SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Index No. 653960/2013

CTNY INVESTORS 3, LLC,

Motion Seq. # 001

Plaintiff,

-against-

DMR CRE OPPORTUNITY FUND I LP, n/k/a
BCM CRE OPPORTUNITY FUND I LP, and
DMR/CT VENTURE LLC,

Defendants,

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION WITH A TEMPORARY RESTRAINING ORDER

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Dated: New York, New York
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CASES

Plaintiff CTNY INVESTORS 3, LLC ("Plaintiff" or "CTNY") submits this memorandum of law in support of its motion brought by Order to Show Cause for a Temporary Restraining Order and Preliminary Injunction pursuant to CPLR 6301 against Defendants DMR CRE Opportunity Fund I LP, n/k/a BCM CRE Opportunity Fund I LP ("DMR Member") and DMR/CT Venture LLC ("Company" and collectively "Defendants").

PRELIMINARY STATEMENT

This action arises out of dispute over the interpretation of certain provisions of the Limited Liability Company Agreement of the Company, dated May 24, 2011 ("Operating Agreement"), between its two members, CTNY and Defendant DMR Member.

The nature of their transaction was the purchase of certain commercial real estate condominium units at 40 Broad Street, Manhattan, New York, and then the sale of those units. While the initial interests of the members was 95% for DMR Member and 5% for CTNY (the "Initial Interests"), CTNY earns a higher proportion of the proceeds of the sales depending upon a combination of the speed with which the units were sold and the prices obtained. Although the DMR Member is the Managing Member of the Company under the Operating Agreement, Plaintiff CTNY actually manages and oversees the day-to-day business of the Company.

Thus, as interpreted by CTNY, and as this language is commonly interpreted in the industry, the proceeds of the sale of the units are distributed in such a fashion as to compensate CTNY for its services and success with an ever increasing portion of the proceeds.

The portion of the proceeds that CTNY is supposed to receive in excess of its Initial Interest is defined in the Operating Agreement as the "Promote" and is reflected in Section 6.1(a) of the Operating Agreement. Reading Section 6.1(a) and 6.1(c) of Article VI together and in combination with the definition of Promote, demonstrate that the Promote accrues from day one,

but before it is distributed the test imposed by Section 6.1(c) allowing the DMR Member to recover 150% of its Capital Contributions must be met, after which time, Plaintiff CTNY is to begin receiving the Promote which it had earned over the course of the investment. Thus, in the instant case, based upon the prospective returns on the sale of the last commercial units at 40 Broad Street, the DMR Member will have received 150% of its Capital Contributions and the Promote now due to CTNY, which is estimated at $836,000, should be paid. The exact amount of the Promote needs to be calculated based upon the determination of the Available Cash, as defined in the Operating Agreement, after the sale.[1]

The DMR Member, however, disagrees, and claims that the Promote does not even begin to accrue unless and until the DMR Member received a return of 150% of its capital contributions. Such an interpretation does not reflect the structure of the agreement and, just as importantly, would render portions of Section 6.1(a) meaningless. Instead of simply providing the DMR Member with a preferred return before CTNY receives its incentive compensation for its hard work in successfully managing the assets of the Company for the DMR Member, the DMR Member's interpretation of the Operating Agreement means CTNY's opportunity to earn incentive compensation only begins as the parties' relationship ends. Nevertheless, the DMR Member, as managing member, intends to act unilaterally in determining what portion of the proceeds from the sale of commercial units will be distributed to it and CTNY.

The reason this preliminary injunction is being sought, along with an interim Temporary Restraining Order, is because the DMR Member has made it clear that it intends to distribute the proceeds of the sale of the final units, due to occur on November 25, 2013, based upon *its* interpretation of Section 6 of the Operating Agreement immediately after the closing.

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[1] In addition, CTNY estimates that approximately $500,000 will be needed to wind up the affairs of the Company and has requested that this sum be restrained as well to ensure the orderly liquidation of the Company.

There is a scheduled closing of the final commercial unit owned by the Company, and the DMR Member has indicated its intent to distribute the proceeds of that sale immediately upon closing. Upon distribution of the final proceeds, under the terms of the Operating Agreement, the Company will be wound up and dissolved, and the funds distributed to DMR Member will likely have been distributed to its partners. Thus, unless this Court acts to preserve the *status quo*, the proceeds of this final sale, and almost $1 million of Plaintiff's money, will disappear and quite possibly be lost.

STATEMENT OF FACTS

The facts relevant to CTNY's instant application are set forth in the accompanying Complaint as well as the Affidavit of Mark P. Boisi sworn to November 15, 2013 ("Boisi Aff."), and the Affidavit of Leonard J. Nannarone, sworn to November 14, 2013 ("Nannarone Aff."). For purposes of brevity, those facts are incorporated into the following discussion and are not repeated here.

ARGUMENT

Plaintiffs requests the entry of a preliminary injunction restraining the distribution of the proceeds of the sale of the final condominium unit owned by the Company to the extent that those proceeds are claimed by CTNY as its Promote and/or are needed to pay the final expenses of the Company in winding up and liquidating its business. CTNY further requests that the funds be placed in an escrow account to be disbursed only upon the agreement of the parties or by order of the court.

Defendant DMR Member's stated intent to act unilaterally and distribute the proceeds of the sales of the commercial units on its own terms necessitates the Court's issuance of a

Temporary Restraining Order and preliminary injunction in order to preserve the *status quo* and to prevent the dissipation of the Company's assets, thereby rendering any potential decision and order nugatory. To obtain a restraining order and preliminary injunction under CPLR 6301, a plaintiff must demonstrate: (i) a likelihood of success on the merits; (ii) irreparable injury without such relief; and (iii) a balance of equities favoring such relief. *Investco Institutional (N.A.), Inc. v. Deutsche Investment Mgmt. Americas, Inc.*, 74 A.D.3d 696, 697, 904 N.Y.S.2d 46, 47 (1st Dep't 2010) (citing *Doe v Axelrod*, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 45 (1988)); *see also Manhattan Real Estate Equities Group LLC v. Pine Equity, NY, Inc.*, 16 A.D.3d 292, 292, 791 N.Y.S.2d 418, 418-19 (1st Dep't 2005); *Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442, 628 N.Y.S.2d 375, 377 (2d Dep't 1995). Here, as demonstrated further below, all three elements weigh in favor of granting the requested injunctive relief.

I. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

In the Complaint, CTNY seeks a declaratory judgment interpreting Section 6 of the Operating Agreement, injunctive relief, and damages predicated upon a cause of action for an anticipatory breach of contract. CTNY's request for injunctive relief concerns the declaratory judgment and anticipatory breach causes of action and seeks to avoid the threatened conversion of an identifiable fund to which CTNY is entitled by DMR Member. In light of the instant facts and controlling case law, CTNY is likely to succeed on this claim.

CTNY and the DMR Member have diametrically opposing interpretations of Section 6 of the Operating Agreement, *i.e.*, the interplay between the Promote, as defined in the Operating Agreement, under Section 6.1(a) and the 150% clause in Section 6.1(c). Boisi Aff. ¶¶15-21; Nannarone Aff. ¶¶7-13. CTNY's interpretation – based on the plain meaning of the sections, the intent of the parties, the purpose of the agreement, and the standard in the industry – is that

Sections 6.1(a) and (c), when read together, demonstrate that the Promote accrues from day one, but before it is distributed the test imposed by Section 6.1(c) must be met. Boisi Aff. ¶¶17-20; Nannarone Aff. ¶¶11-12. The DMR Member, however, has taken the untenable position that Section 6.1(c) precedes the "waterfall" provisions of the Operating Agreement with respect to the distribution of Available Cash (i.e., §§6.1(a)(i)-(iv)), which would render portions of the waterfall a nullity, ignore the hurdles described in Section 6.1(a) and would give CTNY no credit for achieving the returns specified within the waterfall. Boisi Aff. ¶¶19-22; Nannarone Aff. ¶¶13-14.

The Court of Appeals has held that, "[c]onstruction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms." *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324, 834 N.Y.S.2d 44, 47 (2007). "To discern the parties' intentions, the court should construe the agreements so as to give full meaning and effect to the material provisions." *Excess Ins. Co. Ltd. v. Factory Mut. Ins.*, 3 N.Y.3d 577, 582, 789 N.Y.S.2d 461, 464 (2004); *see also God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Associates, LLP*, 6 N.Y.3d 371, 374, 812 N.Y.S.2d 435, 437 (2006) ("A contract 'should be read to give effect to all its provisions.'") (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)). "A written contract 'will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.'" *Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352, 358, 763 N.Y.S.2d 525, 528 (2003) (quoting *Empire Props. Corp. v. Manufacturers Trust Co.*, 288 N.Y. 242, 248 (1942)); *Kass v. Kass*, 91 N.Y.2d 554, 567, 673 N.Y.S.2d 350, 357 (1998) ("Where the document makes clear the parties' over-all intention, courts examining isolated provisions 'should then choose that construction which will

carry out the plain purpose and object of the [agreement].'") (quoting *Williams Press v. State of New York*, 37 N.Y.2d 434, 440, 373 N.Y.S.2d 72, 77 (1975)).

Moreover, "[a] reading of the contract should not render any portion meaningless." *Beal Sav. Bank*, 8 N.Y.3d at 324, 834 N.Y.S.2d at 47-48; *Vectron Int'l, Inc. v. Corning Oak Holding, Inc.*, 106 A.D.3d 1164, 1167, 964 N.Y.S.2d 724, 727-28 (3d Dep't 2013) (rejecting party's contractual interpretation because it violated "the precepts that a contract should be considered as a whole and a reading of it 'should not render any portion meaningless.'") (quoting *Beal Sav. Bank*); *Schiavone Const. Co., Inc. v. City of New York*, 106 A.D.3d 427, 428, 963 N.Y.S.2d 871, 871 (1st Dep't 2013) ("[A] contract should not be read to 'render any portion meaningless' and should be 'so interpreted as to give effect to its general purpose.'") (quoting *Beal Sav. Bank*); *Rex Med. L.P. v. Angiotech Pharm. (US), Inc.*, 754 F.Supp.2d 616, 624 (S.D.N.Y. 2010) ("Under New York (and every other state's) law, parties are not free to interpret a contract in a way that frustrates the purpose of that contract or that makes any provision of the contract meaningless.").

Reading the Operating Agreement as a whole, and Section 6 in particular, it is patently clear that CTNY's interpretation is the correct one because it gives full meaning and effect to the material provisions and the contract's general purpose. *Excess Ins. Co. Ltd.*, 3 N.Y.3d at 582, 789 N.Y.S.2d at 464; *Westmoreland Coal Co.*, 100 N.Y.2d at 358, 763 N.Y.S.2d at 528; *Kass*, 91 N.Y.2d at 567, 673 N.Y.S.2d at 357. The DMR Member's interpretation, on the other hand, would render the Promote essentially meaningless by creating a "sea wall" to block the waterfall from ever flowing. *Beal Sav. Bank*, 8 N.Y.3d at 324, 834 N.Y.S.2d at 47-48; *Vectron Int'l, Inc.*, 106 A.D.3d at 1167, 964 N.Y.S.2d at 727-28; *Schiavone Const. Co., Inc.*, 106 A.D.3d at 428, 963 N.Y.S.2d at 871.

The DMR Member's interpretation also "runs afoul of the well settled principle that a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties." *Cole v. Macklowe*, 99 A.D.3d 595, 596, 953 N.Y.S.2d 21, 22-23 (1st Dep't 2012); *see also 833 N. Corp. v. Tashlik & Associates, P.C.*, 256 A.D.2d 535, 536-37, 683 N.Y.S.2d 111, 112-13 (2d Dep't 1998) ("The defendant's interpretation of paragraph 15 would lead to an absurd result which would not accord with the reasonable expectations of the parties."). The Operating Agreement clearly states the parties' purpose as using the Company to invest in commercial/residential real property and ultimately, the disposition of such real property, in the hopes of making a profit. Boisi Aff. Ex. 2 (Op. Agr.) § 3.1. The DMR Member's interpretation, specifically as to the sales of the final commercial units which is pursuant to the parties' stated purpose, would divest CTNY of approximately $836,000 of incentive compensation based on the notion that CTNY agreed to forego the beginning of the accounting of any recognition of its contributions to the venture (i.e., the commencement of the *accrual* of the Promote) until DMR Member reaped a 150% return of its Contributed Capital. It is simply unreasonable to assume that a party, who was to be the party operating and maintaining the assets for the DMR Member, would willingly enter into such an unfavorable arrangement.

Indeed it would have been commercially unreasonable for CTNY to enter into such a deal that renders the benefits of the Operating Agreement illusory for CTNY. *Zurakov v. Register.Com, Inc.*, 304 A.D.2d 176, 179, 760 N.Y.S.2d 13, 15 (1st Dep't 2003) (rejecting interpretation that would render the benefits of the contract illusory for one party). Further, courts avoid contract interpretations that result in a windfall for one of the parties, as the DMR Member seeks here with the distributions from the sales of the final commercial units. *Cole v.*

Macklowe, 99 A.D.3d at 596, 953 N.Y.S.2d at 22-23 (rejecting defendants' interpretation of the partnership agreement that would represent a windfall to the defendants); *In re Lipper Holdings, LLC,* 1 A.D.3d 170, 171, 766 N.Y.S.2d 561 (1st Dep't 2003) (rejecting interpretation of limited partnership agreement that would bestow a windfall on certain limited partners).

In light of the foregoing, CTNY is likely to prevail on its declaratory judgment and anticipatory beach of contract causes of action both because of the clear language of the Operating Agreement and because the result of applying that language as suggested by CTNY would be consistent with industry practice and standards and would be commercially reasonable.

II. PLAINTIFF WILL SUFFER IMMEDIATE AND IRREPARABLE HARM ABSENT A TEMPORARY RESTRAINING ORDER AND INJUNCTIVE RELIEF

CTNY will suffer immediate, irreparable harm absent the requested injunctive relief. Irreparable harm exists where, but for the grant of the preliminary injunction, it would be difficult or impossible to return the parties to the positions they occupied at the outset. *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999).

With the approaching scheduled time of the essence closing of the final commercial unit owned by the Company, the DMR Member, which is the Managing Member of the Company, has indicated its intent to act unilaterally and distribute the proceeds of that sale immediately upon closing based on its own terms without regard to the rights of Plaintiff. Boisi Aff. ¶30. Upon distribution of the final proceeds, under the terms of the Operating Agreement, the Company will be liquidated, wound up and dissolved. *Id.* ¶35. Further, it will have no assets with which to satisfy a judgment and there will be nothing to stop the DMR Member from distributing the funds to its partners leaving CTNY in the unenviable position of attempting to discover and recover the funds owed to it after the money is no longer within the control of

Defendants. Thus, unless this Court acts to preserve the *status quo*, the proceeds of this final sale, and almost $1 million of CTNY's money, will disappear and quite possibly be lost.

Courts have repeatedly found irreparable harm and granted preliminary injunctions where, as here, another party is dissipating, transferring, selling, or encumbering assets belonging to another party. *1650 Realty Assocs. LLC v. Golden Touch Mgmt. Inc.*, 101 A.D.3d 1016, 956 N.Y.S.2d 178 (2d Dep't 2012) (upholding preliminary injunction enjoining prior property management company from transferring or making payments from petitioners' assets or monies without written consent); *Perpignan v. Persaud*, 91 A.D.3d 622, 622, 936 N.Y.S.2d 261, 262 (2d Dep't 2012); *Reichman v. Reichman*, 88 A.D.3d 680, 930 N.Y.S.2d 262 (2d Dep't 2011) (granting preliminary injunction where plaintiff sought a constructive trust and alleging that he was the majority shareholder in a business); *Winchester Global Trust Co., Ltd. v. Donovan*, 58 A.D.3d 833, 873 N.Y.S.2d 130, 131 (2d Dep't 2009) (upholding preliminary injunction where plaintiff's submission recounted numerous improper asset transfers); *Scomello v. Pascarella*, 33 Misc. 3d 1217(A), 941 N.Y.S.2d 541, at *3 (Sup. Ct. Suffolk County 2011). Indeed, as the First Department has recognized, "injunctive relief is appropriate to remedy the conversion of identifiable proceeds." *Amity Loans, Inc. v. Sterling Nat. Bank & Trust Co*, 177 A.D.2d 277, 575 N.Y.S.2d 854 (1st Dep't 1991); *see also AOM 1703 Lexington Ave. LLC v. Malik*, 13 Misc.3d 1212(A), 824 N.Y.S.2d 752, at *2 (Sup. Ct. N.Y. County 2006) ("[A] plaintiff may obtain a preliminary injunction where the assets sought to be restrained are specific funds which can rightly be regarded as 'the subject of the action.'").

Moreover, if the Court denies CTNY's instant application and the DMR Member is permitted to make the distribution on *its* terms and regardless of CTNY's rights under the Operating Agreement, it is highly unlikely that, even in the event of a favorable judgment,

CTNY will ever retrieve the disbursed funds from the sales of the final commercial units, thus rendering the judgment ineffective. For this reason as well, CTNY will suffer irreparable harm in the absence of injunctive relief. *Burmax Co. Inc. v. B&S Industries, Inc.*, 135 A.D.2d 599, 522 N.Y.S.2d 177 (2d Dep't 1987) (finding irreparable harm where, absent an injunction, defendants' actions would "render the judgment ineffectual").

Accordingly, the Court should grant injunctive relief in its entirety.

III. THE BALANCE OF EQUITIES WEIGHS IN PLAINTIFF'S FAVOR

Finally, the balance of equities clearly weighs in CTNY's favor. The DMR Member is the Managing Member of the Company with final say on the distribution of assets, including the funds from the sales of final commercial units. CTNY, under the terms of the Operating Agreement, is entitled to approximately $836,000 from those sales. In the absence of an injunction, however, the DMR Member can unilaterally disregard that to which CTNY is entitled and reap a windfall from the sale of the commercial units. Moreover, under the terms of the Operating Agreement, the Company will be wound up and dissolved upon the final sale. This means that DMR Member will liquidate the Company and leave CTNY with only a fraction of that to which it is entitled under the Operating Agreement, if at all, and place CTNY in the unenviable position of having to chase the money after the funds have been disbursed and diverted. *Felix v. Brand Serv. Grp. LLC*, 101 A.D.3d 1724, 1726, 957 N.Y.S.2d 545, 547-48 (4th Dep't 2012) ("Finally, we conclude that plaintiffs met their burden with respect to the third prong of the test, *i.e.*, whether a balance of the equities tips in plaintiffs' favor. . . . Here, the irreparable injury to plaintiffs is more burdensome than the harm caused to defendants through the imposition of the injunction. While defendants may be delayed in paying off debt or using

the escrow money for other purposes, plaintiffs may never be able to recover the money, if disbursed, even if plaintiffs ultimately prevail in the underlying action.").

Granting a temporary restraining order will maintain the *status quo* by ensuring that the funds will be available when CTNY prevails in this action. Without it, it is likely that the Defendant DMR/CT Venture LLC will be dissolved and Defendant Member will no longer have the funds with which to pay the judgment obtained by CTNY because it will have distributed those funds to its partners. The DMR Defendants, on the other hand, are not harmed by having such funds deposited into an escrow account until the Court determines the rights of the parties under Section 6 of the Operating Agreement. The money will be readily available at the end of this action.

Accordingly, the equities weigh in CTNY's favor and require the granting of injunctive relief.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court issue the proposed Temporary Restraining Order and preliminary injunction, together with such further relief as the Court may deem just and proper.

Dated: New York, New York
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