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

CTNY INVESTORS 3, LLC, Plaintiff, - against - DMR CRE OPPORTUNITY FUND I LP n/k/a BCM CRE OPPORTUNITY FUND I LP, and DMR/CT VENTURE LLC, Defendants.	Index No. 653960/2013

DEFENDANTS' MEMORANDUM OF LAW
IN OPPOSITION
TO ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION

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Plaintiff CTNY Investors 3, LLC's ("CTNY") Order to Show Cause fails badly. Its interpretation of the key contractual document turns on its *post hoc* insistence upon allegedly implied terms and conditions that are at direct odds with the express terms of the written agreement. CTNY also fails to demonstrate any need for injunctive relief. The funds of which CTNY seeks to enjoin distribution are already in an account for which CTNY is the sole signatory. CTNY's prayer for relief is also grossly overreaching. CTNY is seeking to enjoin distribution of $1,400,000.00 of funds, when its claim is for an estimated distribution of $836,000 – on less than $100,000 of funds available to satisfy that alleged distribution. BCM CRE Opportunity Fund I L.P.[1] ("BCM") therefore respectfully suggests that this Court should deny the entirety of relief that CTNY seeks.

FACTS

a. *The Operating Agreement*

BCM and CTNY entered into a Limited Liability Company Operating Agreement (the "Operating Agreement") for DMR/CT Venture LLC (the "Operating Company"). The purpose of the Operating Agreement was to define the respective responsibilities and interests of the parties in furtherance of their joint investment in the acquisition, development and sale of real estate. The parties thereafter acquired, developed, and just sold the last unit, Unit 7A, at the Setai Condominium, 40 Broad Street, New York, New York. (Kelley Aff., ¶ 3).

Per the Operating Agreement, BCM provided almost all of the initial capital. Specifically, BCM's share of the initial capital contribution was ninety-five percent (95%), for a

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[1] BCM was formerly known as DMR CRE Opportunity Fund I LP. The partnership changed its name to BCM through an Amended and Restated Limited Partnership Agreement dated as of March 30, 2012. (Kelley Aff., ¶ 2).

total of $13,309,491.00, and CTNY's was five percent (5%), a total of $700,500.00. (Op. Agr., § 4.1 & Sched. 1).

CTNY's role was to identify investment opportunities and handle day-to-day management of the Operating Company, including keeping all books and records, and preparing all financial reports of the Operating Company. (*Id.*, §§ 3.2, 7.1 & 9.1-.9.3). CTNY consequently controls all of the accounts for the Operating Company and is the sole signatory on those accounts. (Kelley Aff., ¶ 5). Any proceeds from condominium sales are deposited into the Operating Company's accounts. (*Id.*) CTNY has exploited its singular control of these accounts to unilaterally embargo $840,000 of funds that should be subject to distributions without permission from BCM. (*Id.*, ¶ 16). Conversely, BCM does not have access to these accounts. (*Id.*, ¶ 5).

As discussed below, the Operating Agreement provided CTNY with increased distributions as part of the waterfall distribution depending upon the achievement of certain financial milestones, as incentive for its role as the party actively seeking investment opportunities. CTNY also acted as broker for the Operating Company, and received a two-percent (2%) commission on the sale of each condominium unit. (Kelley Aff., ¶ 6). CTNY is also due a four percent (4%) commission from the sale of the last unit, as it is the sole broker with respect to that transaction. (*Id.*). Additionally, CTNY receives an on-going management fee for the project. (*Id.*, ¶ 6). The commissions and management fees are not in dispute, and will be paid to CTNY in the ordinary course.

Because BCM provided almost all of the capital – and therefore shouldered almost all of the financial risk – BCM received substantial contractual protections and priorities. Of most significance to this matter, Article VI – "Distributions of Available Cash," governed the manner

with which "Available Cash" was to be distributed to BCM and CTNY. Available cash is defined by the Operating Agreement as the amount of cash proceeds and reserves for a finite period that exceeds amounts paid for operating and property expenses for such period and reserves required for working capital and future business needs. (Op. Agr., Art. I, p. 2). In essence, Available Cash is the on-going profit that the Operating Company is generating for a set period, less amounts held in reserve for anticipated future expenses. BCM, as managing member of the Operating Company, has the responsibility to determine the amount of Available Cash available for distribution, and to direct those distributions. (*Id.*, §§ 6.1(a) & (b)). CTNY, as signatory on the operating accounts, is thereafter tasked with the actual distribution of those funds. (Kelley Aff., ¶ 5). The definition of Available Cash does not contemplate a "promote" on an accrued basis being earned by or paid to CTNY, but rather focuses on funds available for distribution during a set time period.

Section 6.1(c) requires that all distributions of Available Cash be made on a *pro rata* basis (*e.g.*, in the same proportion as the parties' respective capital contributions) until BCM recovered one-hundred and fifty percent (150%) of its capital contributions:

> Notwithstanding any contrary term set forth in this Agreement, if, as of the date of any Distribution, the aggregate amount of all distributions theretofore paid to DMR Member is less than 150% of the aggregate amount of all Capital Contributions theretofore made by DMR Member to the Company, then, notwithstanding the Internal Rate of Return theretofore received by DMR Member, 100% of all Distributions shall be made to the Members *pro rata* in accordance with their Percentage Interests, without taking account of the Promote, until such time as DMR Member has received aggregate Distributions equal to 150% of the aggregate Capital Contribution theretofore made by DMR Member.

Of note, Section 6.1(c) makes clear that it trumps any other language in the Operating Agreement – "[n]otwithstanding any contrary term set forth in this Agreement." It further dictates that the financial milestones in this section must be satisfied "without taking account of

the Promote," *i.e.* payments due per Section 6.1(c) are to be fully made prior to commencement of accounting for the promote contained in Section 6.1(a).

It should be emphasized that CTNY also received distributions of its *pro rata* share of Available Cash through Section 6.1(c). CTNY consequently received a one-hundred and fifty percent (150%) return on its capital contribution (along with earned commissions and management fees) at the same time that BCM was receiving distributions in accordance with that section.

Once Section 6.1(c) has been satisfied, Section 6.1(a) governs the priority of distributions of Available Cash:

> Subject to the provisions of Section 6.1(c) hereof, the Managing Member shall distribute the Available Cash of the Company, if any, pursuant to the following order of priority:
>
> (i) First, to the Members pro rata, in proportion to their respective Percentage Interests, until each Member shall have received the full amount of Capital Contributions made by such Member through the date of Distribution;
>
> (ii) Second, to the Members *pro rata*, in proportion to their respective Percentage Interests, until DMR Member shall have received, taking into account the timing and amount of all prior Capital Contributions and Distributions, an Internal Rate of Return equal to 13% per annum;
>
> (iii) Third, (x) 80% to the Members *pro rata*, in proportion to their respective Percentage Interests, and (y) 20% to CTNY Member, until DMR Member shall have received, taking into account the timing and amount of all prior Capital Contributions and Distributions, an Internal Rate of Return equal to 18% per annum;
>
> (iv) Fourth, (x) 75% to the Members *pro rata*, in proportion to their respective Percentage Interests, and (y) 25% to CTNY Member, until DMR Member shall have received, taking into account the timing and amount of all prior Capital Contributions and Distributions, an Internal Rate of Return equal to 23% per annum; and

> (v) Thereafter, (x) 65% to the Members *pro rata*, in proportion to their respective Percentage Interests, and (y) 35% to CTNY Member.

Consistent with Section 6.1(c)'s provision that its terms govern to the extent of any conflict with other contractual language, Section 6.1(a) is expressly "[s]ubject to the provisions of Sections 6.1(c) ...." Additionally, there is no language in Section 6.1 (or otherwise in the Operating Agreement) to the effect that CTNY's "promote" accrues while distributions are Available Cash are being made in accordance with Section 6.1(c). Rather, Section 6.1's limited role is to prioritize distributions of Available Cash consistent with each party's respective investment and risk *after* Section 6.1(c) has been satisfied.

A portion of Section 6.1(a)'s waterfall scheme provides an incentive kicker for CTNY once that waterfall is triggered. The Operating Agreement refers to this kicker as the "promote." This term is defined as the amount of distribution that CTNY receives in excess of its *pro rata* capital contribution:

> "Promote" means the cumulative amount of Available Cash distributed to CTNY Member in excess of the product of the Percent Interest of CTNY member and the cumulative amount of Available Cash distributed to all the Members, as determined by Sections 6.1(a)(iii)-(vi).

(Op. Agr., Art. I, p. 6). Nothing in this definition remotely suggests that the "promote" accrues while distributions under Section 6.1(c) are on-going, or begin to accrue from day one.

Rather, the combination of Sections 6.1(a) and (c) demonstrate that the parties agreed to split the Available Cash on a *pro rata* basis consistent with their respective capital contributions (95% to BCM; 5% to CTNY) until BCM (and CTNY) received an agreed-upon one hundred and fifty percent (150%) return on its capital investment. Upon satisfaction of this contractual condition, Section 6.1(a) governs the distribution of Available Cash. Significantly, Available Cash is defined as the amounts available for distribution for a fixed and finite time period, so that

there is no contractual mechanism whereby Available Cash exists for a promote that allegedly accrued months earlier.

Moreover, Section 6.1(a) dictates that the "promote" only begins to accrue after satisfaction of the earlier, higher priority financial milestones -- "First" to the parties on a *pro rata* basis *until* the parties received one hundred percent (100%) of the parties' capital contributions, "Second" to the parties on a *pro rata* basis *until* the Internal Rate of Return reached thirteen percent (13%), and only thereafter, "Third" eighty percent (80%) to the parties on a *pro rata* basis, with a twenty percent (20%) kicker to CTNY *until* the Internal Rate of Return reached eighteen percent (18%), and so on.

The Operating Agreement contains an integration clause, whereby the contract "contains the entire agreement among the parties" and "supercedes all prior agreements and understandings ...." (*Id.*, § 13.12). Additionally, Section 7.5 of the Operating Agreement, Compensation of Members, states that "[e]xcept as expressly provided for herein ... no payment shall be made to any Member or Managing Member ...." Either singularly or in combination, these clauses rule out the possibility of an "accrued" promote where none exists within the four corners of the Operating Agreement.

Delaware law applies to "all issues concerning the relative rights" of the parties, and "all other questions concerning the construction, validity and interpretation of this Agreement ...." (*Id.*, § 13.9).

b. Course of Performance

Both parties prospered financially as a result of this venture. For its part, CTNY has received, to date, $920,556.62 in distributions, and also earned $400,028.40 in brokerage fees, for a total of $1,320,585.00. (Kelley Aff., ¶ 7). CTNY will receive another distribution of

approximately $160,930.83 as a result of the sale of the final unit, along with a brokerage commission for that unit of $134,743.40, resulting in total distributions of $1,081,487.40 and total brokerage fees of $534,771.80. (*Id.*) All told, CTNY will earn at least $1,616,259.20, along with management fees – a very handsome return on an initial investment of $700,500.00.

Throughout the life of the Operating Company, CTNY has received distributions from the sale of five units. Significantly, CTNY never made a claim for an "accrued" promote or otherwise demanded that reserves be established to account for this alleged "accrued" promote with respect to any of these transactions. Rather, CTNY's periodic accountings with respect to this venture never referenced any accruing promote. The first time that CTNY claimed a right to an "accrued" promote was in September 2013, after the contract for sale of the final unit was signed. (*Id.*, ¶ 8).

CTNY's alleged accrued promote also fails to track the express language of the Operating Agreement or the actual proceeds from the condominium sales. As an initial matter, its calculation fails to mention or consider amounts due per Section 6.1(a) or (c) to BCM. (*See* Boisi Aff., Ex. 3). CTNY's calculation consequently provides itself with every available promote credit from day one, while failing to account for amounts due to BCM out of the same proceeds.

The actual numbers from this deal demonstrates CTNY's faulty accounting. Per Section 6.1(c), both parties were to receive distributions *pro rata* until BCM received one hundred and fifty percent (150%) of its capital contributions. Here, BCM's capital contributions to date are $13,309,491.00. (*Id.*, ¶ 4 & Ex. A). CTNY's own accounting expects that the parties will make an additional capital contribution of $343,000 to cover future accounts payable and contingent liabilities. (*Id.*, ¶ 10 & Ex. C). When BCM's ninety-five percent (95%) share of the expected

capital contribution, $325,850, is added to its existing capital contributions, its total capital contribution for the purposes of distributions for the sale of the final unit will be $13,635,341. BCM consequently has to receive $20,480,011.00 in distributions to satisfy the one hundred and fifty percent (150%) threshold contained in Section 6.1(c) of the Operating Agreement. (*Id.*, ¶ 11).

To date, BCM has received distributions of $17,490,571.35, meaning that there is an additional $2,989,439.65 due to satisfy Section 6.1(c). (*Id.*, ¶ 12).

The final condominium sale generated approximately $3,218,616.60 in Available Cash that may be distributed. Of that amount, $3,146,777.89 remains to be distributed per Section 6.1(c) ($2,989,439.65 (95%) to BCM; $157,338.89 (5%) to CTNY), leaving $71,839.10 available to be distributed through the waterfall contained in Section 6.1(a). (*Id.*, ¶ 13).

The Internal Rate of Return ("IRR") for the project as of the expected date of the last sale is 22.96%. (*Id.*, ¶ 14). Accordingly, Section 6.1(a)(iv) applies, requiring a distribution of: (a) seventy-five percent of available cash *pro rata* (*i.e.* 95% to BCM; 5% to CTNY); and (b) twenty-five percent (25%) to CTNY. That split results in a distribution of $51,184.65 to BCM and $16,163.56 to CTNY.

CTNY's claim of $836,000 in distributions, primarily resulting from "accrued" promote from day one, fails to accord with the contractual language, and specifically with the definition of Available Cash. While difficult to determine from CTNY's papers, CTNY appears to claim almost every dollar available for distribution after Section 6.1(c) is satisfied, without accounting for the fact that BCM also receives a distribution anytime a promote distribution is made per Section 6.1(a)(iii)-(v).

Additionally, CTNY has already exercised self-help, in that it unlawfully retained $150,000 as a portion of its alleged promote from the sale of Units 4a and 4b in October 2013 – despite the fact that Section 6.1(c) had not yet been satisfied. BCM protested this holdback and demanded immediate release of these funds, but to date, CTNY has refused to release this illegal holdback. (*Id.*, ¶ 15 & Ex. D).

CTNY is also controlling all of the funds with respect to the sale of the final unit. As documented by its November 26, 2013 letter, CTNY unilaterally withheld $1,033,000.00 of funds from this final sale without BCM's permission, of which $690,000 is being withheld as part of CTNY's alleged promote. The balance of these withheld funds relates to CTNY's calculation of an additional capital contribution of $343,000. Together with its previous unlawful holdback of $150,000, it is currently holding and refusing to release $840,000 that it claims as a promote. (*Id.*, ¶ 16 & Ex. C).

ARGUMENT

a. Preliminary Injunction Standard

The Civil Practice Law and Rules establishes the standard for the court's authority to grant a preliminary injunction in *Section 6301*:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiffs rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

This language has been held to mean that "[t]o establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction." *De Fabio v. Omnipoint Communications, et al.*, 66 A.D. 3d 635, 636 (2d Dep't 2009). The burden is on the party seeking injunctive relief to satisfy each of these elements. *Sutherland Global Servs., Inc. v Stuewe,* 73 A.D.3d 1473, 1474 (4th Dep't 2010).

Another mandatory component of a preliminary injunction is an undertaking. CPLR 6312(b) makes an undertaking in an amount to be fixed by the Court as a mandatory prerequisite to the granting of a preliminary injunction. New York Courts have consistently ruled that the failure to require an undertaking prior to imposing a preliminary injunction is reversible error. *Smith v. Boxer,* 45 A.D. 2d 1059 (2d Dep't 1974) (modifying order to add a provision that plaintiffs provide an undertaking because the granting of an injunction without such a provision was unwarranted); *Blumberg v. Thomaston-Spruce Corp.*, 46 A.D.2d 671 (2d Dep't 1974) (granting a preliminary injunction without an undertaking was improper). Here, BCM urges this Court to deny CTNY's requested relief entirely. However, to the extent that the Court is inclined to provide CTNY with an injunction, BCM requests that the Court require an undertaking equal to whatever amount of funds is subject to that injunction.

b. CTNY Does Not Have A Likelihood Of Success On The Merits.

CTNY has not and cannot show a likelihood of success on the merits. CTNY's contention is that the promote contained in Sections 6.1(a)(iii)-(v) began to accrue prior to satisfaction of the payments that Section 6.1(c) mandated. In other words, CTNY claims that payments due under the promote vested from day one, irrespective of whether BCM had received distributions equal to one hundred and fifty percent (150%) of its capital contributions. (CTNY Memo, p.5). CTNY

further alleges that while these amounts have accrued over the life of the Operating Agreement, they are now payable from the proceeds of the last condominium unit. (*Id.*, p. 7).

CTNY's construction of the Operating Agreement is at wide variance with the contractual language. Most fundamentally, there is no express language in the Operating Agreement to the effect that the "promote" accrues while payments due under Section 6.1(c) are still outstanding. In fact, there is no contractual language from which an implication of an accrued promote could be drawn. The definitions of Available Cash and promote, along with the language in Sections 6.1(a) and (c), do not even hint at the concept that the promote accrues while payments with a greater priority are still outstanding.

Tellingly, CTNY's papers fail to cite to any express contractual language supporting its position. Rather, CTNY's conclusiary argument is that "[r]eading 6.1(a) and 6.1(c) together and in combination with the definition of Promote, demonstrate that the Promote accrues from day one ...." (CTNY Memo, p. 1). However, CTNY never explains in its papers how the express language of these sections leads to this conclusion (as it does not).

To circumvent the wholesale lack of contractual language supporting its position, CTNY alleges that its interpretation "gives full meaning" to the Operating Agreement, because otherwise, Section 6.1(a)(i) would be rendered a nullity.[2] (*Id.*, pp. 5-6). Section 6.1(a)(i) requires that available cash distributions be made to the parties on a *pro rata* basis until each has received a return of one hundred percent (100%) of its capital contributions. CTNY contends that interpreting Section 6.1(c) – which requires a one hundred and fifty (150%) return of BCM's

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[2] CTNY incorrectly relies upon New York law in making its arguments, as Delaware law governs the Operating Agreement. (Op. Agr., § 13.9).

capital contributions – as requiring payment of those amounts due under that section before the promote accrues somehow renders Section 6.1(a)(i) a nullity. (CTNY Memo, p. 4-5).

CTNY's argument on this point ignores the express terms of the Operating Agreement. Section 6.1(c) governs in the event of any conflicting contractual language ("[n]otwithstanding any contrary term"). The prefatory language of Section 6.1(a) confirms this result, as that section is "[s]ubject to the provisions of Section 6.1(c)." Interpreting 6.1(c) to trump 6.1(a)(i) is therefore consonant with this express language and the canons of construction. *See Land-Lock, LLC v. Paradise Prop., LLC*, 963 A.2d 139, 141 (Del. 2008) (express language of a contract should be given effect). At bottom, the parties have expressly agreed to the result in the event of a conflict in contractual language (6.1(c) governs), and this Court should enforce that agreement.

Moreover, the fact that Section 6.1(c) nullifies Section 6.1(a)(i) does not prove that the promote accrues from day one, as CTNY incorrectly contends. To the contrary, the promote was never intended to accrue from day one. Even if (*arguendo*) Section 6.1(c) is disregarded, the waterfall contained in Section 6.1(a) requires payment of one hundred percent (100%) of the parties' capital contributions and the reaching of an Internal Rate of Return of thirteen percent (13%) *prior* to any promote accruing to the benefit of CTNY. (*Compare* Op. Agr. §§ 6.1(a)(i) & (ii) *with* §§ 6.1(a)(iii)-(v)). Consequently, whether the threshold to earning a promote was one hundred percent (100%) or one hundred and fifty percent (150%) of return of investment, the promote did not accrue until this milestone and others were satisfied.

The structure of the waterfall distribution confirms this construction of the Operating Agreement. Section 6.1(a) relates to the prioritization or distributions of Available Cash only. That section dictates that all Available Cash be distributed "First" to the parties on a *pro rata* basis *until* the parties received one hundred percent (100%) of the parties' capital contributions,

"Second" to the parties on a *pro rata* basis *until* the Internal Rate of Return reached thirteen percent (13%), and only thereafter, "Third" eighty percent (80%) to the parties on a *pro rata* basis, with a twenty percent (20%) kicker to CTNY *until* the Internal Rate of Return reached eighteen percent (18%). CTNY's kicker further potentially increases to twenty-five percent (25%) and then thirty-five percent (35%) upon the achievement of higher rates of return. The graduated nature of the waterfall unmistakably suggests that the "promote," *i.e.* the kicker that CTNY may potentially receive, only accrues upon the satisfaction of the earlier, higher priority financial milestones. And, as discussed previously, there is no language in the Operating Agreement to suggest otherwise.

Additionally, all distributions were to be made from "Available Cash". Those amounts are the finite proceeds from the recent sale of units, determined by an amount available "for any period in question." (Op. Agr., Art. 2, p. 2). The determination of Available Cash for a fixed time period is counter to CTNY's claim that its distributions include a "look back" to earlier periods for an accrued promote.

Contrary to this unambiguous contractual language, CTNY's claim is for $836,000 of accrued promote on $71,898.10 of Available Cash (after 6.1(c) distributions are fully made). That claim fails to accord with the express requirement of Section 6.1(a)(iii)-(v) that BCM and CTNY receive *pro rata* distributions of a set percentage of available cash, with CTNY to receive a limited and graduated kicker upon the achievement of certain financial milestones.

CTNY's reliance upon extrinsic evidence to support its interpretation underscores the illogic of its argument. As a threshold matter, CTNY appears to acknowledge that the Operating Agreement is unambiguous. (CTNY Memo, p.4-5). Its reliance on extrinsic evidence to interpret the terms of an unambiguous contract is therefore inopposite. *See Eagle Indus., Inc. v.*

Devilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.").

Additionally, the extrinsic evidence that CTNY presents lacks any probative value. CTNY filed the Affidavits of Mark P. Boisi ("Boisi") and Leonard J. Nannarone ("Nannarone"). Boisi is the managing member of CTNY, and a signatory of the Operating Agreement. The sum and substance of Boisi's Affidavit is that "the promote accrues from day one," (Boisi Aff., ¶ 19), and that "[t]his was the intent of the parties when the Operating Agreement was drafted, it is reflected in the language of the Operating Agreement and is consistent with practice and usage in the industry." (Id., ¶ 20). Boisi's Affidavit fails to provide any substantiating factual attestations to his conclusions regarding the alleged intent of the parties, fails to specifically identify any language in the Operating Agreement to the effect that the promote accrues from day one, and fails to provide any basis for his allegations regarding purported industry standards. The best that Boisi can do is obliquely reference the fact that BCM had "attempted to incorporate several different structures" during negotiations, but does not provide any detail as to the terms and conditions of those structures, (*id.*, ¶ 24), and alleges irrelevantly that no one from BCM claimed that the promote did not accrue from day one at the time of execution of the Operating Agreement or at any time until September 2013. (*Id.*, ¶ 25). Significantly missing from Boisi's Affidavit is an attestation that BCM acknowledged that the promote accrued from day one. Moreover, the fact that BCM contended in September 2013 that the promote did not accrue on day one is hardly surprising, given that this date coincides with CTNY's first demand for an accrued promote. (*See* Kelley Aff., ¶ 8).

Nannarone's Affidavit is even less helpful. Nannarone was CTNY's counsel for this deal. ((Nannarone Aff., ¶ 1). He couches all of his factual attestations as "[t]o the best of my knowledge and recollection of the negotiation sessions," and expresses his "opinion" regarding the parties' intents. (*Id.*, ¶¶ 11-13). Those "opinions" are unsupported any factual substantiation. Moreover, his purported recollection of negotiations is irrelevant to the construction of the Operating Agreement in view of that contract's integration clause. (*See* Op. Agr., § 13.12); *Li v. Standard Fiber, LLC,* 2013 Del. Ch. LEXIS 83, *24 (Del. Ch. Mar 28, 2013) ("[U]nder Delaware law, an integration clause serves as a presumption of integration, trigging the applicability of the parole evidence rule, which bars the admission of preliminary negotiations, conversations and verbal agreements....") (internal quotations omitted). Perhaps most significantly, his construction of the Operating Agreement (perhaps inadvertently) is that the one hundred percent (100%) return provision would have to be satisfied before the promote accrues, (*id.*, ¶ 11), an attestation that contradicts CTNY's contention that the promote accrued from day one.

CTNY's argument that BCM's interpretation of the Operating Agreement results in an illusory contract and commercially unreasonable terms is badly overreaching. CTNY has already made an enormously healthy profit on this deal, and stands to receive an additional $160,930.83 in distributions and $134,743.40 in brokerage fees upon sale of the final unit. Moreover, CTNY was separately compensated for its brokerage and management. (Kelley Aff., ¶ 6). All told, CTNY is projected to make a return of one hundred and eighty-four percent (184%) on its capital contributions alone (applying BCM's contraction of the Operating Agremeent), as compared with BCM's return of one hundred and fifty-four percent (154%).

For its part, BCM does not dispute the CTNY is due a distribution from the final condominium sale and payment of its commissions and fees. BCM disputes that CTNY may capture essentially all of the remaining Available Cash under the guise that it is due an accrued promote.

c. ***CTNY Will Not Suffer Irreparable Harm In The Absence Of An Injunction.***

CTNY will not suffer any irreparable harm in the absence of an injunction. It controls the accounts from which any distribution will be made and, in fact, has already exercised self-help in embargoing the funds in dispute (and more), (Kelley Aff., ¶¶ 5, 15-16), so there is no risk that BCM will abscond with proceeds. What CTNY really hopes to achieve is this Court's imprimatur on its unilateral and unlawful actions – an entirely inappropriate use of injunctive relief.

Additionally, this dispute is solely about amounts due on a contract, for which monetary damages are available. Injunctive relief is consequently not appropriate in this context -- "Where a plaintiff can be fully compensated by a monetary award, an injunction will not issue because no irreparable harm will be sustained in the absence of such relief." *Lombard v. Station Square Inn Apartments Corp.*, 94 A.D.3d 717, 721 (2d Dep't 2012).

CTNY's requested relief is also grossly overreaching. It seeks to enjoin the distribution of $1,400,000 of sales proceeds, despite its allegation of being due $836,000. CTNY claims that the additional amount is needed to wrap up the affairs of the Operating Company, and yet cannot provide any itemization or calculation as to how it arrived at this figure – despite its control of the books and records. (Boisi Aff, ¶ 5). In contract, its own correspondence claims the need for an additional $343,000 for this purpose, amounts that CTNY already has on hand. (Kelley Aff., Ex. C).

d. The Balance of the Equities Favors BCM.

"To obtain an injunction, the plaintiff [is] required to show that the irreparable injury to be sustained is more burdensome to him than the harm that would be caused to defendant through the imposition of the injunction." *Lombard*, 942 N.Y.S.2d at 121. Here, CTNY has not and cannot make that showing. Its overreaching request ignores the express language of the Operating Agreement and seeks to tie up far more money that it claims to be due. In contradistinction, BCM is ready, willing and able to direct a distribution to CTNY consistent with the deal that that parties made.

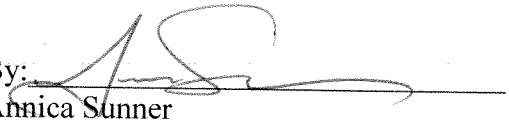
CONCLUSION

BCM respectfully seek an order denying CTNY's Order to Show Cause in its entirety.

Dated: December 4, 2013

Respectfully submitted,

NIXON PEABODY LLP

By: 

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