him to utilize the stenographic record of the trial proceedings before Judge Spargo for factual findings without the need for further testimony to determine the end date for each party's accounting responsibilities.

² The Order was in error in seeking Engels and Staniels to account for the period April 1, 2005 to date. That period should have been April 1, 2003 to date. Gateway's accounting was to be from September 1, 2001 to date (or more properly to March 31, 2003).

The lower court's Decision dated July 11, 2007 established the date of May 26, 2005 (the date of Judge Spargo's Order of Dissolution) to be the proper date for accounting purposes. This appeal followed by Appellants asserting that the proper date should have been April 1, 2003.

QUESTIONS PRESENTED

In a limited liability company do fiduciary duties continue to exist after the parties have mutually expressed their intention to cease doing business together as a joint enterprise?

The lower court held that if the company's operating agreement provided for a method of dissolution then fiduciary duties would continue until such time as the limited liability company was dissolved according to the terms of the operating agreement.

Is a e-mail sent by one member of a limited liability company to the other members indicating agreement with a joint decision that the members of the business enterprise will cease working together a sufficient basis to establish the termination of the business relationship so as to end the parties fiduciary duties one to the other?

The lower court held that such a communication was not sufficient because it was not one of the methods specified in the operating agreement to dissolve the limited liability company.

I

**FIDUCIARY DUTIES END UPON NOTICE OF INTENTION
TO TERMINATE BUSINESS RELATIONS
AND THE END OF SUCH DUTIES IS THE DATE WHICH THE COURT SHOULD USE
IN WINDING UP THE LLC AFFAIRS**

Gateway's accountant's narrative report seeks \$158,413.16 of adjustments (R. 56-64) and presupposes that Petitioners' fiduciary duty owed to Gateway extended in time past February 2003 when the parties determined to end their business relationship. Appellants' accountant, assuming the fiduciary duty ended no later than March 31, 2003³ sees an adjustment of only \$2,944.70 due to Gateway. (R. 47-54) The indisputable facts are that on February 17, 2003 the principals of Beverwyck Abstract, LLC held a meeting and decided to terminate the business relationship (R. 70). A month later, Respondent transmitted documents to Petitioners to sign effectuating the parties' decision (R. 73-75). The fact that Petitioners did not agree to the terms of the disaffiliation and it took the institution of a Court proceeding and a trial to effect the dissolution does not mean that Petitioners' fiduciary duties were extended until the Court formally dissolved the parties business relationship.

An LLC is a relatively new business organization concept sharing similar characteristics with partnerships and closely held corporations (see Weber v. King, 110 F. Supp. 2d 124, 131-132 [EDNY 2000]). Namely, partners in joint ventures, however constituted, owe one another a fiduciary duty of loyalty (see Zulawski v. Taylor, 11 Misc. 3d 1058A, 2005 N.Y. Misc. LEXIS 3096 [Erie County Sup. Ct 2004]). This fiduciary duty has clearly been held to apply between members of an LLC (see Salmon v. Feldstein, 20 AD3d 469 [2005]; Blue Chip Emerald, LLC v. Allied

³ The end of the fiscal quarter after the February 17, 2003 meeting and email ending the jointly run enterprise.

Partners, 299 A.D.2d 278 [2002]; Madison Hudson Associates, LLC v. Neumann, 8 Misc.3d 10251, 2005 N.Y. Misc. LEXIS 1698 [NY County Sup. Ct. 2005]).

The lower court's decision, while providing an acknowledgment that LLCs share traits with both corporations and partnerships and that the "law surrounding the operation and dissolution of LLCs may be newly evolving" eschews any analysis of when and how partnership law principles should be applied for a formalistic statement that the parties' written agreement controls (R. 8). Despite the lower court's statement in this regard that "it is clear that, as with partnerships, the members [of a LLC] have great latitude to chart their own course with their operating agreements." (emphasis supplied) (R. 8), it only cites two cases to support its holding. Neither involved LLC "operating" agreements. The two cited cases both pre-date the LLC form of business in this state and did not therefore take into account the acknowledged "developing law" on the issue presented here. Neither of the cited cases dealt with the issue of how the partnership agreement provisions interacted with the common law fiduciary duty owed by the partners to each other.

Because both an LLC and a partnership are entities whose members are governed by a fiduciary duty, Courts apply partnership law to evaluate an LLC member's rights, duties and interests in the LLC (see Salmon v. Feldstein, *supra*; Blue Chip Emerald, LLC v. Allied Partners, *supra*; Madison Hudson Associates, LLC v. Neumann, *supra*). Thus, it is respectfully submitted that, in order for this Court to evaluate the differing positions taken by the parties with respect to Respondent's economic interest in the LLC, this Court should apply the well-settled law controlling partnerships.

Under partnership law, a partnership is deemed to be dissolved as soon as one of the partners no longer associates with the purposes of the partnership (see Partnership Law § 60; Gardiner Int'l,

Inc. v. J.W. Townsend & Assocs., 13 A.D.3d 246 [2004]). Often this occurs when one or more partners declares their intent to withdraw from the partnership and, therefore, no longer participate in any capacity in the activities of the partnership. Once a partner ceases to participate in the activities of the partnership, the remaining partners may carry on the business of the partnership (see Burger, Kurzman, Kaplan & Stuchin v. Kurzman, 139 A.D.2d 422 [1988]). However, once a partner disassociates with the partnership, the remaining partners no longer owe the disassociating partner a fiduciary duty (see Morris v. Crawford (304 A.D.2d 1018 [3rd Dept. 2003]; Wynne v. Gruber (237 A.D.2d 284 [1997]⁴; Dunay v. Ladenburg, Thalmann & Co., 170 A.D.2d 335; Bayer v. Bayer, 215 A.D. 454 [1926]).

In Morris, the Court held that once one of the partners made clear his intention to terminate the jointly run operation, the fiduciary duty of partners one to another has ended. In Wynne, the Court held that:

“Since the fiduciary relationship between the former partners ended when Gruber and Boffa notified the plaintiff that they were dissolving Ridge Associates [citations omitted], the plaintiff’s claim that his former partners solicited Ridge Associates’ patients during the winding up process is insufficient to establish a cause of action for the imposition of a constructive trust upon the assets of [defendants’ new company].” 237 A.D.2d at 284-285.

In Wynne, such notification occurred prior to the commencement of the action for judicial dissolution, and it was that earlier informal notification date which signaled the end of the fiduciary duties between the partners (see also In Re Sheldon Silverberg v. Schwartz, 81 A.D.2d 640 [1981]

⁴ It should be noted that the case relied upon by the lower court Silverman v. Caplin, 150 A.D. 2d 673 (1989) for the proposition that the parties’ written agreements controlled was cited by Wynne (237 A.D. 2d at 284) and clearly not found by the Court to preclude superimposing on such written agreement common law concepts to determine equitable questions inherent in an accounting proceeding.

[“. . . the fiduciary relations between partners terminates upon notice of dissolution even though the partnership affairs have not been wound up”].

This principle has recently been applied by a lower Court in the LLC context. In Madison Hudson Associates, LLC v. Neumann, *supra*, investors formed several LLCs to develop a hotel property in New York City and, thereafter, there were a series of a written agreements and not surprisingly disagreements and actions taken in the individual interests of different members of the LLC. The Court ruled that:

“The Neumann Group’s numerous expressions of its desire to end its participation in the project, coupled with its actions of exercising its option to market and sell the property amounts to a withdrawal by a joint venturer, such that the joint venture was terminated. A joint venture cannot exist where one party makes evident its intent to no longer be associated with the other joint venturer.” 2005 NY Misc. LEXIS 1698 at 26.

and then it concluded that:

“The fiduciary duties of co-venturers subsists only while the association continues however [citation omitted]. Accordingly, while the Neumann Group had a duty not to exclude plaintiffs from business opportunities while associated with the joint venturers [citation omitted], this duty necessarily ceased with the termination of the joint venturers by the Neumann Group’s withdrawal therefrom.” 2005 NY Misc. LEXIS 1698 at 33.

Similarly, for economic adjustment purposes in a business entity in which members owe a fiduciary duty to one another, the withdrawing member is not entitled to receive any share of the profits of the partnership generated subsequent to the date at which the partner withdrew from the partnership (see Dunay v. Ladenburg, Thalmann & Co., *supra*; Burger, Kurzman, Kaplan & Stuchin v. Kurzman, *supra*; Bitetto v. F. Chau & Assoc., LLP, 10 Misc. 3d 595 [2005]).

Gateway, therefore, is not entitled to share in the profits retained by Appellants for new business commenced subsequent to the date at which the parties terminated their business

relationship. If the parties were free as of February 17, 2003, to act in their own interests because their fiduciary duty to each other was terminated, the only outstanding matters will be to adjust the cash on hand and the fees subsequently received for matters which Ms. Wade described as “in the pipeline” as of that time (February, 2003) and to value the “hard assets” (desk, chairs, computer, etc.) and then to determine the allocation of such value between the respective members of the LLC.

Case law strongly supports such a view. In Conolly v. Thuillez, 26 AD3d 720 (3rd Dept 2006) this court denied withdrawing partner’s claim that he was entitled to share in a multimillion dollar contingency fee award because the lawsuit had not yet commenced as of the date his actual withdrawal from participation in the law firm caused dissolution. The Court in Bitetto v. F. Chau & Assoc, supra rejected the assertion of the right to an accounting adjustment for transactions made by one of the partners or to value the withdrawing of Petitioner’s interest on a “going concern” basis, after a clear indication that the partners had ceased to be associated in the carrying on of the business even though the remaining partner had not changed the entity’s name, ceased operations, or filed any certificates with the Secretary of State. Further in Burger, Kurzman, Kaplan & Stuchin v. Kurzman, supra the court held that where a partnership dissolved due to the death of one of the partners, the remaining partners decision to continue to operate the business of the former partnership did not revive the dissolved entity or entitle the deceased partner’s estate to share in net revenues thereafter. Finally in Estate of Quirk v. Commissioner, 928 F.2d 751 (1991) the court held that partner’s withdrawal dissolved the partnership at that point in time and, therefore, the partner no longer had the right to “share in the gains and losses of any continuing entity.”

Gateway argued in the lower court that fiduciary duties continue until May 26, 2005 (the day of the dissolution issued by Judge Spargo) because §9.01 of the Operating Agreement requires that

all the events of dissolution described in §9.01 must exist before the business terminates rather than any one of them serving such a basis. The lower court did not explicitly reach this issue in its Decision & Order but implicitly disagreed by stating that the “one and only occurrence that marked the dissolution of Beverwyck has Justice Spargo’s Oder of Dissolution issued in May of 2005.

(R.9).

Appellants, on the other hand, contend that since 9.01(d) of the Amended Operating Agreement permits dissolution to be effectuated by the vote of the majority in interest of each class of members and because Staniels and Engels held 51% of both classes, Gateway could not prevent a dissolution based on the Staniels & Engels view that the internal discord with the LLC made its contention no longer reasonably practicable under Limited Liability Company Law §702. This would be a permissible basis of awarding such dissolution relief (see In Re: Extreme Wireless, LLC, 299 A.D. 2d 549 [2002]). The issue only comes into play on this appeal if, after rejecting Judge Platkin’s announced rationale, the Court at Gateway’s urging, looks at other alternative bases to uphold the actual result mandated by the lower court (i.e. the use of the May 26, 2005 date for accounting purposes).

It is respectfully submitted that the word “and” at the end of sub-division(b) of §9.01 is clearly a typographical error and that the only logical reading of the section recognizes that the word “or” was intended. Gateway would have this Court adopt a completely illogical construction in construing §9.01 to require all listed events to occur before dissolution could happen. This reading can not stand for the following reasons.

First, the introductory phrase in the relevant clause in §9.01 reads, “the Company shall be dissolved **upon the first to occur of the following:...**”(emphasis applied). If all three events must

occur before the company is dissolved then how can dissolution occur upon the **first** to occur? This illogical interpretation asserted by Respondent directly conflicts the remaining provisions in the Agreement – which can otherwise be reasonably reconciled by substituting the word “or” for “and” – and, therefore, Respondent’s interpretation must be rejected (see G&B Photography v. Greenberg, 209 A.D.2d 579 [1994]).

Second, if a Judicial Dissolution decree is required to dissolve the LLC, then the other two listed events are rendered meaningless and become mere surplusage within that section. Principles of contractual interpretation require such an interpretation to be avoided. (see NY Jur 2d,-Contracts § 252; Ronnen v. Ajax Elec. Motor Corp., 88 N.Y.2d 582 [1996]). In other words, why bother with a “vote or written consent of a majority in interest...” if, at the end of the day, a member must petition the Court and go through the process of obtaining a certificate judicially dissolving the entity. Gateway’s proposed construction would preclude simply filing a consensual Certificate of Dissolution even if all parties signed said document (let alone if owners of only 51% of the LLC ownership signed the document as permitted by the Operating Agreement), something that is clearly not contemplated by the Limited Liability Company Law and is contra-indicated by the very language contained in the rest of §9.01 of the Operating Agreement. A “court is not required to disregard common sense and slavishly bow to the written word where to do so would plainly ignore the true intentions of the parties in the making of a contract” (Reiss v. Financial Performance Corp., 279 A.D.2d 13 [2000]).

In any event, without conceding that the LLC was not formally dissolved until the May 26, 2005 Dissolution Order was entered, it is submitted that, based on the fundamental similarities between an LLC and partnerships discussed above, for purposes of determining when Gateway’s

rights to an economic accounting of the LLC's profits ended, the date of formal dissolution is irrelevant and the appropriate date for this Court to utilize is the same date as courts utilize in accounting for partnership assets – the date at which one or more of the members ceased participating in business affairs of the LLC (see Madison Hudson Associates, LLC v. Neumann, supra). While it is true that the trial Court in the original dissolution trial did not fix a date upon hearing the evidence presented as to when the fiduciary duties between the members of this LLC terminated, it is respectfully submitted that lower court can and should do so, as a matter of law, in the context of this motion. It has done so, although the date selected Appellants contend is erroneous as a matter of law. Indeed, the law clearly requires the Court to construe the meaning of writings of the parties, as a matter of law, if there is no reasonable dispute as to the facts (see Chimart Associates v. Paul, 66 NY 2d 570 [1986]; Nuzzi v. Warshaw Const. Corp., 12 N.Y. 2d 16 [1962]; Mallad Const. Corp. v. County Federal Savings and Loan Assoc., 32 N.Y. 2d 285 [1973]).

Thus, based on the foregoing, it is submitted that this Court should interpret Ms. Wade's email of February 17, 2005 (R. 70) and the parties' testimony as reflected in the Record and set forth in the Ganz affidavit at ¶ 15,(R. 17-18) as the date upon which the parties ended their fiduciary duties one to another and dissolved their economic relationship. Gateway was, therefore, no longer entitled to receive any share of the profits of the LLC generated subsequent to that date. Whatever outstanding economic matters which existed at the time Gateway ceased doing business with the LLC can then be properly resolved in the context of this existing Dissolution action.

II

MS. WADE'S FEBRUARY 17, 2003 E-MAIL ALONE WAS SUFFICIENT NOTICE TO TERMINATE THE PARTIES' BUSINESS RELATIONSHIP

Gateway argued in the lower court that neither it, nor Appellants, attempted to withdraw from the LLC in accordance with the Operating Agreement and, as such, there is no basis to create a dissolution date distinct from that set in the Court's order (R. 41-42). According to Partnership Law § 60 and recent case law applying § 60,⁵ however, a partnership is dissolved as soon as one of the partners *no longer associates with the purposes of the partnership* (Gardiner Int'l, Inc. v. J.W. Townsend & Assocs., 13 A.D.3d 246 [2004]). Here, Ms. Wade's February 17, 2003 (R. 70-71) email is of critical import in this respect and clearly expresses her intent that Gateway's business relationship with Beverwyck be terminated as of that date. While Ms. Wade begins the email by expressing her displeasure at certain comments made by Petitioners during the meeting earlier that day, she then turns the focus to the future relationship between the parties by stating:

“...it is no surprise to me that the events of the past several months have lead **to the decision to terminate our business relationship.**” (1st paragraph)

“...we have only now to decide how to handle the details of **wrapping up our business together.**” (6th paragraph)

“Finally, rest assured that **our decision to go our separate ways** will not in any way affect the high level of service our office has always strived to provide...” (7th paragraph)

(R. 70-71) (emphasis supplied)

It is submitted that there would be no reason for the parties to be addressing the winding up of Gateway's interest in the business had the parties not agreed at the meeting earlier that day that

⁵ It should be noted that Gateway did not contest in the lower court that partnership law should apply to evaluate an LLC member's rights, duties and interests in the LLC and, in fact, Gateway utilized partnership law principles for the majority of its argument.

Gateway would be withdrawing from Beverwyck and would no longer continue to be associated with the business for economic purposes.

The email unequivocally manifested Gateway's intent to disassociate from Petitioners in the carrying on of the business and, regardless of whether it technically complied with the terms required for resignation in § 8.07 of the Amended Operating Agreement (R. 104), pursuant to the well-settled principles of partnership law (Morris v. Crawford (304 A.D.2d 1018 [3rd Dept. 2003]; Wynne v. Gruber (237 A.D.2d 284 [1997]; Dunay v. Ladenburg, Thalmann & Co., 170 A.D.2d 335; Bayer v. Bayer, 215 A.D. 454 [1926]), it ended Gateway's right to collect any profits earned on business performed after the February 17, 2003 date, as it had no part in generating any of those profits. Appellants' CPA adjustments provides Gateway an additional period to share profits due to the transitional activities, plus it provides adjustments for subsequent periods arising from each side's handling of the assets rightfully belonging to the enterprise. (R. 47-54).

Gateway raised this argument of petitioner's alleged failure to comply with §8.07 of the Amended Operating Agreement for the first time in response to the motion, having failed to raise it as an affirmative defense of "documentary evidence" in its Answer to the dissolution petition (R. 129-132). This should result in a finding that Respondent has waived any such defense to relief sought by Petitioners. See CPLR 3211(e). The lower court's decision cites no **case law whatsoever** to support its decision that would allow a party who ceases to associate with the purposes of the partnership to recover profits earned subsequent to their disassociation as long as they did not formally withdraw in strict compliance with the terms of the partnership agreement or a decree of judicial dissolution is made. This lack of case law support stands in contrast with Petitioners' showing justifying its position that Gateway is not entitled to collect on profits generated from the

business after March 31, 2003. (see Part I, p. 10, supra, citing cases in which such sharing of the economic benefits of the continuing business was denied after the date the court determined the particular event causing withdrawal/termination of fiduciary duty had occurred).

Furthermore, a request for judicial accounting is an *equitable* action (see Rust v. Turgeon, 295 A.D.2d 962 [2002]), and in certain instances, a court will decide matters relating to the accounting for profits on equitable principles (see Shubert v. Lawrence, 27 A.D.2d 292 [1967]). Moreover, a court is surely not, in all cases, required to “slavishly bow to the written word” of an agreement and should be allowed, in a claim invoking its equitable powers, to use its common sense in order to do justice to the parties true intentions, even if those intentions were not manifested through strict compliance with the terms of their agreement (see generally, Reiss v. Financial Performance Corp., 279 A.D.2d 13 [2000]).

In this case, even assuming a withdrawal or resignation by Gateway could only be performed by strictly complying with the terms of § 8.07, it is respectfully submitted that, in the present circumstances where the evidence demonstrates that the parties did intend to cease doing business together, and that Gateway thereafter was not involved in any degree with generating and servicing new business, equitable principles of fairness should require this Court to terminate Gateway’s interest in the business at the time the parties elected to go their separate ways.

CONCLUSION

By reason of the foregoing and Appellants' Motion that the proper date upon which all economic adjustments should be made in the winding up of the affairs of Beverwyck Abstract, LLC, is March 31, 2003 should have been granted, Judge Platkin's Order and Decision of July 11, 2007 should be reversed and Appellants be granted such other and further relief as may seem just and proper.

Respectfully submitted,

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