

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

PRESENT: KORNREICH, SHIRLEY WERNERPART 54*Justice*CAPITAL ENTERPRISES CO.INDEX NO. 653961/2016

MOTION DATE \_\_\_\_\_

- v -

DWORMAN, ALVINMOTION SEQ. NO. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this application to/for \_\_\_\_\_

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits

No(s) \_\_\_\_\_

Answering Affidavits - Exhibits

No(s) \_\_\_\_\_

Replying

No(s) \_\_\_\_\_

Upon the foregoing papers, it is ordered that this petition to compel arbitration is granted and the parties are directed to go to arbitration in accordance with the decision of the court on the January 12, 2017 hearing record; and it is further

ORDERED that the cross-motion to dismiss the petition in its entirety is denied, but granted to the extent of foreclosing petitioner from raising the issues set forth on the January 12, 2017 hearing record; and it is further

ORDERED that the parties shall serve a copy of this decision with the transcript of the hearing record upon the arbitrator.

This shall constitute the decision and order of the court.

DATE: 1/12/2017
  
 KORNREICH, SHIRLEY WERNER, JSC

- |                           |   |   |  |
|---------------------------|---|---|--|
| 1. CHECK ONE              | : | <input checked="" type="checkbox"/> CASE DISPOSED                           | <input type="checkbox"/> NON-FINAL DISPOSITION                                     |
| 2. APPLICATION            | : | <input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| 3. CHECK IF APPROPRIATE : |   | <input type="checkbox"/> SETTLE ORDER                                       | <input type="checkbox"/> SUBMIT ORDER  |
|                           |   | <input type="checkbox"/> DO NOT POST  | <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE  |

2 SUPREME COURT OF THE STATE OF NEW YORK  
3 NEW YORK COUNTY : CIVIL TERM : PART 54

4 -----X  
5 ALVIN DWORMAN, individually and derivatively  
6 on behalf of CAPITAL PROPERTIES CO.,  
7 Plaintiffs

8 - against -

Ind. No.  
651802/16

9 CARARD MANAGEMENT CORP., DEAN PALIN,  
10 GARY ADELMAN

Defendants

11 -----X  
12 CAPITAL ENTERPRISES CO.,

Plaintiff

13 - against -

Ind. No.  
653961/16

14 ALVIN DWORMAN

Defendant

15 -----X  
16 ALVIN DWORMAN

Plaintiff

17 - against -

Ind. No.  
653144/16

18 JANOVER LLC, et al

Defendant

19 -----X  
20 60 Centre Street  
21 New York, New York  
22 January 12, 2017

23 B E F O R E :

24 HONORABLE SHIRLEY WERNER KORNREICH

Justice

25 A P P E A R A N C E S :

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Kathy Y. Jones  
Official Court Reporter

KATHY Y. JONES, OFFICIAL COURT REPORTER

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Proceedings

THE COURT: Good morning.

You may be seated.

MR. SULLIVAN: Good morning.

MR. SCHARF: Good morning, your Honor.

THE COURT: Mr. Dworman's attorneys are sitting to the right. There are three cases here. So, it gets a little confusing although the issues are very much intertwined.

Basically, one case which it's really a petition which was brought by Mr. Dworman and it's the 653961 of '16 case and that's a petition really to?

MR. SCHARF: Your Honor, that case is brought by Capital Enterprise. That's our petition for arbitration.

THE COURT: I am sorry. That was the petition for Capital to compel --

MR. SCHARF: Arbitration.

THE COURT: -- arbitration.

MR. SCHARF: Correct, your Honor.

THE COURT: Right. And I believe that's the first motion I guess.

There is another action under 651802 of 2016. Let me just look at that.

MR. SCHARF: That was brought by Dworman against Janover. In that case we have a motion to stay pending the arbitration.

## Proceedings

THE COURT: Arbitration.

MR. SCHARF: For which we have the petition.

THE COURT: That's the stay of the petition?

MR. SCHARF: That's correct.

THE COURT: That's right.

MR. SULLIVAN: Your Honor, if I might. In the first one, there is a cross motion to dismiss the petition.

THE COURT: That's right. There was a cross motion to dismiss made on that petition, dismiss the petition as well as the -- and let me just say this.

I'm going to take a step backwards.

The entire issue here and all the cases arise out of a partnership, general partnership between -- originally, the partnership began from what I recall in 1966. It was Mr. Dworman and others who had a partnership in buildings in New York. Whether it's three or four, it's unclear still but there was a partnership between Mr. Dworman and these other individuals.

In 1981, the other individuals were out of the picture. I think Mr. Dworman at that point owned a third of the partnership.

What happened is Mr --

MR. SCHARF: Palin --

THE COURT: Michael Palin because there are two

## Proceedings

Palins involved here.

Michael Palin then bought his part of the partnership and in the end through different purchases or whatever Mr. Dworman wound up with 50 percent. Mr. Palin wound up with 50 percent. So, they became equal partners, general partners.

There is a Partnership Agreement here which was created in 1981 for this partnership. Mr. Dworman in that agreement is the managing partner although it is the claim of Mr. Palin that he was the de facto managing partner.

The Agreement also provided, and it's a little ambiguous, but it provided that an entity called Carard would be the management company which would manage the day-to-day management of these buildings. And it specifically said that Carard would be the managing company or an affiliated company. It's unclear to the Court what affiliated means. There is no definition and I don't know whether it's affiliated with Mr. Palin who may -- who appears to have -- he or his son at this point and others, this is all contested, have the ownership interest in Carard. So, it's unclear whether it has to be someone affiliated with Carard, someone affiliated with the partnership and the partnership is called Capital Properties.

MR. SCHARF: Capital Properties is an entity

## Proceedings

that is undisputed to be owned by Michael Palin which --

THE COURT: Then it's Capital Enterprises.

MR. SCHARF: Correct.

THE COURT: My memory isn't that great.

MR. SCHARF: Capital Enterprises succeeded to Michael Palin's interest which is 50 percent.

THE COURT: I remember. Let me finish.

You're right. It's Capital Enterprises. The partnership is Capital Enterprises.

So, I'm going to call --

MR. SULLIVAN: Your Honor, if I may. You said it correctly. It is Capital Properties. Capital Enterprises holds the 50 percent.

THE COURT: Okay. I was right then.

So, the partnership is Capital Properties.

Now, a few years later, I think it was 1986 perhaps Mr. Palin decided to put his 50 percent interest into the Capital Enterprises, the entity he created. So, there was an amendment to the Partnership Agreement in which Capital Enterprises, I'm going to call it Enterprise to distinguish it from Capital Properties which I will call Capital.

So, now, Enterprise is the general partner. Michael Palin no longer is the general partner. Whether he owns or dictates what happens to Enterprise, he

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probably does, doesn't matter. So, now, the partners are Enterprise and Dworman.

According to Michael Palin, as things continue, Carard is the one that is managing the day to day. It's a management company and he is the de facto manager.

Well, it seems to the Court in reading the Partnership Agreement it would make sense that Dworman was the manager because Palin's management company was the one who took care of management. So, you would have each partner overseeing but who knows. This is an issue of fact.

In any event, according to Michael Palin and it may well appear that this is the case, all of the issues were taken care of very informally by Michael Palin and Dworman. They were friends. They would get together and they would have handshakes and things went along with just meetings or telephone calls between the two partners and things were done unofficially. There were certain issues where they would disagree with things and towards the end there were disagreements about whether or not these buildings should be made into co-ops because they were rentals.

There were three residential buildings, two on the east side, one on the west side. There were two garages as well, commercial garages. The question was



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whether they should be made into co-ops, whether they should be leased, disagreement about that, other management disagreements.

According to Mr. Palin, around 2014, Mr. Dworman, who was in his nineties, Mr. Palin in his eighties, decided they were going to divvy up the properties. One would take one building, the other the other building and with the third building, one would buy out the other, get valuations and sell it. There was a handshake deal. Nothing in writing.

Subsequently, according to Mr. Palin, he was called by a business associate of Mr. Dworman, a Ms. Hoppe. She is someone -- I have no idea who she is frankly from all of the papers and told that the deal had changed. He tried to reach Dworman and since that handshake has never been able to reach Dworman again.

It raises issues for the Court that there really is no evidence, really. I mean, there are questions whether Dworman was part of these decisions or not and Mr. Palin who claims to be a long-time friend and apparently is of Mr. Dworman says the signatures of Mr. Dworman on affidavits don't appear to be his signatures.

Again the Court wants explanation exactly as to where Mr. Dworman is, who Ms. Hoppe is, does she have the

## Proceedings

authority, is Mr. Dworman capable mentally of going forward. I want answers to all of that.

So, I'm going to put that out front right away.

Now, the issues here really deal with the arbitration piece of the Partnership Agreement.

The Partnership Agreement provides that if there is a dispute, and it is a very broad Arbitration Agreement, between the partners as to anything arising in regard to the partnership or its business, the counsel, the attorney for each partner would meet, confer and try to work it out, to arbitrate in a sense or mediate. I'm not sure it calls it arbitration. Perhaps, it's mediation. If not, the two attorneys, one for each of the partners -- and I remind everybody the partner is Enterprise not Michael Palin and Dworman, not Ms. Hoppe. The attorneys for each of them would then select an arbitrator and it would be binding arbitration by this arbitrator in regard to any disputes.

So, at this point, there are many disputes.

Originally, the Dworman party, and it's Ms. Hoppe really and the attorneys, have alleged that Carard, they've alleged they will not give them books and records nor would Mr. Palin, came before the Court and the Court ordered that the books and records be turned over. At that point, the Dworman parties asked for arbitration

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but they asked for arbitration only in regard to the books and records. The other side Enterprise then made a cross move or wanted arbitration as to a number of issues.

In May the Court ordered, as well as books and records be turned over, that arbitration. This is May of last year. It is now --

MR. SCHARF: 2015.

THE COURT: Was it 2015?

MR. SCHARF: I believe, your Honor, the first order from the Court was actually 2015. There have been two subsequent requests for arbitration which we put in our motion because we --

THE COURT: Well, there are others but I ordered in May and I thought it was May of 2016 but I ordered that arbitration take place between the parties. They were to select a mediator by -- first the arbitration was to take place between counsel in ten days. Then within the next seven days they were supposed to select a mediator. I was told that they had agreed on Bernie Fried. Bernard Fried is a terrific choice I think.

MR. SULLIVAN: Your Honor, that was your order of October 2015 in the original lawsuit for the books and records and it's in handwritten short form order.

MR. SCHARF: October 2015.

MR. SULLIVAN: Excuse me, counsel. I'm

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speaking.

THE COURT: Meanwhile, it is my understanding there has been no arbitration.

MR. SCHARF: Correct.

MR. SULLIVAN: That is correct, your Honor.

What you said in the order is if the parties in the course of conducting an audit of the books and records have issues they made proceed to arbitration and you did with the parties tentatively name Justice Fried. There is no order.

THE COURT: It is my clear recollection and looking at the documents that support this that the original motion for books and records made before me and the arbitration demand was books and records in aid of arbitration. And I did order arbitration and there has been no arbitration.

It's my understanding that the parties disagree on the issues for arbitration. Whether that's the case or not, it's not an excuse not to arbitrate.

The Palin parties have a whole list of issues they want arbitrated and they put in a demand in 2016, two demands in 2016 demanding arbitration. Those demands have been rejected by the Dworman parties.

It's my belief this is a very broad arbitration provision and that arbitration should go forward. But let

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me hear.

So, what I have here is a motion to dismiss the petition for arbitration and the petition was brought by Enterprise and then Dworman moves to dismiss that petition but I've already ordered frankly arbitration.

Then there are two more cases here. There is the one -- there was a stay of an arbitration, order to show cause staying arbitration and it was signed by Justice Bransten and then I have it.

And then there was also -- that was a stay of this action. I am sorry. There was a stay of this action brought by Enterprise and that's the action of Dworman v Carard. So, that's a different action. There are two other actions.

Oh, it gets more complicated still.

One action is against Carard. Carard has filed tax returns and other things indicating that it is owned by Dean Palin, that's Michael Palin's son. There are two others perhaps who are owners, this guy Altman and someone else.

To make matters worse, and I had ruled on this, the garages are leased apparently or allegedly for under market to Altman who has some connection to Carard.

MR. EPSTEIN: Your Honor, I think you mean Adelman.

## 1 Proceedings

2 THE COURT: Adelman, not Altman.

3 MR. EPSTEIN: Sorry, your Honor.

4 THE COURT: Then there is another action that's  
5 been brought against the accountants who have been the  
6 accountants for Capital since 2011 but they are also the  
7 accountants for Carard. They are also the accountants for  
8 Palin and there is all kind of issues of malpractice and  
9 aiding and abetting, fraud, other things in that action.  
10 I have a motion to dismiss that action.

11 So, the other two actions are one against  
12 Carard, one against the accounting firm and the accounting  
13 firm is?

14 MR. SCHARF: Janover.

15 THE COURT: Pardon?

16 MR. SCHARF: Janover.

17 THE COURT: There is a motion to dismiss in that  
18 action. That's a motion in front of me. Also a motion to  
19 stay that action.

20 As I said, the Carard action, the 651802 action  
21 of '16, there's a motion to stay that action in light of  
22 the request for arbitration. The stay in the Janover  
23 action which is 653144 of 2016 also has request for a stay  
24 as well as the motion to dismiss parts of that action.

25 So, that's what's before me today.

26 I'm not sure where to start but I think I'm

## Proceedings

going to start with Dworman and with my first question.

Where is Mr. Dworman? What's happening?

MR. SULLIVAN: Well, I spent last night with him, your Honor. So, I'm happy to discuss it.

Let me say in 35 years of practicing law, I've never had an adversary say to me you don't really represent your client because he's ill. He's old. He has dementia. Whatever allegations he's made.

What's particularly troubling about that, your Honor, it's a little bit like Willie Sutton getting tackled in the bank by the security guard while he's trying to steal the money and demanding to know whether the security guard is really licensed.

THE COURT: I would like to see Mr. Dworman at some point. I would also like to know who Ms. Hoppe is. She has no connection to the partnership.

MR. SULLIVAN: You're looking at her.

THE COURT: Who is she?

MR. SULLIVAN: She's the executive managing director to the ADCO Group of companies which is a conglomerate of companies.

She's also executive managing director to Alvin Dworman personally.

Alvin Dworman retained my law firm. I've represented him for close to 30 years. We've met with him

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on every single occasion regarding the affidavits that he signed, gone over word for word those affidavits. He is directing what's going on.

THE COURT: And in front of the Court you're telling me he's directing everything?

MR. SULLIVAN: 100 percent. He has appointed his executive --

THE COURT: That's good enough for me.

MR. SULLIVAN: 100 percent. There is no standing by counsel to challenge it. They were caught stealing. Stealing.

THE COURT: Frankly, to the Court it is important to know that in fact because the papers don't say who Ms. Hoppe is, the connection of Ms. Hoppe and that Mr. Dworman knows what he's doing and that he is directing the litigation. You're telling me he is. That's good enough for me.

MR. SULLIVAN: Except that I will add to the Court that as I was leaving for court this morning, I passed the office of my partner Milt Mollen who is in very poor health. He's 96 years old and he was sitting with his eyes closed and he opened them and he said don't talk too much, Sullivan. He's sharp as a tack.

The same thing applies. Age is age.

THE COURT: I'm not suggesting that he isn't.



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I'm just wondering. I want to make sure. And I have to because the papers suggests that on the other side. I just want to make sure that it is he that's directing it.

MR. SULLIVAN: Yes, your Honor. I am representing to you that it is in fact the case including as recently as last night when he said it and I'm paraphrasing, I don't think the Palin family will get a Christmas card from the Dworman family this year and that's a polite way of saying what he said.

May I turn, your Honor, I want to correct the record on the order from October. I have the order here. We sued for the books and records. Imagine that, a 50 percent general partner not able to get access to the books and records maintained by the management company that's servicing the property. So, we had to come to court to get them.

Mr. Scharf and his law firm were not willing to cooperate. We had to make certain concessions, et cetera, et cetera, including agreeing to arbitrate make-believe disputes.

Your Honor in your order granting us access to the books and records added that counsel are directed to meet and to arbitrate the disputes regarding the demand for the books and records if they can't agree amongst themselves. That was the order.

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We got the books and records and through our audit of the books and records we learned that Carard Management Company was commingling the monies of all three properties and its own properties and other entities maintained by the Palin family in a single bank account. That they were paying with our partnership monies the expenses of other properties owned by the Palin family. That they were making undocumented interest-free loans to their principals, Mr. Dean Palin, Mr. Gary Adelman and some affiliates.

THE COURT: You're talking before Carard at this point?

MR. SULLIVAN: Carard.

We learned all of that, your Honor, as we were conducting this audit. That is what led us to commence an action in this court to remove Carard, to remove the Janover accounting firm that resulted in your Honor's order ten months ago doing just that.

THE COURT: I think that may have been the first of the cases.

MR. SULLIVAN: Yes.

THE COURT: That was 651802 of '16 and that is not against Enterprise.

Enterprise, for the record, is not a part of that case. That case is against Carard and its alleged

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principals, Dean Palin and Gary Adelman.

MR. SULLIVAN: That's exactly the point, your Honor. That's exactly the point.

In that action, Carard and its principals came forth supported by Mr. Michael Palin and Capital Enterprises and said stay the action against Carard. Don't remove them as property manager. Don't remove Bricin as garage manager. Don't remove Janover as accountants. Stay the action. It's subject to arbitration.

Your Honor looked at the clause and said you're not a party to the arbitration clause. They weren't then and they aren't now.

So, now they've made another motion.

THE COURT: I already ruled on this.

MR. SULLIVAN: It's law of the case. You've already ruled but what's interesting, your Honor, is that all three motions before you are all directed to the Carard action. All roads lead to Carard to paraphrase a famous saying. Why is that?

THE COURT: Well, not all. There is still the issue of arbitration in regard to Enterprise and Dworman.

MR. SULLIVAN: Not exactly, your Honor. Because when you go -- Carard set aside. It's nonsense. You already ruled on it. The case should continue.

## Proceedings

What are they trying to achieve?

They want to remove independent property manager. That is, canceling sweetheart leases, dealing with the DHC violations, taking the friends of Mr. Palin who live on Central Park West that have a rent stabilized unit in the building and saying it's not your primary residence, taking the units that were illegally conjoined and referring them to DHC or counsel to undo the violations.

The garage which appears to be a seed to launder money away from the partnership has been put out to an independent party.

You have massive fraud with respect to the facade. Phony submissions to the building department of close to \$5 million in repairs that are required because they didn't do the facade work eight and nine years ago. The phony submissions to the Department of Buildings is a nightmare to unravel in some fashion. All this is being dealt with by your independent property manager.

THE COURT: Let me say for the record there was an independent property manager appointed on this Court's order based upon what the forensic accountants of Dworman found in regard to Carard. That was under the Carard case. That property manager, however, was agreed upon. What happened was I asked for names from both parties and

## Proceedings

1  
2 if I got -- and I got a matching name and upon agreement  
3 of the parties I had that management company appointed.

4 MR. SULLIVAN: Correct. So, here's my point,  
5 your Honor. Moving to set aside the Carard action, you  
6 already ruled. The motion should be denied.

7 The next action, Mr. Palin and his Capital  
8 Enterprise Company --

9 THE COURT: What I want to hear from you is why  
10 should this not in regard to Enterprise and Dworman go to  
11 arbitration.

12 MR. SULLIVAN: That's exactly what I want to  
13 address. Because the issue, the legal issue of whether an  
14 alleged dispute is referable to arbitration is for the  
15 Court to decide in the first instance.

16 THE COURT: And I am deciding and I think I  
17 already decided that the disputes between -- and I'm not  
18 talking about Carard or any of the others because I ruled  
19 the accountant, Carard, the Palins and even Michael Palin  
20 are not parties to the partnership but Enterprise and  
21 Dworman in regard to management. All these other disputes  
22 they must go to arbitration.

23 MR. SULLIVAN: If there is a dispute and if I  
24 may your Honor.

25 THE COURT: There appears to be management  
26 disputes and other disputes.

## Proceedings

MR. SULLIVAN: Not so quick, with respect, your Honor.

THE COURT: I want to say some issues raised are statute of limitations issues. This is not a FAA case. This is a case under New York's Article 75, and under 7502(b) statute of limitations is to be decided by this court and not an arbitrator.

MR. SULLIVAN: That's correct. So, half of Mr. Palin's submission in this new proceeding deals with Carard.

THE COURT: I'm ruling that anything time barred, that there are time barred issues and there are tort and contract and fraud issues. Those are all time barred.

MR. SULLIVAN: Okay. And Carard because half of his papers --

THE COURT: Carard is not in this case.

MR. SULLIVAN: So, what's left, your Honor?

THE COURT: But there are others left. There are management issues that are left. There are the issues of whether or not these buildings should go co-op, whether they should be leased, what is leased.

Going forward arbitration issues dealing with management I think are still issues.

MR. SULLIVAN: And if I may, your Honor, because

## Proceedings

I'd rather refer -- you said it too eloquently. Let's use Mr. Palin's words. Half of his papers deal with Carard. He then identifies four issues. The first one is that in the early 1990s.

THE COURT: I think there are more than -- let me just look because I had the issues somewhere.

MR. SULLIVAN: It's important to do exactly that because there are no issues.

THE COURT: The latest letter is from Morrison Cohen and the Enterprise parties because it has the latest requests for arbitration, does list the different issues.

MR. SULLIVAN: Well, with respect to Mr. Palin's affidavit, 1990, early 1990s.

THE COURT: I'm looking at July 20, 2015. Oh, wait a minute. Wait a minute.

MR. SCHARF: June 17, 2016, your Honor, Exhibit 7 to the petition.

THE COURT: Is it seven?

MR. SCHARF: I believe.

THE COURT: Is that the last one?

MR. SCHARF: I believe.

THE COURT: That was the last one.

MR. SCHARF: Yes, that's the last one, your Honor.

THE COURT: I think we have to look at the

## 1 Proceedings

2 formal request for arbitration.

3 MR. SULLIVAN: Let's take a look.

4 THE COURT: It is the June 17?

5 MR. SULLIVAN: Removing Carard. Your Honor has  
6 already removed Carard.

7 Dworman's allegations --

8 THE COURT: Well, the issue as to removal of  
9 Carard as the professional manager of the partnership and  
10 replacement with a company not affiliated with Mr. Palin  
11 as property manager, why is that not arbitrable?

12 I mean, you can raise whatever you're raising  
13 here there.

14 MR. SULLIVAN: Carard was removed on an  
15 emergency application after we discovered that the company  
16 was stealing money.

17 THE COURT: I understand and it was on the books  
18 and records request so that you could go to arbitration.  
19 Why is that not arbitrable?

20 I don't know -- as I said, this would be for  
21 arbitration and the arbitrator.

22 I don't know what affiliated company means  
23 because Mr. Michael Palin has taken different stances as  
24 to what Carard is. At one point he said Carard was merely  
25 a pass-through entity owned partially by Dworman and  
26 partially by him. Meanwhile, later on it turns out tax



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returns are in the name of -- say that the ownership is Dean Palin and I think the other one is -- I keep forgetting his name.

MR. EPSTEIN: Adelman.

THE COURT: Gary Adelman.

Then Mr. Michael Palin who is not a partner says, no, it is he who owns it.

I have no idea. I don't know what affiliated entities, who it refers to, whether affiliated with Capital, affiliated with Enterprise. I'm not sure.

I don't know how broad affiliated is because often affiliated is defined in an operating agreement or when corporations or partnerships write out their agreements as an entity that's controlled by one of the members or shareholders or something other or partners.

Here there is none. So, there is a question of what it means and also a question of who, affiliated with whom and that's for an arbitrator.

MR. SULLIVAN: I agree that there are ambiguities in the clause but my point is Mr. Palin's counsel invented these disputes. Dworman did not demand of Palin to remove Carard. He didn't demand to replace it with a company not affiliated with Palin. He demanded the books and records, and when they showed massive embezzlement, he came into court to stop it.

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THE COURT: He also asked that Carard be replaced. There is a dispute here.

MR. SULLIVAN: I'm not sure, your Honor, that once this Court has removed an entity there is anything to arbitrate at that point in time.

THE COURT: It was interim relief and I think there is arbitration required here.

Let's move on to the next one.

MR. SULLIVAN: Okay. Dworman's allegations that Capital Enterprise has engaged in or directed the mismanagement and/or misappropriation of Partnership assets.

There are no allegations. We haven't made them yet. We're conducting an audit. We're still conducting an audit.

THE COURT: Once that is finished, it goes to arbitration.

MR. SULLIVAN: It is as in when you make an allegation. You can't arbitrate something that hasn't been made.

THE COURT: I think it's been alleged here. I think there is a dispute.

Next.

MR. SULLIVAN: Dworman's abandonment of his duties as managing partner.

## Proceedings

I don't even know what that means. What is the dispute? The Agreement says he's the managing partner. He comes into court to obtain your Honor's protection from the diversion of assets being conducted by fraud in its accounting.

THE COURT: I think there's an issue here. I think Dworman at this point may well want to be the managing partner and he is named as the managing partner.

I must stay de facto management doesn't work under this Agreement because the Agreement requires a writing for any amendment and also has a waiver clause.

So, in a sense, Dworman still is the managing partner and apparently wants to continue as. I don't know, this may or may not be an issue but it's for the arbitrator to decide.

Next.

MR. SULLIVAN: Dworman's revocation of his authorization to Capital Enterprises to act as day-to-day manager for the Properties.

THE COURT: That isn't an issue because there was no written amendment. So, that doesn't exist.

MR. SULLIVAN: Dworman's demand that Capital Enterprises cover the costs of managing the Partnership assets by claiming that he not previously authorize a management fee to Carard.

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We don't even know what this means. The parties are not having these conversations.

THE COURT: I think that is for the arbitrator.

MR. SULLIVAN: Disagreement between the partners concerning the management of the properties.

This is invented by Mr. Palin. There are no conversations. There are no disputes.

THE COURT: I think if you get a good arbitrator -- you had thought about Bernard Fried -- I'm sure he would understand. He is a smart guy.

If it's he or anybody else you pick, it's for the arbitrator.

MR. SULLIVAN: With respect to each of these, your Honor, I assume that you are applying the statute of limitations.

THE COURT: Next one.

MR. SULLIVAN: Disagreement between the parties concerning the temporary withholding of Partnership distributions in order to build an escrow to pay for facade renovation and repairs.

Again, there are no conversations.

THE COURT: These are all for the arbitrator.

MR. SULLIVAN: You have to have a dispute to go to the arbitration. The parties haven't spoken.

THE COURT: It sounds like there is a dispute

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about the facade going on right now.

The next one.

MR. SULLIVAN: Dworman's exclusion for title.  
This is the 1991. I thought you were going to --

THE COURT: If it's 1991 and there's no writing  
or anything else on top of it, the statute of limitation  
bars anything going back that far.

MR. SULLIVAN: With respect, your Honor, to  
every claim, your Honor, the statute of limitations --

MR. SCHARF: If I could put a footnote for this.

THE COURT: Pardon?

MR. SCHARF: I agree that this Court has under  
the CPLR the jurisdiction to stay. Some things are not  
arbitrated because of the statute of limitations.  
However, these issues can be used as setoffs in an  
arbitration where it claims --

THE COURT: It can be used as mitigation and  
defenses.

MR. SCHARF: Yes.

THE COURT: It cannot be used as a claim. We  
agree with that. It's barred by the statute of  
limitations.

MR. SCHARF: In our papers we say that things  
that otherwise might be time barred we would simply  
address as a setoff or as a mitigation to claims that have

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been alleged for mismanagement.

THE COURT: That is possible but it certainly isn't a dispute as a claim that you can bring as a claim because the statute of limitations bars it.

MR. SULLIVAN: We haven't asserted a claim to begin with. So, what are we mitigating?

THE COURT: Next.

MR. SULLIVAN: The offset and accountings to the Partnership for Dworman's decision to provide free or reduced rent.

THE COURT: These issues are also barred by statute of limitations.

MR. SULLIVAN: And nonsense on its face.

THE COURT: And if there is something dealing with damages or setoff or mitigation, however, that can be made as a defense.

MR. SCHARF: Your Honor, but that conduct started at a point in time that may be time barred but is continued and has continued within the statute of limitations, your Honor.

THE COURT: If you can find it was within the statute of limitations, fine. Otherwise, it is time barred.

MR. SULLIVAN: For the record, your Honor, what Halstead is finding are Mr. Palin's friends and family

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only in the building.

THE COURT: Okay.

MR. SCHARF: We'll arbitrate this.

THE COURT: This is all for the arbitrator.

Next.

MR. SULLIVAN: Dworman's refusal to abide by the terms of the prior agreement for a work out. So, this is a --

THE COURT: Well, the other thing that I must say and I'm ruling on this. This is not something that can go to arbitration.

The Partnership Agreement does not permit dissolution of the partnership except it has to be by consent of both partners.

So, there was no writing as to this prior agreement which would be required again under the Partnership Agreement. So, therefore, this is not something that's arbitrable.

MR. SCHARF: If I may, your Honor, just on that point. Section 5.2 in article -- I'm sorry. Section 5.2 in Article 5 of the Partnership Agreement.

THE COURT: Let me find the Partnership Agreement.

MR. SCHARF: It is Exhibit 1 in the petition. It would be earlier in the pages that you're looking at.

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THE COURT: Let me look it up.

Section which is it?

MR. SCHARF: Section 5. It's on page 9, Article 5.

THE COURT: Section 5. 5.1. Event of termination.

MR. SCHARF: Each party hereby agrees to take no action which would result in the dissolution of the Partnership.

THE COURT: Where are you reading from?

MR. SCHARF: 5.2, your Honor, right in the middle of the page.

THE COURT: Right. The middle of a sentence. Each Partner hereby agrees to take no action which would result in the dissolution of the Partnership except with the consent of the other Partner.

MR. SCHARF: That's correct, your Honor.

So, what I believe is an arbitrable issue is whether or not there was consent. A consent --

THE COURT: Please stop.

MR. SCHARF: Your Honor, if I may.

THE COURT: Please.

MR. SCHARF: The provision that relates to things needing to be in writing are amendments to this Agreement, your Honor. It's section 10.5 on page 16.



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This Agreement may be modified or amended only upon the written consent of both of the parties.

That does not mean a consent needs to be in writing. A consent is not an amendment to the Partnership Agreement.

We believe there is consent. There were emails as well, your Honor, about this Agreement that don't constitute a binding agreement that would not misrepresent it to the Court, but whether there was consent is not required to be in writing. The issue of consent to a dissolution and the sale on the disposition on the properties is an arbitrable issue.

THE COURT: You're saying there's issue of whether or not there was consent.

MR. SCHARF: There was consent.

THE COURT: Consent has to be in writing and whether there was consent.

MR. SCHARF: And that is an arbitrable issue.

What your Honor has identified as a gatekeeping issue and then if the answer by the arbitrator is consent does not need to be in writing, we will then go forward and demonstrate that there was consent.

MR. SULLIVAN: Your Honor, it absolutely has to be in writing under New York law.

I would be happy to submit law to the Court that

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shows exactly that.

The concept that the parties had conversations somehow disposed of \$450 million of property is nonsense from beginning to end. We can't arbitrate.

THE COURT: The reason that I believe it would have to be in writing is also for that reason because we're talking about real estate but beyond that, on page 13 there is a whole procedure talking about cross purchase procedures. If they disagree on something, if one wants to buy the other one out, how they could buy the other one out.

That would be a nullity if what you are arguing, Mr. Scharf, were the case.

MR. SCHARF: No.

THE COURT: I really do believe and even under the law requires --

MR. SULLIVAN: It does.

THE COURT: -- the transfers of property to be in writing.

MR. SCHARF: Your Honor, this is not the sale or transfer of real property. This is a provision that says we have made a decision to resolve our partnership in the following manner.

THE COURT: This isn't a corporation. This is not an LLC. This is a partnership that owns land and

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property and they would have to transfer the land and property in order to dissolve it.

What you're talking about is one would sell, they would each sell their portion of one of the buildings to the other and then they would either buy the other building or sell the building and divide up the assets.

So, all of these things have to be in writing and that's my ruling.

You have an exception.

MR. SCHARF: Okay.

THE COURT: Let's continue.

MR. SULLIVAN: Next one is the same. There is an allegation the parties disagreed regarding disposition through the sale or marketing of the assets to third parties, the assets of the partnership.

I don't even know what that means.

THE COURT: Disagreement.

MR. SULLIVAN: It's the same issue in terms of the writing.

THE COURT: It's the same issue.

MR. SULLIVAN: The last one request for inspection is over. We prevailed on that. We got the books and records. That's what revealed the fraud.

THE COURT: Okay. That's gone.

But you still have a lot of issues that are

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arbitrable as I said and I ruled on the record.

I am directing that Enterprise and Mr. Dworman go to arbitration and this time I will tell you if you do not -- apparently the attorneys cannot arbitrate it themselves or mediate it because that's already been tried.

MR. SCHARF: Yes.

THE COURT: And you've agreed previously on Bernie Fried. I don't know if you still want Bernard Fried as an arbitrator.

MR. SCHARF: We would love him.

THE COURT: How about you?

MR. SULLIVAN: We proposed him.

THE COURT: So, I think I am directing that you go to Bernard Fried and have him arbitrate this matter and that you proceed with the arbitration within the next 15 days.

Do you understand?

MR. SULLIVAN: Yes, your Honor.

MR. SCHARF: Yes, your Honor.

THE COURT: I want either party to come to me and tell me if there is any issue.

I know that Mr. Fried isn't always available but it can happen a little later. It does not have to happen immediately but I think he's a great choice.

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MR. SCHARF: Your Honor, I assume, wants us to have a submission agreement signed up with JAMS selecting him as an arbitrator.

THE COURT: Within the next 15 days.

MR. SULLIVAN: Right. After that it's subject to his schedule.

THE COURT: Exactly.

MR. SULLIVAN: Your Honor, may the record clearly reflect that each demand here is subject to the statute of limitations. Some are barred outright but even those --

THE COURT: I'm ruling that anything -- that statute of limitations will bar anything that is barred and is not timely.

MR. SULLIVAN: Right.

THE COURT: However, it can be used in mitigation for damages. It can be used as a defense. That doesn't mean that that's not part of it.

Now, again, you know you've got a great arbitrator. He can deal with it. Okay.

I'm going to ask that you give this transcript to him so he knows what I've ruled.

MR. SULLIVAN: Okay.

MR. SCHARF: Absolutely.

THE COURT: Anyway, let's move on to the other.

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MR. SULLIVAN: Just to clarify, your Honor, the Carard action you set aside completely.

THE COURT: I have not ruled on the two other motions. This is only dealing with Enterprise and Dworman. I emphasize again not even Michael Palin is a partnership. It's Enterprise, his entity, that is a partner here.

Carard has nothing to do with the partnership in the sense that it is not part of this arbitration. I ruled that before and I'm ruling it again.

Same thing with Dean Palin and Mr. Adelman and the accountants.

Okay. So, let's move on to the others.

MR. SULLIVAN: Would you like to hear me on the others?

THE COURT: Whose motion is it?

MR. SCHARF: It is mine, your Honor.

THE COURT: So, let me hear them first.

MR. SULLIVAN: Okay.

MR. SCHARF: Just for housekeeping purposes, the cross motion to dismiss the petition that was brought by Mr. Dworman I believe is effectively denied in the manner as set forth on the record.

THE COURT: The cross motion is denied and the petition is granted.

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MR. SCHARF: To the extent that --

THE COURT: To the extent that I have ordered.  
So, that case is over.

MR. SULLIVAN: Conversely, the cross motion is  
granted to the extent of the statute of limitations and on  
the rulings.

MR. SCHARF: We just want to go home and tell  
our clients we won, Judge.

THE COURT: To the extent of my rulings on the  
record. That's why I asked that you provide the  
arbitrator with the rulings.

MR. SCHARF: Thank you, your Honor.

So, this is the motion of the defendants in the  
Dworman case, index number 651802 of 2016.

THE COURT: Against Carard.

MR. SCHARF: Against Carard.

I represent the defendants in that case, Dean  
Palin and Carard.

Your Honor, we are not looking to join the  
arbitration that your Honor has just ordered must go  
forward. We are not looking as we sought last time to say  
that Carard and Dean Palin should be part of that  
arbitration which your Honor denied that motion.

What we are saying is under New York law when  
issues are inextricably intertwined and there are parties

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who are not parties to an arbitration agreement as Carard and Dean Palin are not but that decisions that will happen if an arbitration --

THE COURT: Let me just clarify one thing.

So, Mr. Scharf, you are the attorney for Enterprise?

MR. SCHARF: I am, your Honor.

THE COURT: You are the attorney for Michael Palin?

MR. SCHARF: Yes.

THE COURT: You are the attorney for Carard?

MR. SCHARF: Yes.

THE COURT: You are the attorney for Dean Palin?

MR. SCHARF: Correct.

THE COURT: And you are the attorney for Mr. Adelman?

MR. SCHARF: I am not.

MR. EPSTEIN: I am the attorney for Mr. Adelman.

THE COURT: Okay. So, we have one other attorney here. All right.

MR. EPSTEIN: Thank you, your Honor.

MR. SCHARF: What Carard and Dean Palin --

THE COURT: And again there is a cross motion by Mr. Adelman for a stay.

So, this one has a cross motion as well.



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MR. EPSTEIN: That's right.

MR. SCHARF: And I believe that cross motion is a piggyback on our motion.

THE COURT: Exactly.

MR. EPSTEIN: Me too.

MR. SCHARF: It's a me-too motion.

THE COURT: Okay.

MR. SCHARF: What the defendants are in essence saying in the action against Carard is that now we're going to arbitration on issues between the partners.

As your Honor previously said, and as we've set forth in our papers, even in the Carard -- in the complaint against Carard, it talks about the actions of Michael Palin and Enterprises although they're not named as defendants. That they were the bad actors with respect to everything that Mr. Sullivan has said about the defendants in the Carard action.

So, what we are saying, those issues as between the partners Capital Enterprises and Mr. Dworman are going to be arbitrated. They are going to be now decided by Justice Fried. Was conduct that was being conducted and directed by Capital -- by Enterprises, let's call it as the de facto.

THE COURT: Well, I don't know. I think there is a separation. There is air between, space between

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2 Carard and Enterprise. Michael Palin may be very much  
3 part of Enterprise. Dean Palin and Adelman are not.  
4 Frankly, I don't think there is really a problem here  
5 going forward with an action against different parties who  
6 are not partners.

7 MR. SCHARF: I agree, your Honor. This isn't  
8 about whether or not there was a valid cause of action  
9 against them. This has nothing to do with anybody trying  
10 to avoid the jurisdiction of your Honor's orders as was  
11 alleged. It is not.

12 We understand that Halstead is in. We  
13 understand there was a new accountant that is in.

14 THE COURT: Right. And you know both of them  
15 with input from all parties, from both Enterprise and  
16 Dworman.

17 MR. SCHARF: But what's happening and I don't  
18 know if your Honor accepted Mr. Sullivan's letter that he  
19 sent into the court which we've -- there was a letter that  
20 was sent in a few days ago about all different types of  
21 disagreements that Halstead -- relating to the facade,  
22 relating to all these issues. These are the partnership  
23 issues.

24 THE COURT: All these issues are part of the  
25 arbitration.

26 MR. SCHARF: Correct, your Honor, especially

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because if I drew your attention --

THE COURT: I already ruled these are arbitrable.

MR. SCHARF: Right, but there is a key point of emphasis here because the provision that talks about control of the partnership affairs, the one that appointed a professional management of Carard which has now been replaced by the non-party, a non-affiliated one.

THE COURT: It's an interim replacement.

MR. SCHARF: As an interim, correct, especially because even though Mr. Dworman is vested with the power to carry out and manage the affairs of the partnership, the next line then says the partner shall use their best efforts to carry out purposes and the business of the partnership and shall devote to the partnership business such time as they shall in their sole discretion determine to be required for its welfare and success.

All of the issues as to how this building was run are going to be decided by Justice Fried in the arbitration.

There are claims being made that Carard who was operating under the direction of those partners, the two general partners --

THE COURT: No, that Carard was -- the accountant as well and were basically --

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MR. SCHARF: Working for Palin and Enterprises.

THE COURT: Well, Dean Palin. Enterprise is separate.

You know, we are really -- you know this, Mr. Scharf. Certainly you appeared -- you've done a lot of commercial law and entity is separate --

MR. SCHARF: Agreed.

THE COURT: -- from a person, from an individual.

MR. SCHARF: Agreed.

THE COURT: And you know that's done for a lot of reasons. Enterprise -- what is Enterprise, is it an LLC? Is it a corporation?

MR. SCHARF: I'll answer your question correctly hopefully in one moment. It is a partnership.

THE COURT: It's also a partnership.

MR. SCHARF: Yes. It is called Capital Enterprises Co., and Michael Palin is the general partner. I'm looking at the signature line. It's Capital Properties Partners unless it's been amended since which I don't think it has.

THE COURT: Capital Properties we know is a partnership.

I'm asking what Enterprise is.

MR. SCHARF: Yes. And Capital Enterprises

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Company appears from the documents to be a partnership.

THE COURT: Okay. Between?

MR. SCHARF: The only information I have here from looking at a signature line is that Michael Palin is the general partner of Capital.

THE COURT: So, you don't know who the partnership is.

MR. SCHARF: I don't know offhand, your Honor. I looked down at the papers.

MR. SULLIVAN: It's the Sachs family, your Honor, that owns the other 25 percent or 50 percent of that entity.

MR. SCHARF: That's correct.

THE COURT: So, it's somebody else who is also a partner.

MR. SCHARF: Correct. There are partnerships that have other partners. The Sachs family that Mr. Sullivan and Mr. Lin reminds me with Michael Palin being the general partner of that.

I agree as I was trying to say before, your Honor, I think it's a matter of sequence.

What I mean by that is, and that's the purpose of the motion for a stay not to compel arbitration but to say there are intertwined issues and I think your Honor said it before from the bench when we were discussing all

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2 three of the motions that are before you, you have  
3 inextricably --

4 THE COURT: I did not mean inextricably  
5 intertwined. I meant the transaction over the many years  
6 from which it arose.

7 You know, it's the same transaction perhaps but  
8 there are lots of pieces to this and there are lots of  
9 parties, and the parties these actions, the two other  
10 actions are brought against are not partners in the  
11 partnership.

12 MR. SCHARF: I agree. That's all I'm saying,  
13 your Honor, is there are going to be decisions that are  
14 going to be made in the arbitration between Dworman and  
15 Enterprises as to how the partnership ran and who was  
16 doing what to whom.

17 THE COURT: Will that affect the liability of  
18 either Dean Palin?

19 MR. SCHARF: Yes.

20 THE COURT: Alderman?

21 MR. SCHARF: Yes.

22 THE COURT: Or Janover?

23 MR. SCHARF: Yes.

24 THE COURT: How?

25 MR. SCHARF: Because, if for instance, the  
26 arbitration turns out that Dworman gave up his rights to

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the day-to-day management to Palin --

THE COURT: It can't. Frankly --

MR. SCHARF: No, no.

THE COURT: He was the manager and nothing was changed. There was no amendment.

MR. SCHARF: I agree there was no amendment. I'm not quibbling about that with your Honor. I'm saying something differently.

Certainly, Dworman had the right under the agreement with no amendment to say, excuse me, what's gone on for the last bunch of years is inappropriate. I'm asserting my rights and that's what they've done. That's what your Honor has ruled.

THE COURT: Right.

MR. SCHARF: That doesn't change that in fact over a number of years Dworman did not act in that role. That does not change the fact that Enterprises and Michael Palin assumed that role in a vacuum. Our contention in the arbitration will be with the consent and the advice of Mr. Dworman.

So, if Dean Palin, Carard, Janover and everybody acted at the direction of Michael Palin and Enterprises with the advice --

THE COURT: This is the same thing that the Nazis said. Hitler told us to do it. So, we did it.

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MR. SCHARF: No, no, no, no, no.

If it is determined that everything, and this is the words that I was about to say, your Honor. If it is determined in the arbitration that Dworman consented to this conduct, and was okay with it --

THE COURT: That he knowingly.

MR. SCHARF: That he knowingly permitted these leases to occur, your Honor, you asked me to explain to you how that can happen but it is a decision that will be made by Bernie Fried. And if he makes that decision, then that will absolve the non-parties to the arbitration from having culpability and posture that --

THE COURT: I don't really buy this argument.

MR. SCHARF: Your Honor, all I'm saying is this is about sequencing. We could have a situation where your Honor is making liability determinations as to non-parties to an arbitration that will contradict decisions that are being made.

So, therefore the CPLR permits non parties to an arbitration and the New York court has a legion of case law which they don't dispute opposition to the motion that says, your Honor, your Honor's orders with respect to the interim orders, cool. Those continue. We're not running away from those. Nobody is asking you to dismiss the case. Stay it.



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Let's go forward quickly with Justice Fried.

Let's make sure that whatever determinations that are made as between the partners can be considered by your Honor when your Honor is looking at the conduct of non-parties to the Arbitration Agreement, non-partners. That's the basis for the stay.

THE COURT: Let me ask you something. Are you going to ask for findings of fact as well as ruling?

MR. SCHARF: Absolutely, your Honor.

THE COURT: You're saying that if the findings of Justice Fried are different from, and I don't see how that really impacts because to me Carard is a separate entity totally. What they did has nothing at all to do with the partnership. What's being alleged is they committed fraud.

MR. SCHARF: Correct, your Honor.

THE COURT: And Adelman is totally unconnected and he's the one with the garage and I just don't get it.

MR. SCHARF: I will try and explain, your Honor. It's only a fraud if somebody doesn't know about it. Okay. Let's take the garage as an example.

THE COURT: So, your argument is that -- your argument will be that Mr. Dworman knew about all of this and said, fine, take, you know, lease the garage way under market, take money before I even get any money, you know.

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Isn't he a businessman?

MR. SCHARF: Yes, your Honor. And the businessman that he is, okay, had two long-time friends running a business and they decided to whack up the spoils different ways, different times. Each getting benefits of the spoils. Some taking some for themselves while others took others for themselves. That's going to be the issue of the arbitration.

When that issue is decided, only then will you be in a better position to be able to say the garage lease was part of the benefits that Alvin Dworman said that Enterprises, Michael Palin, could have for his family.

THE COURT: Wait a minute. Enterprise and Michael Palin are not one in the same?

MR. SCHARF: Correct.

THE COURT: Enterprise is, and frankly I caution you, the Sachses might not like this, but Enterprise is the Sachs family as well as Michael Palin?

MR. SCHARF: That's correct.

THE COURT: And you know, I think you better be careful. The Sachses might have issues, may wind up with legal issues here, but I just don't see this.

Let me hear from the other side.

MR. SCHARF: Thank you, your Honor.

MR. SULLIVAN: Your Honor, when we finally got

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the books and records that Mr. Scharf fought very hard to deny, one of the first things we saw was a series of loans made by Dean Palin to himself.

THE COURT: And Dean Palin is not Michael Palin.

MR. SULLIVAN: He is not Michael Palin.

\$160,000 to a restaurant that he owns just south of my office on Park Avenue, \$75,000 to a company which he's a principal, \$75,000 payments to the Palin Enterprise business in which he has an interest. These aren't arbitrable disputes.

These payments which are not on anyone's list for arbitration aren't anything that go to arbitration. They are part of a lawsuit by Mr. Dworman to stop the bleeding, stop the theft and recover the money and he's a separate individual.

Mr. Scharf who seems to represent everybody in this case, an interesting conflict of interest, is trying to move away from, your Honor, oversight of the theft that was committed by Carard, its principals, the garage, and somehow have Mr. Palin say or Capital Enterprises say, well, I may not be an officer or director, an owner, but merely controlled it and Mr. Dworman may have consented to being robbed.

There's not a piece of paper or a shred of evidence that's here in court challenging it, and

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therefore, it's arbitrable because they want to get that case away from you because we continue to find fraud on top of fraud on top of fraud committed with respect to Carard, the garage, the accounting conduct of the books and records of these entities. They are not parties to an arbitration.

It's nonsense to say, oh, we're going to arbitrate the issue of whether Mr. Dworman agreed to be robbed because we have a theory. There is no evidence of that. That's nonsense. That's a lawyer trying to get away from the Court a pattern of fraud and misconduct. There is nothing arbitrable about that case whatsoever.

In making loans to yourself without any writing whatsoever, any interest payment whatsoever, with partnership monies. We're not talking tens of thousands of dollars. We're talking millions of dollars and the reason, your Honor, that we sent a letter to the Court regarding the physical condition of the property --

THE COURT: The letter is really not part of this record.

MR. SULLIVAN: Understood.

We want the Court to understand that this partnership has been deprived of millions of dollars for years which is why they didn't fix the facade, why they didn't fix the leaks, why the garage was in disrepair.

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That's where the money went. The money went through Carard out.

At the end of the day, we'll track the money and we'll bring it back but that lawsuit has nothing to do with these so-called arbitrable disputes that Mr. Scharf is writing letters about.

THE COURT: At this point I'm denying the stay. I'm denying the stay with regard to Carard, Dean Palin and Adelman.

I believe in this case, and you know, I have so many cases here where judgments eventually get recorded and you just can't find the money. I think delay is not a good thing here.

Carard, Dean Palin and Mr. Adelman have nothing to do with the partnership in the sense that they are parties to the partnership. Enterprise is the party to the partnership. And I believe it's that simple.

MR. SCHARF: Your Honor, paragraph 53 in the complaint in the action against Carard says the following: Alvin Dworman brings this action asserting claims derivatively on behalf of Capital Properties Company. To the extent required, any further demand on the other partners, specifically Michael Palin -- so, he doesn't even recognize the distinction between Michael Palin and Enterprises -- would be futile because all of the conduct

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about which Dworman complains was intentionally perpetrated by Michael Palin to benefit himself and his family with his misconduct and thus Michael Palin is personally interested, benefits from the actions about which Alvin Dworman complains and Michael Palin has failed to exercise sound business judgment in the performance of his responsibilities.

That paragraph summarizes that the entire complaint against Carard is for the actions of Michael Palin who he does not -- who Mr. Dworman does not distinguish because we all know it's Enterprises. He needed to make a demand on Enterprises and he's saying it's all about Enterprises doing all types of bad stuff.

THE COURT: Michael Palin is a managing partner of Enterprise?

MR. SCHARF: Correct.

THE COURT: But Enterprise is not Michael Palin.

MR. SCHARF: I agree but if they would have named Michael Palin in the Carard lawsuit, I would see where your Honor was going but they only name Carard, Dean Palin and Gary Adelman. So, they don't name Michael Palin.

THE COURT: They don't.

MR. SCHARF: Because they know Michael Palin's conduct is tied up in Enterprises which is an arbitrable

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dispute.

THE COURT: I think what that paragraph does is it's a demand in futility. It's a derivative claim as well as individual.

MR. SCHARF: That's the point.

THE COURT: But Michael Palin controls Enterprise in the sense that he is managing partner and they've shown demand futility which is part of the action. I don't believe this really is the same thing as a --

MR. SCHARF: Your Honor, we had cited legions of cases and I know -- I don't mean legions. There were at least four or five cases that we cited that where a derivative lawsuit, exactly this paragraph 53, is being brought and there are claims being made against parties who are not arbitrable, that the Court should stay the derivative lawsuit until the key core issue which is between Enterprises run by Michael Palin and Dworman are arbitrated so you do not have a potential conflict.

THE COURT: Counsel, you want to say something for Adelman?

MR. EPSTEIN: If I may, your Honor. The risk is conflicting decisions from the arbitrator and from this Court for my client Adelman.

There's one cause of action asserted against Adelman in the 802 complaint, the third cause of action,

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that he improperly received partnership assets,  
partnership distributions.

That's exactly what the arbitrator is going to  
hear, your Honor. That's exactly what the arbitrator is  
going to hear.

My only concern is my client being at risk of  
conflicting decisions and quite obviously the expense of  
litigating something here that's going to be decided any  
way in arbitration.

Now, Dworman is at no risk as your Honor pointed  
out because provisional remedies have been put in place  
and Mr. Sullivan indicates his bleeding has stopped. That  
was his goal.

THE COURT: He alleges that he's lost a lot of  
money that went into the pockets of Carard, Dean Palin and  
Mr. Adelman.

MR. EPSTEIN: Correct. The arbitrator is going  
to decide whether that is true or not.

THE COURT: Wouldn't he be prejudiced whenever  
this happens, getting that money as he should get it  
because it takes time also for the litigation to work its  
way.

MR. EPSTEIN: Dworman is going to be prejudiced.  
Capital Enterprises owns 50 percent of  
\$450 million of real estate that everybody's talking



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about.

THE COURT: Capital Enterprises is separate from Carard, Dean Palin and Mr. Adelman. I repeat it again.

MR. EPSTEIN: No question about it, your Honor. I'm not challenging that for a minute. I'm only saying to the Court that there is a public policy, A, to favor arbitration of course, and B, to avoid conflicting results.

If the issue is some prejudice to Dworman by delaying this lawsuit, I submit there is no prejudice to Dworman by delaying this lawsuit for the following reasons.

First of all, the provisional remedies are in place. So, the hemorrhaging, as Mr. Sullivan describes it, has stopped.

Second of all, he's got no collection risks. There are fixed assets here.

THE COURT: Not of Enterprise. Not of your client.

MR. EPSTEIN: He doesn't want the money from my client, your Honor.

THE COURT: Your client and -- your client Carard and Dean Palin are the ones who allegedly took this money. Not Enterprise. Enterprise is a separate entity.

MR. EPSTEIN: Yes, but the arbitrating

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requirement that the money was received by them properly. Your Honor can find they were received improperly. Now, what do we do?

THE COURT: Received by Enterprise? By Adelman?

MR. EPSTEIN: I only care about Adelman, your Honor.

THE COURT: I don't think the arbitrator is going to rule in regard to Adelman.

Let me hear from you.

MR. SULLIVAN: I think Justice Fried is more than capable of dealing with the argument. Mr. Dworman agreed he could be robbed by the managing company and garage operator and they could funnel millions of dollars to themselves. If that issue comes out, Justice Fried will have your decision, your Honor. They are separate entities.

It's exactly the same logic. They funneled millions of dollars out. We're tracing it. It's not easy. There may be more parties involved. Every day that goes by we find more documents, bogus invoices and more suspicion that this was some kind of money laundering. Justice Fried is more than capable of distinguishing.

THE COURT: Let me just say I am denying the stay in regard to Carard, Palin and Adelman.

A stay is not something that courts ever grant

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1  
2 very lightly because it does, no matter what, it  
3 prejudices the other side. It prejudices the case. The  
4 case gets older, witnesses' memories fade even more. It's  
5 just not considered a good thing. Certainly collecting  
6 judgments is really a bad thing.

7 So, at this point I don't believe there really  
8 should be a stay in this case.

9 I think there is a tremendous burden to argue  
10 for one and here we've got separate entities that have  
11 nothing at all to do with Enterprise. They are separate  
12 from Enterprise. They are separate from Dworman. They  
13 are not Capital.

14 So, I am going to deny the stay in this case and  
15 both the motion and cross motion.

16 So, now, we're up to the dismissal motion or  
17 also the stay made by Janover, Hoffman & Solomon. They  
18 were the accounting firm. Hoffman and Solomon were the  
19 partners who were accountants and they are moving under  
20 3211(a) (5) which is statute of limitations argument and  
21 (7) and they are moving to dismiss the second, third and  
22 fifth I believe causes of action.

23 MR. KELLY: Correct, your Honor. We are also  
24 moving for a stay.

25 We are in a different position than the Carard  
26 parties with regard to the stay because the issues in the

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Carard litigation are whether or not Carard should have received the money or Mr. Dean Palin should have received the money and that issue is determinative of things in our case.

In our case we're alleged to have after the fact of those transfers incorrectly recorded them on the books and records after the fact. So, if those transfers are deemed acceptable or not acceptable, that's determinative on whether or not we could be liable because if they were found to be permitted transfers, then there's no error on our part. Then there is no remedy --

THE COURT: Are you arguing that things were -- that your client had an obligation to keep the books and records appropriately, file appropriate tax returns and that things were booked wrongly, not booked, that the tax returns were faulty, that there well may be penalties, things like that?

MR. KELLY: There's been no allegation of penalties.

THE COURT: I thought I read that. Maybe I'm wrong.

MR. KELLY: The question is whether or not the money -- the question is whether or not Mr. Dworman's Enterprises, his companies have been deprived money they should be entitled to. That question is central to the

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Carard litigation.

THE COURT: Well, from what -- there are five causes of action.

MR. KELLY: Correct.

THE COURT: The first one is accounting malpractice. I must say the problem I have with the complaint is it's both a derivative and an individual complaint. But the different causes of action don't say against whom they were and they may well be good against individual and not derivative and vice versa. So, it was hard for the Court to figure out dismissal motion based upon that.

MR. SULLIVAN: You are correct, your Honor, although in fairness that's one of the reasons the motion should be denied. The complaint does allege that a retainer agreement was signed between the Janover firm and entities acting on behalf of the partnership. The first -- the cause of action for accounting malpractice --

THE COURT: Is only derivative.

MR. KELLY: Would only be derivative.

THE COURT: But the other causes of action, there is negative misrepresentation, a fraudulent misrepresentation, an aiding and abetting, breach of fiduciary duty and aiding and abetting the conversion and I'm not sure whether those are individual or derivative or

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both.

MR. KELLY: They could be both. They were certainly individual. For that reason alone, the motion would be denied because there is nothing duplicative at all.

THE COURT: Well, I understand that but that was a very important consideration when I read through all the papers and tried to figure it out but we'll get to that.

What I wanted to know is in regard to this stay, because he's now arguing the stay.

MR. KELLY: They are the accountants for Carard.

THE COURT: What?

MR. KELLY: They are the accountants for Carard. Purportedly, this accounting firm and its principals represented the partnership, Carard, and some of the entities that received the money like Dean Palin's entities. So, ignoring conflict of interest issues, they represented everybody at the same time during the period of theft.

THE COURT: They didn't represent Dworman, did they?

MR. SULLIVAN: They did not. Thank God.

This complaint against them again is addressed to the monies that flowed from Carard to Dean Palin to Mr. Adelman to various Palin entities. It's addressed to

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egregious accounting malpractice. Counsel doesn't challenge that cause of action.

Then on tort theories it's addressed to the fact that the accountants falsified the books and records by creating fictitious names to reflect the moneys that were flowing out. They concealed their own malpractice and they actually engaged in a fraud.

There is a case that we cite, your Honor, Johnson versus Proskauer Rose which the First Department said it is true that tort theories, negligent misrepresentation, fraudulent misrepresentation --

THE COURT: Are we talking about the stay now?

MR. KELLY: I'm sorry. I was talking about the --

THE COURT: I was talking about the stay.

MR. SULLIVAN: There's no reason to stay the action against the accountant. We're looking at the diversion of money through Carard. What's the defense going to be, I falsified books and records of Carard to cover up the money that was stolen because why, because Mr. Dworman consented in advance to be robbed. We're back to that?

We're again on the point of separate entities. They're not parties to an Arbitration Agreement. Carard is not. Principals of Carard are not. The millions of

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dollars that were stolen through Carard and the garage are not.

Why does the accountant get a stay of the action against it in the name of what?

What's Justice Fried going to say about the accountant's malpractice, the accountant's fraudulent misrepresentation, the accountant's manipulation of the books and records of Carard which passed up through the partnership?

He's not going to address anything that comes anywhere close to that.

This action should proceed to discovery.

MR. SCHARF: As I said, your Honor, the stay is not based on what Judge Fried or Arbitrator Fried will or will not rule. He may have an impact on it but as Mr. Sullivan amply explained, all the money that's alleged to have been taken out was taken out through defendants who were in that other case, the Carard, the Palin, the Adelman piece. That case is going to be determined whether or not they took money improperly or without authorization. That case is the one that's going to determine my case.

That's why I'm in a different position than the Carard people. The Carard defendants are pointing to the arbitration. I'm pointing to everyone else at the table



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1  
2 saying let them resolve their disputes before we go into  
3 whether or not after the fact the accountants recorded  
4 what happened incorrectly as opposed to whether or not the  
5 money was taken correctly or not because no allegations  
6 are that the accountants took money.

7 THE COURT: Is there any way, any way at all, in  
8 regard to accounting malpractice, and let's deal with that  
9 because that's a major issue. Is there any excuse  
10 possible that would come out of the arbitration?

11 I mean, I don't understand what possible  
12 defense -- when an accountant puts down wrong figures or  
13 writes the wrong thing in books or records or on a tax  
14 return, how can that ever be excused by what happened in  
15 the arbitration?

16 MR. KELLY: When the client is aware of the  
17 facts, then it's no liability on the accountant if the  
18 accountant makes mistakes in recording those.

19 If Palin who was de facto managing partner who  
20 ran the day-to-day operations and who was the party that  
21 engaged the accountant knew everything they were doing,  
22 then the accountant can't be liable for not informing its  
23 own client.

24 THE COURT: Palin isn't the partnership.

25 MR. KELLY: In the Carard action. They're the  
26 ones being -- Palin is not a partnership of Capital

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Properties but Carard --

THE COURT: And it's a partnership who the accountants, if I recall, was doing the work for.

MR. KELLY: They reported to the agent of the partnership which is Carard and as far as they were concern the de facto general manager.

THE COURT: They knew they were the agent for the partnership and things were going along and Carard was getting money improperly and telling them to list the wrong things in the book and records and on tax returns. There is no way -- if this all happened, there is no way that there couldn't have been an accounting malpractice. I don't see it.

I'm denying the stay.

So, let's move on to the dismissal.

MR. KELLY: Thank you, your Honor.

THE COURT: And you're only talking about negligent misrepresentation, fraudulent misrepresentation and aiding and abetting and conversion?

MR. KELLY: Right.

The misrepresentation claims we're moving on duplicatives. It's malpractice.

THE COURT: I think that might well be true in regard to the corporation.

So, that's the derivative claim but how would it

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possibly be true in regard to the individual claim?

MR. KELLY: The individual being Mr. Dworman?

THE COURT: Exactly.

MR. KELLY: What allegations are we pointing to that are different than the negligence in which there was representation to Mr. Dworman as opposed to the partnership. There's no additional allegation. It's just the same fact allegations.

There's no allegation with regards to a fraudulent representation to Mr. Dworman that was not to the partnership which he's claiming derivatively through.

There's just not separate allegations to delineate those two causes of action.

THE COURT: But one is a contract to which Mr. Dworman is not a party and one is individual and monies he should have gotten he claims and didn't get.

So, some of this, let's say the tax returns and there are penalties and stuff, would be problems for the company whereas the monies he should have been distributed or his Capital accounts or whatever affected is individual and separate.

MR. KELLY: Well, the money at -- the accounting firm doesn't direct where the money goes. They are reporting after the fact.

THE COURT: But it all is dependent, the

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distributions, what's in the Capital account, all of that may well depend on what the accountants put into the books and records.

MR. KELLY: Then there should be separate allegations that flow like your Honor is looking for and there just aren't. There's no separate allegations. We can speculate but then we are speculating what could have been put in the complaint.

I have the same concerns that you do, your Honor, because it doesn't say which factual allegation you're going to support, the negligence or fraudulent misrepresentation claim, and there aren't any separate or distinct allegations that support those. It's just the same that support the negligence claim.

THE COURT: Let me hear from the other side in regard to the three claims and I need you to tell me individual or derivative because it's important.

MR. SULLIVAN: Both.

As your Honor pointed out, the accounting malpractice claim which arises out of contractual relationship with the partnership is derivative.

THE COURT: Is derivative.

MR. SULLIVAN: With respect to negligent misrepresentation and fraudulent misrepresentation, Mr. Dworman is the managing partner of the general

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partnership. The partnership is a flow-through entities. The deductions that are taken flow through with Mr. Dworman on an individual basis.

So, you have Carard paying the expenses of Mr. Dean Palin's restaurant.

THE COURT: Let me take a step backwards.

You talk about negligent misrepresentation which requires some kind of duty.

Is the duty here to Mr. Dworman, not to the company, to Mr. Dworman?

MR. SULLIVAN: I think the answer to that is yes, your Honor. When you're the managing partner of the general partnership that's represented by an accounting firm that is falsifying books and records that implicate what expenses, what deductions are taken by the general partner personally because it's a flow-through entity. Partnerships don't pay taxes. Yes, there's a duty to the general partner.

When you affirmatively misrepresent in the books and records by using fictitious names the fact that undocumented interest-free loans are being made to Dean Palin, to Mr. Adelman, to Palin family entities and you cover up in the books so that nobody knows and the accounting treatment and the tax treatment and the financial statements are all false as a consequence and

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the managing general partner is filing tax returns for himself based on that, yes, he has an individual cause of action. That disposes of the motion right there.

THE COURT: And aiding and abetting the conversion.

MR. SULLIVAN: All they said -- that's nonsensical. They said to the extent, we don't know that you are, that you plan to go back more than three years, we want the judge to issue a declaratory judgment that the statute of limitations might apply.

Well, we haven't done that yet. This is a pre-answer motion.

THE COURT: Well, also you've raised the issue of statute of limitations and you claim equitable estoppel.

MR. SULLIVAN: Prediscovery.

It's also interesting that a pre-answer motion someone is raising statute of limitations arguments that don't even apply. We haven't gotten to discovery. I don't know how far back the fraud goes.

THE COURT: Statute of limitations often is raised at dismissal.

MR. SULLIVAN: Then how can you conceal the books and records?

How can you falsify books and records and say

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too bad for you. You didn't catch it in time,  
Mr. Dworman. How do you do that?

MR. KELLY: Your Honor, the act they are  
complaining of that was wrongful acts, the negligent act,  
is the incorrect books and records.

They cannot now point to that and say that's  
what you did to conceal the wrongful act. You need a  
separate act to prevent the plaintiff who filed suit other  
than the allegedly negligent act.

So, the equitable estoppel claim does not stand.  
You can't have the same act as the same one that's alleged  
to be negligence.

THE COURT: You're saying that the fact that all  
of this was hidden from them can't toll the statute of  
limitations because that's part of the conversion, it's  
part of the fraud?

MR. KELLY: That is bad conduct that they're  
alleging that causes liability, whether you call it  
negligence or misrepresentation.

THE COURT: How could they have possibly known  
that?

MR. KELLY: As general partner, they have a  
right to manage the business on a day-to-day basis.

They have a right under the Partnership  
Agreement that we heard a lot about. They had a right to

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inspect the books and records as your Honor has been aware of over the last two years. So, that's how they would be able to do it.

THE COURT: If they did inspect the books and records, they would have needed -- you're saying they would have found out about the Palin loans, et cetera?

MR. KELLY: They would have found out about the transaction.

THE COURT: I don't know if at this point I can know that. I mean, because they weren't required -- Dworman wasn't required to get a forensic accountant and audit. This is what they're doing now. But, yes, you're talking about justification and reliance. I don't think you raised that in your papers.

MR. KELLY: No, no --

THE COURT: But I see what you're arguing now may well be a point for a summary judgment motion later on.

At this point I don't know if the books and records, if Mr. Dworman had looked at them, would have revealed what we're talking about.

MR. KELLY: That's not the issue for this motion. That's the issue for later on.

The issue on this motion is for conversion claim. We requested that the statute of limitations be



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applied to any claims beyond the statute of limitations.

THE COURT: You're also arguing only for conversion statute of limitations.

MR. KELLY: Only on the conversion claim.

THE COURT: Right.

MR. KELLY: They're saying the statute of limitations shouldn't apply to any aspects of it because you're equitably estopped from asserting statute of limitations based on the fact that the entries in the books and records were incorrect.

Our response is the entries being incorrect is what you're saying the claim against us is, what you're saying our wrongdoing is, our act that aided the conversion.

THE COURT: It is that -- it is the fact of taking the money and allegedly helping, aiding and abetting Carard and its other people in taking this money.

MR. KELLY: That's not the allegation. The allegation is that what we did wrong was incorrectly record transactions. We didn't write -- we didn't transfer money. We didn't receive money. We didn't set up the deals.

THE COURT: Yes, but they aided and abetted Carard, Dean Palin and one of these days I'm going to remember his name, Adelman.

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MR. EPSTEIN: I don't care if you forget his name, Judge.

THE COURT: Aided and abetted their taking the money because it covered up what they did by wrongly recording all of this.

MR. KELLY: Correct. That's why we are not moving to dismiss the claim, just saying anything that's beyond the statute of limitation is not recoverable because of the statute of limitations.

THE COURT: Yeah.

MR. KELLY: The claim survives to the extent it's within the statute of limitations.

THE COURT: So, you're saying tolling can't be argued because it's part of the transaction itself?

MR. KELLY: Exactly. That's what the case law is.

THE COURT: I think you may well be right.

MR. SULLIVAN: Your Honor, very briefly. I think it's an issue for summary judgment as you pointed out. Why raise it now. It's going to be because you want to block discovery in some fashion outside the three-year period they concede as legitimate.

THE COURT: How about in regard to the others?

MR. SULLIVAN: With respect to the aiding and abetting conversion, it's not just a book and record. The

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complaint alleges multiple acts of wrongdoing and we annexed to our opposition in pre-answer motion affidavits both from Mr. Hoffman and from Mr. Kreuter, the plaintiff's expert, that detail a host of misconducts.

THE COURT: Were any of those acts separate from the conversion itself and exchanging books and records?

MR. SULLIVAN: Failure to inform the managing partner of the partnership that you were falsifying the books and records to conceal undocumented personal loans to Dean Palin, yes.

THE COURT: That may well be a fraud or a negligent misrepresentation or a fraudulent concealment argument, but how is that the conversion, aiding and abetting conversion?

MR. SULLIVAN: The conversion in this case consisted of the monies that flowed from Carard to the principals of Carard, the garage, the various third parties that were then concealed by the defendant. They aided and abetted the theft.

When they were confronted, they submitted affidavits to your Honor in opposition to a motion for books and records and opposition to a motion to remove Carard in which they made further misrepresentations.

THE COURT: That happens later and that would be within the statute of limitations period.

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I'm going to rule on this right now.

I am dismissing the negligent misrepresentation, fraudulent misrepresentation, aiding and abetting conversion causes of action that are derivative.

I am leaving them as to the individual Dworman.

I am also granting statute of limitations argument as to aiding and abetting the conversion only as to the acts prior because it goes from 2011 till when this was filed in 2016. So, it goes back to 2013 but it will not go back before the statute of limitations.

MR. SULLIVAN: With respect to all those rulings, your Honor, respectfully, may we request leave to amend after discovery if in fact discovery proves the validity of the additional claims.

THE COURT: I think it's duplicative really in regard to the derivative claims.

With regard to conversion, at this point, this is my ruling and it's really covered in the other cause of action any way.

MR. SULLIVAN: I agree.

THE COURT: So, what I'm going to ask is the parties order the record and efile it and I will write up a gray sheet.

MR. SCHARF: Your Honor, we would be remiss if we didn't tell your Honor that an order to show cause was

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2 filed yesterday in the action where we sought to compel  
3 arbitration which your Honor has now ordered.

4 THE COURT: Ordered.

5 MR. SCHARF: That order to show cause we  
6 understand has come up in the course of today. I know you  
7 have a full courtroom and you are moments away from --

8 THE COURT: And this order to show cause is  
9 requesting what?

10 MR. SCHARF: The very first issue that your  
11 Honor was concerned about and it relates to Mr. Dworman.

12 Now that we have an arbitration, we are seeking  
13 expedited deposition of him in aid of the arbitration in  
14 order to preserve his testimony based upon the information  
15 that we put forth here and also to enjoin Ms. Hoppe from  
16 continuing to act because what we heard Mr. Sullivan say  
17 is that she is the executive managing director of ADCO  
18 Group who is not a party to the partnership and then he  
19 started to say she was appointed by Mr. Dworman.

20 Well, we are not partners with an appointee of  
21 Mr. Dworman. That is why the predicate for this motion  
22 was a demand that we made under the partnership law to  
23 request and demand that Mr. Dworman acknowledge that he is  
24 functioning, he is managing and he is capable of  
25 continuing to manage and provide assurances.

26 The only thing we heard in response to that is

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that is insulting. That is why we brought this motion and there is a request for a TRO that until your Honor looks at this issue and Ms. Hoppe who is, as Mr. Sullivan admitted, is appointed only by Mr. Dworman, there cannot be an appointment for somebody to perform duties of a general partner. That Ms. Hoppe or anybody who is acting in her direction in ADCO or otherwise not be permitted to do what Mr. Dworman himself is obligated to do.

THE COURT: Counsel.

MR. SULLIVAN: Wow. I would like permission to move for sanctions for Mr. Scharf and his firm for filing this application, your Honor.

THE COURT: Have you seen it?

MR. SULLIVAN: I have, your Honor. Last night we received an ecopy. It is ridiculous on its face. There is no standing whatsoever to even make the assertion. It's gratuitously insulting. Justice Fried will deal with whatever proceedings need to go forward in front of him.

What I said with respect to Mr. Dworman and Ms. Hoppe is that she is overseeing this litigation. Counsel is asserting claims in egregious bad faith. They are completely false as a factual matter and I won't even dignify them with a response.

If your Honor is inclined to even consider the

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motion and I believe your Honor has already denied it, I would like to submit cross motion for sanctions against counsel.

MR. SCHARF: How so?

THE COURT: At this point, I have to read the order to show cause before I do anything.

So, you have your decisions on the other three motions and three cases.

Please order the record, efile it and I will write up gray sheets as to that and you're to go on the major case to arbitration.

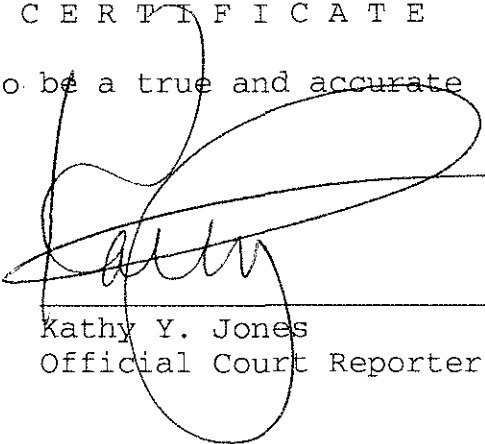
MR. SCHARF: Thank you, your Honor.

MR. SULLIVAN: Thank you very much.

MR. KELLY: Thank you, your Honor.

## C E R T I F I C A T E

Certified to be a true and accurate transcript of the proceedings.



Kathy Y. Jones  
Official Court Reporter

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