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 Motion Sequence # ____ (Ramos, J.)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JOSEPH SCIMONE'S MOTION TO DISMISS THE SECOND, THIRD, FOURTH, FIFTH AND SEVENTH CAUSES OF ACTION CONTAINED IN THE SECOND AMENDED COMPLAINT

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Joseph Scimone ("Scimone"), individually and as Executor of the Estate of Nathan L. Serota, by his Attorneys Kaye Scholer LLP, submits this memorandum of law in support of his motion to dismiss the Second, Third, Fourth, Fifth and Seventh Causes of Action contained in the Second Amended Complaint of Charles Serota ("Charles"), Geoffrey Serota ("Geoffrey"), 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").

PRELIMINARY STATEMENT

In their third attempt at fashioning a viable complaint, Plaintiffs make a startling departure from their previous theory of liability. In the first two complaints, Plaintiffs asserted that Nathan L. Serota ("Mr. Serota") was blind, infirm, and incapable of understanding the property management agreement he signed on April 8, 2010 (the "Agreement"). Now, after the medical record authorizations have been produced and Plaintiffs have reviewed the relevant medical records — which records expose as a lie Plaintiffs' claim of incapacity — Plaintiffs have changed their theory and allege that, to the extent Mr. Serota was not incompetent, he cheated his sons in a variety of nefarious ways. The stark contradiction between the first claim, that Mr. Serota was a hapless and mentally incapacitated victim, and the new claims, that Mr. Serota masterminded various schemes to cheat his sons, is indicative of Plaintiffs' motivation and cavalier attitude with respect to the legal process. Charles and Geoffrey, Mr. Serota's sons, have committed themselves to doing whatever it takes – including the assertion of contradictory versions of events that would embarrass even the most cynical litigant – to undo their father's estate plan. Charles and Geoffrey make these allegations against their father notwithstanding the

fact that he provided them with lifetime employment and left them assets, either outright or in trust, worth a staggering *one hundred million dollars*. Not surprisingly, the claims at issue, all of which accuse Mr. Serota of some attempt to cheat his sons, either fail to set forth a cognizable legal theory, or are flatly refuted by documentary evidence.

The Second Amended Complaint contains eight causes of action. The First and Sixth, alleging lack of capacity and unjust enrichment, survived Defendants' previous motion to dismiss, and the Eighth is directed only to Defendant Michael Cassidy. This motion addresses the remaining five causes of action, all of which appeared for the first time in the Second Amended Complaint, and all of which should be dismissed.

The Second and Seventh causes of action allege the same underlying claim, and as such must be dismissed for the same reason. The Second cause of action, which seeks a declaratory judgment that the Agreement is null and void, alleges that Mr. Serota cheated his sons because he breached a duty of trust to them when he signed the Agreement. The Seventh cause of action, which seeks money damages against Scimone, alleges that Scimone knowingly participated in Mr. Serota's breach of trust. These causes of action are fatally flawed because the alleged "breach of trust" at their core is Mr. Serota's execution of the Agreement. While it is undeniably true that Charles and Geoffrey do not like the Agreement, as they would like to have Scimone out of the way, Mr. Serota's mere signing of an agreement, absent some bad faith or conflict of interest on his part, does not constitute a breach of trust. Plaintiffs allege no such bad faith. At most, Plaintiffs argue that Mr. Serota's Agreement is not a good deal for them (a self-serving claim which is completely false). In any event, even if all of Plaintiffs' allegations are true and the Agreement really is a "bad deal," a "bad deal" does not constitute a breach of trust.

Plaintiffs' Third and Fourth causes of action allege that Mr. Serota, acting in his capacity as managing member of the various LLC Plaintiffs, cheated his sons because he acted beyond his authority when he signed the Agreement. More specifically, the Third cause of action alleges that Mr. Serota lacked the authority to execute the Agreement, and the Fourth cause of action alleges that the Agreement delegates certain authority and that Mr. Serota lacked the authority to so delegate. These claims are in direct conflict with the operating agreements of the relevant LLC Plaintiffs, which clearly grant the required authority. A brief review of the operating agreements is all that is required to dispose of these claims.

The Fifth cause of action alleges that the powers granted to Scimone in the Agreement constitute a testamentary disposition, and that since the Agreement was not executed with all the formalities required by a Will, the Agreement is voidable. This claim fails because, simply put, the Agreement is not a disposition of any kind, let alone a testamentary disposition. The Agreement does not dispose of Mr. Serota's property and therefore the formalities required of Will executions are not applicable. The Agreement was signed by Mr. Serota as the managing member of certain LLCs. The terms of the Agreement require those LLCs to pay Scimone a fee in return for his performance of certain property management functions for those LLCs. On its face the Agreement is quite obviously not a testamentary disposition, and as such the Fifth cause of action must be dismissed.

In sum, the Second, Third, Fourth, Fifth and Seventh causes of action of the Second Amended Complaint all allege that Mr. Serota cheated his sons in some fashion. This new legal strategy is deeply cynical, but it is also unsustainable as a matter of law because the new causes of action either fail to set forth viable claims or are conclusively refuted by the documents at issue. As such, they must be dismissed.

FACTS

Over the course of his life, Mr. Serota assembled a large and thriving real estate business, largely consisting of shopping center properties. In his Will, signed on April 9, 2002, eight years prior to his death, Mr. Serota named Joseph Scimone ("Scimone") as his Executor. By the time of Mr. Serota's death, Scimone had worked with Mr. Serota for more than 11 years, many of those as Serota Properties' Chief Financial Officer. In addition to naming Scimone his Executor, Mr. Serota's Will provided that many of the properties owned by Mr. Serota's real estate business entities were to be managed by Scimone, or a company owned or controlled by Scimone. Scimone Aff. ¶ 3, Ex. A. In 2002, the same year the Will was executed, Mr. Serota personally directed that an Agreement be drafted naming Scimone property manager of the subject properties. Mr. Serota personally directed the terms of the Agreement and negotiated those terms with Scimone, and those terms are in full accord with the terms set forth in the Will. Mr. Serota often mentioned the Agreement and his plans for the management of his business after his death, but he also said that he would only sign the Agreement when he was ready. Mr. Serota signed the Agreement on April 8, 2010. Scimone Aff. ¶ 4, Ex. B. Mr. Serota signed the Agreement in both his personal capacity and as managing member of various LLCs, including all of the Plaintiff LLCs. The operating agreements of the various LLCs authorized Mr. Serota to sign the Agreement. Riordan Aff. ¶ 9, Ex. D.

A few days after signing the Agreement, Mr. Serota went to the Serota Properties office to tell Charles, Geoffrey, and his wife's son Daniel Serota, about how his business would be managed after his death. When Mr. Serota informed his sons that he had signed the Agreement entrusting management of his real estate business to Scimone, Charles became belligerent. Scimone Aff. ¶¶ 10-11. After the conversation with his father, Geoffrey asked

Scimone for a copy of the Agreement, which Scimone provided. Scimone Aff. ¶ 12. Mr. Serota died on May 1, 2010. Scimone Aff. ¶ 1.

On October 1, 2010, as authorized by the Agreement, Scimone assigned the Agreement to Lighthouse Realty Partners, LLC ("Lighthouse"), an entity formed on September 2, 2010. Scimone is the managing member of Lighthouse. Scimone Aff. ¶ 14.

For years prior to Mr. Serota's death, the LLC Plaintiffs paid a management fee of 6% to NLS Co., the Serota Properties' in-house management entity. Scimone Aff. ¶ 15. The Agreement kept that fee arrangement in place, providing for a management fee of 6% to be paid to Scimone's company. Scimone Aff. ¶ 15. After Mr. Serota's death, Scimone hired most of the personnel who had previously managed the properties, as employees of NLS Co. or other Serota entities, as Lighthose employees. Lighthouse manages the properties from the same office space that NLS Co. occupied in Valley Stream, New York. Scimone Aff. ¶ 16.

Plaintiffs filed their first Complaint on April 5, 2012. Riordan Aff. ¶ 4. After motions to dismiss were served, Plaintiffs withdrew their first Complaint and filed an Amended Complaint on May 18, 2012, alleging various causes of action against not only Scimone but also Mr. Serota's elderly widow Vivian Serota, and Mr. Serota's in-house counsel, Michael Cassidy. Riordan Aff. ¶ 5. A second round of motions to dismiss were filed by Defendants, and this Court dismissed certain causes of action, and also dismissed Vivian Serota and Michael Cassidy from the action entirely. Riordan Aff. ¶ 6. Plaintiffs moved to amend their complaint a second time, which motion was granted. Plaintiffs then consolidated their surviving causes of action and several new causes of action into a Second Amended Complaint, which was filed on August 28, 2013. Riordan Aff. ¶ 8, Ex. C.

ARGUMENT

I. PLAINTIFFS' SECOND AND SEVENTH CAUSES OF ACTION FOR BREACH OF TRUST MUST BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO ALLEGE ANY ACTS CONSTITUTING A BREACH OF TRUST

Plaintiffs' Second and Seventh causes of action allege that Mr. Serota cheated his sons by breaching the trust of the LLC Plaintiffs and that Scimone knowingly participated in Mr. Serota's alleged breach. Riordan Aff. ¶ 8, Ex. C ¶ 84-95, 122–128. These causes of action must be dismissed because Plaintiffs have failed to allege the most fundamental element of their claim – that is, any acts that could constitute a breach of trust by Mr. Serota.

To state a claim for knowing participation in a breach of trust, Plaintiffs must allege "(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 (1st Dep't 2003). An essential element of knowing participation in a breach of trust is a viable, underlying claim for breach of fiduciary duty. See Kassover v. Prism Venture Partners, LLC, 53 A.D.3d 444, 449 (1st Dep't 2008); Bullmore v. Ernst & Young Cayman Islands, 45 A.D.3d 461, 464 (1st Dep't 2007). Therefore, in order to state a claim for knowing participation in a breach of trust, Plaintiffs must allege facts which, if proven, would support a claim that Mr. Serota breached his fiduciary obligation to Plaintiffs by executing the Agreement. Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 A.D.3d 804, 809 (2d Dep't 2011); Zutty v. Rye Select Broad Mkt. Prime Fund, L.P., 33 Misc. 3d 1226(A), at *9 (Sup. Ct. 2011).

Put another way, Plaintiffs' Second and Seventh causes of action are premised on the legal theory that Mr. Serota's act of entering into the Agreement, by itself, constituted an actionable breach of trust. This legal theory cannot survive a motion to dismiss for at least two reasons: (1) Mr. Serota's entering into the Agreement is specifically authorized by the operating

agreements of the relevant LLC Plaintiffs, and (2) the business judgment rule protects Mr. Serota's business decision to enter into the Agreement from lawsuits like this one.

Plaintiffs allegations of breach are set forth in the Second Amended Complaint as follows:

> 86. Entering into the Agreement constituted a breach of Serota's duties of trust and fiduciary duties to the LLC Plaintiffs and their members because it was commercially unreasonable and, in the alternative, constituted an improper gift to Scimone.
>
> 124. Entering into the Agreement constituted a breach of Serota's duties of trust to the LLC Plaintiffs.
>
> Riordan Aff. ¶ 8, Ex. C. ¶¶ 86, 124.

CPLR § 3211(a)(1) allows a party to move to dismiss a cause of action where "a defense is founded upon documentary evidence." Here, Plaintiffs' legal theory is conclusively debunked by the relevant LLC operating agreements. As such, the Second and Seventh causes of action must be dismissed because "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Richard Feiner and Co. Inc. v. Paramount Pictures Corp., 95 A.D.3d 232, 237 (1st Dep't 2012); *see, e.g.*, SNS Bank v. Citibank, 7 A.D.3d 352, 355 (1st Dep't 2004) (affirming dismissal of claims that defendant made "improper, imprudent, and unsuitable investments" where they were barred by the exculpation provisions of the parties' contract). The relevant provisions of the operating agreements of the ten LLC Plaintiffs are identical. The provisions at issue provide, "Management of the Company shall be vested in the Managing Member[] set forth in Exhibit 'A' annexed hereto, who shall manage the Company in accordance with the Act." Serota is named as the sole managing member. The operating agreements grant the Managing Member "full, exclusive and complete discretion,

power and authority, on behalf of the Company to . . . enter into any agreement, instrument or other writing, . . . and take any other lawful action that the Managing Member[] consider[s] necessary, convenient or advisable in connection with any business of the Company." Riordan Aff. ¶ 9, Ex. D §§ 4.1-4.2. Section 4.6 provides "If at any time there is only one person serving as a Managing Member, such managing Member shall be entitled to exercise all powers of the Managing Members set forth in this Section, and all references in this Section and otherwise in this Operating Agreement to 'Managing Members' shall be deemed to refer to such single Managing Member." Riordan Aff. ¶ 9, Ex. D § 4.6.

In sum, the operating agreements conclusively establish that Mr. Serota's execution of the Agreement was not a breach of trust, but rather a routine exercise of his authority as Managing Member. As such, Plaintiffs' breach of trust causes of action should be dismissed pursuant to CPLR § 3211(a)(1).

The second reason Plaintiffs' Second and Seventh causes of action must be dismissed is because Plaintiffs have not alleged sufficient facts to overcome the protection that the business judgment doctrine affords Serota. Stated succinctly, the business judgment rule bars judicial review of business decisions made in good faith for legitimate purposes. CPLR § 3211(a)(7) allows a party to move for judgment dismissing a cause of action against him where "the pleading fails to state a cause of action." Here, because the business judgment rule bars review of Mr. Serota's decision to enter into the Agreement, Plaintiffs' theory, that entering into the Agreement, by itself, constitutes a breach, cannot survive a motion to dismiss.

Seven of the ten Plaintiff LLCs are limited liability companies organized under the laws of Delaware.[1] The other three Plaintiff LLCs are limited liability companies organized

[1] Sons Eastport LLC, Sons Riverhead LLC, Sons Riverhead II LLC, 409–423 WFP Shirley LLC; 349–351 WFP Shirley LLC; Sons East Meadow LLC and Serota Valley Stream LLC.

under the laws of New York.[2] Riordan Aff. ¶ 9, Ex. D. For the Plaintiff LLCs incorporated in Delaware, the question of whether Mr. Serota's execution of the Agreement constituted a breach should be evaluated under Delaware law, as it is well settled that the law of the state of incorporation controls issues of corporate governance. Diamond v. Oreamuno, 24 N.Y.2d 494, 503-04 (1969) ("The primary source of the law in this area ever remains that of the State which created the corporation."); Hart v. Gen. Motors Corp., 129 A.D.2d 179, 182-83 (1st Dep't 1987) ("One of the abiding principles of the law of corporations is that the issue of corporate governance . . . is governed by the law of the State in which the corporation is chartered."); Lerner ex rel. Citigroup Inc. v. Prince, 36 Misc. 3d 297, 305 (Sup. Ct. 2012) ("[defendant corporation] is incorporated in Delaware, and, therefore, Delaware law governs this action."). In any case, regardless of whether Delaware law or New York law applies, the business judgment rule immunizes Mr. Serota's decision to execute the Agreement.

Under Delaware law, the business judgment rule "is a presumption that in making a business decision the [managing member] acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." In re Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 124 (Del. Ch. 2009). The burden is on Plaintiffs to rebut this presumption. *Id.* "Absent an allegation of interestedness or disloyalty to the corporation," the business judgment rule bars judicial inquiry into the actions of the managing member that can be attributed to any rational business purpose. *Id.* The standard of liability under the business judgment rule is one of gross negligence; in order to overcome the business judgment rule on the basis of gross negligence, Plaintiffs must allege that the managing member acted with "reckless indifference" or engaged in conduct "beyond the bounds of reason."

[2] Serota Wading River LLC; 3644 Long Beach Road LLC; 3600 Long Beach Road LLC.

Giuliano v. Gawrylewski, 2013 WL3497611, at *4 (N.Y. Sup. 2013) (citing to Delaware Chancery cases and applying Delaware law). Plaintiffs must also allege a "'disabling' directorial interest, which arises 'whenever divided loyalties are present, or a director either has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders.'" *Id.* An interest is disabling if it is "of such subjective material significance to that particular director that it is reasonable to question whether that director objectively considered the advisability of the challenged transaction to the corporation and its shareholders." *Id.*

Similarly, under New York law, the business judgment rule "bars judicial inquiry into actions . . . taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. Questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to [the managing member's] honest and unselfish decision, for their powers therein are without limitation and free from restraint, and the exercise of them for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient." Auerbach v. Bennett, 47 N.Y.2d 619, 629 (1979). (Internal citations omitted.)

The operating agreements similarly limit Plaintiffs' ability to second guess Mr. Serota's actions as managing member. At § 4.4, the operating agreements provide, in relevant part, that "[a] Member who performs such management duties shall not have any liability by reason of having done so. 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." Riordan Aff. ¶ 9, Ex. D § 4.4.

Here, Plaintiffs make no allegation that Mr. Serota acted with self interest, disloyalty, for personal financial benefit or, for that matter, with any bad faith of any kind. Nor do Plaintiffs make any allegation of gross negligence on the part of Mr. Serota. Plaintiffs allege only that Serota signed an agreement they describe as "commercially unreasonable." Essentially they argue that Mr. Serota signed a bad deal. Even if that were true – and it most assuredly is not true – signing a bad deal does not constitute an actionable breach of trust. In sum, Plaintiffs have failed to allege any acts that could constitute a breach of trust on the part of Mr. Serota. Accordingly, their Second and Seventh causes of action must be dismissed.

II. PLAINTIFFS' THIRD AND FOURTH CAUSES OF ACTION MUST BE DISMISSED BECAUSE THE LLC OPERATING AGREEMENTS PROVIDE THAT MR. SEROTA HAD AMPLE AUTHORITY TO ENTER INTO THE AGREEMENT

Plaintiffs' Third cause of action alleges that the Agreement is voidable because Mr. Serota "lacked the authority to execute the Agreement." The Fourth cause of action alleges that the Agreement is voidable because Mr. Serota did not "have the power or authority to delegate the powers and duties of the LLC Plaintiffs' Managing Members after his death." Riordan Aff. ¶ 8, Ex. C ¶ ¶100, 128. These causes of action must be dismissed pursuant to CPLR § 3211(a)(1) because the LLC operating agreements, as well as applicable law, irrefutably provide that Mr. Serota had ample authority to enter into the Agreement.

Although Plaintiffs concede that "Serota's powers as Managing Member of the LLC Plaintiffs were set forth in the operating agreements" (Riordan Aff. ¶ 8, Ex. C ¶ 97), they nevertheless allege:

> 98. Serota lacked the authority to execute the Agreement and to bind the LLC Plaintiffs to the Agreement because the Agreement is not

apparently for the carrying on of the business of the LLC Plaintiffs in the usual way and is a breach of the duties owed by Serota to the LLC Plaintiffs and their members under the implied covenant of good faith and fair dealing.

99. Neither the LLC Plaintiffs nor their members authorized Serota to execute the Agreement on their behalf.

100. Because Serota lacked the authority to execute the Agreement, the Agreement is voidable by Plaintiffs.

* * *

104. Serota's execution of the Agreement was a de facto delegation of the LLC Plaintiff's Managing Members' powers and duties to Scimone.

* * *

106. Serota did not have the power or authority to delegate the powers and duties of the LLC Plaintiffs' Managing Members after his lifetime, and did not have the power and authority to deny successive Managing Members of the LLC Plaintiffs the powers and duties provided for in the operating agreements.

107. Because Serota lacked the power or authority to delegate the powers and duties of the LLC Plaintiffs' Managing Members after his death, the Agreement is voidable by Plaintiffs.

Riordan Aff. ¶ 8, Ex. C.

As discussed in Section I. above, the operating agreements vest management of the LLCs "in the Managing Members set forth in Exhibit 'A' annexed hereto, who shall manage the Company in accordance with the Act." Mr. Serota is named as the sole Managing Member. The operating agreements grant the Managing Member extremely broad powers, including "full, exclusive and complete discretion, power and authority, on behalf of the Company to . . . enter into any agreement, instrument or other writing, . . . and take any other lawful action that the Managing Members consider necessary, convenient or advisable in connection with any business of the Company." Riordan Aff. ¶ 9, Ex. D. (emphasis added).

The broad authority granted by the operating agreements is buttressed by New York Limited Liability Company Law, which provides that "the act of every member, including the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business of the limited liability company, binds the limited liability company, unless (i) the member so acting has in fact no authority to act for the limited liability company in the particular matter and (ii) the person with whom he or she is dealing has knowledge of the fact that the member has no such authority." N.Y. Ltd. Liab. Co. Law § 412(a). Similarly, the Delaware Limited Liability Company Act provides that "if a limited liability company agreement provides for the management, in whole or in part, of a limited liability company by a manager, the management of the limited liability company, to the extent so provided, shall be vested in the manager who shall be chosen in the manner provided in the limited liability company agreement. The manager shall also hold the offices and have the responsibilities accorded to the manager by or in the manner provided in a limited liability company agreement. . . . Unless otherwise provided in a limited liability company agreement, each member and manager has the authority to bind the limited liability company." Del. Code §18–402.

Plainly, Mr. Serota was authorized, by the operating agreements, New York law and to the extent applicable, Delaware law, to enter into the Agreement. Indeed, Plaintiffs' contrary allegations amount to a somewhat mystifying potpourri of legal theory and wishful factual assertions. By way of illustration, Plaintiffs' allege that "Serota lacked the authority to execute the Agreement and to bind the LLC Plaintiffs to the Agreement because the Agreement is not apparently for the carrying on of the business of the LLC Plaintiffs in the usual way and is a breach . . . under the implied covenant of good faith and fair dealing." Riordan Aff. ¶ 8, Ex. C

¶ 98. This assertion is not just confusing, it is plainly wrong. The Agreement itself provides that its purpose is "to provide for continuity of management" of the Plaintiff LLCs. Serota Aff. Ex. B. What could be more "for the carrying on of the business of the LLC Plaintiffs in the usual way" than an Agreement to provide for the continuity of its management? Indeed, carrying on the business of the LLC Plaintiffs in the usual way was precisely the point of the Agreement. Likewise, Plaintiffs' half-hearted reference to the "implied covenant of good faith and fair dealing" is misplaced. The implied covenant of good faith and fair dealing "is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." Jaffe v. Paramount Commc'ns Inc., 644 N.Y.S.2d 43 (1st Dept. 1996). Here, Plaintiffs have alleged that Mr. Serota violated these implied covenants to the LLC Plaintiffs and that, therefore, the Agreement should be declared null and void. Chief among the many obvious and fatal flaws of this theory is the fact that the Agreement is not between Mr. Serota and the LLC Plaintiffs, but rather between Scimone and the LLC Plaintiffs. In other words, Mr. Serota is not the "other party" bound by an implied covenant. In any case, even if the Agreement were between Mr. Serota and the LLC Plaintiffs, Plaintiffs have not alleged that Mr. Serota did anything to deprive them of their right to receive the benefits under the Agreement. Indeed, Plaintiffs' complaint seems to be that the Agreement exists at all, not with any failure to receive the benefits the Agreement provides. Finally, the doctrine is inapplicable where, as here, the conduct complained of is expressly contemplated and authorized by the operating agreements. *See* Cohen PDC, LLC v. Cheslock-Bakker Opportunity Fund, LP, 942 N.Y.S.2d 81, 82 (1st Dept. 2012) ("The CBOs' claim of breach of the implied covenant of good faith and fair dealing is inapplicable because the buy/sell calculation at issue is subject to and governed by the express

terms and conditions contained in the parties' 2002 Operating Agreement."). As such, Mr. Serota's act of entering into the Agreement can hardly be said to implicate an implied covenant of good faith and fair dealing.

Finally, Plaintiffs' allegation that "Serota's execution of the Agreement was a de facto delegation of the LLC Plaintiffs' Managing Members' powers and duties to Scimone" is unavailing. Even if true, this allegation does not establish that Mr. Serota lacked the authority to make such a delegation. In fact, the language of the operating agreements provides Mr. Serota "full, exclusive and complete discretion, power and authority" to make such a delegation. Riordan Aff. ¶ 9, Ex. D.

Plaintiffs' Third and Fourth causes of action, which allege that Serota did not have the authority to enter into the Agreement, are conclusively refuted by the operating agreements and applicable law, and as such must be dismissed pursuant to CPLR § 3211(a)(1).

III. PLAINTIFFS' FIFTH CAUSE OF ACTION MUST BE DISMISSED BECAUSE THE AGREEMENT IS NOT A TESTAMENTARY DISPOSITION

Plaintiffs' Fifth cause of action seeks a declaratory judgment that the Agreement is voidable based on the theory that the Agreement is a "testamentary disposition that fails to comply with the requirements of New York Law." Riordan Aff. ¶ 8, Ex. C ¶ 114. Put another way, Plaintiffs claim that the Agreement functions as a Will because it makes a testamentary disposition, and that since it was not executed with the Will execution formalities required by EPTL § 3–2.13, it is voidable. Riordan Aff. ¶ 8, Ex. C ¶¶ 110–116.

CPLR § 3211(a)(1) provides that "a party may move for judgment dismissing one or more causes of action" on the ground that "a defense is grounded upon documentary evidence." Here, the Agreement speaks for itself. On its face it is not a testamentary disposition and Plaintiffs' Fifth cause of action must therefore be dismissed. The Agreement was executed

by Mr. Serota in his individual capacity and as the managing member of various LLC entities, including all of the LLC Plaintiffs. Serota Aff. ¶ 4, Ex B. Pursuant to the Agreement, Scimone is required to "provide complete real estate management and administration for the Properties." Serota Aff. ¶ 4, Ex B. The Properties in question are all owned by the LLC entities. As compensation for these services, the Agreement provides that Scimone's management company is entitled to a management fee. In sum, the Agreement calls for Scimone to provide services to the LLC Plaintiffs for a fee. Nothing about that commonplace commercial arrangement is a "testamentary disposition."

EPTL § 1–2.4 defines a disposition as "a transfer of property by a person during his lifetime or by will." Here, despite invoking the phrase "testamentary disposition," Plaintiffs fail to allege any transfer of property of any kind, let alone any property of Mr. Serota's. Plaintiffs make only the vague allegation that "the powers granted to Scimone in the Agreement constitute an attempted testamentary disposition or will substitute by Serota." Riordan Aff. ¶ 8, Ex. C ¶ 110. Presumably, this reference to "powers" means the authority granted to Scimone, pursuant to the Agreement, to manage the LLC-owned properties. Specifically, the Agreement provides that "Scimone shall have responsibility and authority to operate, maintain, and manage the properties, subject to and on the terms and conditions hereinafter set forth." Serota Aff. ¶ 4, Ex B. The obvious flaw in Plaintiffs' theory is that the "powers" referenced in their Complaint were not property given by Serota to Scimone – they are the negotiated terms of an agreement between the LLC Plaintiffs and Scimone. The Agreement is exactly what it looks like – an agreement whereby Scimone agreed to provide property management services to certain LLC entities, including the LLC Plaintiffs, for a fee. The Agreement does not transfer property of

Mr. Serota's to Scimone. As such, the Agreement is not a "testamentary disposition" and the execution formalities of EPTL § 3–2.1 are not required.

The Agreement, on its face, is plainly not a testamentary disposition. Accordingly, Plaintiffs' Fifth cause of action must be dismissed.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Second, Third, Fourth, Fifth and Seventh Causes of Action from Plaintiffs' Second Amended Complaint, and grant Defendant Joseph Scimone such further relief as is just and proper.

Dated: New York, New York
September 13, 2013

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SUPREME COURT OF THE STATE OF NEW YORK
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