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

CHARLES R. SEROTA, GEOFFREY S. SEROTA, SONS EASTPORT LLC, SONS RIVERHEAD LLC, SONS RIVERHEAD II LLC, 409-423 WFP SHIRLEY LLC, 349-351 WFP SHIRLEY LLC, SEROTA WADING RIVER LLC, SONS EAST MEADOW LLC, 3644 LONG BEACH ROAD LLC, 3600 LONG BEACH ROAD LLC, AND SEROTA VALLEY STREAM LLC,

Plaintiffs,

-against-

JOSEPH SCIMONE individually, JOSEPH SCIMONE in his capacity as Executor of the ESTATE OF NATHAN L. SEROTA, MICHAEL CASSIDY, AND LIGHTHOUSE REALTY PARTNERS, LLC,

Defendants.

Index No.: 651117/2012

Hon. Charles E. Ramos

(Motion Sequence Nos. 16, 17 and 18)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs Charles R. Serota ("Charles"), Geoffrey S. Serota ("Geoffrey") (collectively, "Individual Plaintiffs"), Sons Eastport LLC, Sons Riverhead LLC, Sons Riverhead II LLC, 409-423 WFP Shirley LLC, 349-351 WFP Shirley LLC, Serota Wading River LLC, Sons East Meadow LLC, 3644 Long Beach Road LLC, 3600 Long Beach Road LLC, and Serota Valley Stream LLC (collectively, "Plaintiffs"), by their attorneys, Greenfield Stein & Senior, LLP and Kantor, Davidoff, Mandelker, Twomey & Gallanty, P.C., submit this memorandum of law in opposition to the motions of Defendants Joseph Scimone ("Scimone"), Michael Cassidy ("Cassidy") and Lighthouse Realty Partners, LLC ("Lighthouse") to dismiss the second through fifth and seventh and eighth causes of action in Plaintiffs' Second Amended Complaint.

Defendants Scimone and Cassidy's motions to dismiss should be denied because under both Delaware and New York law, Nathan Serota ("the Decedent" or "Nathan"), as the managing member of the Plaintiff LLCs, owed both the Plaintiff LLCs and their members, Charles and Geoffrey, a fiduciary duty to preserve, protect and promote their interests, which he breached by burdening the Plaintiffs with the management agreement (the "Management Agreement") that he allegedly executed with Scimone on April 8, 2010. Nathan's execution of the Management Agreement breached his fiduciary duties because it deprived Plaintiffs of their ownership rights and prerogatives by foreclosing them from controlling the operations of the Plaintiff LLCs and burdening them with an agreement which encumbers the properties owned by the LLCs in the event of sale. The business judgment rule provides no protection to Nathan where, as here, Plaintiffs have adequately pleaded that he breached his fiduciary duty.

Scimone's and Cassidy's motions should also be denied because Nathan had no authority to constrain the rights of Charles and Geoffrey, as managing members, to manage the affairs of the Plaintiff LLCs after Nathan's death. The Plaintiff LLCs' operating agreements do not authorize him to do so and his attempt to do so breached his implied covenant of good faith and fair dealing which inheres in those agreements. It is also a de facto attempt to override the terms of the Plaintiff LLCs' operating agreements which do not limit the powers of any future managing members absent an amendment to the operating agreement which is signed by all other members. Further, the authority bestowed to Scimone by the Management Agreement is tantamount to a testamentary bequest that was not executed with the requisite testamentary formalities.

Cassidy's argument concerning whether a cause of action exists for his knowing participation in a breach of Nathan's fiduciary duty must also fail because Plaintiffs have

sufficiently alleged that Nathan's and Cassidy's involvement in the execution of the Management Agreement caused Plaintiffs' injury. Cassidy, who was both Nathan's attorney and the attorney for the Plaintiff LLCs, concedes that he reviewed the Management Agreement with Nathan, both when he claims that it was initially drafted and when Nathan allegedly signed it, and that he notarized Nathan's acknowledgment. There is also no dispute that Cassidy is receiving a benefit from the Management Agreement, as a 5% owner of Lighthouse, and Plaintiffs have adequately alleged that this benefit was his motive in assisting Nathan to enter into the Agreement. The mere fact that Scimone could have entered into an arms-length management agreement as Executor under Nathan's Will did not grant him the authority to enter into the self-dealing Management Agreement in dispute, which is not only manifestly injurious to the Individual Plaintiffs as estate beneficiaries, but adversely affects the majority ownership rights and interests that they had prior to Nathan's death. Cassidy also fails to show that any power of attorney obtained by Scimone during Nathan's life would permit him under applicable law to sign the Management Agreement as attorney-in-fact for Nathan in his capacity as managing member. Thus, Cassidy's claim that the Management Agreement could have been executed, regardless of his participation and assistance, is incorrect.

Lighthouse's argument that Plaintiffs' second through fifth causes of action for declaratory relief should be dismissed, because it didn't come into existence until after Nathan's death, is the same argument that this Court previously rejected in sustaining Plaintiffs' first cause of action against Lighthouse's motion to dismiss the Amended Complaint. Lighthouse, as the assignee of the Management Agreement, obviously has a financial interest in whether the Management Agreement is invalidated because all of the financial benefits of the Management Agreement flow to Lighthouse. Thus, it is a proper defendant.

STATEMENT OF FACTS

Nathan was a premier developer of commercial shopping centers on Long Island (SAC, ¶28).[1] At the time of his death on May 1, 2010, he owned, individually or jointly with his sons, Charles and Geoffrey, interests in 28 limited liability companies which, in turn, owned the shopping center properties.

In seven of the Plaintiff LLCs, Charles and Geoffrey had a controlling two-thirds ownership interest (Charles Serota Aff., ¶4; Geoffrey Serota Aff., ¶3) prior to the Decedent's death. Of the remaining three Plaintiff LLCs, Charles and Geoffrey had a forty percent ownership interest in 3644 Long Beach Road LLC and Serota Valley Stream LLC prior to the Decedent's death. In 3600 Long Beach Road LLC, defendant Scimone, as Executor, conceded in the initial estate tax return that he filed with the New York State Department of Taxation and Finance that they owned at least a 28% ownership interest at Nathan's death. Under Nathan's will, his ownership in the Plaintiff LLCs are bequeathed outright to Charles and Geoffrey, except his interests in 3600 and 3644 Long Beach Road which are bequeathed to them in trust (Charles Serota Aff., ¶5; Geoffrey Serota Aff., ¶4; Exh. 3, Article Third (c) (3) and (d)).[2]

Since the 1970's, Charles and Geoffrey worked side by side with Nathan in the family business, becoming partners of a number of the properties in the mid-1970's, and holding positions of substantial responsibility until Scimone banished them from the family's Valley

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[1] References to "SAC" are to Plaintiffs' Second Amended Complaint annexed to the accompanying Affidavit of Harvey E. Corn, sworn to on October 15, 2013 ("Corn Affidavit"). References to Charles Serota Aff. and Geoffrey Serota Aff. are to the Affidavits of Charles R. Serota and Geoffrey S. Serota, sworn to on October 15, 2013.

[2] Nathan bequeathed his interests in certain other of the LLC's which he owned to Vivian, as well as those in three additional properties (Serota Islip LLC, Serota Farmingville LLC and Serota Smithtown LLC) in trust 50% for Charles and Geoffrey and 50% for Vivian. Again, Scimone is named as trustee.

Stream, New York office after Nathan's death. Geoffrey's job for the Plaintiff LLCs and all of the Serota companies was to obtain major tenants for the shopping centers, and negotiate leases with them. Among other accomplishments, it was Geoffrey's work in obtaining Loews Theaters and Lowes Home Improvement that was instrumental in obtaining $3,000,000 in annual revenues for LLC's in Brookhaven. He also obtained site plan and zoning approval for properties and, along with Burton Seelig, the family's in-house architect, built or expanded a number of the shopping centers (Geoffrey Serota Aff., ¶5).

Charles supervised construction for several of the family's shopping centers and their expansion, and since 2000 served as property manager for about 17 of the 28 properties, overseeing construction and repair work for those properties. However, Geoffrey's and Charles's roles were not rigid, and Geoffrey would sometimes obtain construction contractors, and Charles would participate in meetings with Nathan and Geoffrey whenever major decisions had to be made concerning the development and leasing of the family's shopping centers (Charles Serota Aff., ¶¶2-3; Geoffrey Serota Aff., ¶5).

Contrary to the impression that Scimone seeks to convey, he was not the manager of the family's properties (SAC, ¶25) while Nathan was alive. Scimone's relationship with the family started as a banker for Fleet Bank, where Nathan obtained financing. Nathan brought him into the company in the late 1990's because of his financing expertise and the only management role that he assumed was to oversee the bookkeeping staff in the office and handle minor contracts, for such things as snow removal, maintenance and landscaping. All business decisions were made by Nathan, Geoffrey and Charles (Charles Serota Aff., ¶6; Geoffrey Serota Aff., ¶7).

It was only after Nathan's physical and mental condition deteriorated, that Scimone had a greater role in the decision-making process, as part of an informal operating

committee that also included Geoffrey, Charles, the Plaintiff LLCs' attorney (Cassidy), and Daniel Serota, Nathan's second wife, Vivian's son, who represented her on the committee. The committee was formed because it was recognized that Nathan could no longer comprehend the deals that were presented to him (SAC, ¶35; Charles Serota Aff., ¶6; Geoffrey Serota Aff., ¶7).

All of the operating agreements for the Plaintiff LLCs are virtually identical except that seven are governed by Delaware Law[3] and three by New York law (SAC, ¶¶12-21, 60).[4] Paragraph 4-1.2 of the operating agreements vests broad and exclusive power in the managing members (who are now the Individual Plaintiffs) to, among other things, purchase, lease, acquire or dispose of property; open bank accounts and otherwise invest the funds of the company; retain accountants, attorneys or other agents; make distributions to members in the sole discretion of the managing members; and to cause to be prepared and filed the federal and state tax returns for the company (SAC, ¶61; Exh. 4, ¶4.2).[5] The operating agreements do not permit amendment except in writing signed by all members (Exh. 4, ¶15.4).

Prior to his death, Nathan was sole managing member of each of the Plaintiff LLCs, as well as the other limited liability companies which comprised the family business (SAC, ¶58). Subsequent to Nathan's death, Charles and Geoffrey, as the Plaintiff LLCs' sole surviving members and beneficiaries, became managing members (SAC, ¶¶29, 58; Charles Serota Aff., ¶5; Geoffrey Serota Aff., ¶4).[6]

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[3] Sons Eastport, Sons Riverhead, Sons Riverhead II, 409-423 WFP Shirley, 349-351 WFP Shirley, Sons East Meadow and Serota Valley Stream.

[4] Serota Wading River, 3644 Long Beach Road and 3600 Long Beach Road.

[5] References to "Exh." are to the exhibits annexed to the Corn Affidavit.

[6] The operating agreements provide that Scimone, as Nathan's executor, has no right to vote Nathan's membership interest during the pendency of the estate's administration. Thus, even in those Plaintiff LLCs where Nathan held a

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On April 8, 2010, Nathan, unbeknownst to Charles and Geoffrey, allegedly entered into the Management Agreement with Scimone, purporting to bind each of the Plaintiff LLCs and all of the other limited liability companies holding title to the Serota properties (SAC, ¶37). The Management Agreement sharply curtailed the powers of the current managing members, which are the Individual Plaintiffs, notwithstanding that no amendment to the Management Agreement could occur without their signed consent as members. As shown in the accompanying affidavit of Robert Von Ancken ("Von Ancken Aff.")[7] and as alleged in the Second Amended Complaint, the Management Agreement is replete with commercially unreasonable provisions which effectively deprive the Plaintiff LLCs, many of which were then majority owned by Charles and Geoffrey, of their ownership rights, including the ability to control their revenue and expenses, and hence profits, and to sell the properties at anything close to their fair market value.

Chief among the Management Agreement's commercially unreasonable terms is its provision that it will automatically renew, in perpetuity, following an initial five-year term (Exh. 2, ¶1(b); SAC, ¶64a; Von Ancken Aff., ¶5). Normally, an owner has the at-will right to terminate its manager by giving 30 to 60 days' notice (Von Ancken Aff., ¶5). Under the Management Agreement, the Plaintiff LLCs can terminate Scimone only in the most limited circumstances – such as commission of a material breach of the agreement, conviction of a felony or crime of moral turpitude, bankruptcy or lengthy disability (Exh.2, ¶20(b) and (c)). Thus, regardless of how poorly Scimone is performing, he cannot be removed. This is contrary

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majority interest, Geoffrey and Charles had the authority to consent to their own appointment as managing members (see p. 22-23, infra).

[7]Affidavit of Robert Von Ancken, sworn to on October 9, 2013.

to the powers that the Individual Plaintiffs would have as current managing members under the operating agreements.

Even the sale of a Plaintiff LLC-owned property does not terminate the Management Agreement as to that property. The Management Agreement specifically provides that it will terminate only upon the sale of all of the properties (Exh. 2, ¶20(c)(ii)), including those that Nathan bequeathed to his wife, Vivian, over which Charles and Geoffrey have no control (SAC, ¶64d; Von Ancken Aff., ¶6; Exh. 3, Article Third (b)(1)). The continued existence of the Management Agreement severely depresses the Plaintiff LLCs' properties' value, because any prospective purchaser would expect the right to manage the property (s)he is purchasing or to choose his (her) own manager, unburdened by a prior management agreement that leaves an owner with no final say over all major financial decisions (Von Ancken Aff., ¶6).

The Management Agreement also gives Scimone the right to determine annual operating plans for the properties, including their budgets, and grants the Plaintiff LLCs no rights to disapprove of those plans or budgets, or even make recommendations with respect to their terms (Exh. 2, ¶4(b) and (c); SAC, ¶¶52, 63a; Von Ancken Aff., ¶7) . In a typical management agreement, ownership, who is paying these costs, always has the right of final say as to the budget and the operating plan (Von Ancken Aff., ¶7).

Scimone is also given full authority to negotiate all tenant leases, including rental rate, leasehold improvements, concessions and other similar items without the input of either the Plaintiff LLCs or Charles or Geoffrey as owners/managing members (Exh. 2, ¶15; SAC, ¶¶52, 63e; Von Ancken Aff., ¶8). The Management Agreement grants the Plaintiff LLCs and Charles and Geoffrey no recourse if they disagree with the rent or common area maintenance charges

that Scimone proposes to charge or the length of the lease term or the acceptability of the tenant that Scimone has installed or granted a renewal (Von Ancken Aff., ¶8).

As Mr. Von Ancken has noted, leasing is the lifeblood of shopping center ownership and one below market lease to a major tenant could render a shopping center financially unviable; to remove this decision-making authority from a managing member and confer it instead on a property manager is unheard of and deprives the Plaintiff LLCs and their members of control over the transactions which are critical to their financial success (Von Ancken Aff., ¶9).

The adverse financial impact that the Management Agreement has on the value of the Plaintiff LLCs' and their members' ownership interests is compounded by the untrammeled discretion which it grants to Scimone to determine what monies will be held in reserve and what distributions will be made to the Plaintiff LLCs (Exh. 2, ¶7(d); SAC, ¶¶52, 63(c)). Not only do the Plaintiff LLCs' managing members have no control over the rents that the properties will be generating, but they are also deprived of the right to determine how much they will derive from the properties' operations if profitable. Under a normal and reasonable management agreement, the manager is required to make monthly or quarterly payments to the owners after disbursements. It is not up to the manager to decide when the owners receive cash flow from the properties (Von Ancken Aff., ¶10).

Further burdening the Plaintiff LLCs' property rights and Charles's and Geoffrey's interests, the Management Agreement permits Scimone to assign it, subject only to the requirements that he be the assignee's 50% owner and the principal manager of the properties (Exh. 2, ¶22). No approval is required by the Plaintiff LLCs for Scimone to assign the Management Agreement even though the assignee may not have the requisite management

capability and has a poor reputation in the industry. It is highly unusual for a manager to have these rights and is contrary to the broad discretion vested in the managing member by the operating agreement. Always, ownership is advised and can accept or veto such an assignment (Von Ancken Aff., ¶11).

Other examples of the Management Agreement's commercial unreasonableness include: (a) Scimone's unfettered right to enter into contracts on the Plaintiff LLCs' behalf, without the Plaintiff LLCs' approval (Exh. 2, ¶5(c)) - even if they involve Scimone's self-dealing (Exh. 2, ¶5(e); SAC, ¶63(h)); and (b) Scimone's control over the hiring and deployment of on-site employees to perform his management duties, even though the Management Agreement requires the Plaintiff LLCs to pay for them, and the Plaintiff LLCs are unable to determine the amount of their compensation (Exh. 2, ¶8; SAC ¶¶52, 63(d); Von Ancken Aff., ¶12).

On October 1, 2010, Scimone assigned the Management Agreement to Lighthouse, thereby conferring on Lighthouse all of the powers and authority granted to Scimone under the Management Agreement, which rightly belong to Charles and Geoffrey, as the Plaintiff LLCs' managing members (SAC, ¶24). Scimone has a 70% interest in Lighthouse, while the remaining 30% is divided among Steve Appas, a former leasing agent for the family (20%), Terry Regan, the family's former controller (5%) and Cassidy (5%), the family's former attorney (SAC, ¶¶ 25, 27).

THE PRESENT ACTION

Plaintiffs commenced this action on April 5, 2012, seeking a declaratory judgment declaring that the Management Agreement was invalid because it was signed by Nathan at a time when he lacked the mental capacity to understand it. Plaintiffs alleged that Scimone and Cassidy were the cause of the execution of the Management Agreement and that

they profited handsomely therefrom. Defendants moved to dismiss the original complaint but withdrew their motions when Plaintiffs served an Amended Complaint on May 18, 2012.

In their Amended Complaint, Plaintiffs added factual allegations to the original complaint and asserted new causes of action, including claims against Scimone and Cassidy for unjust enrichment and for Cassidy's breach of fiduciary duty to the Plaintiff LLCs in causing Nathan to enter into the Management Agreement, and as against Scimone for aiding and abetting Cassidy's breach of fiduciary duty.[8] Plaintiffs also added Scimone in his capacity as Executor of Nathan's Estate, and the Plaintiff LLCs as plaintiffs. Defendants moved to dismiss the Amended Complaint in June 2012 and by Decision and Order dated January 10, 2013, this Court granted Cassidy's motion to dismiss the Amended Complaint as against him in its entirety, and granted Scimone's motion to the extent it sought dismissal of Plaintiffs' claim against him for aiding and abetting Cassidy's breach of fiduciary duty. The Court denied the Defendants' motions to dismiss with respect to all of Plaintiffs' other claims.[9]

On November 13, 2012, before any decision by the Court was granted concerning dismissal of any causes of action in the Amended Complaint, Plaintiffs, by its prior counsel, moved for leave to file a Second Amended Complaint to allege in the alternative, that if Nathan was competent to execute the Management Agreement, as the Defendants had asserted in their motions to dismiss, then the Management Agreement should be declared invalid because Nathan's execution of the Management Agreement as the managing member of each of the

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[8] Plaintiffs alleged that Cassidy had breached his fiduciary duty as legal counsel to the Plaintiff LLCs by causing Nathan to enter into the Management Agreement.

[9] The Court at the oral argument on the defendants' motions to dismiss on July 9, 2012, had orally dismissed all claims which Plaintiffs had asserted against Nathan's wife, Vivian, and their claim against Cassidy under Judiciary Law §487.

Plaintiff LLCs was a breach of the fiduciary duty which he owed to the Plaintiff LLCs and Charles and Geoffrey as members (Second Cause of Action) (SAC, ¶¶84-95). Plaintiffs also alleged that the Management Agreement should be declared invalid because Nathan lacked authority to bind the LLC Plaintiffs to the Management Agreement because it was not an agreement in the ordinary course of the Plaintiff LLCs' business and because his execution constituted a breach of the implied covenant of good faith which inheres in the Plaintiff LLCs' members' operating agreements (Third Cause of Action) (SAC, ¶¶96-102).

Plaintiffs' Fourth Cause of Action alleges that the Management Agreement should also be declared invalid because Nathan did not have the power or authority to deprive Charles and Geoffrey of their powers and duties as managing members of the Plaintiff LLCs after Nathan death, and to delegate them to Scimone, through his execution of the Management Agreement (SAC, ¶¶103-109). Such would be a de facto amendment to the operating agreement contrary to its terms, which requires the agreement of other members (Exh. 4, ¶15.4). In the alternative, Plaintiffs alleged that because the Management Agreement had the effect of a testamentary disposition, it should be declared invalid because of Nathan's failure to sign it with the requisite testamentary formalities (SAC, ¶¶110-116).

Plaintiffs also asserted two new causes of action, for knowing participation in Nathan's breach of trust, as against Scimone and Cassidy. (Seventh and Eighth Causes of Action) (SAC, ¶¶122-128, 129-135). Plaintiffs allege that Scimone and Cassidy knew Nathan owed a duty of trust to the Plaintiff LLCs and to Charles and Geoffrey, because they knew that Nathan was the managing member of the Plaintiff LLCs and that Charles and Geoffrey were members of those LLCs. Plaintiffs further allege that, because Scimone was a party to the Management Agreement, and because Cassidy acted as counsel to Nathan and to the Plaintiff

LLCs and acted as notary when Nathan allegedly signed the Management Agreement, they both knew or should have known that Nathan was breaching his fiduciary duty to the Plaintiff LLCs and their members and that they substantially assisted in Nathan's breach of his fiduciary duties (Id., SAC ¶¶88-93).

By its Decision and Order, dated July 19, 2013, this Court granted Plaintiffs leave to file their Second Amended Complaint and these motions followed.[10]

ARGUMENT

POINT I

THE APPLICABLE STANDARD

It is well established that in determining whether to grant a motion to dismiss, "the pleading is to be afforded a liberal construction (CPLR 3026) and the Court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any discernible legal theory." Sheila C. v Povich, 11 A.D.3d 120, 122, 781 N.Y.S.2d 342, 345 (1st Dep't 2004). Any "deficiencies in the complaint may be amplified by supplemental pleadings and other evidence." AG Capital Funding Partners, L.P. v State St. Bank and Trust Co., 5 N.Y.3d 582, 591, 808 N.Y.S.2d 573, 578 (2005). When "evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, ... dismissal should not eventuate." Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 185 (1977).

[10] The Second Amended Complaint in the form approved by the Court included the claims against Cassidy and Scimone that were dismissed by this Court's January 10, 2013 Decision and Order. By Stipulation filed on August 28, 2013, the parties omitted these claims (formerly denominated as the Seventh and Eighth Causes of Action).

Further, to prevail on a CPLR 3211(a)(1) motion based on documentary evidence, "the moving party must show that the documentary evidence conclusively refutes plaintiff's ... allegations." AG Capital Funding Partners, L.P., supra, 5 N.Y.3d at 591, 808 N.Y.S.2d at 577.

Under these standards Plaintiffs' second through fifth causes of action for declaratory relief and seventh and eighth causes of action for Scimone's and Cassidy's participation in Nathan's breach of trust have been adequately pleaded.

POINT II

PLAINTIFFS HAVE STATED A CLAIM FOR A DECLARATIORY JUDGMENT THAT THE MANAGEMENT AGREEMENT IS NULL AND VOID BECAUSE IN ENTERING INTO IT, NATHAN BREACHED HIS FIDUCIARY DUTY TO THE PLAINTIFF LLCS AND CHARLES AND GEOFFREY AS MEMBERS

The law is well established that questions of corporate governance are to be determined by the law of the state of incorporation. See, e.g., Matsumura v. Benihana National Corp., 2010 WL 882968 (S.D.N.Y. 2010), at *10 fn. 23. Under Delaware law, applicable to seven of the Plaintiff LLCs, it is well settled that a managing member of a limited liability company owes a fiduciary duty to the LLC and its members. "Under Delaware law, ...absent a provision to the contrary in the governing LLC agreement, an LLC's 'managers and controlling members owe the traditional fiduciary duties that directors and controlling shareholders in a corporation would (including the traditional duties of loyalty and care).'" Coventry Real Estate Advisors, LLC v. Developers Diversified Realty Corp., 84 A.D.3d 583, 584, 923 N.Y.S.2d 476, 477 (1st Dep't 2011) (quoting South Canaan Cellular Invs. LLC v. Lackawaxen Telecom, Inc. [In re South Canaan Cellular Invs., LLC], 2010 WL 3306907, at *7 (E.D. Pa. 2010) (applying Delaware law)); accord Kelly v. Blum, 2010 WL 629850 (Del. Ch. 2010), at *10 ("'in the absence of a contrary provision in the LLC agreement,' LLC managers and members owe 'traditional fiduciary duties of loyalty and care' to each other and to the company" (quoting Bay

Ctr. Apartments Owners, LLC v. Emery Bay PKI, LLC, 2009 WL 1124451 (Del. Ch. 2009) , at *8 n. 33).

The duty of loyalty requires that the managing member maintain an undivided loyalty to the limited liability company and its members, which includes affirmatively protecting the interests of the other limited liability company members and refraining from doing anything which would work injury to the limited liability company or deprive it of profit or advantage. In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 751 (Del. Ch. 2005), aff'd, 906 A.2d 27 (Del. 2006).

To eliminate the fiduciary duty that a managing member owes under Delaware law, a limited liability company's operating agreement must do so explicitly. Kelly v. Blum, supra, 2010 WL 629850, at *10; accord In re Atlas Energy Resources, LLC, 2010 WL 4273122, at *6 (Del. Ch. 2010) ("in the absence of explicit provisions in an [LLC] agreement to the contrary, the traditional fiduciary duties owed by corporate directors and controlling shareholders apply in the limited liability company context"). The drafters of the limited liability company agreement "'must make their intent to eliminate fiduciary duties plain and unambiguous.'" Feeley v. NHAOCG, LLC, 62 A.3d 649, 664 (Del. Ch. 2012) (quoting Bay Ctr. Apartments Owners, LLC v. Emery Bay PKI, LLC, supra, at *9).

The Plaintiff LLCs' operating agreements contain no provisions granting Nathan immunity from a breach of his fiduciary duties as managing member. The agreements provide only that:

> 4.4 ... The Member shall not be liable to the Company or any other Member for any loss or damages sustained by the Company or any Member, unless the loss or damage shall be the result of the gross negligence or willful misconduct of such Member (Exh. 4, ¶4.4).

In Feeley v. NHAOCG, LLC, supra, the LLC's operating agreement contained the following exculpatory clause:

> *Limited Liability of Members:* Except as and to the extent required under the Delaware Act or this Agreement, no Member shall be (i) liable for the debt, liabilities, contracts or any other obligations of the Company; or (ii) liable, responsible, accountable in damages or otherwise to the Company or the other Members for any act or failure to act in connection with the Company and its business unless the act or omission is attributed to gross negligence, willful misconduct or fraud or constitutes a material breach by such Member of any term or provision of this Agreement....

63 A.3d at 664. Notwithstanding the broad language contained in Feeley, the Delaware Chancery Court held that "it does not limit or eliminate fiduciary duties as authorized by [6 Del. Code] Section 1101(c)." 62 A.3d at 664. Importantly, it does not prohibit the right to seek injunctive relief or other equitable remedies such as specific performance, rescission, and the imposition of a constructive trust. (Id.). Thus, under Delaware law, the language contained in Paragraph 4.4 of the Plaintiff LLCs' operating agreements does not prevent Plaintiffs from obtaining a judgment declaring that the Management Agreement is void because of Nathan's breach of his fiduciary duty.

Under New York Law, a managing member of a limited liability company also owes common law fiduciary duties to the limited liability company and its members. Arfa v. Zamir, 21 Misc.3d 1101(A), 873 N.Y.S.2d 231, 2008 WL 4302790 (Sup. Ct. N.Y. Co.), aff'd, 75 A.D.3d 443, 905 N.Y.S.2d 97 (1st Dep't 2010); Salm *v.* Feldstein, 20 A.D.3d 469, 470, 799 N.Y.S.2d 104 (2nd Dep't 2005). "It is well-settled under New York law that managing members of an LLC owe a fiduciary duty to the LLC and their fellow LLC members." McGuire Children, LLC v. Huntress, 24 Misc.3d 1202(A), 889 N.Y.S.2d 883, 2009 WL 1693725, at *16 (Sup. Ct.

Erie Co. 2009), aff'd, 83 A.D.3d 1418, 920 N.Y.S.2d 531 (4th Dep't 2011); accord Out of the Box Promotions, LLC v. Koschitzki, 55 A.D.3d 575, 578, 866 N.Y.S.2d 677 (2nd Dep't 2008).

Under New York law, as in Delaware, the fiduciary duties one assumes as a managing member includes a " 'duty of undivided and undiluted loyalty,' requiring him to 'single-mindedly pursue the interests' " of his fellow limited liability company members. McGuire Children, supra, at *16 (quoting Birnbaum v. Birnbaum, 73 N.Y.2d 461, 466, 541 N.Y.S.2d 746, 748 (1989)). "It is a breach of the duty for a fiduciary to injure or act contrary to the interests of the person to whom a duty of loyalty is owed." Lio v. Zhong, 21 Misc. 3d 1107(A), 873 N.Y.S.2d 234, 2008 WL 4489937, at *3 (Sup. Ct. N.Y. Co. 2008).

While New York's Limited Liability Company Law also permits members in their operating agreements to limit the personal liability of managers for any breach of duty in such capacity, the LLCL does not grant the members complete immunity. Thus, LLCL 417(a)(1) provides that an operating agreement may not eliminate:

> ...the liability of any manager if a judgment or other final adjudication adverse to him or her establishes that his or her acts or omissions were in bad faith or involved intentional misconduct or a knowing violation of law or that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled....

Moreover, as in Delaware, to limit or eliminate a fiduciary duty, the operating agreement must "clearly" do so. Pappas v. Tzolis, 87 A.D.3d 889, 892, 932 N.Y.S. 2d 439, 444 (1st Dep't 2011), reversed on other grounds, 20 N.Y.3d 228, 958 N.Y.S.2d 656 (2012); see 511 W. 232nd Owners Corp. v. Tempo Realty Co., 98 N.Y.2d 144, 153, 746 N.Y.S. 2d 131 (2002); Arfa v. Zamir, supra, (operating agreement provision virtually identical to that contained in operating agreements of Plaintiff LLCs does not eliminate duty of loyalty).

Here, Plaintiffs have alleged that Nathan burdened the Plaintiff LLCs and Charles and Geoffrey with a management agreement which deprives them of their ownership rights and their ability to derive any significant value from such ownership by a sale of the Plaintiff LLCs' properties, or their operation (SAC, ¶¶52, 53, 61-64). The Courts in both Delaware and New York have held that that the deprivation of similar rights constitutes a breach of fiduciary duty. See Blackmore Partners, L.P. v. Link Energy LLC, 864 A.2d 80 (Del. Ch. 2004) (complaint alleging that directors' approval of sale of substantially all of company's assets, which rendered equity unit holder's interest in limited liability company worthless, stated cause of action for breach of fiduciary duty); In re Atlas Resources, LLC, 2010 WL 4273122 (Del. Ch. 2010) (complaint alleging that exchange ratio at which minority LLC unitholders received controlling unitholder's stock in merger did not adequately compensate them for loss of cash distributions stated claim for breach of fiduciary duty against controlling unitholder); 21st Century Diamond, LLC v. Allfield Trading, LLC, 88 A.D.3d 558, 559, 931 N.Y.S.2d 50, 52 (1st Dep't 2011) (third-party complaint stated a claim for oppression by majority member of limited liability company of minority member "by freezing the latter out of the business and depriving it of its interest"); Noe v. Friedberg, 2009 WL 569276 (Sup. Ct. N.Y. Co. 2009) (claims that co-members unfairly diluted plaintiff's membership interest and forced him out of participation in the limited liability company stated cause of action for breach of fiduciary duty); Barbour v. Knecht, 296 A.D.2d 218, 227, 743 N.Y.S.2d 483 (1st Dep't 2002) (plaintiff's complaint that she was frozen out of the management of a close corporation asserts a cognizable wrong).

This Court held in Arfa v. Zamir, supra, that limited liability companies sufficiently alleged that their managers had breached their fiduciary duties by, inter alia, "entering into self-interested agreements and transactions with their affiliated companies, that

caused the Property LLCs to make commercially unreasonable payments" (emphasis added), and that such conduct constituted gross negligence and/or willful misconduct and bad faith.

It does not matter that Nathan was, as the Plaintiff LLCs' managing member, generally authorized to enter into contracts on behalf of the Plaintiff LLCs. In exercising that authority he is bound by his fiduciary responsibility not to injure the Plaintiff LLCs or their members' interests. He was also bound by the terms of the operating agreements which prohibit amendments thereto without the written consent of all other members.

Plaintiffs have alleged that the Management Agreement by its terms is perpetual and does not permit the termination of the Agreement upon the sale of any single property, thus providing a major obstacle to the sale, valuation or refinancing of any one property (SAC, ¶64a; Von Ancken Aff., ¶¶5, 6). It also alleges that the Management Agreement is replete with commercially unreasonable provisions which yield discretion and control over prerogatives normally belonging to ownership, including the right to establish and control budgets, negotiate and determine acceptable tenants for leases, control expenses, determine reserves and distributions and control the hiring of employees and professionals, to Scimone as property manager (SAC, ¶52, Von Ancken Aff., ¶¶ 7, 8, 10, 12). Drawing inferences that are most favorable to plaintiffs, the Second Amended Complaint alleges a burden on Plaintiffs' ownership, which severely impacts if not eliminates their ability to realize any of their properties' value.

The Second Amended Complaint also sets forth sufficient facts to establish that Nathan, if capable, breached his fiduciary duty to Charles and Geoffrey as the members holding the controlling voting interest in seven of the Plaintiff LLCs, by failing to disclose his intention to enter into the Management Agreement. See VGS, Inc. v. Castiel, 2000 WL 1277372 (Del. Ch.

2000), aff'd, 781 A.2d 696 (Del. 2001) (managers of minority LLC interests breached their duty to majority interest holders when they secretly held a meeting to reorganize the limited liability company to reduce the majority holder's interest to minority interest). Had Nathan disclosed his intent to execute a management agreement concerning those Plaintiff LLCs in which Charles and Geoffrey owned a majority interest and were members, they could have taken steps to block his actions.

Defendants' attempt to shield Nathan's misconduct by resort to the business judgment rule is also unavailing. Under both Delaware and New York law, the business judgment rule does not apply where a member/shareholder has adequately alleged a breach of fiduciary duty. In re Walt Disney Company Derivative Litig., supra, 907 A.2d at 756; In re Bear Stearns Litigation, 23 Misc.3d 447, 462, 870 N.Y.S.2d 709, 728 (Sup. Ct. N.Y. Co. 2008) (applying Delaware law); VGS Inc. v. Castiel, supra; Higgins v. New York Stock Exchange, Inc., 10 Misc.3d 257, 278, 806 N.Y.S.2d 339, 357 (Sup. Ct. N.Y. Co. 2005) ("The presumptive applicability of the business judgment rule is rebutted, and judicial inquiry thereby triggered, however, by a showing that a breach of duty has occurred"); Waterford Association, Inc. v. Samii, 2008 WL 4360419 (Sup. Ct. N.Y. Co. 2008), aff'd 68 A.D.3d 585, 891 N.Y.S.2d 367 (1st Dep't 2009) ("the rule was not intended to insulate an officer or director from his/her fraud, self dealing, breach of fiduciary duty or decisions affected by an inherent conflict of interest").

Those duties are not limited to a managing member's duty of care or his duty not to engage in self dealing. As the Delaware Chancery Court held in In re Walt Disney Company Derivative Litigation, supra:

> Fundamentally, the duties traditionally analyzed as belonging to corporate fiduciaries, loyalty and care, are but constituent elements of the overarching concepts of allegiance, devotion and faithfulness that must guide the conduct of every fiduciary. The

> good faith required of a corporate fiduciary includes not simply the duties of care and loyalty, in the narrow sense that I have discussed them above, but all actions required by a true faithfulness and devotion to the interests and its shareholders.

907 A.2d at 755.

Nathan cannot be said to have acted in the interests of the Plaintiff LLCs or Charles and Geoffrey, by stripping each of them of the power and authority to control their financial destiny as owners of the properties.

The business judgment rule also does not preclude inquiry into decisions which are "egregious," Aronson v. Lewis, 473 A.2d 805 (Del. 1984), that "cannot be attributed to any rational business purpose," Sinclair Oil Corp. v. Levien, 280 A.2d 717,720 (Del. 1971), or constitute "a gross abuse of discretion." Warshaw v. Calhoun, 221 A.2d 487 (Del. 1966). Accord Bansbach v. Zinn, 1 N.Y. 3d 1, 9, 769 N.Y.S.2d175, 181 (2003) (business judgment rule does not preclude review when "the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the director"). Under any of these standards, Nathan's action in depriving the Plaintiff LLCs and Charles and Geoffrey of their ownership and membership rights and preventing them from realizing the fair value of their assets, particularly as to those LLCs that they had a majority ownership interest in, cannot be found to have been made in good faith and as a product of sound business judgment. As Mr. Von Ancken has opined, no managing member who was acting in good faith and in furtherance of the best interests of the Plaintiff LLCs and their members would have entered into a management agreement which is so detrimental to their interests (Von Ancken Aff., ¶14).

Dismissal based on the invocation of the business judgment rule is particularly inappropriate prior to Plaintiffs' having had an opportunity for discovery. See Ackerman v. 305 E. 40th Owners Corp., 189 A.D.2d 665, 667, 592 N.Y.S.2d 365 (1st Dep't 1993) ("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").

POINT III

NATHAN DID NOT HAVE THE AUTHORITY TO BURDEN THE PLAINTIFF LLCS WITH THE MANAGEMENT AGREEMENT

In attempting to sustain their claim that Nathan had the authority to enter into the Management Agreement, Defendants rely on Paragraph 4.2 of the Plaintiff LLCs' operating agreements, which grants the managing member "full, exclusive and complete discretion, power and authority, on behalf of the Company to ...(e) enter into any agreement, instrument or other writing, ... and (g) take any other lawful action that the [managing member] consider[s] necessary, convenient or advisable in connection with any business of the Company." (Emphasis added). However, as this provision makes clear, Nathan was only authorized to enter into lawful contracts, not those made in breach of his fiduciary duty, as Plaintiffs have alleged here (SAC, ¶98). Nathan was not able to limit these rights to future managing agents unless the then existing members consented in writing to amend the operating agreements.

Defendants' argument must also fail because the Plaintiff LLCs' operating agreements do not authorize a managing member to enter into an agreement which is to take effect only after he dies, when he no longer had any authority to enter into the Management Agreement (SAC, ¶106). Here, the Management Agreement provides that "the original term of this Agreement shall commence within 180 days of the death of Serota" (Exh. 2, ¶(1)(b)).

Nor should any such authority be implied because it contravenes the rights of Charles and Geoffrey, as the Plaintiff LLCs' sole surviving members, to manage the Plaintiff LLCs. When Nathan died on May 1, 2010, his interest as a member of each of the Plaintiff LLCs terminated, except as it relates to the administration of his estate (see 6 Del. Code §18-705;

NY LLCL §608). Scimone, as Nathan's executor, has no right to vote Nathan's shares (see Exh. 4, ¶9.4(b)), and could only obtain such voting rights if Charles and Geoffrey consented to his becoming a voting member (Id., ¶¶9.2, 9.7). Even if Scimone had such authority, in seven of the ten Plaintiff LLCs, Charles and Geoffrey would control the vote because they hold a two-thirds majority. Thus, following Nathan's death, Charles and Geoffrey had the right to become managing members, and their authority to manage cannot be abridged by Nathan's unlawful delegation of all management authority to Scimone -- which is also a de facto amendment contrary to the terms of the operating agreement which requires all other members to consent in writing.

Defendants also misconstrue Plaintiffs' claim that Nathan's alleged entry into the Management Agreement was a breach of the implied covenant of good faith and fair dealing. The implied covenant which Nathan is alleged to have breached concerns the operating agreements for the Plaintiff LLCs that he entered into with Charles and Geoffrey, not the Management Agreement (SAC, ¶¶97, 98).

Under Delaware law, the implied covenant of good faith and fair dealing "requires that contracting parties 'refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party from receiving the fruits of the contract.'" Kelly v. Blum, 2010 WL 629850, at *13 (quoting Kuroda v. SPJS Hldgs., LLC, 971 A.2d 872, 888 (Del Ch. 2009)). In the context of corporate entities, "'the implied covenant functions to protect shareholders' expectations that the company and its board will properly perform the contractual obligations they have under the operative organizational agreements.'" Bay Center Apts. Owner, LLC v. Emery Bay PKI, LLC, 2009 WL 1124451 (Del Ch. 2009), at *7 (quoting Wood v. Baum, 953 A.2d 136, 143 (Del. 2008)). "Part of corporate managers' proper performance of their

contractual obligations is to use the discretion granted to them in the company's organizational documents in good faith." Id.

Similarly, under New York law, the implied covenant of good faith and fair dealing "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Dalton v. Educational Testing Service, 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 979 (1995) (quoting Kirke La Shelle Co. v. Armstrong Co., 263 N.Y. 79, 87 (1933)). Where "the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." Dalton, supra, 87 N.Y.2d at 389, 639 N.Y.S.2d at 979.

By entering into the Management Agreement, Nathan, if capable, deprived Charles and Geoffrey of the very essence of their bargain in establishing the operating agreements for the Plaintiff LLCs. This includes their rights as surviving members to take over as managing members at the death of a managing member and to not have those rights abridged unless they consent in writing. The operating agreements vest the management of the Plaintiff LLCs in their managing members and grant the managing members broad powers to control and manage the LLCs, including the authority to:

> (a) purchase, lease or otherwise acquire any property from any Person or sell, lease or otherwise dispose of any property to any Person, (b) open bank accounts and otherwise invest the funds of the Company, (c) purchase insurance on the business and assets of the Company, (d) commence lawsuits and other proceedings, (e) enter into any agreement, instrument or other writing, (f) retain accountants, attorneys or other agents and (g) take any other lawful action that the Managing Members consider necessary, convenient or advisable in connection with any business of the Company. (Exh. 4, ¶4.2).

The operating agreements further provide that:

> Unless authorized to do so by this Agreement or the Managing Members, no Person shall have any power or authority to bind the Company. (Id., ¶4.3)

By entering into the Management Agreement, Nathan has divested Charles and Geoffrey, current managing members of the Plaintiff LLCs, of these powers which is a de facto amendment contrary to the terms of the operating agreement. Under the Management Agreement, Scimone, not Charles and Geoffrey, has the final say and the decision making authority over:

a. Establishing the Plaintiff LLCs' budgets and operating plans;

b. Leasing the Plaintiff LLCs' shopping centers, including determining the amount of the rent to be charged, the length of the lease and the acceptability of the tenant;

c. Determining the costs that will be incurred by the Plaintiff LLCs in their operations, by virtue of his unrestrained authority to enter into contracts on their behalf; and

d. Deciding what reserves will be established for each of the Plaintiff LLCs, and when and how much in profit will be distributed to Charles and Geoffrey.

Charles and Geoffrey have no control over the revenues that their properties will generate or the costs that will be incurred, and consequently, the profits that will be obtained or distributed to them.

Further restricting Charles and Geoffrey's ability to realize income or any significant value from their interests in the Plaintiff LLCs is the Management Agreement's perpetual renewal provision (SAC, ¶64a; Exh. 2, ¶1(b); Von Ancken Aff., ¶5). Charles and Geoffrey are precluded from terminating Scimone or any of his assignees (including Lighthouse) from serving as manager except in the most limited circumstances, such as a material breach of the Management Agreement or Scimone's conviction of a felony or a crime of moral turpitude (Exh. 2, ¶20(b) and (c); Von Ancken Aff., ¶5). If less than all properties all sold, the Management Agreement continues to encumber all of the properties (Id., ¶20(c)(2)). Thus, no

reasonable commercial investor – who would want the right to manage the properties himself or to choose his own property manager – would pay anything even remotely approaching the fair market value for the any of the properties (Von Ancken Aff., ¶6).

When Charles and Geoffrey entered into the Plaintiff LLCs' operating agreements, they bargained for the normal rights of ownership and the ability to control their destiny. These legitimate expectations have been completely stymied by Nathan's alleged execution of the Management Agreement, which, as noted previously, is a de facto amendment of the operating agreement contrary to its terms.

The Management Agreement was also unauthorized because it was not made in the usual course of the Plaintiff LLCs' business. Section 412(c) of New York's Limited Liability Company Law provides that:

> (c) An act of a member or manager that is not apparently for the carrying on of the business of the limited liability company in the usual way does not bind the limited liability company unless authorized in fact by the limited liability company in the particular matter.

Nathan's alleged execution of the Management Agreement was not "for the carrying on of the business of [the Plaintiff LLCs] in the usual way." Prior to Nathan's entry into the Management Agreement, the management of the family business was conducted in-house by "NLS Co.," which was merely a "dba" for Nathan (see Charles Serota Aff., ¶6; Geoffrey Serota Aff., ¶¶5-7). Scimone did not have responsibility for the Plaintiff LLCs' properties' leasing, for construction, or for most all of the responsibilities for which he is given binding authority under the Management Agreement (Id.). Nathan's alleged execution of the Management Agreement is at least as significant an event as the pledging or mortgaging of all or substantially all of the Plaintiffs' assets, which under New York law (see LLCL §402(d)(2)),

requires approval by the majority of members. Compare TIC Holdings, LLC v. HR Software Acquisitions Group, Inc., 301 A.D.2d 414, 755 N.Y.S.2d 19 (1st Dep't 2003) (voiding transfer of a substantial portion of plaintiff's assets because it was not in the ordinary course of business, and, therefore, not authorized under operating agreement). Indeed, each of the Plaintiff LLCs' operating agreements requires unanimous consent to approve "the sale, lease, exchange or other disposition of all or substantially all of the assets of the Company" (Exh. 4, ¶3.6) as well as to amend the agreement itself. That the alleged Management Agreement was not entered into in the normal course of the Plaintiffs' business is also confirmed by the fact that Nathan did not subject the Plaintiff LLCs to operation of the Management Agreement during his lifetime or for 6 months following his death (Exh. 2, ¶1(b)). If Nathan was allegedly entering into the Management Agreement for the Plaintiff LLCs' best interests, he would not have attempted to defer its operation.

POINT IV

PLAINTIFFS HAVE ADQUATELY ALLEGED CLAIMS AGAINST CASSIDY AND SCIMONE FOR THEIR PARTICIPATION IN NATHAN'S BREACH OF TRUST

The elements of a claim for participation in a breach of trust are "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." Kaufman v. Cohen, 307 A.D.2d 113, 125, 760 N.Y.S.2d 157, 169 (1st Dep't 2003). A "person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator." Id. at 126, 760 N.Y.S.2d at 170. Substantial assistance "occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so." Id. at 126, 760 N.Y.S.2d at 170.

Scimone does not take issue with Plaintiffs' pleading of these elements, except for Plaintiffs' allegation that Nathan breached his fiduciary duty to Plaintiffs. Because Plaintiffs have adequately pleaded that Nathan, if capable, breached his fiduciary duty by entering into the Management Agreement, Scimone's motion to dismiss should be denied as to Plaintiffs' Seventh Cause of Action.

Cassidy asserts that the elements of substantial assistance and causation are lacking, because Scimone could have entered into the Management Agreement as Nathan's Executor under his Last Will and Testament, or under Nathan's power of attorney, regardless of Cassidy's actions. However, as Nathan's Executor he could not have entered into the same agreement under Nathan's Will absent a court order, because he has a fiduciary duty to Nathan's estate, which precludes him from burdening its beneficiaries with the kind of oppressive provisions which serve Scimone's own financial interest at the expense of the beneficiaries' interests. See Matter of Scarborough Properties Corp., 25 N.Y.2d 553, 558, 307 N.Y.S.2d 641, 645 (1969) ("The rule has long been established that a trustee 'should not be allowed to become a purchaser of the trust property, because of the danger in such a case that the beneficiary might be prejudiced'"); Matter of Rothko, 84 Misc.2d 830, 838, 379 N.Y.S.2d 923, 935 (Sur. Ct. N.Y. Co. 1975), modified on other grounds, 56 A.D.2d 499, 392 N.Y.S.2d 870 (1st Dep't 1977), aff'd 43 N.Y.2d 305, 401 N.Y.S.2d 449 (1977) ("A fiduciary faced by a problem of conflict of interest should not use his dual position to deal for his own self-interest with the corporation to which he has a conflicting duty as director and officer, in the disposition of estate property without prior court approval. He cannot serve two masters....").

Further, while Nathan did grant Scimone a power of attorney, its provisions do not grant Scimone the authority to act on Nathan's behalf in his capacity as a managing member

of the Plaintiff LLCs. Section 5-1502E of the General Obligations Law, to which the Scimone's power of attorney refers, governing business operating transactions, contains no provisions authorizing an attorney-in-fact to act for his principal in the principal's capacity as managing member, or in any other capacity, with respect to a limited liability company that has more than one member. The powers that are accorded to the holder of the power under this section apply only to actions which the principal may take as a partner (GOL §5-1502E(1)) or the sole owner of a business enterprise (GOL §5-1502E(3)). Cassidy has provided no other evidence of Scimone's authority.

Thus, Plaintiffs respectfully submit that Cassidy's participation and substantial assistance, as alleged in the Second Amended Complaint, together with Nathan's breach of his fiduciary duty, caused Plaintiffs' injury (SAC, ¶¶37-40, 88-92). Plaintiffs allege that Cassidy participated in Nathan's signing of the Management Agreement by admittedly reading it to him and providing legal counsel and taking Nathan's acknowledgment as notary public, thereby facilitating Nathan's signing of the Management Agreement (SAC, ¶37) for Cassidy's own personal advantage (SAC, ¶¶27, 43-45). By his own admission, Cassidy "oversaw the execution of the Management Agreement" and allegedly "reviewed the Agreement with [Nathan]" who allegedly "understood all of its terms." (Exh. 5, ¶¶5, 8). Cassidy also claims that the Management Agreement's handwritten ink change, which provided that the Management Agreement's original term would commence "within 180 days of" Nathan's death, was "discussed and agreed to by Mr. Serota and Mr. Scimone" (Id., ¶7). Cassidy also claims that the Management Agreement was first drafted in 2002, that one of his first jobs was to review and discuss the Management Agreement at length with Mr. Serota, and that he kept "a copy which remained unchanged until the date of its execution" (Id., ¶7).

These allegations are more than sufficient to plead that Cassidy rendered substantial assurance to Nathan in his breach of fiduciary duty. Cassidy admits that he preserved the Management Agreement for Nathan's execution and that he supervised and facilitated that execution.

POINT V

THE MANAGEMENT AGREEMENT SHOULD BE DECLARED INVALID BECAUSE IT WAS AN ATTEMPTED TESTAMENTARY DISPOSITION WITHOUT THE REQUISITE FORMALITIES

Defendants attempt to avoid the strictures of EPTL §3-2.1 by arguing that the Management Agreement was just a negotiated contract whereby Scimone undertook to provide management services for a fee. But the agreement vests Scimone with much more than that: it clothes him with rights that Charles and Geoffrey, as owners and surviving members of the Plaintiff LLCs should possess, including the right to determine revenues that their properties will generate, the costs incurred and the profits that can be obtained. Compounding this grant of authority, the Management Agreement precludes the true owners and surviving members from realizing the value of their property or ever getting out from under this burden. Thus, the Management Agreement, although cast as a contract, is actually a disposition of rights attendant to the Plaintiff LLCs' ownership interests, and the right of Charles and Geoffrey as surviving members to control the destiny of their properties. Such a disposition is much more akin to a testamentary disposition than a contract. Indeed, the Management Agreement itself provides that it was not to take effect until 180 days after Nathan's death.

Because Nathan's alleged execution of the Management Agreement did not comply with the formalities required by EPTL §3-2.1, it is unenforceable.

POINT VI

THE SECOND, THIRD, FOURTH AND FIFTH CAUSES OF ACTION PROPERLY STATE CLAIMS FOR RELIEF AGAINST LIGHTHOUSE

Lighthouse contends that Plaintiffs' Second through Fifth Claims for a declaratory judgment should be dismissed as against Lighthouse because it did not exist until after the Management Agreement was allegedly entered into. It cites no authority for its position and the absence thereof is not surprising.

Lighthouse plainly has an interest in Plaintiffs' claims to declare the Management Agreement invalid because it is the assignee of that agreement and the recipient of all its benefits. Plaintiffs are entitled to bind Lighthouse to these determinations; otherwise Lighthouse would be free to resist any declaration that this Court may make as to the Management Agreement's invalidity.

This Court rejected the identical argument which Lighthouse made when it sought to dismiss Plaintiffs' First Cause of Action, for a judgment declaring the Management Agreement invalid because of Nathan's incapacity and Scimone and Cassidy's undue influence. There is no reason to reach a different result on the present motion.

Further, to the extent that Lighthouse seeks to invoke the Management Agreement's two-year arbitration provision, this Court has already decided that Plaintiffs' claims are timely:

> Plaintiffs' claims are not time-barred by the arbitration clause contained in the Agreement. The Agreement, which Plaintiffs seek to have set aside as null and void because it was allegedly procured by collusion, was executed on April 8, 2010. This action was commenced on April 5, 2012, and thus, is within the two year limitations period referred to in the arbitration clause.

(Exh. 6, p. 5). Plaintiffs' claims in any event relate back to the commencement of this action because they arise out of the same facts and transactions. See, e.g., Llama v. Mobil Service Station, 262 A.D.2d 457, 692 N.Y.S.2d 98 (2nd Dep't 1999).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully submit that the Defendants' motions to dismiss should be denied in all respects.

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Respectfully submitted,

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