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

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JEFFREY DOPPELT and RICHARD MATIST, INDEX NO.: 650749/2014

Plaintiffs,

-against-

HOWARD SMITH, Individually and Doing Business As SMITH ENERGY 1986-A PARTNERSHIP and SMITH ENERGY 1986-A PARTNERSHIP,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE VERIFIED COMPLAINT AND TO DIRECT PLAINTIFFS TO POST A BOND FOR SECURITY

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Defendants Howard Smith (ñSmithò) and Smith Energy 1986-A Partnership (ñEnergyò or the ñPartnershipò) (collectively, the ñDefendantsò), by their undersigned counsel, submit this memorandum of law in support of their motion (a) pursuant to C.P.L.R. 3211(a)(1) and (3) to dismiss the ninth, tenth and eleventh causes of action alleged in the complaint upon the ground that the Plaintiffs lack the capacity to assert a claim for dissolution, (b) pursuant to C.P.L.R. 3211(a)(3) to dismiss the first, second, third, fourth, fifth, seventh, eighth, and twelfth causes of action alleged in the complaint upon the ground Plaintiffs lack standing to assert derivative claims, (c) pursuant to C.P.L.R. 3211(a)(10) to dismiss the sixth cause of action alleged in the complaint upon the ground that the Plaintiffs failed to join indispensable parties, (d) pursuant to C.P.L.R. 3211(a)(7) to dismiss the first, second, third and twelfth causes of action in the complaint upon the ground that the Plaintiffs failed to state a cause of action, (e) pursuant to N.Y. Partnership Law 115-b, or in the alternative, the Court's equitable power, to direct Plaintiffs to post a bond to for security; and in support thereof state the following:

PRELIMINARY STATEMENT

Asserting both legal and equitable claims in their Complaint, plaintiffs Jeffrey Doppelt (ñDoppeltò) and Richard Matist (ñMatistò) (hereinafter collectively, the ñPlaintiffsò), disgruntled limited partners of Energy, ask this Court (a) to overlook the provisions of their partnership agreement requiring a grant of authority from a majority of limited partnership interests to compel a premature dissolution of the Partnership and (b) to ignore settled law precluding Plaintiffs from directly asserting their legal claims

against the Defendants. If maintainable at all, Plaintiffsô legal claims, derivative in nature, may be brought only on behalf of all the limited partners of Energy, not for the sake of the individual plaintiffs Doppelt and Matist. In short, Plaintiffs lack standing. Moreover, their equitable claim for an accounting must fail, for Plaintiffs have not joined Energyôs remaining limited partners, without whose participation Plaintiffs may not maintain the cause of action.

Other grounds for dismissal are amply justified. As set forth in detail below, Plaintiffsô breach of contract claims, even if brought derivatively, do not constitute viable causes of action. Failure to hire a particular accounting firm, failure to turn a profit, failure to provide annual accounting statements, and ñentering and continuing litigation,ò however unfortunate they may be, neither constitute ñgross negligence,ò nor give rise to cognizable causes of action in this case. Plaintiffs fraudulent inducement claim, predicated on Smith's alleged wrongdoing in 1986, fails to allege a direct harm. Each of the foregoing deficiencies is fatal to Plaintiffsô claims and collectively warrant dismissal of all of causes of action set forth in the Complaint.

BACKGROUND

Smith is the general partner of Energy, a New York limited partnership (Compl. ¶ 7) which purchased two leases in Galveston County, Texas in 1986 and thereafter was engaged in the production and sale of crude oil. Plaintiffs are limited partners in Energy, having purchased a one-third unit for $25,000 in 1986. Compl. ¶ 11-12; Affidavit of Howard Smith, sworn to on May 6, 2014 (the "Smith Aff.") at ¶ 8. In the aggregate,

they hold 2.32 percent of the total limited partnership interests. *Id.* and Ex. C and D. Doppelt and Matist allege that Energy failed to hire an escrow agent (Compl. ¶ 27) as provided in the Limited Partnership Agreement, a copy of which Plaintiffs erroneously claim to have annexed to the Complaint as Exhibit A. Compl. ¶ 21. Plaintiffs further allege that beginning in 2008 ñDefendants failed . . . to provide a yearly K-1 accounting of the business to the partners.ò Moreover, Plaintiffs contend that Smith ñwillfullyò or ñnegligentlyò committed ñaccounting irregularitiesò or ñinaccuraciesò in the management of the Partnership.ò Compl. ¶ 45.

In addition, Doppelt and Matist charge Smith with ñgross mismanagement and negligence in the handling of the affairs of Smith Energyò which, they posit, resulted in lost profits ñdespite the record increase in the per barrel price of oil.ò Compl. ¶ 39. In the alternative, Plaintiffs seem to postulate ñon information and beliefò that profits actually had materialized, but that Smith, in violation of his fiduciary duty, simply ñfail[ed] to make distributions to the limited partners." Compl. ¶ 50. Finally, Doppelt and Matist charge that Smith and Energy ñfraudulently inducedò them to invest.ò Compl. ¶ 75. As set forth in detail below, Plaintiffsô allegations suffer from a host of legal deficiencies.

Finally, without having joined Energy's other limited partners, Plaintiffs demand a ñformal accounting.ò Compl. ¶ 52. In response, Smith and Energy request this Court enter an order dismissing the Complaint and directing Plaintiffs to post a bond as security for costs and reasonable attorneys fees pursuant to New York Partnership Law Section 15-b (McKinney Supp. 1969) or, in the alternative, by virtue of its equitable power.

ARGUMENT

I.

THE NINTH, TENTH AND ELEVENTH CAUSES OF ACTION FOR DISSOLUTION MUST BE DISMISSED PURSUANT TO CPLR 3211(1) & (3) BECAUSE PLAINTIFFS DO NOT REPRESENT A MAJORITY INTEREST OF ENERGY'S LIMITED PARTNERS

Pursuant to CPLR 3211(a)(3) a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the party asserting the cause of action has not legal capacity to sue.ò As the following analysis makes clear, Plaintiffs do not have standing because they lack the capacity to assert a claim of dissolution under the terms of the Partnership Agreement.

Article X of the Partnership Agreement[1] governs issues of dissolution and termination of the Partnership. Section in pertinent part, provides:

> Dissolution. The Limited Partnership shall be upon dissolved . . .
> (b) the expiration of the term of the Partnership as provided in Section 2.3 hereof; . . . [or]
>
> (d) by vote of at least a majority in interest of the Limited Partners to dissolve pursuant to Article XI.

[1] Defendants are of the view that the Partnership Agreement is part of the pleadings. After all, the Plaintiffs themselves have designated it as such and referred to it. Compl. ¶ 21. *See, Internat'l Audiotext Network, Inc. v. AT & T Co.*, 62 F.3d 69, 72 (2d Cir.1995) (In determining the adequacy of a complaint, the court may consider any written instrument attached to the complaint as an exhibit or incorporated in the complaint by reference). However, in the event the Court deems this contract between the parties outside the pleadings, Defendants respectfully request that the Court treat this part of their motion as falling within the ambit of CPLR 3211(a)(1), and consider the Partnership Agreement to be documentary evidence.

Section 2.3 of the Partnership Agreement provides that ñunless earlier dissolved pursuant to the terms hereof,ò Energy ñshall exist for a term ending December 31, 2015.ò The language of the Partnership Agreement makes clear that a premature dissolution of the Partnership requires a vote of at least a majority of limited partnership interests. Therefore, the overriding issue before this Court on a motion to dismiss Plaintiffsô ninth, tenth and eleventh causes of action is whether or not Plaintiffs have met the fifty percent threshold.

Collectively, Plaintiffs are holders of only 2.32 percent of Energy, not a majority interest in the Partnership. Smith Aff. ¶ 8, Ex. C & D. As a basis for obtaining a dissolution of Energy, *see* Compl.¶¶ 62, 65, & 68, Plaintiffs have merely alleged that Energy (a) failed to retain the services of "a separate and distinct collecting and disbursing agent," Compl. ¶¶ 21-24, (b) beginning in 2008, failed "to provide a yearly K-1 accounting of the business," *id.* ¶ 35, (c) lacked profits and entered into and continued costly litigation *id.* ¶ 39, and (d) engaged in willful accounting irregularities. *Id.* ¶ 45. On this motion, the Court is constrained to accept these allegations as true. Nevertheless, the Court must dismiss the three causes of action for a dissolution. Plaintiffs lack standing because Doppelt and Matist are holders of only 2.32 percent of the limited partnership interest in Energy, and dissolution is foreclosed to them as a matter of law.

II.

PLAINTIFFS' LACK STANDING TO BRING THEIR FIRST, SECOND, THIRD, FOURTH, FIFTH, SEVENTH, EIGHTH AND TWELFTH CAUSES OF ACTION WHICH ARE DERIVATIVE, NOT DIRECT CLAIMS

. Pursuant to CPLR 3211(a)(3) a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the party asserting the cause of action has not legal capacity to sue.ò In the case at bar, Plaintiffs lack the capacity to assert their legal claims, and all must be dismissed because they are derivative, not direct causes of action.

Plaintiffs have asserted seven legal claims on their own behalf, and each one must be dismissed because they are derivative in nature, maintainable, if at all, on behalf of the partnership, not for the benefit of individual litigants. *Strain v. Seven Hills Assocs*., 429 N.Y.S.2d 424, 432 (1st Dept 1980) (ñ[A] limited partnerôs power to vindicate a wrong done to the limited partnership and to enforce redress for the loss or diminution in value of his interest is no greater than that of a stockholder of a corporation.ò); *Broome v. ML Media Opportunity Partners L.P.*, 273 A.D.2d 63 (1st Dept 2000) (the claims are derivative in nature, because they allege no more than the mismanagement and diversion of assets, and do not implicate any injury to plaintiffs distinct from the harm to the partnership); *HF Lexington KY LLC v. Wildcat Synergy Manager LLC*,35 Misc.3d 1210, 950 N.Y.S.2d 723 (2012) (limited partner failed to allege any harm to itself individually, because all of Plaintiff's alleged harms flow through its investment).

ñThe distinction between derivative and individual actions rests upon the party being *directly* injured by the alleged wrongdoing." *Kramer v Western Pacific Industries,*

Inc., 546 A2d 348, 351 (Del Supr 1988). "Whether a cause of action is individual or derivative must be determined from the 'nature of the wrong alleged' and the relief, if any, which could result if plaintiff were to prevail . " *Id.* at 352; *Feldman v Cutaia,* 951 A2d 727 (Del. Supr. 2008); *see also, Tooley v. Donaldson, Lufkin & Jennrette, Inc*., 845 A.D.2d. 1031 (Del. Supr. 2004).

New York Courts routinely make the distinction between derivative and direct causes of action when deciding a motion to dismiss in limited partnership cases. In *Goodwin v. MAC Resources, Inc.,* 149 A.D.2d 666, 540 N.Y.S.2d 477 (2d. Dept 1989) the plaintiffs were the limited partner and a general partner of a limited partnership, who brought claims for breach of fiduciary duties, breach of contract and for an accounting against another general partner. Because the case "was neither brought as a derivative action pursuant to Partnership Law § 115-a nor as a class action on behalf of the other limited partners,ò *id. (citations omitted),* the Second Department dismissed both the contract and breach of fiduciary claims. As set forth below, all of Plaintiffsô legal claims are derivative and must also be dismissed.

A. <u>Plaintiffs' First Cause of Action Is Derivative and Must Be Dismissed</u>

The first cause of action sounds in contract, and is premised on what claims to be a violation of the Partnership Agreement. The nature of the harm asserted, the purported failure to employ Berenson, Berenson & Adler ("Berenson"), befell Energy directly. Doppelt and Matist, as limited partners may well have been disappointed or even harmed by the purported lack of their preferred escrow agent. But the imagined harm caused by Smith's choice, or even the total lack of such a firm to act as escrow agent, affected

Energy directly, and Plaintiffs only indirectly. Further, any relief granted for this alleged breach would inure to the Partnership as a whole, not to one or two individual limited partners. Here it is clear that the alleged breach is the underpinning of a cause of action belonging to the Partnership, not to Plaintiffs, and consequently their first cause of action is derivative and must be dismissed as a matter of law.

B. **Plaintiffs' Second Cause of Action Is Derivative and Must Be Dismissed**

The second cause of action seeks money damages on account of Defendantsô alleged failure to provide Energyôs limited partners with K-1s. Yet K-1 are schedules to the Partnershipôs 1065 tax return, and thus implicate Energy primarily, and Doppelt and Matist only secondarily. Further, this alleged breach of the Partnership Agreement would have caused harm to all limited partners of Energy, not just Plaintiffs. This purported accounting irregularity would have deprived all partners of a benefit whether the partnership made money or lost it. In the former case, the partners would have had reason to expect distributions. In the latter case, the partners would have had the right to claim losses on their annual tax returns. But whatever the harm, it befell all the partners, not just Plaintiffs. Finally, the relief they seek, money damages, would be shared among all partners, not just Plaintiffs.

C. **Plaintiffs' Third Cause of Action Is Derivative and Must Be Dismissed**

The third cause of action sounds in both contract and tort, and is premised on the Partnership's "lack of profits . . . as well as the protracted and costly litigation entered into and continued" (Compl. ¶ 39) by Smith. Yet these factors, lack of profit, and

expensive litigation, were harms suffered by the Partnership directly; Plaintiffs, no matter how severely, only indirectly felt their sting. The Plaintiffs' third cause of action must be dismissed as a matter of law because it is a derivative claim.

D. **Plaintiffs' Fifth Cause of Action Is Derivative and Must Be Dismissed**

Fifth cause of action accuses Smith of ñwillful and/or negligent accounting irregularities and/or inaccuracies, but makes no new, or specific allegations in support of this claim. If Smith's alleged wrongdoing resulted in a "lack of profitability" and "lack of return on investment to the Plaintiffs," Compl. ¶¶ 45, then the harm was to the diminished value in Plaintiffsô proportionate interest in the Partnership, and not a direct injury to the Plaintiffs. This cause of action must also be dismissed as derivative.

E. **Plaintiffs' Sixth Cause of Action Is Derivative and Must Be Dismissed**

Plaintiffsô Sixth cause of action sounds in contract and alleges that Defendants have ñfailed to make distributions to the limited and general partners without any cause or justification.ò Compl. ¶ 50. To the extent Plaintiffs seek distributions pursuant to this cause of action, it is dismissible because it is derivative. After all, Plaintiffs themselves allege that harm befell the ñlimited and general partnersò of the firm, not just the two of them as individuals. *Id.* Further, any recovery available pursuant to this cause of action would be shared among all partners, as a percentage of their interest in the partnership.

F. Plaintiffs' Fourth, Seventh, Eighth, and Twelfth Causes of Action are Duplicative of Other Claims and Are Therefore Derivative and Must Be Dismissed

Plaintiffs' fourth cause of action contains no new allegations. By merely ñrepeatingò and ñreallegingò prior averments and recasting them as a ñbreach of fiduciary duties,ò this cause of action is also derivative. The harm alleged is the same as in causes of action one and three, and the relief to be accorded would accrue to the benefit of the Partnership first, and the Plaintiffs only secondarily. In short, the fourth cause of action is duplicative of cause of action one and three, and must be dismissed as a derivative claim.

Similarly, the seventh and eighth causes of action merely repeat the allegations that Defendants ñfail[ed] to make distributions.ò Compl. ¶ 55, and ñPlaintiffs are entitled to distributions.ò Compl. ¶ 58. Whether they are premised on breach of contract or breach of fiduciary duty, these causes of action are nothing more than a restating of causes of action one through five and also must be dismissed as derivative claims assertable only on behalf on all the limited partners. Finally, the twelfth cause of action for fraud is a recasting of the first cause of action and should be dismissed because it is derivative.

III.

PLAINTIFFS' SIXTH CAUSE OF ACTION FOR AN ACCOUNTING MUST BE DISMISSED BECAUSE PLAINTIFFS FAILED TO JOIN ALL THE LIMITED PARTNERS

Pursuant to CPLR 3211(a)(10), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court should not proceed in the absence of a person who should be a party." Plaintiffs' sixth cause of action for an accounting must be dismissed, because they seek to act alone; but under settled New York law, all partners must be joined in an action for an accounting. *Goodwin v. MAC Resources, Inc.,* 149 A.D.2d 666, 540 N.Y.S.2d 477 (2d. Dept 1989); *Marks v. Zucker*, 118 A.D.2d 452, 499 N.Y.S.2d 740, (1st Dept 1986), *Meisels v. Harris*, 136 N.Y.S.2d 655 (App. Term 1st Dept 1954); *Accord, Alley v. Clark,* 71 F.Supp. 521, 528 (E.D.N.Y. 1947) (a proceeding to admeasure the interest of a limited partner, assuming it to be jus in re, is surely one that could not proceed to decree in the absence of the other owners) (dicta).

The Second Department's decision in *Goodwin v. MAC Resources, Inc.,* 149 A.D.2d 666, 540 N.Y.S.2d 477 (2d. Dept 1989) dealt with the issue of an accounting sought by a limited partner who failed to act on behalf of the partnership. There, the plaintiffs were a limited partner and a general partner of a limited partnership, who brought claims for breach of fiduciary duties, breach of contract and for an accounting against another general partner. With respect to the plaintiffs' cause of action for an accounting, the *Goodwin* court held, that it:

> may not be maintained without the joinder of all the limited partners. Generally, all partners are necessary parties

in an action for a partnership accounting (citations omitted),
particularly where the action is not brought in a representative capacity.

Id. at 667 (emphasis supplied).

As in *Goodwin,* Plaintiffs in the case at bar are individual limited partners who seek a "formal accounting" from the partnership. Here too, Plaintiffs have chosen to proceed as mere individuals and not in a representative capacity, a factor that weighs heavily against their request for an accounting. *Id.* As in *Goodwin, Marks* and *Meisels,* without joinder of all limited partners, this Court will be unable to grant equitable relief to all interested parties without the risk of inconsistent results. Whether or not Plaintiffs will ultimately establish that they are entitled to an accounting under the New York Partnership Law is an issue that must be left to another day. At this stage, Plaintiffsô sixth cause of action must be dismissed for failure to join all of Energyôs limited partners.

IV.

PLAINTIFFS' FIRST, SECOND, THIRD AND TWELFTH CAUSES OF ACTION DO NOT STATE CLAIMS UPON WHICH RELIEF MAY BE GRANTED

Plaintiff's first, second, third and twelfth causes of action fail to state a claim upon which relief may be granted and require dismissal pursuant to CPLR 3211(a)(7). Under New York law, a breach of contract claim must allege (1) the terms of the agreement; (2) consideration; (3) performance by plaintiff; and (4) the basis of the defendantôs alleged breach. *Furia v. Furia*, 498 N.Y.S.2d 12, 13 (2d Depôt 1986). A breach of contract cause of action "cannot withstand a motion to dismiss if the express terms of the contract contradict plaintiffôs allegations of breach,ò and the Court is ñnot required to accept the

allegations of the complaint as to how to construe the partiesô agreement.ò *Merit Grp., LLC v. Sint Maarten Int'l Telecommc'ns Servs., NV*, No. 08 Civ. 3496, 2009 WL 3053739, at *2 (S.D.N.Y. Sept. 24, 2009) (internal quotation marks and citations omitted) (applying New York law).

A. <u>Plaintiffs' First Cause of Action Must Be Dismissed</u>

Under the first prong of the *Furia* analysis, the Court must turn to the ñterms of the agreementò between the parties. Here, Plaintiffs contend ñ[t]he Partnership Agreement . . . provides that Defendants had selected the firm of Berenson, Berenson & Adler to act as collecting and disbursing agent,ò but failed to retain the Berenson firm. Compl. ¶¶ 21-26. However, the Partnership Agreement *nowhere says what the Defendants say it says.* Smith Aff., Ex. A. What it does say is that:

> The General Partners shall have the full, exclusive and complete discretion in the management and control of the business of the Partnership for the purposes herein stated and shall make all decisions affecting the business of the Partnership.

Id. at Article III, section 1.1. It is apparent from this language that Smith had the authority to retain a firm other than Berenson. Thus, Plaintiffsô claim of reliance on Energyôs retention of the Berenson firm, and Energyôs alleged failure to do so, is not legally cognizable in this case and the first cause of action must be dismissed.

B. <u>Plaintiffs' Second Cause of Action Does Not State A Claim</u>

Plaintiffsô second cause of action rests on the proposition that Defendants are liable in damages on account of their failure to provide Plaintiffs with schedule K-1s on

or after 2008. This cause of action fails to state a claim. It does not constitute ñgross negligenceò under the Partnership Agreement. *See,* subpart IV.C, *infra.* Smith did in fact send Plaintiffs K-1s for the years 2008, and 2009. Smith Aff. Ex. C & D. Thereafter, Smith elected not to send K-1s to partners because Energy had no reportable income, deductions or credits, Smith Aff. ¶¶ 5 & 7, Ex. E, and federal law does not require a partnership to file a tax return in their absence. Treasury Regulation 26 C.F.R. Sec. 1.6031 pertinently provides:

> (a) *Domestic partnerships*ð (1) *Return required.* Except as provided in paragraphs (a)(3) and (c) of this section, every domestic partnership must file a return of partnership income under section 6031 (partnership return) for each taxable year . . . . ñ
>
> * * *
>
> (3) *Special rule.* (i) A partnership that has no income, deductions, or credits for federal income tax purposes for a taxable year is not required to file a partnership return for that year.

As subsection (3) clearly demonstrates, Energy was not obligated to file a tax return for the years in which it had no income, deductions, or credits. In this case, that means 2010, 2011, 2012 and 2013. Because the law does not require Smith to have done what Plaintiffs claim he was to have done, they can not base a claim for damages upon it, and the second cause of action must be dismissed.

C. <u>Plaintiffs' Third Cause of Action Does Not State A Claim</u>

Plaintiffs maintain that Defendants are liable in damages on account of their alleged failure to generate profits. Compl. ¶ 39. Yet section 3.5 of the Partnership Agreement provides:

> <u>Limitation of Liability</u>. The General Partners shall have no liability to the Limited Partners for losses sustained or liability incurred, except if (a) such

> loss or liability arises out of any action or inaction of the General Partners, *(b)* the General Partners have not acted in good faith, *(c)* such course of conduct was not in the best interests of the Partnership, and *(d)* such conduct constituted gross negligence or misconduct on the part of the General Partner.

Applying this standard, it is evident that the Plaintiffs do not have a breach of contract claim against the Smith. What they claim, that ñlosses . . . constituted gross mismanagementò is a bare conclusory allegation, one totally devoid of the who, what, where, when, how and why of things. Under the Partnership Agreement, Smith could be liable to the limited partners for losses only ***if*** Smithôs actions amounted to gross mismanagement. Under Plaintiffsô reading of the Partnership Agreement Smith committed gross mismanagement ***because*** the Partnership suffered losses. Plaintiffsô third cause of action rests on nothing but a bald conclusion; it is an *ipse dixit* that conflates ñlossesò with ñgross mismanagementò and turns a Section 3.5ôs limitation on liability into a guarantee of profits. Unless and until Plaintiffs can set forth, at the very least, ***how*** Smith failed them, they have neither articulated, nor do they have, a cause of action for gross mismanagement. *See, e.g. Kalmanash v. Smith,* 291 N.Y. 142, 153 (1943) (a cause of action may not be predicated on mere conclusory statements unsupported by factual allegations).

Plaintiffsô charge that Defendant ñentered into and continuedò ñprotracted and costly litigation,ò Compl. ¶ 39, is no less feckless. Nowhere is the mention of the names of the parties, the nature of the lawsuit, the location and date the case started and concluded. Further, and perhaps most striking by its absence, there is no indication of the errors made by the Defendants and their attorneys. Empty labels do not constitute an adequate cause of action. Plaintiffsô third cause of action must be dismissed.

D. Plaintiffs' Twelfth Cause of Action Does Not State a Claim

To assert a viable cause of action for fraudulent inducement, the Plaintiffs must allege "misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Shea v. Hambros PLC*, 244 AD2d 39 (1st Dept 1998). In addition, they must "must show both that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)." *Meyercord v. Curry*, 38 AD3d 315 (1st Dept 2007).

In this case Plaintiffôs contend that Defendants represented to them that Energy would ñuse of a collecting and disbursing agent.ò Compl. ¶¶ 70-73. However, Energyôs alleged failure to do so would have caused harm, if at all, to the Partnership in the first instance, and to Plaintiffs only *indirectly*. Because Plaintiffs have not alleged, and on no set of facts could ever show ñloss causationò the twelfth cause of action must be dismissed for failure to state a claim.

V.

PLAINTIFFS MUST POST A BOND FOR SECURITY

N.Y. Partnership Law 115-b (McKinney Supp.1969) permits a limited partnership to require that security for expenses be furnished in a derivative case "unless the contributions of or allocable to plaintiff or plaintiffs to partnership property amount to

five percent or more of the contributions of all limited partners, in their status as limited partners, or such contributions of or allocable to such plaintiff or plaintiffs have a fair value in excess of fifty thousand dollars." *See. e.g. Lerman v. Tenney*, 425 F.2d 236 (2d Cir. 1970). A bond is a prerequisite to maintenance of this case because Plaintiffs do not meet the statutory threshold: Matist's capital account is valued at minus $155.00 and represents only 1.16 percent of the Partnership, and Doppelt's capital account is valued at minus $152.00 and represents only 1.16 percent of the Partnership. Smith Aff. ¶¶ 4,5, & 8. Moreover, the Partnership lacks any funds to repay Smith for the expenses of this lawsuit.

Section 99 of the NY Partnership Law permits a limited partner the right to request an accounting in circumstances that are "just and reasonable." Defendants submit that there are ample grounds to deny Plaintiffs the accounting they seek in this case. After a decade or more of negative capital accounts, no profits, and no assets to distribute, no purpose would be served by a formal accounting. *Union Circulation Co., Inc. v. Hardel Publishers Service Inc.*, 6 Misc.2d 340 (S.Term NY Co. 1957) ("The right of a retiring partner to a partnership accounting depends first on whether there is a res."); *Kennedy v. Yost*, 88 A.2d 297 (Del.Ch.1952) (cause of action for an accounting dismissed because the only remaining asset of the partnership was good will and of no value); *Warburton v. Davis*, 91 A. 163, 123 Md. 225. (Md. 1914) (Where it is manifest that the party asking for a partnership accounting has no real cause of complaint, and that no good purpose could be accomplished thereby it ought not to be ordered).

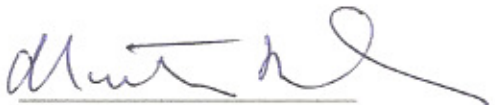
Ultimately, Plaintiffs bear the burden of demonstrating that an accounting is "just and reasonable" in the circumstances. N.Y. Partnership Law Section 99 (McKinney Supp.1969). In response Smith will demonstrate that he has faithfully, fairly and diligently fulfilled his duties as a fiduciary to all of Energy's limited partners, that the charges leveled against him in the Verified Complaint are either unverifiable or a blizzard of irrelevancies--and that the burden of an accounting which Plaintiffs seek is both unjust and unreasonable in the circumstances. The undersigned, on behalf of Howard Smith, respectfully asks this Court, in the exercise of its equitable power, to enter an order requiring Plaintiffs to post a bond in the amount of $10,000.00 to secure the cost of an accounting.

CONCLUSION

Wherefore, Defendants respectfully request entry of an order dismissing the Verified Complaint and directing the Plaintiffs to post a bond for security.

Dated: Bronx, New York
May 10, 2014

MARTIN MINSKY



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