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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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE VERIFIED COMPLAINT

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PRELIMINARY STATEMENT

Defendants Howard Smith ("Smith") and Smith Energy 1986-A Partnership ("Energy" or the "Partnership") (collectively, the "Defendants"), by their undersigned counsel, submit this reply memorandum of law in further support of their motion to dismiss dated May 10, 2014. In their original moving papers, Defendants moved to dismiss Plaintiffs' causes of action seeking dissolution of the Partnership on account of Doppelt's and Matist's lack of legal capacity. Further, Defendants moved to dismiss Plaintiffs' legal claims for want of standing. In addition, Defendants sought dismissal of Plaintiff's claim for an accounting for failure to join indispensable parties. Broadly and liberally construing Plaintiffs' opposition papers dated June 24, 2014, Doppelt and Matist oppose dismissal because they posit New York Partnership law confers upon them the right to dissolve the Partnership, notwithstanding their express agreement to the contrary. Further, distorting the holdings and ignoring the reasoning of the shareholder cases they cite, Plaintiffs characterize all of their legal claims as direct and not derivative, relieving them of the obligation of acting in a representative capacity. Finally, Plaintiffs seek to avoid the requirement of joining all limited partners in their action for an accounting because of inconvenience. For all the of the following reasons, the Verified Complaint should be dismissed.

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

Without offering the case law support, Plaintiffs seem to maintain that Section 99 of the NY Partnership Law confers upon them an inviolable cloak of legal capacity to seek dissolution in this Court, one that operates notwithstanding of the language of the Partnership Agreement requiring the approval of a majority of the limited partners.[1] Plaintiffs' assertion just isn't so. In New York*, as it does in all states that have adopted uniform limited partnership laws*, the statute only operates by "default," i.e., in the absence of a partnership agreement to the contrary. *See, e.g., Bailey v. Fish & Neave*, 8 N.Y.3d 523, 529, 837 N.Y.S.2d 600, 604 (2007). Rather than violate New York law, as Plaintiffs claim in opposition, the specific provisions of the Partnership Agreement in the case at bar impose an agreed upon limitation to it--one fully enforceable by its terms. For example, in *Bailey* the Court of Appeals was asked to review a challenge to an amendment to a partnership agreement affecting compensation to withdrawing partners and passed by a majority of the shares in interest of the partnership. The plaintiff contended that the partnership agreement was trumped by the language of New York Partnership law requiring a unanimous consent for such an action. Rejecting plaintiff's argument, the *Bailey* court held that because the agreement, by its terms, unambiguously

[1] *See* Affirmation in Opposition of Andrew T. Cupit, dated June 24, 2014 (the "Cupit Aff.") at page 4.

permits amendments by majority vote, the contradictory provisions of New York Partnership statute fell by the wayside. In so holding the Court of Appeals reasoned as follows:

> It is well settled that partners may fix their partnership rights and duties by agreement (see *Lanier v Bowdoin*, 282 NY 32 [1939]; *Corr v Hoffman*, 256 NY 254 [1931]). On this point, we previously held that "[i]n the absence of prohibitory provisions of the statutes or of rules of the common law relating to partnerships, or considerations of public policy, the partners of either a general or limited partnership, as between themselves, may include in the partnership articles any agreement they wish concerning the sharing of profits and losses, priorities of distribution{**8 NY3d at 529} *on winding up* of the partnership affairs and other matters. If complete, as between the partners, the agreement so made controls" (*Lanier*, 282 NY at 38).

Id. at 529, 604, (emphasis supplied). Neither the holding nor the reasoning of the Court of Appeals in *Bailey* were novel pronouncements. *See, Lanier v Bowdoin*, 282 NY 32 (1939). What is true of law in general is particularly true in the context of partnership law: parties to a contract are free to limit, or even obviate rights otherwise granted to them by statute. *Id.*

The Court of Appeals in *Bailey* does make clear that the right to contract has limits, and Courts will not enforce provisions of a contract, which, by their terms, violate public policy. What Plaintiffs have failed to articulate in their opposition are public policy considerations which might render unenforceable the challenged terms of the Partnership Agreement in this case. Research by the undersigned has failed to uncover any case which would undermine the efficacy of the fifty percent threshold of limited partnership interests for dissolution at issue here.

What research has disclosed is that partners may agree among themselves to require a *seventy-five* percent threshold of partnership interests before the commencement of litigation of *any kind.* *See, Heritage Co. v. LaValle*, 199 A.D.2d 1036 605 N.Y.S.2d 613 (4th Dept 1993) (where a partnership agreement provided that no litigation could be commenced without the affirmative vote of 75% of the partnership interests, a suit approved by only 55.45% of the partnership interests was dismissed). Therefore, it is clear that the Partnership Agreement at issue here, requiring only 50% of limited partnership interests for dissolution, is less onerous than the terms found in *Heritage Co.,* violates no known or articulated public policy concern, and should be enforced. *Accord, Bailey v. Fish & Neave*, 8 N.Y.3d 523 529, 837 N.Y.S.2d 600, 604 (2007) ("it would be anomalous for the firm to be able to bring about the most fundamental change—***dissolution***—by majority vote and not be able to amend its compensation/payment system without the unanimous consent of the partners.")(dicta) (emphasis supplied). For all of the foregoing reasons, the Court must dismiss Plaintiffs' ninth, tenth and eleventh causes of action.

II.

PLAINTIFFS' FIRST CAUSE OF ACTION IS DERIVATIVE AND UNTENABLE

Plaintiffs maintain that Smith's alleged failure to retain the services of the Berenson accounting firm to act as collecting and disbursing agent for the Partnership constitutes a direct cause of action for breach of contract. *See* Cupit Aff. at p. 5-6.

However, neither the law cited, nor the affidavits submitted in opposition to the motion to dismiss, lends support to the notion that first cause of action is direct. *Glenn v. Hoteltron Sys*, 74 N.Y. 386 (1989), on which Plaintiffs rely, is a shareholder derivative suit whose holding is inapplicable to the case at bar. *Fellner v. Morimoto,* 52 A.D.3d 352 (1st Dept. 2008) and *Chalmers v. Eaton Corporation,* 71 A.D.2d 712 (3d Dept. 1979) are indeed "direct" shareholder cases, but they both involved all the shareholders of the real party in interest--a third party corporation--and thus there was no reason to require the plaintiff to replead or act in a representative capacity in those cases.

For example, in *Chalmers,* plaintiff and defendant had engaged in a joint venture. Once business operations had commenced, plaintiff created a corporation to provide the services promised. When a dispute arose, and plaintiff sued in his own name, Defendant sought to dismiss, claiming the plaintiff's corporation was the real party in interest. In response, plaintiff contended that his corporation was nothing more than his agent, created to carry out his obligations. In permitting the case to proceed, the *Chalmers* court reasoned,

> "The test for determining the real party in interest is whether payment to the plaintiff will protect the defendant from having to defend against the same claim a second time, and whether such payment will bar all claims of all others."

Id. at 722. Application of the test described by the court led to the cogent conclusion that the individual plaintiff and the non-party corporation had an identity of interests, and there was no need to replead. In *Chalmers* "payment to the plaintiff " would "protect the defendant from having to defend against the same claim a second time" because the

plaintiff was the sole shareholder of the corporation.[2] Thus, the holding in *Chalmers,* was that a plaintiff, who sues directly may not be compelled to bring suit on behalf of a corporation when his interest in the outcome of the suit was identical to that of the corporation.

The facts in *Chalmers* are readily distinguishable from the instant case--but the court's reasoning applies. Whereas in the plaintiff there was the sole shareholder of the corporation, the Plaintiffs here hold only a small fraction of the limited partnership interests. An award to the plaintiff in *Chalmers* would insulate the defendant from further liability on the same claim from anyone else. Here, however, after an award to Plaintiffs on their first cause of action for breach of contract, Defendants would be open to suit from all the remaining limited partners for the very same claim. Consequently, under the test identified in *Chalmers,* Plaintiffs' first cause of action is derivative, and must be dismissed.

In an oddly irrelevant attempt to characterize their first cause of action as direct, Doppelt and Matist have submitted affidavits attesting to their reliance[3] on the appointment of Robert Berenson as collecting and disbursing agent for the Partnership. However, whereas the Verified Complaint of February 14th avers that this alleged failure "is true to the best of . . . [Doppelt's] knowledge," now Doppelt is not so sure. In his affidavit he states, "Defendants ***apparently*** never retained the services of Berenson . . . "

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[2] *Fellner v. Morimoto,* 52 A.D.3d 352 (1st Dept. 2008) upon which Plaintiffs similarly rely, was also a case in which all the parties in interest were before the court, and there was no need to replead.

[3] Detrimental reliance is not identified as a factor in distinguishing "direct" claims from "derivative" ones in any of the cases cited by the Defendants or the Plaintiffs.

Affidavit of Jeffrey Doppelt, sworn to on May 31, 2014 (the "Doppelt Aff.") (emphasis supplied). Doppelt's apparent equivocation is amply warranted. *See, O & G Carriers, Inc. v. Smith,* 799 F.Supp. 1528, 1531 (1992) (Robert Berenson was the accountant, and collecting and disbursing agent for Smith Energy-A Partnership).[4]

III.

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

Defendants demonstrated that Plaintiff's sixth cause of action for an accounting must be dismissed pursuant to CPLR 3211(a)(10), because Plaintiffs have failed to meet the requirement of settled New York law, and join all the partners to this action. *See,* Defendants' memorandum of law in support of motion to dismiss, dated May 10, 2014.

[4] In 1989 a group of disappointed investors brought suit against Smith, Berenson, and others, contending that they had cooked up a fraudulent oil and gas scheme. These investors did great harm to the Partnership, and after years of litigation recovered nothing from their mischief. *See* Cupit Aff., Ex. E. Now, twenty-five years later, we have come full-circle. Whereas in *O & G Carriers, Inc.* the plaintiffs asserted that Smith had engaged the services of a willing co-conspirator in Berenson to act as collecting and disbursing agent for the Partnership, Plaintiffs in this case contend that Smith fraudulently induced them to invest *by failing to hire the very same fellow. See,* Affidavit of Richard Matist, sworn to on May 31, 2014; Doppelt Aff.; Cupit Aff. at page 5 ("Smith[ ] unilateral[ly] ... dispense[d] with the chosen collecting and disbursing agent.") The common theme in all of this is the apparent willingness of plaintiffs and their counsel to allege a breach of fiduciary duty (or worse) on the part of their putative adversaries, while at the same time ignoring their own duties to the Court, to their partners, to the defendants, and to one another. A simple investigation by counsel prior to his concoction of the first and twelfth causes of action would have disclosed Berenson's extensive, albeit unsatisfying role in formation and operation of the Partnership.

In response, Plaintiffs ask this court to look beyond the case law to chart a new course, one based on inconvenience to the Plaintiffs. This argument finds no support in partnership case law.

Plaintiff's claim that "the refusal to participate of only one single limited partner would deprive Plaintiffs of their legal rights" rests on "defendant's reasoning", Cupit Aff. at p. 11, does no such thing. It rests instead on Cupit's "reasoning." In Defendants' view, joinder of a party may implicate participation, but does not require it. If, after having been joined, every single other limited partner ignores this case, Plaintiffs' right to an accounting would not be impaired. If a few do participate, then Plaintiffs may overcome the 5 percent threshold, and be relieved of any obligation to post the bond so "just and reasonable" in this case. Moreover, the Court and the parties would have the benefit of other partners and their counsel. But whatever the outcome in this case may be, the reason the law requires joinder of all partners in an accounting action is to prevent inconsistent results, and this Court should direct Plaintiffs to comply.

IV.

PLAINTIFFS MUST POST A BOND FOR SECURITY

In its memorandum of law, Defendants asked this Court to direct plaintiffs to post a bond for security, and offered alternate grounds for doing so. Def. Memo at p. 16-18. The first was pursuant to Section 115-b of the New York Partnership Law, in the event the Court rules, as in Defendants' view it should, that Plaintiffs' surviving causes of action (if there are any) are derivative in nature. The second was pursuant to the Court's equitable power and the "just and reasonable" language of Section 99 of New York

Partnership Law. *See,* Def. Memo at p. 18. This language is a clear indication that the Plaintiffs do not have an unconditional right to an accounting in this case. For the reasons set forth in their original brief, and those set forth below, Defendants submit that the posting of a bond is a just and reasonable condition.

There are three prongs to the Verified Complaint. First, Plaintiffs have brought an action for equitable relief: dissolution and an accounting are both equitable causes of action. Second, Plaintiffs asserted several causes of action for money damages. Third, in the last paragraph of their Verified Complaint, Plaintiffs have sought "reasonable attorney's fees" and the costs and disbursement of this action. Therefore, after discovery, and the production of an adequate accounting, and all of Smith's alleged transgressions are laid bare, and judgment is entered against Smith, he, and he alone, will bear the cost of the bond at issue now. Therefore, at this juncture, Smith respectfully submits that Plaintiffs, as parties who seek equity, should be called upon to do what is equitable--post a bond for the cost of the accounting they seek.

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
July 1, 2014

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