

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

-----	X	
LEONARD GARTNER,	:	
	:	
Plaintiff,	:	Index. No.: 150609/2011
	:	
v.	:	
	:	FIRST AMENDED
CARDIO VENTURES, LLC, JAMES S.	:	<u>VERIFIED COMPLAINT</u>
CARDONE, ALAN M. SWIEDLER, and	:	
ADRIENNE EDELSTEIN,	:	<u>JURY TRIAL DEMANDED</u>
	:	
Defendants.	:	
-----	X	

As and for his First Amended Verified Complaint against defendants Cardio Ventures, LLC (“Cardio Ventures”), James S. Cardone (“Cardone”), Alan M. Swiedler (“Swiedler” and, together with Cardio Ventures and Cardone, the “Cardio Ventures Defendants”) and Adrienne Edelstein (“Edelstein”), Plaintiff Leonard Gartner (“Plaintiff”), by and through his attorneys, Smith Valliere PLLC, alleges as follows:

PRELIMINARY STATEMENT

1. This is an action by Plaintiff for a declaration that a purported transfer of one half of his membership interest in Cardio Ventures to Edelstein was improper, unlawful and void *ab initio*. Cardio Ventures operates physical therapy offices at various locations in New York. Following Plaintiff’s divorce from Edelstein in Florida, Plaintiff was ordered by the Florida State Court, 16th Division (the “Florida Court”) to transfer one half of his interest in Cardio Ventures to Edelstein *provided* such a transfer was permitted under New York law. Plaintiff vehemently opposed the transfer based on his understanding that no such transfer of interests was permitted. Notwithstanding Plaintiff’s protests, the Florida Court ordered Plaintiff to transfer one-half of his membership interests in Cardio Ventures to Edelstein based on its adoption as truth of a false

representation by the Cardio Ventures Defendants that Plaintiff's membership interests were transferrable to Edelstein under Cardio Venture's operating agreement. In fact, the transfer in question was not allowed.

2. When Plaintiff requested an executed copy of the purported Cardio Ventures operating agreement (which the Cardio Ventures Defendants claimed had been executed by all of Cardio Ventures' members, and which he was entitled to by law) to prove that it did not permit the transfer to Edelstein, the Cardio Ventures Defendants refused to provide it. This resulted in Plaintiff expending significant amounts on attorneys' fees in efforts to obtain an executed copy of Cardio Ventures' operating agreement (which does not exist), including the costs of this lawsuit.

3. But for the Cardio Ventures Defendants' misrepresentations to the Florida Court and Plaintiff, Plaintiff would not have been ordered by the Florida Court to transfer one half of his membership interest in Cardio Ventures to Edelstein. These misrepresentations, and the subsequent improper and unauthorized purported transfer of one-half of Plaintiff's interests in Cardio Ventures to Edelstein, resulted in Plaintiff: (i) being required by the Florida Court to request a transfer of one half of his membership interest in Cardio Ventures to Edelstein, (ii) being deprived of distributions of Cardio Ventures' profits that were improperly paid to Edelstein pursuant to the improper and unlawful purported transfer, and (iii) expending significant amounts on attorneys' fees in the Florida divorce proceeding and in this action concerning the purported transfer.

4. This action seeks (i) a declaration that there is no effective operating agreement of Cardio Ventures; (ii) a declaration that the purported transfer of one half of Plaintiff's membership interest in Cardio Ventures to Edelstein was unauthorized, illegal and void *ab initio*;

(iii) damages representing the costs, including attorneys' fees, expended by Plaintiff as a result of the Cardio Ventures Defendants' misrepresentations concerning the transferability of his membership interest; and (iv) damages representing the amounts of any distributions paid to Edelstein on account of the invalid transfer of one half of Plaintiff's membership interest to Edelstein. It also seeks damages against Swiedler, an attorney who had previously represented Plaintiff, for his breach of his professional and fiduciary duties to Plaintiff in connection with Swiedler's legal representation of Edelstein relating to the divorce.

5. The original Complaint in this action contained allegations concerning the existence and terms of various purported Cardio Ventures operating agreements based on representations that the Cardio Ventures Defendants made to Plaintiff prior to the commencement of this action. Through discovery in this action, it has become clear that those representations were false. This First Amended Verified Complaint is being filed to conform Plaintiff's allegations to the facts obtained to date through discovery, and to address certain inaccurate pre-discovery information provided by the Cardio Ventures Defendants that was incorporated into the original Complaint.

JURISDICTION AND VENUE

6. Jurisdiction and venue are proper in this Court pursuant to CPLR 301 and 503. Cardio Ventures is a New York Limited Liability Company. Upon information and belief, Swiedler and Edelstein are residents of New York, New York. Upon information and belief, Cardone regularly transacts business in New York, including in his capacity as the Managing Member of Cardio Ventures. Cardone has appeared in this action and does not contest that he is subject to this Court's jurisdiction. Plaintiff designates New York County as the venue for this action.

PARTIES

7. Plaintiff Lawrence Gartner is an individual and a resident of the State of Florida. Plaintiff is a member of Defendant Cardio Ventures LLC.

8. Defendant Cardio Ventures LLC is a Limited Liability Company formed under the laws of the State of New York. Upon information and belief, Cardio Ventures has its principal place of business c/o Richard Conduv CTA, 550 Mamaroneck Avenue, Harrison, New York 10528.

9. Upon information and belief, Defendant James M. Cardone is an individual and a resident of the State of Florida. Cardone is the Managing Member of Cardio Ventures and is responsible for its operations and actions.

10. Upon information and belief, Defendant Alan M. Swiedler is an individual licensed to practice law in the State of New York. Swiedler is a resident of the State of New York. Swiedler is also a member of Cardio Ventures. Upon information and belief, Swiedler is a manager of Cardio Ventures and its attorney and agent.

11. Upon information and belief, Defendant Adrienne Edelstein is an individual and a resident of the State of New York. This action does not assert any claims against Edelstein; Edelstein has been named as a party solely to permit the Court to afford complete relief among the parties, and because she may be affected by a judgment in this action.

FACTUAL BACKGROUND

The Formation of Cardio Ventures and the Draft Operating Agreements

12. Cardio Ventures was formed in 1999 by Cardone, Swiedler, Plaintiff and a number of other individuals and/or entities. Cardio Ventures was formed for the purpose of providing physical therapy services and operating physical therapy offices in New York.

13. Upon information and belief, each original member of Cardio Ventures was required to execute a written, substantively identical subscription agreement (the “Subscription Agreement”) as a prerequisite to membership in Cardio Ventures. The Subscription Agreement provides that membership interests in Cardio Ventures are not transferrable except under certain narrow circumstances not relevant to this action. It further requires members contractually to agree not to transfer their membership interests except as permitted in the Subscription Agreement, and states that Cardio Ventures’ operating agreement would contain provisions consistent with the Subscription Agreement’s prohibition on transfers.

14. Upon information and belief, each initial member of Cardio Ventures, and Cardio Ventures, executed the Subscription Agreement and contractually obligated themselves not to transfer, or permit transfer of membership interests in Cardio Ventures except under the narrow circumstances set forth in the Subscription Agreements and not applicable to the purported transfer of one half of Plaintiff’s membership interest to Edelstein. Upon information and belief, the Subscription Agreements are binding contractual obligations among the members and Cardio Ventures and govern the transferability of membership interests in Cardio Ventures unless superseded by a subsequent written contract among the members and Cardio Ventures.

15. Plaintiff relied on the representation in the Subscription Agreement that Cardio Ventures’ Operating Agreement would contain restrictions on transfers consistent with the restrictions contained in the Subscription Agreement. Plaintiff considered such restrictions to be a mutual protection of his investment in Cardio Ventures.

16. Upon information and belief, at the time Cardio Ventures was formed, each prospective member of Cardio Ventures *other than Plaintiff* was also provided a draft of either an operating agreement (the “Draft Operating Agreement”) or an amended operating agreement

(the “Draft Amended Operating Agreement”) for execution in connection with their subscription for, and acquisition of, membership interests in Cardio Ventures.

17. Plaintiff was not provided, and did not execute, either the Draft Operating Agreement or the Draft Amended Operating Agreement.

18. Upon information and belief, certain initial members of Cardio Ventures executed the Draft Operating Agreement and other initial members executed the Draft Amended Operating Agreement. Upon information and belief, neither the Draft Operating Agreement nor the Draft Amended Operating Agreement was signed or adopted by the full membership of Cardio Ventures.

19. Upon information and belief, in or about 2003, the Cardio Ventures Defendants drafted an amended and restated operating agreement for Cardio Ventures (the “Draft Amended and Restated Operating Agreement”) (the Draft Operating Agreement, Draft Amended Operating Agreement and Draft Amended and Restated Operating Agreement will be referred to collectively as the “Draft Operating Agreements”). Plaintiff was not provided with a copy of the Draft Amended and Restated Operating Agreement until in or about 2010. Plaintiff was never asked to execute the Draft Amended and Restated Operating Agreement and never did so. Upon information and belief, the Draft Amended and Restated Operating Agreement was not executed by all of the members of Cardio Ventures.

The Transfer Provisions of the Draft Operating Agreements

20. The Draft Operating Agreements each contain substantially identical provisions under the heading “TRANSFERABILITY.”

21. Section 9.1 of the Draft Operating Agreements provides:

9.1 GENERAL. Except as set forth in this Agreement, no Member shall gift, sell, assign, pledge, hypothecate, exchange or otherwise transfer to another Person any portion of a Membership Interest.

22. Section 9.2 of the Draft Operating Agreements provides:

9.2 NO PUBLIC MARKET. The Membership Interests in the Company were purchased by means of a private placement exemption from federal securities registration, pursuant to section 4(2) of the Securities Act of 1933, as amended, and, if required, Regulation D promulgated thereunder. The Membership Interests in the Company may not be sold, assigned, transferred or otherwise disposed of to any Person not a Member of the Company or a Permitted Transferee as set forth in Section 9.3 until the security is first subject to an effective registration statement filed with the Securities and Exchange Commission or until an opinion of counsel acceptable to the Member/Managers of the Company has been obtained to the effect that such disposition does not violate any of the applicable provisions of the Securities Act of 1933, as amended, or any of the regulations promulgated thereunder.

23. Section 9.3 of the Draft Operating Agreements provides:

9.3 PERMITTED TRANSFEREES. Notwithstanding anything contained in this Agreement to the contrary, any Member may transfer (the word "Transfer" shall mean any disposition of a Membership Interest by a Member, including without limitation, gifts, sales, pledges, encumbrances, bequests and all other inter vivos or testamentary dispositions, whether voluntary or involuntary, or whether pursuant to court order or by operation of law) all or part of his or her Membership Interest to *his or her spouse, issue, or to a trust for the benefit or any of the foregoing*, during his or her lifetime or on death. In the event of such Transfer, the permitted transferee shall be admitted to the Company as a Member to the extent of the transferred membership Interest, and shall have the right to exercise any rights or privileges of a Member, and the permitted transferee shall hold such Membership Interest subject to the terms of this Agreement, including but not limited to Section 9.3.

(emphasis added).

24. Section 9.4 of the Draft Operating Agreements provides:

9.4 TRANSFEREE NOT A MEMBER. Except as stated in Section 9.2, no person acquiring a Membership Interest pursuant to this Section other than a Member shall become a Member unless the Person is approved by a majority vote or written consent of a majority of all other Members holding Membership Interests. Any such approval may be subject to any terms and conditions imposed by the Members.

25. There are no other provisions of the Draft Operating Agreements addressing the transferability of the membership interests of Cardio Ventures.

Plaintiff's Divorce Proceeding In Florida

26. Gartner and Edelstein were married in December 1998.

27. Plaintiff and Edelstein participated in a divorce proceeding in Florida to end their marriage (the "Divorce Proceeding"). *After* a final decree of divorce had been entered by the Florida Court, in or about 2010 Plaintiff was ordered by the Florida Court to transfer one half of his membership interest in Cardio Ventures to Edelstein *if and only if* such transfer was permitted under New York law, which requires consideration of Cardio Ventures' governing agreements.

28. Plaintiff informed the Florida Court that he was not permitted to transfer his interest in Cardio Ventures to Edelstein, who was no longer his spouse.

29. However, the Cardio Ventures Defendants falsely represented that such transfers were permitted. They also provided a redacted, unsigned copy of the Draft Amended and Restated Operating Agreement to the Florida Court, and represented that the Draft Amended and Restated Operating Agreement had been executed by *all* the members of Cardio Ventures, including Plaintiff, and permitted the transfer of Plaintiff's membership interest in Cardio Ventures to Edelstein. Upon information and belief, the Cardio Ventures Defendants knew or should have known that the Draft Amended and Restated Operating Agreement had not been executed by all of the members of Cardio Ventures, including Plaintiff, and knew – or, at a minimum, should have known – that their representation to the Florida Court and Plaintiff, that one half of Plaintiff's membership interest in Cardio Ventures was transferrable to Edelstein, was false.

The Unlawful Purported Transfer

30. Relying entirely on the Cardio Ventures Defendants' misrepresentation regarding the transferability of Plaintiff's membership interest in Cardio Ventures, the Florida Court

ordered Plaintiff to transfer one half of his membership interest in Cardio Ventures to Edelstein even though such transfer was prohibited by the Subscription Agreement and would have been prohibited by the terms of the Draft Operating Agreements (if they were effective), and therefore would be null and void *ab initio*.

31. Plaintiff protested and appealed the Florida Court's ruling, but he was required by the Florida Court, under threat of contempt, to submit a request for transfer of one half of his membership interest in Cardio Ventures to Cardio Ventures.

32. In or about June 2010, the Cardio Ventures Defendants prepared a document, to be completed by Plaintiff, requesting the transfer of one half of Plaintiff's membership interest to Edelstein (the "Transfer Document"). Plaintiff refused to execute the Transfer Document because he adamantly believed that the transfer was impermissible and would be null and void *ab initio*.

33. Under threat of contempt from the Florida Court, in or about March, 2011, Plaintiff was ordered by the Florida Court to execute a different "request" for transfer, which the Florida Court ruled would be governed by New York law. The request signed by Plaintiff did not waive any claims against Cardio Ventures, including claims for the improper transfer. The request was not executed until after the divorce was final and Plaintiff and Edelstein were no longer spouses.

34. The Florida Court's order requiring Plaintiff to complete the request was based solely upon the Cardio Ventures Defendants misrepresentation to Plaintiff and to the Florida Court that one half of Plaintiff's membership interest in Cardio Ventures was transferrable to Edelstein.

35. The Cardio Ventures Defendants and certain other Cardio Ventures members then executed a consent to the transfer on or about April 1, 2011, which was provided to Plaintiff, and which purported to transfer one half of Plaintiff's membership interest in Cardio Ventures to Edelstein. The purported transfer was unlawful and void *ab initio*.

36. Upon information and belief, pursuant to the invalid purported transfer, Cardio Ventures made one or more distributions to Edelstein that rightfully belonged to Plaintiff and, upon information and belief, will continue to make distributions to Edelstein pursuant to the invalid transfer of one half of Plaintiff's membership interest. Those distributions rightfully belong to Plaintiff and should have been made (and should in the future be made) to Plaintiff. Edelstein was (and is) not entitled to such distributions because the purported transfer to her of one half of Plaintiff's membership interest in Cardio Ventures was unlawful and void *ab initio*.

37. Plaintiff incurred significant legal fees and costs in the Divorce Proceeding as a result of the material misrepresentations made by the Cardio Ventures Defendants regarding the transferability of Plaintiff's membership interests in Cardio Ventures. Those fees and costs would not have been incurred by Plaintiff but for the above false representation by the Cardio Ventures Defendants concerning the transferability of Plaintiff's membership interests in Cardio Ventures.

The Cardio Ventures Defendants Refuse To Provide Plaintiff With An Executed Operating Agreement

38. Beginning in or about 2010, during the course of the Divorce Proceeding, Plaintiff requested that the Cardio Ventures Defendants provide him with an executed copy of the operating agreement that the Cardio Ventures Defendants contended controlled the transferability of his membership interest in Cardio Ventures, and any amendments thereto. In or about 2010, the Cardio Ventures Defendants provided Plaintiff with a redacted, unexecuted copy

of the Draft Amended and Restated Operating Agreement, and represented that its terms controlled the transferability of Plaintiff's membership interest in Cardio Ventures. Although the Cardio Ventures Defendants acknowledged that Plaintiff had the right to and executed copy of the document, and promised to provide it, as of the date of the filing of the original Complaint, they had not provided an executed copy of the Draft Amended and Restated Operating Agreement. Based on information obtained through discovery in this case, no such document exists.

Plaintiff's Membership Interests Were Not Transferrable

39. The Cardio Ventures Defendants have asserted that the Draft Amended and Restated Operating Agreement permits transfers of membership interests to *any* person or entity upon the consent of a majority of the members of Cardio Ventures. However, upon information and belief, none of the Draft Operating Agreements have ever been executed or adopted by *all* of the members of Cardio Ventures, and, therefore, they are not effective or binding on Cardio Ventures or its members.

40. The Cardio Ventures Defendants' position is also inconsistent with the terms of the Draft Operating Agreements, which provide that membership interests may be transferred only to a "spouse, issue, or to a trust for the benefit or any of the foregoing." Thus, even if one of the Draft Operating Agreements did control the transferability of Cardio Ventures membership interests, they also would have prohibited the transfer of one half of Plaintiff's membership interest in Cardio Ventures to Edelstein because she was not a spouse or issue of Plaintiff at the time the purported transfer was "requested" by Plaintiff or "approved" by Cardio Ventures.

41. Upon information and belief, absent a written operating agreement adopted by *all* members of Cardio Ventures, the provisions of the Subscription Agreement, which was executed

by all of the members of Cardio Ventures, and by Cardio Ventures, controls the transferability of Cardio Ventures membership interests and prohibited the transfer of one half of Plaintiff's membership interest in Cardio Ventures to Edelstein.

Swiedler's Individual Misconduct

42. In or about 1983, Plaintiff engaged Swiedler as legal counsel and Swiedler represented Plaintiff in various matters until 2004 (the "Representation"). The Representation included, but was not limited to, Swiedler representing Plaintiff in certain real estate matters.

43. In the course of the Representation, Plaintiff provided Swiedler with private, confidential, and secret information regarding Plaintiff's business dealings, real estate holdings, finances, and other highly confidential information. Swiedler had ongoing professional, fiduciary, contractual and legal duties to Plaintiff not to disclose such information to third parties and not to use such information to Plaintiff's detriment. Plaintiff never waived Swiedler's duties to him, the attorney/client privilege, or his rights to confidentiality.

44. Swiedler also had an ongoing professional and fiduciary duty to Plaintiff not to accept representation of other clients that presented conflicts of interest with Plaintiff. However, upon information and belief, in or about November 2010, Swiedler began representing Edelstein against Plaintiff in connection with her divorce from Plaintiff. Upon information and belief, at a minimum, Swiedler represented Edelstein with respect to the division of certain real estate assets in connection with the Divorce Proceeding. Swiedler never sought or obtained Plaintiff's consent to represent Edelstein, and, indeed, Plaintiff specifically objected to Swiedler's representation of Edelstein and demanded that Swiedler cease such representation. Upon information and belief, Swiedler continued to represent Edelstein, notwithstanding Plaintiff's protests.

45. Upon information and belief, during the course of his representation of Edelstein in connection with the Divorce Proceeding, Swiedler, necessarily and actually, used for Edelstein's benefit, or disclosed Plaintiff's confidential and attorney/client privileged information, including confidential information regarding Plaintiff's real estate holdings, business dealings, and financial condition to Edelstein.

46. Upon information and belief, Swiedler also advised Edelstein to structure the transfer of the real property in a manner that would be advantageous to her from a tax perspective, but would cause Plaintiff to incur certain tax liabilities.

47. The above conduct by Swiedler constituted violations of Swiedler's professional obligations and fiduciary duties to Plaintiff.

FIRST CAUSE OF ACTION
(Access to Books and Records)

48. Plaintiff incorporates the allegations set forth in Paragraphs 1 through 47 as if fully set forth herein.

49. The Cardio Ventures Defendants are required to provide Plaintiff with Cardio Ventures' financial information, at a minimum, upon due demand by Plaintiff.

50. Plaintiff duly demanded a copy of Cardio Ventures' financial information in or about September 2011 and has since repeated that request on numerous occasions.

51. The Cardio Ventures Defendants have failed and refused to provide Plaintiff with Cardio Ventures' financial information.

52. The Cardio Ventures Defendants' failure and refusal to provide Plaintiff with copies of Cardio Ventures' financial information constitutes a breach of their duty to Plaintiff.

53. As a result of the foregoing, Plaintiff seeks an injunction compelling the Cardio Ventures Defendants to provide him with copies of Cardio Ventures' financial information.

SECOND CAUSE OF ACTION

(Declaratory Judgment – Draft Operating Agreements Not Effective)

54. Plaintiff incorporates the allegations set forth in Paragraphs 1 through 47 as if fully set forth herein.

55. Cardio Ventures has no effective operating agreement because none of the Draft Operating Agreements was ever adopted or executed by all of the members of Cardio Ventures.

56. As a result of the foregoing, Plaintiff seeks a declaration that the Draft Operating Agreements are not effective and do not govern the transferability of membership interests in Cardio Ventures.

THIRD CAUSE OF ACTION

(Declaratory Judgment – Purported Transfer of Membership Interests Null and Void)

57. Plaintiff incorporates the allegations set forth in Paragraphs 1 through 47 as if fully set forth herein.

58. The Subscription Agreement is a binding contract between the Cardio Ventures Defendants, Plaintiff, and the other original members of Cardio Ventures.

59. Plaintiff has fully performed his obligations under the Subscription Agreement.

60. The Subscription Agreement prohibits transfers of membership interests in Cardio Ventures except under certain narrow circumstances not applicable to the purported transfer of one half of Plaintiff's membership interest in Cardio Ventures to Edelstein.

61. Cardio Ventures has no effective operating agreement because none of the Draft Operating Agreements were ever adopted or executed by all of the members of Cardio Ventures.

62. Because Cardio Ventures has no effective operating agreement, the Subscription Agreement, which is the only executed, binding contract between Cardio Ventures and all of its members, governs the transferability of Plaintiff's membership interest in Cardio Ventures.

63. Even if one of the Draft Operating Agreements was effective, the transferability provisions of the Draft Operating Agreements do not authorize a transfer of membership interests other than to a spouse, issue or trust for the benefit of a spouse or issue.

64. Edelstein was not Plaintiff's spouse at the time Cardio Ventures purportedly approved the transfer of one half of his membership interest to Edelstein.

65. On or about April 1, 2011, the Cardio Ventures Defendants and certain other members of Cardio Ventures executed a purported consent to transfer one half of Plaintiff's membership interest in Cardio Ventures to Edelstein.

66. The purported consent to transfer was prohibited by the Subscription Agreement and contrary to the terms of the Draft Operating Agreements.

67. As a result of the foregoing, the purported transfer of one half of Plaintiff's membership interest in Cardio Ventures to Edelstein was unauthorized, illegal and void *ab initio*.

68. As a result of the foregoing, Plaintiff seeks a declaration that the purported transfer of one half of Plaintiff's membership interest in Cardio Ventures to Edelstein was unauthorized, illegal and void *ab initio*.

FOURTH CAUSE OF ACTION
(Negligence/Negligent Misrepresentation)

69. Plaintiff incorporates the allegations set forth in Paragraphs 1 through 47 as if fully set forth herein.

70. The Subscription Agreement is a binding contract between the Cardio Ventures Defendants, Plaintiff, and the other original members of Cardio Ventures.

71. The Subscription Agreement prohibits transfer of the membership interests in Cardio Ventures, except under certain narrow circumstances not applicable to the purported transfer of one half of Plaintiff's membership interest in Cardio Ventures to Edelstein.

72. Plaintiff has fully performed his obligations under the Subscription Agreement.

73. Cardio Ventures has no effective operating agreement because none of the Draft Operating Agreements were ever adopted or executed by all of the members of Cardio Ventures.

74. When the Cardio Ventures Defendants made representations to Plaintiff and the Florida Court in the Divorce Proceeding regarding the transferability of Plaintiff's membership interests, they had a duty to Plaintiff, among others, to provide truthful information.

75. The Cardio Ventures Defendants falsely represented that Plaintiff was permitted to transfer one half of his membership interest in Cardio Ventures to Edelstein pursuant to the terms of the Draft Amended and Restated Operating Agreement.

76. The Cardio Ventures Defendants knew, or at a minimum, should have known that this representation was false because the Subscription Agreement prohibits transfers of membership interests, and the Draft Amended and Restated Operating Agreement was never adopted or executed by all of the members of Cardio Ventures.

77. The Cardio Ventures Defendants also knew, or at a minimum, should have known that the terms of the Draft Operating Agreements, which were not effective, also prohibited the transfer of one half of Plaintiff's membership interest in Cardio Ventures to Edelstein while she was no longer his spouse.

78. The Cardio Ventures Defendants knew, or, at a minimum, it was foreseeable to the Cardio Ventures Defendants that Plaintiff would be ordered by the Florida Court to transfer one half of his membership interests in Cardio Ventures to Edelstein as a result of the Cardio Ventures Defendants' misrepresentation. By making this representation the Cardio Ventures Defendants breached their duty to Plaintiff.

79. As a result of the Cardio Ventures Defendants' misrepresentation, Plaintiff was ordered by the Florida Court to transfer one half of his membership interest in Cardio Ventures to Edelstein.

80. The Cardio Ventures Defendants arranged for and, in fact, did unlawfully purport to transfer one half of Plaintiff's membership interest in Cardio Ventures to Edelstein in breach of the terms of the Subscription Agreement, and contrary to even the transferability provisions in the Draft Operating Agreements. This "request" and the purported transfer were of no effect because the Subscription Agreements prohibited such transfer.

81. The purported transfer of one half of Plaintiff's membership interest in Cardio Ventures was unauthorized, unlawful, and void *ab initio* because it was prohibited by Cardio Ventures' Operating Agreement.

82. As a result of the foregoing, Plaintiff was required to incur, and continues to incur, significant costs, including attorneys' fees in connection with the Florida Divorce Proceeding and this action and his efforts to void the purported transfer. Plaintiff was also improperly and unlawfully denied distributions from Cardio Ventures which were wrongfully paid to Edelstein.

83. As a result of the foregoing, Plaintiff seeks damages from the Cardio Ventures Defendants in an amount to be determined at trial.

FIFTH CAUSE OF ACTION

(Against Swiedler – Legal Malpractice/Breach of Fiduciary Duty)

84. Plaintiff incorporates the allegations set forth in Paragraphs 1 through 47 as if fully set forth herein.

85. As an attorney representing Plaintiff, Swiedler owed Plaintiff a duty to act in accordance with the standards of care ordinarily possessed and exercised by members of the legal community.

86. As a result of the attorney-client relationship between Plaintiff and Swiedler, Swiedler also owed certain fiduciary duties to Plaintiff, including, but not limited to, the duties of honesty, good faith, fairness, integrity, and fidelity, and the duty to exercise reasonable skill, diligence, and knowledge in representing Plaintiff's interests – even after the termination of the Representation.

87. Swiedler breached his duty to Plaintiff in connection with the Representation by, among other things:

(a) undertaking, in or about 2010, to represent Edelstein against Plaintiff in connection with her divorce from Plaintiff where said representation was adverse to Plaintiff;

(b) undertaking, in or about 2010, to represent Edelstein against Plaintiff in connection with her divorce from Plaintiff where Plaintiff had specifically objected to Swiedler's representation of Edelstein;

(c) upon information and belief, necessarily and actually using for Edelstein's benefit and/or disclosing to Edelstein Plaintiff's confidential, private, and attorney-client privileged information, including confidential information regarding Plaintiff's real estate holdings, business dealings, and financial condition; and

(d) upon information and belief, advising Edelstein to structure the transfer of certain real estate property in connection with the Divorce Proceeding in a manner that would be advantageous to Edelstein from a tax perspective, but would cause Plaintiff to incur certain tax liabilities, all without Plaintiff's consent.

88. As a result of his prior representation of Plaintiff, Swiedler had a professional and fiduciary duty not to undertake representation adverse to Plaintiff, and to maintain the confidentiality of all of Plaintiff's confidential information obtained by Swiedler as a result of his attorney-client and fiduciary relationship with Plaintiff.

89. Swiedler's negligence and breach of fiduciary duties proximately caused damages to Plaintiff.

90. As a result of Swiedler's breach of fiduciary duties and failure to act in accordance with his professional obligations and duties, Plaintiff has suffered substantial damages in an amount to be determined at trial.

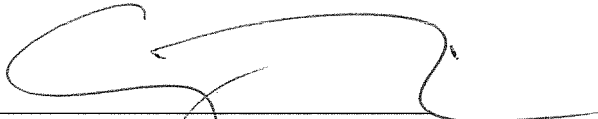
WHEREFORE, Plaintiff Leonard Gartner respectfully requests that the Court enter an Order:

- (a) ordering the Cardio Ventures Defendants to provide him with copies of Cardio Ventures' financial information;
- (b) declaring that the Draft Operating Agreements are not effective and do not govern the transferability of membership interests in Cardio Ventures;
- (c) declaring that the purported transfer of one half of Plaintiff's membership interest in Cardio Ventures to Edelstein was unauthorized, illegal and void *ab initio*;
- (d) awarding Plaintiff damages against the Cardio Ventures Defendants in an amount to be determined at trial;
- (e) awarding Plaintiff damages against Swiedler in an amount to be determined at trial;
- (f) awarding Plaintiff his costs and attorneys' fees in connection with this action; and

(g) granting Plaintiff such other and further relief as the Court deems just and proper.

Dated: October 4, 2012
New York, New York

SMITH VALLIERE PLLC

By: 
Mark W. Smith, Esq.
Gregory Zimmer, Esq.

75 Rockefeller Plaza, 21st Floor
New York, New York 10019
msmith@svlaw.com
gzimmer@svlaw.com

(212) 755-5200 Phone
(212) 755-5203 Fax

Attorneys for Plaintiff Leonard Gartner

VERIFICATION AND SWORN STATEMENT


STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, Leonard Gartner, being duly sworn, depose and say: I have read the foregoing First Amended Verified Complaint, and I know the contents thereof, and I acknowledge that the contents thereof are true to the best of my knowledge, except as to matters alleged on information and belief, and as to those matters I believe them to be true.



Leonard Gartner

Sworn and subscribed to before me
this 4th day of October, 2012.



Notary Public

Gregory Zimmer
Notary Public, State of New York
No.02Z16044317
Qualified in Westchester County
Commission Expires September 21, 2016