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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM : PART 48

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MARIA OTTO, as an individual and on behalf of BAYONNE BROADWAY PARTNERS, LP; BAYRIDGE ASSOCIATES, LP; BELLMORE SUNRISE REALTY ASSOCIATES, LP; COURTESY BRENTWOOD ASSOCIATES, LLC; ELMONT REALTY ASSOCIATES, LP; HICKSVILLE ASSOCIATES; HOMEPORT ASSOCIATES; KINGS HIGHWAY MIDWOOD, LLC; LEVITTOWN EAST MEADOW ASSOCIATES, LP; MASSAPEQUA MALL ASSOCIATES; MASPETH ASSOCIATES, LP; MERRICK MASS REALTY ASSOCIATES, LP; PARKCHESTER RB ASSOCIATES, LP; and RB WHITE PLAINS ASSOCIATES, LLC,

Plaintiffs,

-against-

Index No. 108886/10

JONATHAN OTTO; METROCENTERS, LLC; METROCAPITAL HOLDINGS, LLC; METROCAPITAL LLC, METRO ASSETS TRUST; MAYBROAD, INC.; RIDGEBAY, INC., BELLMORE SUNRISE REALTY CORP.; COURTESY BRENTWOOD, INC.; ELMONT REALTY, INC.; HICKSVILLE ASSOCIATES, INC.; HOMEPORT ASSOCIATES, INC.; LEVITTOWN EAST MEADOW CORP.; MASPETH GRAND REALTY CORP.; MASSAPEQUA MALL ASSOCIATES, INC.; MERRICK MASS REALTY CORP.; and PARKCHESTER RB CORP.,

Defendants.

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March 9, 2012
60 Centre Street
New York, NY 10007

B e f o r e:

HON. JEFFREY K. OING, Justice.

A p p e a r a n c e s:

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MINUTES OF PROCEEDINGS

Reported By:
William L. Kutsch
Senior Court Reporter

Proceedings

THE COURT: The court has before it the matter of Maria Otto, et al, versus Jonathan Otto, et al, Index Number 108886 of 2010.

This is motion sequence number 002, which is defendants' motion to dismiss. It's a pre-answer motion.

I also have a cross-motion by plaintiff seeking other relief.

Parties enter their appearances for the record.

For the plaintiff?

MS. McPHERSON: For the plaintiff, your Honor, Laurie McPherson and Andrew Hambelton of Blank Rome LLP, 405 Lexington Avenue, New York, New York.

Good morning, your Honor.

THE COURT: Good morning. Thank you.

For defendants?

MR. WALSH: Good morning, your Honor.

Matthew Walsh with Dewey & LeBoeuf on behalf of the defendants.

THE COURT: Ganging up on you; two against one.

MR. WALSH: I'll do the best I can.

THE COURT: All right. Do the best you can.

This is your motion, counsel. Why don't you tell me why I should dismiss all these claims.

There are four causes of action.

One is, just to put it on the record, a breach of

fiduciary duty against all defendants, and it's a derivative claim so it's not being asserted by the individual. And this is coming from the Second Amended Complaint that we have here.

We have a second cause of action for unjust enrichment against all the defendants, and it's an individual and a derivative claim.

We have a third cause of action for aiding and betting against Jonathan, and that is Jonathan Otto, the individual defendant. And that's a derivative claim asserted by the individual on behalf of the limited partners as well as these other LLC's.

And the fourth cause of action for an accounting against the Metro defendants. Doesn't say if it's an individual claim or a derivative claim, but when I read the allegations here, sounds more like an individual claim.

Do you want to tell me if that's accurate, the accounting against the Metro defendants? It's important, because of what they're arguing here, whether or not it's a derivative or an individual claim.

MS. McPHERSON: Your Honor, I believe it's certainly an individual claim, but I think there is some argument that it could be a derivative claim, as well, but --

THE COURT: You crafted this complaint. I'm asking

you. I don't know.

MS. McPHERSON: Your Honor, we were --

THE COURT: This is your third bite. First Amended Complaint and Second Amended Complaint.

MS. McPHERSON: No. I understand that, your Honor.

THE COURT: Okay.

So, all right. We'll leave that as it is then.

Okay. Tell me why I should dismiss.

Let's go first to the argument of legal capacity and standing because I think if that's resolved, depending upon how that's resolved, we'll decide whether or not we go forward in terms of the other allegations. So let's start with that first. Why do you think there is no legal capacity or legal standing?

MR. WALSH: Yes, your Honor.

But before I get to that could I tell you one thing to make the record clear here?

THE COURT: Sure.

MR. WALSH: Miss Otto is going to receive her final distributions at some point.

THE COURT: $800,000.

MR. WALSH: Right. You know, a bulk of these distributions were distributed to all the shareholders and members way back when in '04 or '05. A final slice was withheld from all the different individual holders except if

you signed a clawback agreement.

THE COURT: She didn't sign it.

MR. WALSH: Right, your Honor.

THE COURT: That's the problem.

MR. WALSH: So as a result, your Honor, we have to wait until any liability overhang is resolved. And the only remaining liability overhang is with respect to this Settlement Agreement that's pending in front of the Surrogates' Court.

THE COURT: I read that. I read that in the record here. In a sense I got the sense that this action may go away.

The bottom line is -- well, I shouldn't ask you, I should be asking the plaintiff, they would know better, but the bottom line here, is this dispute over the $800,000?

MS. McPHERSON: No, your Honor. Principally it is a dispute concerning the actions of Jonathan Otto both as an individual and through his corporate entities. It's our contention that he --

THE COURT: Corporate entities being that -- what is it, Metrocenters?

MS. McPHERSON: No, your Honor. He was a control person for all of the GP entities, of each of the real estate entities.

THE COURT: But the Metro defendants were the

managing -- was the managing agent, so it's taking in, taking in all the monies and taking a fee for taking the monies. And the allegation here is that Mr. Otto never distributed the revenues that he collected to all the other shareholders.

MS. McPHERSON: Correct, your Honor.

THE COURT: I read this stuff.

MS. McPHERSON: Absolutely, your Honor.

There is a number of concerns that Mrs. Otto has, separate and apart from not getting her, what I imagine --

THE COURT: So $800,000 is just sort of the baseline. There is more, a claim of damages above $800,000 that this lawsuit is seeking to recover?

MS. McPHERSON: Yes, your Honor.

THE COURT: Okay.

MR. WALSH: Okay, your Honor.

So the takeaway is, Miss Otto will get her $800,000 either sooner, if she signs the clawback, or as soon as the Surrogates' Court approves that settlement. So I want to get that up front.

Let's talk about the claims. And you asked about the derivative defenses we have.

THE COURT: Right. Well, her derivative claims and your defenses to that is, basically she's saying she doesn't have standing to assert them.

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MR. WALSH: Right. And there's two things here, the first being notices of cancellation were filed on behalf of all of the LP's and the LLC's in Delaware. That's attached to our papers, your Honor. You're entitled to take judicial notice of that and we request that. There has been no dispute as to the authenticity of these documents.

It's one thing to wind up an LP or LLC. It's entirely a different thing to file a notice of cancellation when you're done, your Honor. That's been done. You cannot sue on behalf of an LP or an LLC once a notice of cancellation is filed.

THE COURT: You know, I saw that argument and I thought about it long and hard. That argument would mean then, if anything happened prior to the dissolution or prior to the winding up or prior to the cancellation of the certificates, anything, any malfeasance or misfeasance that occurred prior to that, that argument would mean then that all that is gone, that's forever lost, there is no way that you could be sued on that, there is no way that that can be litigated.

So in a sense then, not to say that this is in this case here, but in that kind of situation, the wrongdoer gets off scot-free, or the wrongdoers get off scot-free. That's your argument though. That's what I'm taking that argument to be.

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MR. WALSH: Your Honor, I understand your point, but I disagree. For two reasons.

One, in this particular case there was a Settlement Agreement as you know, signed by a majority in interest of all the holders for all the companies and the GP's and the managing members releasing all these claims. That was signed even before this happened.

THE COURT: That's correct, but the allegations in here, there were allegations of fraud, there were allegations of breach of fiduciary duty. So the fact that they did sign off on all those settlements and everything, her claim is: They all did it against my interests. They all breached their fiduciary duty. It was all fraud. There was all -- all these bad things going on. So in a sense you can't really -- those aren't bona fide settlements. Those were done to, pardon the pun, get me. That's her allegation. I'm not saying that this -- I mean, that's her allegation.

MR. WALSH: Sure. Sure. I understand that, your Honor.

And there's two points that -- those are all derivative allegations, number one. Okay? And we're talking about the business judgment rule when you talk about that. She said: I don't like the settlement they entered, bad things happened with the sale, et cetera, et cetera.

It's all in the Second Amended Complaint. She's trying to pierce the business judgment rule, and you can't do that based on the settlement.

THE COURT: Business judgment rule gives way to when there's -- when you prove fraud and misrepresentation, the business judgment rule is there, yes, only to the extent that it is a bona fide business judgment, but it's not there to shield acts that are found to be fraudulent. I can't believe and I don't think there's a case out there that would say that: Oh, business judgment rule is a blanket shield for everything. It doesn't matter what it is because in that sense, you know, you would say that if someone decides to take someone out and send them to their maker: That's a business judgment rule, you can't come after me because I had to get rid of them.

MR. WALSH: We agree, your Honor, the business judgment rule --

THE COURT: I'm not so sure that's right.

MR. WALSH: -- that this does not shield from fraud or things of that nature.

Having said that, to get by the BJR you have to plead with high specificity. We have pages of case law in our papers. This comes nowhere near neither "who, what, where, when and why;" otherwise, courts will not substitute their judgment for the judgment of the GP's or the

individuals. I remind you that the Settlement Agreement, submitted with the motion for a stay, is signed by a vast majority of the interests, 85 to 90 percent of the holders, who do not want these claims to be pursued, your Honor.

So going back to the derivative portion of this, she's seeking to sue on behalf of companies --

THE COURT: That might be more appropriate for a summary judgment motion; don't you think? That might be more appropriate for a summary judgment motion than a motion to dismiss in a pre-answer motion.

Pre-answer motion is whether or not -- when you give me affidavits on a pre-answer motion, affidavits are not like documentary proof where it's a document or a contract that I can read.

For example, I had one yesterday where I read the contract and it was clear that, you know: Okay, you are right, this is it. I didn't need affidavits to look at it.

Here, I got affidavits all accusing each other of something else, something bad, very bad, something not nice. That's all later on down the road.

Right now, it's the four corners of the complaint and the allegations set forth there, as well as any documentary proof that I can look at without having to hear all the distractions and all the noise to decide whether or not it states a cause of action.

But having said that, what I'm looking at is, when you cite the Limited Liability Partnership Act and the Limited Liability Dissolution Act, I looked at the two sections here. I can't find -- I can't find 705(d) or 121-203(d). I'm sorry -- yes. It only goes up to -- hang on a second. I looked at it, I'm tearing my hair out, the hair I have left, and it only has up to (c). Where is the (d), unless I'm looking at the wrong sections.

MR. WALSH: Well, your Honor, while I'm turning through my papers, can I respond to your first two points briefly?

THE COURT: Find the sections first, then you can respond.

MR. WALSH: I don't have those sections with me, your Honor. Are you sure you are looking at the newest, most recent pocket part?

THE COURT: Take a look at this. And you tell me. Unless I'm looking at the wrong one.

MR. WALSH: We also, your Honor, have case law that specifically says --

THE COURT: I understand that, but if you give me the section, I got to see Subdivision (d), because case law doesn't mean anything if the section is not there. I looked at the pocket part, too.

MR. WALSH: I understand, your Honor.

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THE COURT: Can you answer that, counsel? Is there a Subdivision (d)?

MS. McPHERSON: It doesn't exist, your Honor.

THE COURT: Thank you. Okay.

When someone relies on something hard, I look at it. Okay.

MR. WALSH: Let me turn to the case law, your Honor, if I may.

THE COURT: Well, I don't look at the case law. If the subsection is not there, it doesn't matter what the case law says. What that would mean to me is that -- if they are talking about subdivision (d) in the cases, that would mean that they are talking about something old, that's been either repealed or changed.

But having said that, let me point you to a section that does exist, and it's Section 121-803 of the Limited Partnership Act which talks about winding up. 121-803(b) provides: Upon dissolution of a limited partnership, the persons winding up the limited partnership's affairs may, in the name of, and for and on behalf of, the limited partnership prosecute and defend suits, whether civil, criminal or administrative, dot-dot-dot.

So that would mean to me, or that would indicate to me at this stage, that she does have standing to bring this suit derivatively.

And the same thing goes for Articles of Dissolution in Section 705, which provides that, on Subdivision (c): The cancellation of the articles of organization shall not affect the liability of the members during the period of winding up and termination of the limited liability company.

Which answers my question earlier that anything that's pre-dissolution doesn't go away, the fact that you dissolve. This says the liability still stands, doesn't affect the liability.

MR. WALSH: Agreed. Now can I circle back to the point you made five minutes ago?

The Second Amended Complaint specifically talks about the Settlement Agreement. That brings it within the four corners of the document you're allowed to look at.

Number two, the certificates of cancellation, and you can take judicial notice of those, there has been no objection to the authenticity. They're public documents and they're -- they've got the bells and whistles on them from Delaware and New York, your Honor, so those are in the record.

THE COURT: They are valid. Okay. Assuming they are valid certificates of cancellation, there is no issue, fine. You're right.

MR. WALSH: So, your Honor, if they are cancelled, your Honor, the case law cited in our papers is clear that

you can't sue on behalf of a cancelled corporation.

And, number two, Miss Otto doesn't own any piece of the cancelled corporation. As a result, you can't sue on behalf of -- I should say -- I said "corporation." I meant LP or LLC. You can't sue on behalf of derivatively an LP or an LLC you don't own a piece of.

THE COURT: Why doesn't she own a piece of it?

MR. WALSH: Because the cancellation notice has been filed, your Honor.

THE COURT: But she did -- prior to the cancellation notice, she did own a piece of it.

MR. WALSH: She did, yes.

THE COURT: She owned a piece of every single entity she's named as a plaintiff prior to the cancellation.

MR. WALSH: That's the allegation, your Honor. That's my understanding.

THE COURT: So, again, obviously, you know, if you can prove later on through discovery that she had, in fact, no interests all prior to cancellation, your argument would fly very far.

MR. WALSH: I missed that.

THE COURT: If I were to sustain these allegations, and you prove later on at summary judgment or discovery that she, in fact, had no -- because you're saying she alleges she has interests prior to the dissolution, or prior to the

cancellation, if, in fact, through discovery later on, that, in fact, you're right, she had no interest in any of these entities that are being set forth as plaintiffs, you're right, she doesn't have an interest and she can't sue -- or she can't sue derivatively. Did you follow that?

MR. WALSH: Yes, your Honor.

THE COURT: So, again, these are allegations. You don't have -- unless you have documentary proof of all the certificates of incorporation with respect to the LP's and LLC's setting forth all the members, and she's not listed as any of the members, that is what I say is documentary proof right there. I don't think I recall seeing that.

MR. WALSH: No, your Honor. The allegations are she owned interest -- and I know for a fact she owned interest in many if not most or all of these.

THE COURT: That's why I asked the question. Okay.

MR. WALSH: The Cohen case as well as the Shapsis case we cite in our papers specifically say you have to own a piece both at the time of the allegation, the events, as well as when you sue, and you can't proceed otherwise. The notices of cancellation are in the record.

THE COURT: But you just said it. You just said -- you just said that she may have owned a piece.

MR. WALSH: No, no. May have owned a piece before the notice of cancellation, your Honor. When something is

cancelled, it doesn't exist.

THE COURT: That goes back to the original argument that we had with respect to the statute here, that whether or not someone can bring a lawsuit derivatively, even after the LLC or LP is dissolved, your position is: No, they cannot; the statute provides for it. My position is, in reading the statute, the statute doesn't say that. It doesn't say they can't do it. In fact, it's kind of unclear. They kind of leave a little wiggle room.

And that goes back to my earlier statement that, I can't believe that the law is read to give a bye to all the people, alleged wrongdoers, who say: You know what? We did all these wrong things, let's dissolve the LP and LLC right now, that we're shielded from any liability, let's do that. Because if that were the case, the Law Journal would be filled with dissolution notices.

MR. WALSH: Your Honor, there's a remedy for that. You could go back to Delaware and you can unwind the dissolution.

THE COURT: It would be the size of a book. You would have law firms doing that, too.

MR. WALSH: That's a parade of horribles, your Honor. It is perfectly appropriate to go to Delaware and to unwind the dissolution.

THE COURT: I am not saying that that's wrong.

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MR. WALSH: So -- but you're -- the parade of horribles does exist because you can do that.

The point that you made first actually, unpackaging the two points, because that's what it is, the first is, once an LP and an LLC has been cancelled, it cannot sue. That's the point you take issue with. I understand. I disagree in our papers based on the case law. I don't think I'm going to get anywhere, so I'm going to move to the next point, your Honor.

THE COURT: Okay. Don't worry. Their turn is next.

MR. WALSH: Right. Right.

Your Honor, the next point is a distinct point and is equally important. The Cohen and Shapsis cases say: If you don't own a piece at the time the litigation is proceeding, you can't sue.

THE COURT: Do you have the case in front of you, by any chance?

MR. WALSH: Yes, your Honor.

THE COURT: Let me take a look at it.

MR. WALSH: There might be some highlighting on and some marking on it unfortunately, but --

THE COURT: Oh, I got it. It's attached.

MR. WALSH: It is attached.

THE COURT: Cohen. Hold on a second. First of

all, it's a trial court decision, so that it really -- it's persuasive's but not binding, but let me read the section. I did recall looking at this.

MR. WALSH: Page five, your Honor, is where the primary discussion starts.

THE COURT: No. I'm reading this case. I remember this. Yes, okay.

Does this case here deal with the dissolution or cancellation of certificates that you are relying on in the Cohen case?

MR. WALSH: No, your Honor.

THE COURT: In the Cohen case, was there a dissolution and was there a cancellation in Cohen? Because I agree with you, Cohen does say that you have to own a share of the entity if you are going to sue on behalf of it. But what happens when there is a cancellation and there is a dissolution? This Cohen case doesn't say that, doesn't have that fact in here.

And dollars to doughnuts, the other case you rely on doesn't have a cancellation either. Does it? What was the other case?

MR. WALSH: The other one is Shapsis, Malishkevich --

THE COURT: I got it. Shapsis. Another New York County, another Supreme Court case, not an appellate court,

and I'm looking at this, I don't think -- I don't think Shapsis deals with the cancellation either.

I don't disagree with you that, at the time -- if these entities are still alive and kicking around, that if you don't have an interest, you have no right to bring a lawsuit on its behalf. Clearly. You are absolutely right about that.

But when you read Cohen, Cohen doesn't talk about cancellation or a dissolution. Does it? I'm giving you an opportunity to disagree with me.

MR. WALSH: No, I don't believe it does, your Honor, but I will tell you this is a matter --

THE COURT: Every case turns on the facts.

MR. WALSH: It's a matter of law for you to decide though when an LP or an LLC has been cancelled --

THE COURT: I know what I've got to decide.

MR. WALSH: -- that it still exists. And the legal answer, your Honor, should be no, particularly here when the allegations show a Settlement Agreement on behalf of the majority interests, and a minority person wants to bring everyone back in and make them expend a lot of legal fees that they --

THE COURT: I wouldn't doubt that the partnership laws protect that, protects other members in a sense that if attorneys' fees awarded probably in -- that's probably

contemplated in the Partnership Law and Limited Liability section, members start dragging other members in unnecessarily, or for whatever reason they do that, I'm pretty sure, and I have not thoroughly looked through the Partnership Law, unless I have to, probably provides for attorneys' fees or an award of reasonable attorneys' fees, so that I think that might be covered. So that it is what it is at this point.

But, okay. That's your position. That's your standing in capacity. I want to hear what they have to say about that. Depending on how I go here, we may or may not go to the next one. We'll see.

MS. McPHERSON: Your Honor, you are absolutely right, and the Court of Appeals in the State of New York agrees with you.

The two cases that my -- counsel would have you ignore are dispositive here. Dispositive. And the cases I'm specifically referring to --

THE COURT: Look at the size of that binder.

MS. McPHERSON: I was prepared for you today, Judge.

THE COURT: Did the word get out that I ask questions during oral argument? Oh, my goodness.

MS. McPHERSON: Your Honor, the cases that you can't ignore, and I find it utterly telling that there is no

mention of them in my adversary's briefs, is the Weinert case. It dates back to 1947. It was a progeny of cases. And they specifically addressed the issue of capacity to sue. The Court of Appeals held that, you know, whereas here, you would be ignoring realities to require a defunct entity to be an indispensable party here.

As the court specifically writes: The presence of a representative of the artificial person would add no material element to the litigation.

It goes further to say: Whereas here -- and that case was a Delaware corporation that had been dissolved.

THE COURT: No. You know, I looked at the Partnership Law and the Limited Liability Company, and I don't see in the provisions where they say that that's -- that Miss Otto doesn't have a standing in this type of situation here. That doesn't mean, however, like I already said, that you are going to survive a summary judgment motion later on, if, in fact, we get to that point, but right now it's a pre-answer motion, and you have said everything that I've already thought about.

MS. McPHERSON: Right, your Honor. And I would be remiss were I not to emphasize the importance of the other Court of Appeals decision which is the Independent Investment Protective Services case, both of which were cited extensively in our briefs. And in that case it

specifically addresses how a cause of action accruing before dissolution may be interposed by and against a dissolved corporation.

So, your know, your Honor is completely right and the Court of Appeals obviously agrees.

MR. WALSH: Your Honor, may I respond?

THE COURT: Your response, counsel.

MR. WALSH: Yes, your Honor.

First, that's a case involving a corporation. We show in our papers a law for corporation is very different than LP's and LLC's.

Secondly, your Honor --

THE COURT: I understand that LP's and LLC's are creatures by statute or by corporation laws, and there is a lot of things that went behind -- there were a lot of reasons behind enacting those statutes or those provisions.

But when it comes to factual circumstances in this sense, I can't -- like I mentioned earlier, I can't think that the legislature intended for that kind of result as you are pressing for now, saying that I have to dismiss these claims because Miss Otto -- the certificates of cancellation and dissolutions have been filed already, so since this action was commenced subsequent to that, Miss Otto has no right to sue on their behalf.

MR. WALSH: Your Honor, the second point is, the

statute book you handed me was the New York statute book. Eight of the entities here are Delaware LP's or LLC's. And the provisions there, your Honor, govern with respect to capacity and standing, your Honor, and specifically say: Upon -- this is Delaware Title 6, Section 18-803(b): Upon dissolution of a limited liability company and until the filing of a certificate of cancellation as provided in Section 18-203 -- this is page four of our reply brief -- the persons winding up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits.

THE COURT: You have to slow down.

MR. WALSH: Quoting Title 6, Section 18-803(b) and all this paragraph, your Honor. It's on page four.

THE COURT: You know, let me just take a look at that.

MR. WALSH: There is some highlighting which I'm okay with. Are your okay if I show that to the Judge?

THE COURT: Don't worry. I look past the highlights.

MR. WALSH: May I approach?

THE COURT: Delaware 17-803(b). Upon dissolution of a limited liability company and until the filing of a certificate of cancellation as provided in Section 18-203 of this title, the persons winding up the limited liability

company's affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits.

You're right. That's prior to the filing of the certificate of cancellation.

So you're saying that -- from this, you're saying once you file the certificate of cancellation, that's it, you don't have that authority to file or to commence an action.

MR. WALSH: As to a Delaware LP or LLC.

THE COURT: Do you have, for example, now 17-203? Because I would like to see what 17-203 says.

MR. WALSH: Is that the New York equivalent, your Honor?

THE COURT: New York equivalent, which ropes in what I read, which -- if you asked me to look at 203 here in the New York equivalent, the New York equivalent also has later on, when you're looking at 121-203, Cancellation Certificates, but there's also in here the section of 121-803(b), which talks about upon dissolution what happens.

So if you are going to have me use by analogy 17-203 is akin to 211-203, I then have to flip the page and look at 121-803, which goes on to say: By the way, upon dissolution, you still can go at it.

MR. WALSH: For New York. Your point is for New

York.

THE COURT: I understand that, but you are telling me that -- when I asked you for 17-203, you're saying: Well, it's the equivalent to the New York version.

MR. WALSH: There are 14 entities here. Eight of the entities are Delaware entities.

THE COURT: Right.

MR. WALSH: You're talking about the six other ones?

THE COURT: What I'm saying is -- you know what? I'm not doing the research because I gave that up a while ago, but 17-203, I got to look at what 17-203 says in the Delaware. That's something when I read, I said: Where is 17-203?

MR. WALSH: I understand your point for New York, your Honor, but the eight Delaware LP's and LLC's you cannot make a derivative action on their behalf.

THE COURT: Why not?

MR. WALSH: Because that Delaware code says: Once a notice of cancellation is filed -- doesn't say "once." It says: You can maintain until a notice of cancellation is filed. Those eight Delawares LP's and LLC's cannot maintain a derivative action.

THE COURT: It goes on to further say: Until the filing -- you're right. Upon dissolution and until the

filing of a certificate of cancellation you can sue, but once -- like you said, once a certificate of cancellation is filed in Delaware, a Delaware LLC and Delaware LP, you don't have the right to sue anymore. And I need -- and that's your argument. And I would agree with it until I read 17-203 or anything else in the Delaware LP or LLC statute that probably may say otherwise.

MR. WALSH: May I see the 17-203 you handed me a few minutes ago, your Honor?

THE COURT: Sure.

MR. WALSH: May I approach?

THE COURT: Come on up.

MR. WALSH: Thank you.

THE COURT: This is 12 and this is 803. Here's your binder back.

MR. WALSH: Thank you.

Your Honor, this is the New York law you handed me.

THE COURT: I don't have the Delaware. You want the Delaware? That's the one I was looking at.

MR. WALSH: Right. I understand, your Honor, but the New York law would only apply to the six New York LP's and LLC's.

THE COURT: That's fine. With respect to the Delaware one, the Delaware law applies, because I asked you, do you have the Delaware 203, and you said, well, it's the

same as the New York 203. And I said okay, fine. I looked at the New York 203. Then you asked me to look at New York 203. Something tells me that these are all pretty much synonymous, so that I would venture to guess that the Delaware would have Section 803 -- 121-803 -- where it talks about winding up the affairs.

MR. WALSH: Your Honor, I do know the LP and LLC laws for New York are largely the same, your Honor, but I cannot make representation as to whatever cites the section says or doesn't say.

THE COURT: It's your motion, counsellor. I don't have the burden. I'm just telling you that 121-803 kind of puts a dent in what you're arguing in terms of what Miss Otto can or cannot do at this juncture.

MR. WALSH: As with respect to the New York companies, your Honor, I understand your position.

THE COURT: Okay.

MR. WALSH: Delaware law does control on the LP's and the LLC's.

THE COURT: I got it. The dog is chasing the tail at this point.

Response?

MS. McPHERSON: Your Honor, just very briefly, the argument that counsel raises is clearly addressed in effect by the Weinert case as well. In that case, again, it dealt

with a defunct Delaware corporation. And even if one were to try to say that the LP laws are different by statutory design, jurisdictional design, we --

THE COURT: I don't think so because I think these partnership and LLC's, all these states kind of are on board. They all look at it. They all want to be in conformity or uniformity with each other. So I would venture to guess that Delaware has a companion part of 803 that we have here.

MS. McPHERSON: Yes. And this case is pending in New York, and Weinert governs, and the defunct dissolved company, even where there has been certificates of cancellation, does prevent Mrs. Otto from going forward with her claims as it relates both to the LLC's and to the LP's, your Honor.

THE COURT: Okay. Thank you.

All right. This is my decision and order with respect to that branch of the motion to dismiss the complaint on the grounds that Miss Otto does not have legal capacity or legal standing to sue or bring this lawsuit on behalf of the LP's and LLC's. I'm going to deny that branch of the motion. I find that as a matter of law, the limited partnership -- that the Limited Liability Company as well as the Partnership Law in New York with respect to the LLC's and LP's are New York entities, does not preclude as a

matter of law Miss Otto from maintaining an action on their behalf in this proceeding here, and that's based on the arguments that I've heard today.

Also, with respect to the Delaware corporations, I find that counsel has failed to demonstrate to me as a matter of law that the Delaware corporations or the Delaware LP's and -- LLC's and LP's can't be the named plaintiffs here in a sense that Miss Otto can sue on their behalf. I find that there is a failure of proof on that. With regards that branch of the motion to dismiss the --

Just to be clear, the first cause of action as a derivative claim is denied.

The same for the second cause of action asserted in a derivative capacity for unjust enrichment, that's denied.

The third cause of action for aiding and abetting as a derivative claim, that's denied.

And the fourth cause of action, I'm going to treat it as a derivative claim, also. And that's denied.

So these four causes of action will continue, and Miss Otto as a plaintiff may bring them on behalf derivatively on their behalf. So that branch of the motion is denied.

Let us now go to whether or not a cause of action has been stated.

Let's go to the first cause of action for breach of

fiduciary duty. Why should I dismiss that?

MR. WALSH: Your Honor, in the first place, there are statute of limitations issues here. It's a three-year statute in New York with respect to breach of fiduciary duty claims pertaining to money recovery. There is a six-year statute when you have non-monetary recovery. That's not the issue here. The acts alleged occurred more than three years before the filing of the Second Amended Complaint. So it's the contention on behalf of Miss Otto that the Second Amended Complaint should relate back to the original filing. That is her burden to show on this motion. And we have submitted paperwork, of which you can take judicial notice, that the statute -- that the relation-back doctrine is not relevant because Miss Otto intentionally excluded the derivative claims from her first two iterations of this complaint.

We found in the court file records from 2007 which Miss Otto filed but did not serve derivative actions claims against some of these entities, and we also have in the record from Miss Otto demand letters from ten of the 14 companies seeking derivative actions back in 2007. Because of that, your Honor, the Second Amended Complaint does not relate back as to the new parts, your Honor, and the three-year statute excludes both the breach of fiduciary duty claim, and, while we're on it, your Honor, the aiding

and abetting breach of fiduciary duty as part and parcel of that, as you might imagine.

THE COURT: Okay. Thank you.

Response to that?

MR. WALSH: Your Honor, it's clear that counsel is wrong, and I refer your Honor respectfully to page 28 of our brief that specifically addresses the statute of limitations arguments. It's clear that there is a six-year statute of limitation as it relates to derivative claims regardless of the underlying theory of recovery, your Honor. And we're citing cases that are specifically addressing breach of fiduciary duty.

There is clearly in our papers sufficient prima facie allegations, and the relation-back argument frankly is irrelevant. We don't need -- we don't need these artificial entities under Weinert, and it ends upon their dissolution. The fiduciary duty -- the cause of action doesn't even begin to run, accrue, until the end of the fiduciary relationship, which by the defendants' claim, is -- continues until 2007, when they seek to dissolve all the entities.

THE COURT: Well, the fact of the matter is, the complaint is pretty -- the Second Amended Complaint is pretty detailed in terms of all the alleged circumstances and the timeline here. And based on the fact that I do agree with counsel that these claims are governed by the

six- and not the three-year statute of limitations, I'm going to at this juncture deny that branch of the motion to dismiss the claims for statute of limitations grounds. I believe that at this juncture here, you know, the facts as alleged are sufficient to get over that hump.

Of course in the matter of discovery that's still, you know, ripe for summary judgment, later on in discovery everything gets crystallized, and you say: Oh, no, no, Judge, the timelines are very different now, and these are exactly what happened and we think they should be dismissed.

But at this juncture the allegations are sufficient to get over the hurdle.

But you wanted to add something?

MR. WALSH: Yes, your Honor. One last point.

Twelve of the 14 transactions, that -- two outliers being Courtesy Brentwood and Bayonne Broadway, occurred outside the six-year period. Twelve of the 14, that's Courtesy Brentwood and Bayonne Broadway --

THE COURT: I thought there was something that happened subsequent to that. There was an allegation that --

Well, you want to respond to that?

MS. McPHERSON: I'm sorry, your Honor. I didn't hear you.

THE COURT: I thought there was something that

happened. He is saying that 12 of the transactions fell outside the six years, and I thought something happened that, in the allegations here, that sort of brought you back in.

MS. McPHERSON: Well, your Honor, the entities continued until they were dissolved, and that didn't happen until --

THE COURT: They were dissolved in accordance with 2008 or 2009, something like that.

MS. McPHERSON: I think it was 2007 by defendants' claim.

THE COURT: Those are the allegations here. I thought that -- okay. I note that for your argument, but I'm still going to say that based on these allegations, I think they get over -- at this juncture, they get over the statute of limitations hurdle.

Let me ask you a question. I think I misspoke. I jumped a little ahead of the gun.

One of the arguments that you raised was failing to make a demand, that she failed to make a demand, with respect to the --

MR. WALSH: With respect to four entities, your Honor.

THE COURT: Four entities: The Bayonne Broadway Partners, Levittown East Meadows Associates LP, Maspeth

Grand Associates, and Merrick Mass Realty Associates LP, is that correct?

MR. WALSH: That's our argument, your Honor. And there is no allegation that she made a demand as to those four entities.

MS. McPHERSON: It's clear from the pleading, your Honor, it would have been futile for her to do so. Jonathan Otto took the position wholesale that --

THE COURT: They don't like each other.

MS. McPHERSON: I'm sorry?

THE COURT: I get the sense they don't like each other.

MS. McPHERSON: Apparently not, your Honor. And for good reason unfortunately.

THE COURT: Unfortunately family businesses are the toughest, but go ahead.

MS. McPHERSON: So it's clear that the pleadings are more than sufficient to show the court that it would have been futile had she made such a demand.

THE COURT: Okay. I just wanted to get that on the record.

Based on the pleadings here again, this is a pre-answer motion, I'm sufficiently satisfied that the allegations here do set forth sufficient basis for me to conclude at this stage, the pleading stage, that a demand

would have been futile, particularly given the fact that Jonathan Otto is -- I believe the stepson?

MS. McPHERSON: He is, your Honor.

THE COURT: And that there is quite a bit of acrimony going back and forth, that any demand that would have been made would have been disregarded at this juncture. At least that's the allegation here.

So with respect to failing to make demand on those four entities, I'm going to deny that branch of the motion to dismiss on the grounds that the demand would have been futile.

So let's turn now to, other than the statute of limitations, your unjust enrichment, what else do we have here?

That's statute of limitations. Why don't we go now to the elements, if you want, for breach of fiduciary duty, and aiding and abetting.

MR. WALSH: Your Honor, there is case law in New York cited in our brief about the particularity required when pleading a breach of fiduciary duty claim. We argued in our brief and it's correct that the particularity was not provided with respect to the breach. You can't just walk in and say: Gee, you didn't sell those properties for enough money, period, let's move on to the next property.

It's -- what Miss Otto has done here is, she has

gotten all 14 entities and kind of lumped them together and suggested that all this together results in a breach of fiduciary duty. But when you unpackage it, your Honor, there is no particularity as any particular breach, or why anything that -- the "who, what, where, when and why" of any breach, your Honor.

THE COURT: Okay. Thank you.

Counsel?

MS. McPHERSON: Your Honor, there is more than sufficient particularity here in the pleadings. We speak of -- and, by the way, I make that comment, and I hope the court can recognize, that Mr. Otto is the one with all the information, but it's certainly clear, at least at this point, that he's clearly withholding monies due to her, not just for her signing onto a clawback, by the way, but for a full general release in his favor. And that is we contend itself a breach of fiduciary duty.

THE COURT: I got the sense that your assertion here is he was using leverage.

MS. McPHERSON: Yes, your Honor, and I --

THE COURT: Well, that's your assertion.

MS. McPHERSON: It is, and I maintain it, and I think it will be proven, your Honor, respectfully.

It's clear by even the limited audit that had been conducted by an entity called Getri (phonetic), that it

establishes that he had been improperly collecting management fees; that he didn't properly distribute the proceeds, he glommed over half a million dollars for himself off the top. That is more than sufficient particularity respectfully to meet the pleading requirements, your Honor.

THE COURT: Okay. Based on what I've --

Yes, counsel. Do you want to respond?

MR. WALSH: Your Honor, I'm not sure how much you unpackage all this, but the business judgment rule does go with this particularity. I could talk about that now or I could talk about that --

THE COURT: I understand about the business judgment rule. I'm familiar with the BJR in the short term. But that only stands to the point where, you know, later on if you can prove, in fact, there was no conduct that would jeopardize the business judgment rule that exists, then you are absolutely right, these claims are dismissed.

But at this stage of the litigation all I have is these allegations, and it's hard to disregard the argument that the defendants or the individual defendant has everything. I don't have anything. I'm just bringing this lawsuit so I can get it straight and see what's going on. So that, in fact, at the end of the day you may be absolutely right, you may be absolutely correct in your argument saying: The business judgment rule protects my

clients and protects these defendants. But until we get to the bottom of it, these are allegations here, and the business judgment rule is very weak. It's a house on sand at this point when I'm looking at these allegations, which are pretty extreme in terms of what's she is claiming happened. They may not pan out. I'm just saying that at this stage of pre-answer -- you know, they say in the Commercial Division an answer to the complaint is a motion to dismiss. That's what it is. And what I have here is, I don't have enough here. I don't have -- when you get into the business judgment rule, the way I look at it is, it's a very fact-intense analysis there. It's not straight documents where it's just boom, you read the document, Judge, you're done. Now it become fact-intensive. It depends on who said what to who when and what was going on at the time, because those are decisions that are being made by directors and members. So that's a highly fact-intensive analysis, the factual analysis there.

MR. WALSH: Your Honor, this is very, very important. The business judgment rule applies, period, unless there is bad faith or fraud. And in a presumption, corporations cannot be dragged into court based on their business decisions. And a vast majority of BJR cases don't make it past the --

THE COURT: Let me ask you this: Those BJR cases

that you are relying on, how many were on motions to dismiss and how many were on summary judgment motions?

MR. WALSH: Well, your Honor, I don't have that fact at my fingertip, but I can get back to you with a supplemental brief.

THE COURT: No. Counsel, this is my favorite line: This is poker. Once I show my hand and I have a full house, and you've only got a pair, that's it. There is no backsies here.

MR. WALSH: Your Honor, I could tell --

THE COURT: Sorry. I tell you now, she has got all the cases there.

MR. WALSH: Your Honor, the BJR cases are -- I mean, as you, I have had many BJR cases, and you don't get a corporation through discovery unless there are allegations there. There are no allegations of fraud --

THE COURT: That's why I asked you, how many are --

MR. WALSH: She has the burden of proof.

THE COURT: No. You are moving to dismiss. You've got the burden of proof.

MR. WALSH: Untrue, your Honor. I have the burden of proof, but if I say BJR, okay, she has to come back and show why she gets around the BJR. She has not shown fraud, and you cannot -- Miss Otto cannot proceed here on the breach of fiduciary duty or the aiding and betting unless

MS. McPHERSON: No. Respectfully, what our burden is is to make sure that our pleading is sufficient to allege self-dealing, your Honor.

she has allegations showing the fraud. This is very clear in New York law.

THE COURT: Your response to that.

MS. McPHERSON: Your Honor, I would respectfully refer the court to page 23 of our brief in which we make it -- which we cite the operative New York law that makes it clear that the business judgment rule does not protect corporate officers or partners who engage in fraud or self-dealing or corporate fiduciaries when they make decisions affected by an inherent conflict of interest.

Here, our allegations contain many acts of self-dealing by defendants. They withheld her distribution to leverage a general release, number one; that he has taken excessive management fees for his own company in excess of almost -- well, almost $500,000, just for the management fees; that he has withheld sales proceeds for himself.

THE COURT: I saw all those allegations. His counsel's argument is that all he has to do is throw up the BJR rule and that's it, your burden now, which I kind of disagree with, but now your burden is now you have to try your case in front of me and tell me that the BJR rule doesn't apply or doesn't work.

MS. McPHERSON: No. Respectfully, what our burden is is to make sure that our pleading is sufficient to allege self-dealing, your Honor.

Proceedings

THE COURT: I thought that -- what he's argued in terms of shifting the burden sounds more like a summary judgment motion.

MS. McPHERSON: Yes. No, your Honor.

THE COURT: Give me a second please.

(Pause in the proceedings.)

THE COURT: I got a case here, Lemle versus Lemle, First Department case, 92 AD3d 494 (2012). It says right here, on a motion to dismiss the complaint, First Department says: At this early stage of the litigation, it cannot be said that those parts of the complaint alleging excessive compensation are barred as a matter of law by the business judgment rule. The business judgment rule prevents courts from inquiring into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. However, pre-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate where those pleadings suggest that the directors did not act in good faith.

So, that puts to rest your argument on business judgment rule.

Next argument.

MR. WALSH: Your Honor, the unjust enrichment claim, which is the second cause of action, is a quasi

contract claim, and you cannot assert a quasi contract claim when there is a contract in the law, we cite in our papers, requires to be a partnership agreement or an LLC agreement you can't have an unwritten LLC agreement or LP agreement.

THE COURT: I did see that.

Your response to that, counsel.

MS. McPHERSON: Well, your Honor, to the extent the defendants are claiming that those entities are no longer in existence, there is no longer a contract in place. And for that reason, the alternative, we don't -- that we have a right to proceed with an unjust enrichment claim as a quasi contract.

THE COURT: Yes, because I notice one thing. Your other causes of action, this is the only one she is asserting in an individual capacity. I don't see the other causes of action that she is asserting in her individual capacity.

MS. McPHERSON: That's right, your Honor, and it's consistent with the notion of if it's not a derivative -- if she doesn't have the right of a derivative claim, then she certainly has a right as an individual to seek an unjust enrichment as it relates to these entities which have been dissolved.

THE COURT: Right. And with respect to her claim against the Metro defendants, that's something separate.

That's the management fee structure that she's claiming that she didn't get her share of the revenues coming in.

MS. McPHERSON: Exactly, your Honor.

THE COURT: Do you have a response, counsel?

MR. WALSH: Your Honor, Miss Otto can't have it both ways.

THE COURT: I didn't say she could have it both ways.

MR. WALSH: I know. But if they're properly dissolved, the derivative claims have to go away. If your ruling here today is you're not sure you're going to let it go on, then these agreements, the partnership agreements and the LLP agreements, tell us how to deal with distributions and how to deal with all the other issues here, and you can't have a quasi contract claim when there are contracts out there for these entities telling us what to do.

THE COURT: All right. Based on what I've heard here, I'm going to deny that branch of the motion to dismiss the unjust enrichment claim, so that still stands.

I've denied the motion getting past the capacity and the demand issues.

I've denied the motion with respect to the first cause of action because I find that it's been sufficiently stated and pleaded.

I've denied that motion right now with respect to

the second cause of action for unjust enrichment.

Turning now to the -- I've already discussed and argued with respect to the third cause of action, aiding and abetting against Mr. Otto as a derivative claim, and that's been sufficiently stated at this juncture.

So last one is the Metro defendants, fourth cause of action for an accounting.

MR. WALSH: Your Honor, we didn't get to one more layer, and that's the allegations against Mr. Otto specifically. He was managing member of only two of the entities and he is sued for breach of fiduciary duty as to all 14 because he was the owner of the GP corporate entities.

THE COURT: GP entities, right, and he was the managing member of the RB White Plains Associates and Kings Highway Midwood.

Okay. Your response to that, counsel?

MS. McPHERSON: Your Honor, as an individual, because he was the control person and exercised sole control and dominion over the GP entities, the law is that he himself has a fiduciary duty as an individual. We cite -- it is clear that as an individual in that special capacity -- if he didn't exercise sole control, if he wasn't the sole director, president, chief bottle washer, he might be in a position to say: I have no individual liability.

But having exercised sole control and dominion, he as an individual has a --

THE COURT: Allegedly exercising. You still have to prove all that.

MS. McPHERSON: Yes. And we will, your Honor.

THE COURT: All right.

MR. WALSH: This is a corporate veil. It's not so easily pierced, your Honor. You can't just walk in. You have to have some allegation as to why you pierce each of the 12 --

THE COURT: When you say "corporate veil," it's not a corporation we're dealing with. We're dealing with limited partners and LLC's, which is kind of a different animal.

MR. WALSH: Incorrect, your Honor. Incorrect.

What they're saying is, Mr. Otto owned -- the two aside, the managing member, the other 12, the GP controlled, the managing member is a GP, they're saying he owned it. And -- I misspoke. It's not a managing member. They're all GP's, your Honor. If he owned the GP, therefore he is responsible for the fiduciary duty owed by the GP.

THE COURT: I have to tell you something. When I read through the record, this much you can't dispute. I had a hard time trying to keep track of all the entities. It was almost as I'm looking at a spiderweb. These entities,

goodness sakes, there are about 20 or 30 of these entities, and I've got to figure out looking at who did what and where and when. That alone right now, on those facts alone, with respect to how this is set forth in the complaint, makes it very difficult for me to agree with you and dismiss the claim against Mr. Otto.

MR. WALSH: That's not my fault, your Honor.

THE COURT: I'm not saying it's your fault. I'm saying --

MR. WALSH: If plaintiff, if they give you a sloppy pleading, therefore I have to go to summary judgment --

THE COURT: No, I didn't say that was a sloppy pleading. I just said it was a web, that it's hard to try to find out who, what, and connecting all the dots here. I didn't say it was a sloppy pleading.

MR. WALSH: They have claims as to 14 transactions, different members, your Honor, GP's, your Honor. Because they didn't unpackage it, your Honor, I'm therefore suffering, and I --

THE COURT: Let me tell you this. I am glad you mentioned that. Because they didn't unpackage it, then it's your burden on a motion to dismiss to package it before me sufficiently so I can have it laid out: Oh, that is a clear picture of what's going on here.

The fact that you're trying to have -- you're

having, from what I've read here, there was some sort of, it wasn't crystal clear. The burdens here, you know, we can argue as to where the burdens are, but suffice it to say, you are the one looking to throw this case out, so I'm going to make it a little harder for you in the sense that I'm going to make it more difficult.

I've thrown causes of action out. I've dismissed cases, too. But here, so far, I haven't gotten to that point yet.

MR. WALSH: Your Honor, as to the 12 GP's, there are no allegations of corporate veil piercing, therefore there is nothing for me to unpackage. There's no saying as to Massachusetts [sic] Merrick XYZ or as to this XYZ; they just don't say it. And there is nothing for me to unpackage in that regard.

THE COURT: Counsel, your response?

MS. McPHERSON: Not true, your Honor. The law in New York, I could point, for example, to the Gonzalez case on page 18 of our brief, a Court of Appeals case, that clearly held that a limited partner who was also the president, sole shareholder, and director of the corporate general partner, was subject to individual liability. And that's really the issue here: Have we pled sufficiently that he has acted as -- in this kind of control capacity, and he has, and we have. It's sufficient to get past the

motion.

THE COURT: Based on the arguments that I heard, and again based on the record that I've reviewed here, I'm sufficiently satisfied at this stage of the litigation that the complaint sets forth, or the Second Amended Complaint, sets forth sufficient allegations to state a cause of action against Mr. Otto.

Again, I repeat myself a lot, whether or not that survives later on after discovery and summary judgment is to be seen, and it's always interesting to see where it goes once we do some discovery here.

Turning to the last cause of action against the Metro defendants, why should I dismiss that claim?

MR. WALSH: Your Honor, that's a cause of action for the accounting. And in order to have an accounting you need to have a fiduciary relationship and the trust. On paragraphs 75 to 77 of the complaint, they allege that the trust holds the money. That's the alleged fiduciary relationship. The other Metro defendants don't have it.

THE COURT: Right, but the Metro defendants were controlled by Mr. Otto, or Jonathan Otto. That's alleged.

MR. WALSH: That's the allegation.

THE COURT: That's the allegation, that he controlled the Metro defendants, and the Metro defendants were in a sense the managing agents and taking in the

revenue from all these other entities. And the allegation then also is that the Metro defendants by way of Mr. Otto failed to distribute income to Miss Otto. That's the allegations.

So there is -- the fiduciary duty, it has an air of trust there in a sense that, you know, the managing agent there is taking money from all these entities, the expectation is: I'm going to get my share, and now I didn't, and I want to know where my money is. That's what the claim is.

So, you know, anyway. Your response?

MS. McPHERSON: Your Honor, I agree with you. It's clear that there is a fiduciary duty lying at the Metrocenter defendants who, as you say, and quite rightly, were managing the monies and are still holding the monies. They certainly should be responsible for a proper accounting.

THE COURT: Based on what I heard here, I'm satisfied that, again, with respect to the fourth cause of action, the allegations are sufficiently stated to state a cause of action against the Metro defendants for an accounting. Again, I repeat, whether or not this survives at the summary judgment stage after discovery is to be seen.

So, accordingly, that's my decision and order with respect to the defendants' motion to dismiss. It's decided

in accordance with what I have just dictated.

Counsel, you are moving party. Please order the transcript and I will so order it, and you will have it for your record.

You need to also answer the complaint within the timeframe set forth in the CPLR.

That's where you've got to go with that.

And then after you're done here, please see my part clerk to see when you come back for a status conference.

MR. WALSH: There are two more things, your Honor. We had a motion to stay.

THE COURT: That's right. The motion to stay and the cross-motion to cancel.

MR. WALSH: Which is no longer relevant. Well, maybe it is, but let me start with the motion for a stay first, your Honor.

THE COURT: Okay. The decision and order will continue.

I'm sorry.

MR. WALSH: First, your Honor, one thing we didn't address was our request that Miss Otto be required to post a bond. With respect to the motion to stay, your Honor, we did submit a declaration of Mr. Ibegs (phonetic) who signed on behalf of the settlement on behalf of the estate. He pointed out that a vast majority of the owners of these

entities released these claims and have not joined Miss Otto, your Honor. We think a bond is appropriate so that at the end of the case those owners don't find themselves with an attorneys' fees bill for a case they didn't want to pursue because of course allocations occur in partnership agreements.

THE COURT: Right. In terms of allocations of the partners, do the partnership agreements provide for attorneys' fees?

MR. WALSH: Not that I'm aware of, your Honor. Some may, some may not. They're drafted at all different times. And we can't assume that a bond --

THE COURT: You know, you're asking for a bond. A bond is usually a case that if I stay the action, you guys post the bond, not them. They are not asking for a stay. That's turning it -- correct me if I'm wrong, but the person asking for the stay has to put the bond up.

MR. WALSH: No, your Honor. Under New York Partnership Law Section 121-1003: When a plaintiff has an allocable value of five percent or less, your Honor, or $50,000, the court may order that a bond be posted.

THE COURT: 121 dash what?

MR. WALSH: 1003.

MS. McPHERSON: Your Honor, if I may?

THE COURT: One second please.

It says: Shall be entitled at any stage of the proceeding before final judgment to require plaintiff to give a security.

It's my discretion as to what point I put the bond in. I don't have to put a bond in right now.

It also says: Unless the contribution amount of five percent or more.

Are there going to be an amount of five percent or more here?

MS. McPHERSON: Your Honor, Mrs. Otto owned ten percent at a minimum of each of the entities.

MR. WALSH: Owned; they're cancelled, your Honor. And someone has got to pay the attorneys' fees at the end of the day. And if Miss Otto decides she doesn't want to pay, we have no recourse without a bond, your Honor.

THE COURT: I know that, but attorneys' fees at this juncture, first of all, it doesn't require me to post a bond now, require a bond being posted now. It says at any time at this stage of the litigation. This litigation is so nascent, as they say, it's still sort of -- it's a twinkle in someone's eye at this point, that I'm not so sure I'm going to require posting of a bond. I mean, that's still without prejudice later on when you believe, okay, now we're getting into the nitty-gritty here, and I think the bond needs to be posted, I will consider that application at a

later time. That's not a problem.

So with respect to staying this action, what's your response to that?

MS. McPHERSON: Your Honor, that would be inappropriate, respectfully.

First, Mrs. Otto never signed the September 2006 agreement. And even if the Surrogate Court were one day -- and, by the way, it's certainly not imminent, I'm involved in that action, there has never been any effort to seek the enforcement of that agreement in the absence of her signature. But even if they were to do so sometime in the future, that is only going to affect her as a beneficiary in that proceeding. That's not going to be binding with respect to her individual claims here which your Honor has rightfully ruled should -- she should have the right to pursue.

THE COURT: You know what? I don't stay actions, I don't believe in staying actions, because I really -- I believe I'm not familiar enough with the Surrogates action. I know the arguments that are raised here. I know I have affidavits and the records here. But absent an appellate court staying this case, I don't believe in staying my cases, they go forward, because it is each party's belief or position that they have a meritorious claim or a defense, or counterclaims. So in that regard, that --

Proceedings

Do you want to say something, counsel?

MR. WALSH: I'm listening. When you're finished, your Honor. I don't want to interrupt you.

THE COURT: So in that regard with respect to the application for a stay of this action, that's denied.

So, next?

MR. WALSH: I was going to point out, your Honor, that the Surrogates action resolution won't completely release a huge number of claims here, and we engage in expensive discovery until then? It's really a waste, especially when there is no bond, you're putting a ton of pressure on the 85-plus percent of the shareholders who don't want this lawsuit to go forward, your Honor. A ton of financial pressure.

MS. McPHERSON: Your Honor, it remains to be seen whether that agreement will even be enforced. I will dare say that if they had wanted her signature in the first instance and thought they needed it to enforce it, they would still need it.

THE COURT: What I will do for you with respect to this application for a stay, same with respect to the application of a bond, it's going to be denied without prejudice. Like I said, later on as you proceed down that slope and you see things, it's the crystal ball section here. I call balls and strikes. Right now I don't have

enough here to really formulate a decision that I believe would be proper here. I think what you're telling me is this assertion: My clients are going to be incurring large expenses, large legal expenses, so forth and so forth, and if this proceeding or this action in Surrogate Court is ultimately resolved, it will get rid of a bunch of these claims, well, that may be well and true, but, if anything, this turns up the fire to try to get this resolved quickly rather than late, sooner than later as they say, to try to avoid expenses.

But having said that, I will give you the opportunity without prejudice if you believe that circumstances change, even on Monday, by Monday, you are free to bring back an order to show cause or whatever motion you believe is necessary to have me reconsider it, and that won't be a problem.

So those applications for that are denied.

Now, turning to -- I think I covered everything.

MR. WALSH: Yes, your Honor.

THE COURT: With respect to the cross-motion for nullification, I just cut to the chase: I don't think I could do that.

MS. McPHERSON: We are -- I'm going to withdraw it without prejudice, your Honor.

THE COURT: Thank you. You are getting tired;

aren't you?

That cross-motion then with respect to nullification as to the certificate is withdrawn without prejudice at a later date in terms of things changing or circumstances changing.

So that's my decision and order with respect to the motion and cross-motion. We have that for the record.

Order the transcript, I'll so order it.

Since both parties are seeking relief, please share the cost of it, and we're good to go.

Thank you very much. Have a good weekend.

(At this time the proceedings were concluded.)

-oOo-

C E R T I F I C A T I O N

This is to certify the within is a true and accurate transcript of the proceedings as reported by me.

3/20/12

William L. Kutsch, SCR

Duplicate Original

So Ordered

Original signed 3/19/12

JEFFREY K. OING
J.S.C.

WLK