

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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JOHN BUDIS, Individually, as Executor of Number 702060 / 2012
the Estate of SOPHIA BUDIS, Deceased,
Derivatively, in the right and on behalf Motion
of 1ST KINDRED LLC, and on behalf of his Date December 18, 2013
Minor Children, EMMANUEL BUDIS and MARIA BUDIS,

Plaintiff, Motion Seq. No. 2

-against-

FAY SKOUTELAS, Individually and as
Trustee of the Trust Created Under the
Will of Sophia Budis, Deceased,
KONSTANTINOS SCOUFARAS, and 1ST KINDRED
LLC (as a nominal defendant),

Defendants.

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The following papers numbered 1 to 8 read on this motion by the
defendants to dismiss the plaintiff's amended complaint against
them pursuant to CPLR 3211 and CPLR 3016 or, in the alternative,
transfer the ninth cause of action to Surrogates' Court.

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-5
Answering Affidavits - Exhibits.....	6-8

Upon the foregoing papers it is ordered that the motion is
determined as follows:

Plaintiff John Budis is the executor of the Estate of his late
wife Sophia Budis and the father of their minor children. At the
time of her death, the plaintiff's decedent was a member of 1st

Kindred LLC, a family business whose primary assets are four parcels of real property, three located in Queens County and one located in Suffolk County. Upon the death of Sophia Budis, her interest in 1st Kindred LLC became an asset of her estate. Under her Will, her interest in 1st Kindred LLC was to be transferred to a Trust, of which defendant Skoutelas is the trustee. Plaintiff, as executor of Sophia Budis' estate, was supposed to transfer said interest to the Trust but has admittedly not done so in light of the allegations he asserts in this action.

1st Kindred LLC was formed by decedent's mother Maria Scoufaras (Maria) in August 2007. At that time, Maria owned 61% of the business and her three children defendant Fay Skoutelas, defendant Konstantinos Scoufaras and plaintiff's decedent Sophia Budis each owned 13% of the business. Thereafter, Maria transferred her entire interest in the business to her three children whereupon plaintiff's decedent Sophia Budis and defendants Skoutelas and Scoufaras became the sole members of the business, each owning one-third interests in the business. The Operating Agreement for the business provided that these three members would also be the managers of the business. Specifically, section 5.1(a) of the Operating Agreement provided: "The company shall be managed by the following three (3) Managers, Fay Skoutelas, Sophia Budis and Konstantinos Scoufaras, or the survivors thereof." Thus, Sophia Burdis's death left defendants Skoutelas and Scoufaras as 1st Kindred LLC's sole managers. Further, in accordance with the Operating Agreement, upon Sophia Burdis' death on February 19, 2009, she was deemed to have involuntarily withdrawn as a member of 1st Kindred LLC. According to section 6.4 of the Operating Agreement, "upon the occurrence of an Involuntary Withdrawal, the successor of the Withdrawn Member shall thereupon become an Interest Holder, but shall not become a Member. The successor Interest Holder shall have all the rights of an Interest Holder (i.e. the right to receive the profits, losses and distributions that the Member would have received, at the time the Member would otherwise have been entitled to receive them had the Member not withdrawn), but shall not be entitled by reason of the withdrawal to receive in liquidation of the Interest, the fair market value of the Member's Interest as of the date the Member involuntarily withdrew from the Company." The Operating Agreement also provides that the agreement is binding upon "the parties hereto and their respective heirs, executors, administrators, personal and legal representatives, successors, and permitted assigns."

The plaintiff commenced this action (a) on his own behalf (b) as executor of the Estate of Sophia Budis, (c) on behalf of his minor children and (d) derivatively in the right and on behalf of

1st Kindred LLC to assert claims arising from the defendants' alleged misconduct and mismanagement of 1st Kindred LLC.

The amended complaint asserts fifteen causes of action. The plaintiff's first through seventh causes of action assert derivative claims on behalf of 1st Kindred LLC, respectively, for breach of fiduciary duty, fraud, breach of the LLC's Operating Agreement, unjust enrichment and imposition of a constructive trust, an accounting, an injunction, and a declaratory judgment that defendants Skoutelas and Scoufaras are guilty of fraud, deceit and/or gross negligence. The eighth cause of action alleges breach of contract arising from the defendants' failure to distribute a share of the profits from the LLC to the executor of the decedent's estate. The ninth cause of action alleges breach of fiduciary duty vis a vis the trust beneficiaries as against defendant Skoutelas only. The tenth cause of action alleges breach of fiduciary vis a vis the executor of the decedent's estate. The eleventh cause of action is asserted on behalf of the executor of the decedent's estate and alleges fraud. The twelfth cause of action is asserted on behalf of the executor of the decedent's estate and alleges breach of the operating agreement. The thirteenth cause of action is asserted on behalf of the executor of the estate and seeks an accounting. The fourteenth cause of action seeks injunctive relief prohibiting any further acts of misconduct by the defendants. Lastly, the fifteenth cause of action seeks a declaratory judgment that defendants Skoutelas and Scoufaras are guilty of fraud, deceit and/or gross negligence.

The defendants' motion to dismiss the amended complaint against them pursuant to CPLR 3211 is granted because plaintiff lacks standing to assert the foregoing derivative claims against 1st Kindred LLC or its two managers. According to the clear terms of the Operating Agreement, plaintiff is an interest holder but not a member of 1st Kindred LLC and, therefore, is not vested with the requisite member status necessary to bring this action. "To have standing in a derivative suit regarding an LLC, a plaintiff must own portions of the LLC" as a member (*Cohen PDC LLC v Cheslock-Bakker Opportunity Fund, LP*, 2010 WL 4530242 [2010]). Further, although the eighth through fifteenth causes of action alleged in the complaint are labeled individual claims against the LLC and its managers, the court notes that they are also derivative in nature and, thus, cannot be properly brought by the plaintiff herein (see *Mizrahi v Cohen*, 104 AD3d 917 [2013]; *Abrams v Donati*, 66 NY2d 951 [1985]; *Billings v Bridgepoint Partners, LLC*, 21 Misc3d 535 [2008]).

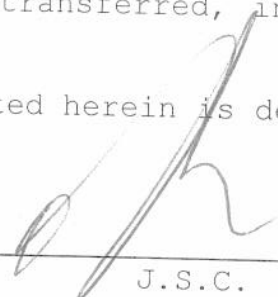
Accordingly, the defendants' motion to dismiss the complaint against them pursuant to CPLR 3211(a)(1), (3) and (7), based upon

documentary evidence, lack of standing and failure to state a cause of action upon which relief may be granted herein, is granted.

In light of plaintiff's reluctance to fund the aforementioned Trust as directed by Sophia Budis' Will, should plaintiff be so advised by counsel, he may consider pursuing his claim for breach of fiduciary duty on behalf of the trust beneficiaries and against defendant Skoutelas, who was named in decedent Sophia Budis' Will as trustee of the Trust into which the decedent's interest in defendant 1st Kindred LLC was to be transferred, in Surrogate's Court.

Any matter not specifically granted herein is denied.

Dated: July 16, 2014



J.S.C.