

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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Matter of UNIVEST I CORP., derivatively on behalf  
of 470 PEARL STREET, LLC,

Commercial Division:  
Hon. Timothy J. Walker, J.C.C.

Petitioner,

v.

Index No.: **2014-811644**

SKYDECK CORPORATION d/b/a PAY2PARK;  
BUFFALO DEVELOPMENT CORPORATION; and  
Nominal Respondent 470 PEARL STREET, LLC

Respondents.

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**MEMORANDUM OF LAW IN OPPOSITION TO  
RESPONDENT BUFFALO DEVELOPMENT CORPORATION'S  
MOTION TO REARGUE**

**RUPP BAASE PFALZGRAF CUNNINGHAM LLC**  
Attorneys for Petitioner  
Matthew D. Miller, Esq.  
David R. Pfalzgraf, Jr., Esq.  
1600 Liberty Building  
Buffalo, New York 14202  
(716) 854-3400

### **PRELIMINARY STATEMENT**

Petitioner, Univest I Corp. (“**Univest**”), derivatively on behalf of 470 Pearl Street, LLC (“**Petitioner**”), submits this memorandum of law in opposition to respondent Buffalo Development Corporation’s (“**BDC**”) motion to reargue its prior motion to dismiss the petition, previously determined by this Court by Commercial Division Decision and Order on December 1, 2014. *See* Doc. Nos. 25, 26. For the reasons set forth below, this Court should deny reargument in its entirety. In the alternative, if the Court grants reargument, it respectfully is submitted that the Court should adhere to its original decision.

### **STATEMENT OF FACTS**

The facts will not be repeated herein except to the extent as is necessary, as the facts have been set forth at length in the Verified Petition (“**Petition**”) (Doc. No. 1), the Affirmation of Matthew D. Miller, Esq., sworn to October 3, 2014 (Doc. No. 12), and the contemporaneously-filed Affirmation of Matthew D. Miller, Esq., sworn to January 14, 2015, which are incorporated herein in full, and to which the Court respectfully is referred.

### **ARGUMENT**

#### **I. Motion to Reargue Standard.**

It is well settled that “[a] motion to reargue is addressed to the discretion of the court and ‘may be granted only upon a showing that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision.’” *Andrea v. E.I. du Pont de Nemours & Co.*, 289 A.D.2d 1039, 1040-1041 (4th Dep’t 2001) (quoting *Matter of Mayer v. National Arts Club*, 192 A.D.2d 863, 865 (3d Dep’t 1993)); *see also*, CPLR §

2221(d)(2). “Equally well settled is the rule that a motion to reargue is not a means by which the unsuccessful party can obtain a second opportunity to argue issues previously decided or to present new or different arguments relating to previously decided issues.” *Andrade v. Triborough Bridge & Tunnel Auth.*, 10 Misc. 3d 1063A, 814 N.Y.S.2d 559 (Sup. Ct., Bronx Co. 2005) (citing *McGill v. Goldman*, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2nd Dep’t 1999); *Pahl Equipment Corp. v. Kassiss*, 182 A.D.2d 22, 588 N.Y.S.2d 8 (1st Dep’t 1992)).

Similarly, a motion to reargue is not designed “to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted.” *Mayer*, 192 A.D.2d at 865 (3d Dep’t 1993). Nor is its purpose “to serve as a vehicle to reargue once again the very questions previously decided.” *Foley v. Roche*, 68 A.D.2d 558, 567-68, 418 N.Y.S.2d 588 (1st Dep’t 1979) (citing *Fosdick v. Town of Hempstead*, 126 N.Y.651 (1891); *American Trading Co. v. Fish*, 87 Misc. 3d 193, 195, 383 N.Y.S.2d 943 (Sup. Ct., N.Y. Co. 1975)).

If the proponent of a motion to reargue does not articulate how the Court misapprehended or misapplied the law and instead attempts to restate its previous arguments or offer new arguments, reargument should be denied. *See Pahl*, 182 A.D.2d at 27 (1st Dep’t 1992) (court improperly granted reargument where movant raised same arguments; court was not obliged to further articulate its reasoning and should have concluded its analysis and denied the motion based on the movant having simply rehashed the same arguments); *Laracuente v. Mora*, 2 Misc. 3d 1012A, 784 N.Y.S.2d 921 (Sup. Ct., Kings Co. 2004) (reargument denied because

movant only reiterated arguments that had been expressly rejected by the court and thus failed to set forth grounds for reargument); *Santorto v. Schrieber* 263 A.D.2d 953, 695 N.Y.S.2d 443 (4th Dep't 1999) (reargument could not be granted on grounds not raised in initial papers; fundamental fairness requires that prior notice be given and reargument is not a vehicle for parties to raise new questions or advance arguments different from those originally put forth); *Diorio v. City of N.Y.*, 202 A.D.2d 625, 609 N.Y.S.2d 304 (2d Dep't 1994) (reargument should have been denied where movant failed to adequately demonstrate that court overlooked or misapprehended facts or that court misapplied any controlling principle of law).

If a motion to reargue fails to set forth an adequate basis for reargument and instead seeks only to rehash the same arguments presented before, the court should deny reargument outright without reconsidering the merits of the underlying motion. *See Pahl*, 182 A.D.2d at 281; *see also* Weinstein, Korn & Miller CPLR Manual § 15.08[b] (a court may deny reargument outright, grant reargument and change its decision, or grant reargument but adhere to its original decision).

When CPLR 2221 was enacted in 1999, it codified a well-developed body of case law that courts previously applied to reject motions to reargue that failed to set forth a proper foundation that a court overlooked some fact or misapplied some issue of law. For example, in *Fosdick v. Town of Hempstead*, *supra*, the Court of Appeals denied a motion to reargue and commented on what was seen as a misuse of motions to reargue by the bar. There, the Court congratulated defense counsel for arguing his positions in the case “with zeal and ability” yet

made clear that the Court had decided against him “not on account of his failure to properly present his views for the defendant, but because after mature and careful deliberation [the Court had] differed with the learned counsel in his contention” as to the construction of a document (in that case, a will). *Fosdick*, 126 N.Y. at 652. The Court expressed its disapproval of the practice of making motions to reargue simply because unsuccessful counsel often desired to continue to argue the same questions expressly decided by the court. *Id.* The Court acknowledged that while courts err in many cases,

there must be at some point an end of litigation, and after counsel has had his day in this court and has been unsuccessful in his case, it is but fair to the court and to other litigants who are pressing to be heard, that a case should be made such as the court has decided to be necessary before entertaining the question of the propriety of granting a reargument.

*Id.* The *Fosdick* Court held that the defendant was asking for reargument “simply because he desire[d] to present further views upon the same question which has been already, and after full argument, carefully considered and decided by us.” *Id.* at 653.

#### **I. Reargument Should be Denied.**

Considering the underlying principles for motions to reargue, it is immediately apparent that BDC’s motion is a transparent attempt to couch a rehearing of the same arguments as an issue of first impression, when, in reality, the same misguided argument – which hinges entirely upon a misreading of the plain and unambiguous language of the Operating Agreement – is being advanced. BDC advances the same arguments made in its previous motion that were expressly considered and rejected by the Court. BDC has also offered some new arguments that

it failed to make in its initial motion papers – a tactic not permitted on a motion to reargue. In the course of attempting to restate its entire argument from its motion to dismiss, BDC asserts that the Court misapprehended the law and the application of it to the Operating Agreement.

The red herring in BDC's argument is its assertion that this is a case of first impression where an LLC member brought a derivative suit when the contracting LLC members allegedly contracted away their right to bring such a suit without the consent of all members. However, this is not a case of first impression; this is a case stemming from *Tzolis v. Wolff*, 10 N.Y.3d 100 (N.Y. 2008), where a non-managing member of an LLC – here, Univest – has brought suit on behalf of the LLC to enforce the rights of the LLC when a managing member has refused and failed to act in the LLC's best interest. *See e.g., In re 1545 Ocean Ave., LLC*, 72 A.D.3d 121, 132 (App. Div. 2d Dep't 2010) (“[I]f Crown Royal is truly aggrieved by Van Houten's actions as manager, the Court of Appeals has found that a derivative claim is available”); *Yuko Ito v. Suzuki*, 57 A.D.3d 205, 208 (App. Div. 1st Dep't 2008) (“Owners of a fractional interest in a common entity are owed a fiduciary duty by its manager, and it is now settled that a member of a limited liability company has standing to maintain a derivative action on its behalf”).

There is nothing unique about the arguments raised now by BDC. They were raised previously and rejected. Accordingly, it respectfully is submitted that reargument of BDC's motion to dismiss the petition should be denied outright.

## II. If Reargument is Granted, the Court Should Adhere to Its Decision.

Most importantly, Univest did not contract away its right to bring a derivative suit on behalf of the LLC. BDC asserts that § 6.02 of the Operating Agreement requires the consent of a majority of members in order to commence or pursue any lawsuit on behalf of the LLC. However, the plain and unambiguous language of § 6.02 (by admission of the parties) provides that it is the **manager** who must seek consent to bring suit – not the non-managing member. *See* Petition, Doc. No. 1 at Exhibit E, § 6.02 (“**The Manager** must . . . obtain the vote in favor of, consent or approval of a Majority in Interest of the Members **before he** may cause or permit 470 Pearl to take any action with respect to . . . any of the following events or matters”) (emphasis added). Thus, as was clear and apparent to Univest and the Court the first time around, the language of § 6.02 that BDC relies upon has no effect on Univest’s common law right as the non-managing member of the LLC to bring a derivative action on behalf of the LLC. Importantly, when there is no ambiguity in a contractual provision – especially when neither parties have asserted ambiguity as is the case here – it is the Court’s job to interpret the provision of the contract. *Hartford Acc. & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169, 172 (1973). That is precisely what the Court did here when it determined that the eviction “proceeding does not usurp the power of the manager . . .”. Doc. Nos. 25, 26 at p. 6. Contrary to what BDC would like this Court to believe, the provision at issue does not give the manager the sole right to pursue an action on behalf of the LLC; rather it imposes limits on the manager’s powers. It does not however, impose a restriction on the non-managing member’s ability to bring a derivative suit under the proper circumstances.

Moreover, if BDC's mistaken construction of § 6.02 were taken as true, the outcome would be absurd. BDC's argument is that § 6.02 requires any suit brought on behalf of the LLC to have the consent of both members – a provision that BDC believes overrides the common law right of a derivative suit. If that were the case, where BDC as managing member is the offender, a contractual provision requiring BDC's consent to sue on behalf of the LLC – with no exception for demand or consent futility – would leave Univest to suffer whatever acts or wrongdoings BDC may partake in or dream up, without regard to the harm it causes or may cause to the LLC. Such a provision would be unsustainable as against public policy.

Furthermore, this Court made clear that this Operating Agreement was created and executed nearly three years **before** *Tzolis* was decided, and thus three years before the right of LLC members to bring derivative suits was even recognized in New York State. Yet, BDC would like this Court to reverse itself, and decide that the sophisticated parties to the Operating Agreement – the same parties that put together a very detailed agreement – really meant one thing when they in fact wrote something entirely different into the agreement. It is interesting – to say the least – that BDC now tries to convince the Court that Univest meant to give up a right it did not even know it had – a right not even recognized by the Court of Appeals until three years later. The argument, and BDC's convenient reading of the relevant portion of the Operating Agreement, have no merit and should be rejected.

### **CONCLUSION**

Under the guise of an issue of first impression, BDC essentially has asked this Court to sit as an appellate court over itself and to reconsider the same arguments previously raised and expressly rejected on its motion to dismiss. At the heart of the issue is an unambiguous contractual provision that the Court properly interpreted according to its plain meaning – one BDC conveniently ignores. BDC's entire legal argument fails and necessarily is without merit when the Operating Agreement is read and interpreted properly, as this Court did. It therefore is respectfully submitted that reargument should be denied.

**WHEREFORE**, for the forgoing reasons, as well as the reasons set forth in the contemporaneously-filed Affirmation of Matthew D. Miller, Esq., and for all the reason previously set forth in the papers submitted in support of the Petition (which are fully incorporated herein by reference), it respectfully is submitted that this Court should deny Respondent's motion to reargue in its entirety. If, however, the Court grants reargument, it respectfully is submitted that this Court should adhere to its prior decision.

Dated: January 14, 2015  
Buffalo, New York

**RUPP BAASE PFALZGRAF CUNNINGHAM LLC**  
Attorneys for Petitioner

By: 

Matthew D. Miller, Esq.  
David R. Pfalzgraf, Jr., Esq.  
1600 Liberty Building  
Buffalo, New York 14202-3502  
(716) 854-3400