To Be Argued By:
EDWARD TOPTANI
Time Requested: 15 Minutes

New York County Clerk's Index No. 652857/16

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

FAVOURITE LIMITED, CLAUDIO GATELLI, GRAZIANO SGHEDONI, ALBERTO BRENTEGANI, SIRIO SRL, OILE SRL, and UPPER EAST SIDE SUITES, LLC,

Plaintiffs-Respondents,

—against—

BENEDETTO CICO, CARLA CICO,

Defendants-Appellants,

151 EAST HOUSTON ACQUISITION LLC, ABC CORPS. 1-20, and JOHN DOES 1-20,

Defendants.

CASE NO. 2018-5365

BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

This is an appeal from an order of the Supreme Court, New York County (Schecter, J), entered on October 30, 2018 (the "October 30, 2018 Order") (R. 4-25.)[1] The Order addressed the motions to dismiss the first amended derivative complaint filed by Appellants Benedetto Cico and Carla Cico (collectively, the "Cicos" or "Appellants") and a cross-motion for leave to file a second amended complaint filed by Respondents Favourite Limited, Claudio Gatelli, Graziano Sghedoni, Alberto Brentegani, Sirio Srl, Oile Srl (collectively, the "Remaining Plaintiff Members") and Upper East Side Suites, LLC (the "Company," and together with the Remaining Plaintiff Members, the "Respondents").

Appellants appeal from so much of the October 30, 2018 Order that: (a) denied Appellants' motion to dismiss the amended derivative complaint for lack of subject matter jurisdiction; (b) failed to dismiss the action because Respondents relied upon a Good Standing Certificate illicitly obtained from the Delaware Secretary of State after the Company was cancelled; and (c) permitted Respondents to re-file the Company's direct claims that were previously dismissed by Judge Kornreich.

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[1] References preceded by "R." are to pages of the Record of Appeal.

More specifically, Judge Schecter should have granted Appellants' motion to dismiss this action because under Delaware law *and* the Company's operating agreement, jurisdiction of the amended derivative complaint was vested exclusively with the Chancery Court in Delaware. In addition, Judge Schecter should have dismissed this action instead of permitting the Remaining Plaintiff Members to avoid dismissal based upon a Good Standing Certificate that was obtained under false pretenses by an individual purportedly acting on behalf the Company from the Delaware Secretary of State after it was cancelled. This *ultra vires* action not only breached the terms of the Company's operating agreement, but also did not satisfy the requirements of Delaware law, which required the Company's cancellation to be nullified by the Court of Chancery in Delaware before the amended derivative complaint could be filed and prosecuted.

Finally, Judge Schecter also erred in granting the Remaining Plaintiff Members' motion for leave to file direct claims on behalf of the Company because these claims were previously dismissed by Judge Kornreich after the Remaining Plaintiff Members permitted the Company to default on its obligation to retain substitute counsel. Thus, when Judge Schecter granted the Remaining Plaintiff Members leave to file direct claims on behalf of the Company, she not only incorrectly ignored Judge Kornreich's order

dismissing those claims, but she also erroneously disregarded the requirements of CPLR 5015(a)(1) that must be satisfied by a party seeking to vacate a default.

QUESTIONS PRESENTED

1. Did the IAS Court (Schecter, J) err in granting leave to file a second amended complaint with direct claims on behalf of the Company because under Delaware law *and* the terms of the Company's Operating Agreement, sole jurisdiction to hear the first amended derivative complaint was vested in the Delaware Court of Chancery?

2. Did the IAS Court (Schecter, J) err in failing to dismiss the claims asserted on behalf of the Company in the amended derivative complaint because the Company's cancellation was not nullified by the Delaware Chancery Court and/or the Company's Good Standing Certificate was improperly obtained from the Delaware Secretary of State by an unauthorized individual in violation of the Company's Operating Agreement, which provides that the Company is a manager-managed Delaware limited liability company?

3. Did the IAS Court (Schecter, J) err in granting Respondents leave to file a second amended complaint with direct claims on behalf of the Company that Judge Kornreich previously dismissed?

STATEMENT OF FACTS

A. The Parties

1. *Appellants*

Benedetto Cico, who resides in San Anselmo, California, and Carla Cico, who resides in Verona, Italy (R. 215, ¶¶ 3-14), were duly appointed co-managers of the Company pursuant to Section 2.19 of the Company's

Operating Agreement, dated October 31, 2007 (the "Operating Agreement"). (R. 59-91, § 2.19.)

Benedetto Cico and Carla Cico are also Class A and Class B members of the Company, who invested $250,000 and $125,000, respectively.[2] (R. 120-121.) Approximately 20 other investors invested in the Company, and each such investor was also admitted as a member of the Company. All members were required to execute the Company's Operating Agreement, which governs their rights and the management of the Company.

One of the purposes of forming the Company was to acquire, own and sell a building located at 44-46 East End Avenue, New York, New York (the "Building"). (R.58-91, § 1.3.) The Company purchased the Building in December 2007 (R. 140) and it was sold in May 2013.[3] (R. 141.)

In or around early December 2015, the law firm of Kelly Drye & Warren LLP ("KDW"), former counsel for the Remaining Plaintiff

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[2] Benedetto Cico and Carla Cico are siblings. Their brother, Luca Cico, who lives in Hong Kong, also invested $250,000 into the Company. (R. 120.) Thus, in total, the Cico siblings invested $650,000 into the Company.

[3] Section 1.3 of the Operating Agreement states: "The purpose of the Company is to acquire, hold, manage, operate, finance, develop, maintain, and sell the Property *and other related property and personal property related thereto*. The Company shall have the authority to do all things necessary or convenient to accomplish its purpose and operate its business as described in this Section…" (Emphasis added.) (R. 59, § 1.3.) The term "Property" is defined as the Building and related improvements and personal property located at 44-46 East End Avenue, New York, New York." (R.65, § 2.32.)

Members, advised the Cicos that a majority in interest of the Company's members (i.e., over fifty percent of the membership interests) removed them without cause as the managers of the Company pursuant to a "Written Consent," dated November 23, 2015 (the "Manager Resolution"). (R. 302-311.)

In addition, the Manager Resolution named Saudi Investments Limited ("Saudi Limited") as the replacement manager of the Company for the Cicos. (*Id.* ("FURTHER RESOLVED, that Saudi Investments Limited is hereby appointed as new manager (the "Manager") of the Company, and that the Manager of the Company be, and hereby is, authorized and directed to execute, deliver and perform, in the name and on behalf of the Company, all agreements, instruments and documents…").) No other replacement manager was named in the Manager Resolution.

The Manager Resolution was executed by the following thirteen (13) alleged members of the Company: (i) Anchor Holdings Limited, (ii) Cap 18 Srl, (iii) Carlo Oliveri, (iv) Maura Masola, (v) Andia Srl, (vi) Afil Srl, (vii) Marco Bonesini, (viii) Favourite Limited, (ix) Claudio Gatelli, (x) Graziano Sghedoni, (xi) Alberto Brentegani, (xii) Sirio Srl, and (xiii) Oile Srl (collectively referred to hereinafter as the "Original Plaintiff Members"). (*Id*.)

At that time, KDW represented each of the thirteen (13) Original Plaintiff Members (including the Remaining Plaintiff Members).[4]

2. *Respondents*

Respondent Upper East Side Suites, LLC (the "Company") is a Delaware limited liability company that was organized under the laws of the State of Delaware. (R. 59.) Section 1.5 of the Operating Agreement states that the principal place of business and office of the Company shall be located at 201 Stuyvesant Drive, San Anselmo, California 94960. (*Id*., § 1.5.)

The Company's Operating Agreement, which is to be construed under the laws of Delaware, provides that the Company is a manager-managed limited liability Company. (*Id*. § 5.1, § 11.5.) Section 5.19 of the Operating Agreement expressly prohibits members of the Company from acting on its behalf. (R. 78, § 5.9.)

On November 26, 2016, the Delaware Secretary of State cancelled the Company. (R. 301.) This cancellation occurred over a year after the adoption of the Manager Resolution by the Original Plaintiff Members on

[4] All references herein to the Original Plaintiff Members, whether specified or not, includes the Remaining Plaintiff Members.

November 23, 2015, which removed the Cicos as managers and named Saudi Investments as the new manager. (R. 302-311.)

Respondent Favourite Limited ("Favourite") alleges that it is a Limited Company organized under the laws of the Cayman Islands, with principal offices in Grand Cayman, Cayman Islands, British West Indies. Favourite alleges that it is a Class A member of the Company. (R. 216, ¶ 18.)

Respondent Claudio Gatelli ("Gatelli") alleges that he is an Italian citizen who resides in Italy. Gatelli alleges that he is a Class A member of the Company. (*Id*., ¶ 20.)

Respondent Graziano Sghedoni ("Sghedoni") alleges that he is an Italian citizen who resides in Italy. Sghedoni alleges that he is Class A member of the Company. (*Id*., ¶ 20.)

Respondent Alberto Brentegani ("Brentegani") alleges that he is an Italian citizen who resides in Italy. Brentegani alleges that he is a Class A member of the Company. (*Id*., ¶ 21.)

Respondent Sirio Srl ("Sirio") alleges that it is a limited liability company organized under the laws of Italy with offices in Verona, Italy. Sirio alleges that it is a Class A member of the Company. (*Id*., ¶ 23.)

Oile Srl ("Oile") alleges that it is a limited liability company organized under the laws of Italy with offices in Verona, Italy. Oile alleges that it is a Class A member of the Company. (*Id*., ¶ 26.)

B. Relevant Factual and Procedural Background

1. *A Federal Action is Commenced Against the Cicos in Los Angeles, California*

In their inexorable pursuit of the Cicos, it is indisputable that the Remaining Plaintiff Members have engaged in an ever-changing and harassing litigation strategy that has included, among other things, forum shopping. On July 17, 2015, Anchor Holdings Limited ("Anchor Holdings"), an Original Plaintiff Member, commenced an action against the Cicos *and* the Company in the United States District Court for the Central District of California, Western Division (Los Angeles).[5] (R. 181-199.) The lawsuit was filed by KDW, who maintains law offices in Los Angeles. (*Id*.)

Following the adoption of the Manager Resolution on November 23, 2015, twelve (12) of the other Original Plaintiff Members agreed to join Original Plaintiff Member Anchor Holdings in the federal action.

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[5] The case was captioned, *Anchor Holdings Limited v. Upper East Side Suites LLC, Benedetto Cico and Carla Cico* (2:15-cv-5447). (R. 181-199.) Anchor Holdings alleged that it is an English Limited Company with offices in London. (*Id*., ¶16.) The federal complaint alleged misconduct by the Cicos in their roles as co-managers of the Company, i.e., the same types of general claims that have been alleged in this New York Action.

On December 31, 2015, KDW filed an amended complaint on behalf of all the Original Plaintiff Members in the federal action asserting claims against the Cicos.[6] The Company, however, was removed by KDW as a named defendant in the amended complaint.[7]

The *only* connection the federal action had to Los Angeles is the fact that the Original Plaintiff Members' counsel, KDW, maintains offices there.[8] (R. 200.)

On February 25, 2016, approximately eight months after the federal action was commenced, the Original Plaintiff Members unilaterally dismissed it pursuant to Federal Rule of Civil Procedure 41(a)(1). (R. 200-201.)

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[6] To be clear, the amended complaint filed on December 31, 2015, included each of the thirteen (13) Original Plaintiff Members, i.e., the same entities and individuals who executed the Manager Resolution on or about November 23, 2015 (and were represented by KDW).

[7] *See* Dkt. No. 46.

[8] Benedetto Cico, who lives in San Anselmo, California, lives approximately 20 miles from the federal courthouse in San Francisco, California. Nevertheless, KDW filed the federal action approximately 400 miles away in Los Angeles, where no plaintiff or defendant was located.

2. *Three Months After They Dismissed the California Federal Court Action, the Original Plaintiff Members Commence the New York Supreme Court Action*

On May 27, 2016, approximately 3 months after the federal action was dismissed, KDW re-filed a lawsuit against the Cicos in New York Supreme Court, New York County, on behalf of the Original Plaintiff Members (which group included each Remaining Plaintiff Member) (the "New York Action") (R. 212-242.)

Several weeks earlier, by virtue of a resolution dated April 13, 2016 (the "KDW Resolution"), the Original Plaintiff Members -- and not Saudi Investments, the Company's then purported manager -- retained KDW to represent the Company in the New York Action.[9] (R. 202-211). In turn, KDW also included the Company as a named plaintiff asserting direct claims against the Cicos in the New York Action. (R. 212-242.)

Thus, in addition to changing their litigation strategy with regard to the forum in which they would seek to pursue their individual direct claims, the Original Plaintiff Members (including each Remaining Plaintiff Member) also changed their litigation strategy with regard to the Company:

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[9] As discussed above, the Manager Resolution named Saudi Investments as the replacement manager for the Cicos. (R. 302-311.) The Company's Operating Agreement provides that it is a manager-managed LLC and prohibits members from acting on behalf of the Company. (R. 58-91, § 5.1, § 5.19.)

first, the Company was a named defendant in the federal complaint filed by KDW on July 17, 2015; *second*, it was omitted as a party in the first amended federal complaint filed by KDW on December 31, 2015; and *third*, it was a named plaintiff with direct claims in the complaint filed by KDW in the New York Action on May 27, 2016.[10]

3. *The Original New York Complaint*

The Original Plaintiff Members (including each Remaining Plaintiff Member) and the Company asserted six identical direct causes of action against the Cicos in the original complaint: (1) breach of the Operating Agreement; (2) breach of fiduciary duty; (3) unjust enrichment; (4) accounting; (5) fraud; and (6) conversion. Each of the foregoing claims (other than accounting) sought the exact same damages. (R. 212-242.)

The gravamen of the original complaint filed in the New York Action revolved entirely around the Company's purchase and sale of the Building

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[10] Incredulously, as discussed further below, the litigation strategy with respect to the Company changed three additional times in the New York Action: (i) the Original Plaintiff Members (including the Remaining Plaintiff Members) thereafter knowingly permitted the Company's direct claims to be dismissed by Judge Kornreich for lack of prosecution (R. 267-274); (ii) after the dismissal of the Company's direct claims, the Remaining Plaintiff Members filed an amended derivative complaint on behalf of the Company (R. 33-57); and (iii) finally, in order to avoid the certain dismissal of the amended derivative complaint – which at the time was subject to the Cicos' motions to dismiss – the Remaining Plaintiff Members (with the consent of the other Original Plaintiff Members) cross-moved to re-file the Company's direct claims that the Original Plaintiff Members (including each Remaining Plaintiff Member) intentionally allowed Judge Kornreich to previously dismiss. (R. 333-335.)

and Company's later use of the sales proceeds in an attempt to purchase the 151 East Houston Hotel. (R. 212-242.) In sum, the Original Plaintiff Members and the Company alleged that the Cicos sold the Building in violation of the Operating Agreement, despite the fact that the Operating Agreement authorized them to do so. (*Id*., *see also*., R. 58-91, § 1.3, § 5.2(e).) They also incorrectly asserted that upon the sale of the Building, the Cicos were required to dissolve the Company with the proceeds being distributed to its members, rather than used in an effort to acquire the 151 East Houston Hotel -- a proposed transaction that was approved by resolution at investor meetings in Verona, Italy in May 2013.[11] (*Id*.; R. 112-119, ¶¶ 8-9, R. 99-111.) Nonetheless, instead of accepting the inherent risk that is involved with any investment opportunity and the consequences of their own decisions, the Original Plaintiff Members and the Company chose to litigate their "claims" against the Cicos.

4. *Initial Motion Practice*

Because the various causes of action asserted by the Original Plaintiff Members suffered from a myriad of legal deficiencies, Benedetto Cico and

[11] For example, Section 5.2(e) of the Operating Agreement states that the sale of all or substantially all of the Company's assets *shall not* be deemed to make it impossible for the Company to carry on the ordinary business of the Company; and Section 8.1 provides for dissolution of the Company *only* if there is a sale of all of the Company's assets *and* a distribution of the proceeds therefrom by the managers. (Emphasis added.)

Carla Cico filed separate motions to dismiss on July 18, 2016 and January 18, 2017, respectively.[12]

In the meantime, while the Cicos' motions to dismiss were *sub judice*, the six (6) Remaining Plaintiff Members notified the Court on March 21, 2017, that they retained the law firm of Valla & Associates, Inc., P.C. (the "Valla Law Firm")[13] to replace KDW.[14] Approximately one month later, on April 19, 2017, two (2) of the Original Member Plaintiffs, Anchor Holdings and AFIL Srl (collectively, the "Withdrawing Plaintiff Members"), filed a voluntary motion to dismiss their claims with prejudice.[15] And two weeks later, on May 2, 2017, KDW filed an Order to Show Cause to be relieved as counsel for the following five (5) Original Plaintiff Members: (i) Carlo Oliveri, (ii) Maura Masola, (iii) Marco Bonesini, (iv) Cap 18 Sri and (v) Andia Srl (collectively, the "Non-Appearing Plaintiff Members").[16]

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12 *See* Mot. Seq. 001 & Mot. Seq. 003. To avoid duplication of arguments, to the extent applicable, the Benedetto Cico and Carla Cico also adopted the arguments advanced in each other's motions below.

13 The Valla Law Firm currently represents the Remaining Plaintiff Members and the Company.

14 *See* Dkt. No. 65.

15 *See* Mot. Seq. 004.

16 *See* Mot. Seq. 005.

On May 11, 2017, Judge Kornreich granted KDW's motion to be relieved as counsel to the Non-Appearing Plaintiff Members (the "May 11, 2017 Order"). (R. 243.) In addition, she ruled that the Non-Appearing Plaintiff Members that are entities were required to retain new counsel within 30 days of notice of her ruling or face dismissal. (*Id*.) Similarly, those Non-Appearing Plaintiff Members who are individuals were instructed that they faced dismissal if they failed to appear either *pro se* or through counsel within such 30-day deadline. (*Id*.) Thus, at that time, KDW no longer represented any of the thirteen (13) Original Plaintiff Members. Its role was confined solely to the representation of the Company with respect to the prosecution of its direct claims against the Cicos.

On June 15, 2017, KDW filed a second Order to Show Cause.[17] This time, the law firm sought to be relieved from serving as counsel to the Company.

By order dated June 27, 2017 (the "June 27, 2017 Order"), Judge Kornreich granted KDW the relief it requested and provided the Company 30 days in which to retain substitute counsel, "and if not, the corporate plaintiff [the Company] will be in default and defendants may move to

[17] *See* Mot. Seq. 006.

dismiss that corporate plaintiff's action against them."[18] (R. 267.) Notably, no Original Plaintiff Member (including the Remaining Plaintiff Members), each of whom had previously executed the purported KDW Resolution to authorize the retention of KDW on behalf of the Company in the first place, objected to this ruling or otherwise requested additional time in which to retain substitute counsel for the Company.

Thereafter, the Non-Appearing Plaintiff Members failed to appear either *pro se* or by counsel by the deadline set by the Judge Kornreich in the May 11, 2017 Order. Likewise, the Original Member Plaintiffs (including the Remaining Plaintiff Members) did not retain new counsel for the Company by the deadline set in the June 27, 2017 Order. In other words, the Original Plaintiff Members (including each Remaining Plaintiff Member) made the deliberate litigation decision to forgo the Company's direct claims.[19] Clearly, at that time, the Remaining Plaintiff Members were content to confine the New York Action to the pursuit of their individual claims as alleged in the original complaint.

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[18] Notice of Entry for the June 27, 2017 Order, with the accompanying affidavit of service, were filed on June 28, 2017 (*See* Dkt No. 100 and Dkt. No. 101, respectively).

[19] The record contains no evidence that any of Original Plaintiff Member (including the Remaining Plaintiff Members who were represented by the Valla Law Firm at that time) took any steps to retain substitute counsel by the deadline set by Judge Kornreich in order to avoid default and dismissal of the Company's claims.

On August 31, 2017, in accordance with the Judge Kornreich's earlier rulings, Benedetto Cico moved to dismiss the claims filed by the Company and each of the Non-Appearing Original Member Plaintiffs because they failed to appear in the case by the imposed deadlines.[20]

5. *Judge Kornreich Dismisses All Claims in the Original Complaint and Grants the Remaining Plaintiff Members Unrequested Limited Relief*

On October 19, 2017, Judge Kornreich heard oral argument with respect to Benedetto Cico's motion to dismiss the complaint (Mot. Seq. No. 001), Carla Cico's motion to dismiss the complaint (Mot. Seq. No. 003), the Withdrawing Plaintiff Members' motion to dismiss their claims (Mot. Seq. No. 004) and Benedetto Cico's motion to dismiss the Company's and Non-Appearing Plaintiff Members' claims for failing to appear in the action (Mot. Seq. 007).

By order dated February 21, 2018 (the "February 21, 2018 Order"), Judge Kornreich dismissed all claims in the complaint.[21] (R. 92-98.) Among other things, the February 21, 2018 Order included the following specific rulings: (i) the claims of the Withdrawing Plaintiff Members were dismissed

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[20] *See* Mot. Seq. 7.

[21] Notice of Entry for the February 21, 2018 Order was filed with the Court on April 3, 2018. (*See* Dkt. No. 115).

with prejudice; (ii) the claims of the Non-Appearing Plaintiff Members were dismissed on default for failing to appear in the action in accordance with the May 11, 2017 Order; (iii) the claims of the Company were dismissed on default for failing to appear with counsel in the action in accordance with the June 27, 2017 Order; and (iv) the claims of the six Remaining Plaintiff Members were dismissed because the "potentially viable causes of action belong to the Company." (R. 268-274 at 271.)

In addition, even though the Original Plaintiff Members (including the Remaining Plaintiff Members) intentionally allowed the Company's direct claims to be dismissed for failure to prosecute, and they never cross-moved or otherwise requested any relief, the Court *sua sponte* afforded the Remaining Plaintiff Members a limited opportunity to file an amended derivative complaint on behalf of the Company.[22] In doing so, Judge Kornreich noted with skepticism that the Remaining Plaintiff Members "might be capable of pleading derivative claims based upon demand futility."[23] (*Id*.)

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[22] In addition, in making her ruling, Judge Kornreich instructed that if the Remaining Plaintiff Members determined that they would file an amended derivative complaint, "the proper causes of action should be for breach of the Operating Agreement and breach of fiduciary duty." (*Id*.)

[23] Judge Kornreich did not consider multiple other grounds for dismissal advanced by the Cicos in making her ruling because they were rendered moot by her ruling. (R. 92-98 at 96.)

Judge Kornreich did not grant the Remaining Plaintiff Members any other relief. No Original Plaintiff Member appealed the February 21, 2018 Order, nor did it seek to renew or reargue the ruling.

6. *The Remaining Plaintiff Members File an Amended Derivative Complaint in a Futile Effort to Salvage a Case*

By intentionally allowing the Company's claims to be dismissed for lack of prosecution, the Remaining Plaintiff Member's litigation strategy obviously backfired. In short, Judge Kornreich dismissed the Remaining Plaintiff Members' direct claims, ruling that the only viable claims belonged to the Company. And, as expected, because the Original Plaintiff Members (including the Remaining Plaintiff Members) knowingly failed to retain substitute counsel for KDW within the deadline set by Judge Kornreich in the June 27, 2017 Order, the Company's direct claims were also dismissed.

In a transparent attempt to salvage their case, the Remaining Plaintiff Members seized upon the only window of relief afforded to them (and not the Company) by Judge Kornreich and filed an amended derivative complaint on March 28, 2018. (R. 33-57.) In this filing, the Remaining Plaintiff Members sought to litigate claims on behalf of the Company even though the Original Plaintiff Members (including each Remaining Plaintiff Member) previously allowed those same claims to be dismissed by failing to retain new counsel for the Company.

The amended derivative complaint included claims on behalf of the Company for breach of the Operating Agreement, breach of fiduciary duty and fraud.[24] (*Id*.)

7. *Subsequent Motion Practice*

In response to the filing of the amended derivative complaint, the Cicos filed motions to dismiss.[25] Among other things, Carla Cico's motion demonstrated that (i) the Remaining Plaintiff Members failed to adequately plead demand futility;[26] (ii) subject matter jurisdiction did not exist in New York because Delaware law and the governing clause provision in the Company's Operating Agreement vested exclusive jurisdiction with the Delaware Chancery Court;[27] and (iii) no Company claims, derivative or

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[24] Remarkably, the Remaining Plaintiff Members also re-asserted a fraud claim on behalf of the Company in defiance of Judge Kornreich's specific instructions that such a claim was not viable. (See R. 92-98 at 95, n.5). Similarly, in a further act of impenitence, the Remaining Plaintiff Members also re-asserted individual claims for breach of contract and fraud against the Cicos even though Judge Kornreich ruled that any viable claims belonged to the Company. (*Id*. at 95.)

[25] *See* Mot. Seq. 009 and Mot. Seq. 010.

[26] For example, the Manager Resolution adopted by the Original Plaintiff Members on November 23, 2015, included provisions for the *removal* of the Cicos as co-managers of the Company and their replacement by Saudi Investments. Thus, the Cicos were removed as Company managers *prior* to the filing of the original complaint by KDW, which was done at the insistence and direction of the Original Member Plaintiffs. Simply put, the factual circumstances prevented the Remaining Plaintiff Members from pleading demand futility as a matter of law. Therefore, the Remaining Plaintiffs were precluded from taking advantage of the narrow relief afforded to them by Judge Kornreich.

[27] *See* DE Code § 18-1001; R. 58-91, § 11.5.

direct, could be pursued by the Company because it had been cancelled by the Delaware Secretary of State after the Cicos were removed as co-managers and before the amended derivative complaint was filed.[28]

Faced with certain dismissal of the amended derivative complaint, the Remaining Plaintiff Members filed a cross-motion for leave to amend the amended derivative complaint to re-file direct claims on behalf of the Company. (R. 333-335.) Such an action was done in flagrant defiance of the February 21, 2018 Order because the proposed second amended complaint *did not* contain derivative claims on behalf of the Company. (R. 393-429.) Instead, the Remaining Plaintiff Members sought to re-assert the Company's direct claims that had been previously dismissed on default for lack of prosecution. In other words, the Remaining Plaintiff Members were seeking a "do-over." They wanted another opportunity to retain substitute counsel to replace KDW in order to re-file the very same Company claims that had been dismissed pursuant to the February 21, 2018, because the Original Plaintiff Members failed to retain new Company counsel by the deadline set by Judge Kornreich in the June 27, 2017 Order.

There is no doubt that the Remaining Plaintiff Members were seeking to avoid the adverse consequences of their earlier litigation decision,

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[28] *See* DE Code § 18-803(b).

whereby the Original Plaintiff Members (including each Remaining Plaintiff Member) intentionally allowed the Company to default and have its claims dismissed because they decided to not retain new counsel to replace KDW. To support this troubling reversal in litigation strategy, the Remaining Plaintiff Members submitted a new Company resolution, dated May 31, 2018, to the IAS Court that they claimed justifies the re-filing of the Company's direct claims that had previously been dismissed pursuant to the February 21, 2018 Order (the "Valla Resolution").[29] (R. 374-388.)

Remarkably, the Original Plaintiff Members (including each Remaining Plaintiff Member) were signatories to the KDW Resolution, dated April 13, 2016, which provided for the retention of KDW to prosecute the Company's direct claims. (R. 202-211), Moreover, it was also the Original Plaintiff Members (including each Remaining Plaintiff Member) who knowingly failed to retain new counsel for the Company prior to the

[29] The record below provides no justification why the Remaining Plaintiff Members (and the other Original Plaintiff Members) delayed for nearly a year to retain the Valla Law Firm to represent the Company in connection with its direct claims nor why they failed to do so by the deadline set by Judge Kornreich in the June 27, 2017 Order. In addition, setting aside the fact that the Company is a manager-managed LLC, the Valla Resolution, which purportedly authorized the retention of the Valla Law Firm, is obviously defective on its face and should have been rejected by the IAS Court. An examination of the signature pages reveals that they were culled together from obviously different documents. For example, some of the signature pages have printed dates of May 31, 2018 and others have printed dates of June 1, 2018 (and some are not dated). Moreover, some of the signature pages are in Italian and others are in English, and others are in a different format. (R.374-388.)

deadline set by Judge Kornreich in the June 27, 2017 Order, thereby resulting in the dismissal of the Company's claims pursuant to the February 21, 2018 Order. Incredulously, the Original Plaintiff Members (including each Remaining Plaintiff Member) are also signatories to the Valla Resolution, dated May 31, 2018, which purportedly authorized the retention of the Valla Law Firm to represent the Company in connection with the re-filing of the Company's direct claims that were previously dismissed pursuant to the February 21, 2018 Order.

In light of the foregoing, it cannot be ignored that through the filing of their cross-motion, which is based upon the Valla Resolution, the Original Plaintiff Members (including each Remaining Plaintiff Member) were blatantly seeking to circumvent Judge Kornreich's June 27, 2017 Order (which imposed a 30-day deadline in which the Company was required to retain new counsel or face dismissal) and Judge Kornreich's February 21, 2018 Order (which thereafter dismissed the Company's direct claims for failing to retain substitute counsel and provided no relief other than an opportunity for the Remaining Plaintiff Members to file an amended derivative complaint if demand futility could be properly alleged).

8. *Judge Schecter Misconstrues Judge Kornreich's February 21, 2018 Order as Well as Applicable Law*[30]

On October 30, 2018**,** Judge Schecter denied the Cicos' motions to dismiss the amended derivative complaint.[31] (R. 4-25.) In doing so, she misapprehended the fact that pursuant to Delaware law *and* the terms of the Operating Agreement, no subject matter jurisdiction existed in the New York Supreme Court with respect to the amended derivative complaint that was filed by the Remaining Plaintiff Members.

In this order, Judge Schecter also improperly granted the Remaining Plaintiff Members' cross-motion to file a second amended complaint, thereby permitting the Company to belatedly re-assert the same direct claims that had been dismissed by Judge Kornreich on default for failing to retain counsel. Judge Schecter's decision ignored the unequivocal ruling in Judge Kornreich's February 21, 2018 Order, which only granted the Remaining Plaintiff Members a limited right to file an amended derivative complaint on behalf of the Company if demand futility could be properly alleged. (R. 268-

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30 The Honorable Shirley W. Kornreich, Commercial Division Part 54, retired in May 2018. The Honorable Jennifer G. Schecter succeeded her as the Justice assigned to Part 54.

31 However, Judge Schecter instructed the Remaining Plaintiff Members that their individual claims and the fraud claims in the proposed second amended complaint, which had been dismissed by Judge Kornreich in the February 21, 2018 Order, were not viable. (R. 4-25 at 8 n.5, 6 n.8 and 17-18.)

274 at 272-73.) Moreover, the February 21, 2018 Order did not provide the Remaining Plaintiff Members or the Company with an opportunity to revisit her June 27, 2017 Order, which required the Company to appear with substitute counsel within 30 days or face default and dismissal (R. 267.) And it cannot be disputed that Judge Kornreich properly dismissed the Company's claims pursuant to the February 21, 2018 Order, because the Original Plaintiff Members (including each of the Remaining Plaintiff Members) intentionally failed to retain new counsel in accordance with the June 27, 2017 Order. To be sure, the February 21, 2018 Order left absolutely no room for the Remaining Plaintiff Members to escape the consequences of their earlier litigation decisions.

Finally, the Company was cancelled by the Delaware Secretary of State on November 28, 2016 -- nearly a year after the Cicos were removed as managers of the Company by the Original Plaintiff Members pursuant to the Manager Resolution and purportedly replaced by Saudi Investments. (R. 301) On April 20, 2018, in breach of the terms of the Operating Agreement, Sirio Srl ("Sirio"), one of the Remaining Plaintiff Members, unilaterally obtained a Good Standing Certificate for the Company from the Delaware Secretary of State for the sole purpose of avoiding dismissal of the Company's claims. (R. 430-432.) Sirio, however, was not authorized to do

so. Moreover, the Company's cancellation was never properly nullified or revoked by the Delaware Court of Chancery, which was required before proceeding with the Company's claims.

For all of the reasons set forth below and upon the foregoing factual and procedural background, Judge Schecter should have dismissed the Company's claims and denied Respondents' cross-motion to amend.

STANDARD OF REVIEW

On appeal, this Court reviews *de novo* orders granting or denying the relief sought. The Court of Appeals has ruled that the Appellate Division, as part of the Supreme Court, possesses "the same power and discretion as the court at Special Term possesses, and it is not necessary, in order to justify the reversal, to demonstrate that Special Term abused its discretion." *Phoenix Mut. Life Ins. Co. v. Conway*, 11 N.Y.2d 367, 370 (1962) (the Appellate Division has plenary power to substitute its own exercise of discretion for any discretionary decision of the law court without any necessity "to demonstrate that Special Term abused its discretion); *Brady v. Ottaway Newspaper, Inc*., 63 N.Y.2d 1031, 1032 (1984) (concluding that the Appellate Division could properly substitute its discretion for that of the lower court in reversing the lower Court's decision).

"Whether there is a reasonable excuse for a default is discretionary, sui generis determination to be made by the court based upon all relevant factors." *Gecaj v. Gjonaj Realty & Mgt. Corp*., 159 A.D.3d 600, 602 (1st Dept. 2017) (finding that the trial court failed to consider all relevant facts and reversing its finding of reasonable excuse in defendants' motion to vacate under CPLR 5015(a)(1)) (citation omitted).

On a motion to dismiss for failure to state a claim under CPLR 3211(a)(7), the court will dismiss if it determines that plaintiff has not stated a cognizable cause of action "within the four corners of the complaint." *Scott v. Bell Atlantic Corp.,* 282 A.D.2d 180, 183 (1st Dept. 2001). In making this determination, the court liberally construes the complaint and accepts the facts it alleges as true, drawing inferences in the plaintiff's favor. CPLR 3026; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, on a motion to dismiss pursuant to CPLR 3211(a) (1), where allegations are contradicted by documentary evidence, they are not presumed to be true or granted every favorable inference inasmuch as the interpretation of an unambiguous contract is a question of law for the court, and the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint. *Sterling Fifth Assocs. v. Carpentille Corp*., 9 A.D.3d 261, 261-62 (1st Dept. 2004) (citations omitted).

Moreover, if the court considers extrinsic evidence, the question is whether the plaintiff has a cause of action rather than whether he has stated one. *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dept. 1999).

A motion to dismiss pursuant to CPLR 3211(a)(2) rests on the court not having jurisdiction of the subject matter of the cause of action. *Lacks v. Lacks*, 41 N.Y.2d 71, 75 (1976).

The decision to grant or deny leave to serve an amended pleading pursuant to CPLR 3025(b) is addressed to the trial court's discretion. *Mayers v. D'Agostino*, 58 N.Y. 2d 696, 698 (1982). Generally, leave to amend generally should be freely given in the absence of prejudice or surprise to the opposing party. *Sahdala v. New York City Health & Hosp. Corp*., 251 A.D.2d 70 (1998). However, where a party is guilty of extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion. *Cherebin v. Empress Ambulance Serv., Inc*., 43 A.D.3d 364, 365 (1st Dept. 2007) (citing *Volpe v. Good Samaritan Hosp*., 213 A.D.2d 398, 398-399 (2nd Dept. 1995).

ARGUMENT

POINT I

THE IAS COURT SHOULD HAVE DISMISSED THE AMENDED DERIVATIVE COMPLAINT BECAUSE THERE WAS NO SUBJECT MATTER JURISDICTION

As an initial matter, the IAS Court erred in granting leave to file yet another amended complaint because it did not have subject matter jurisdiction to entertain the claims asserted by the Remaining Plaintiff Members on behalf of the Company in the amended derivative complaint. Therefore, the amended derivative complaint should have been promptly dismissed without further amendment.

The only court where the amended derivative complaint could have been properly filed is the Court of Chancery of the State of Delaware. This is true because the Company was formed under the Delaware Limited Liability Company Act (the "Act"). (R. 56-91, § 1.1.) Under the Act, "the parties to an LLC agreement have substantial authority to shape their own affairs and . . . in general, any conflict between the provisions of the Act and an LLC agreement will be resolved in favor of the LLC agreement."

Achaian, Inc. v Leemon Family LLC, 25 A.3d 800, 802-803 (Del. Ch. 2011).[32]

Here, the Operating Agreement expressly provides that it is governed exclusively by Delaware law. In relevant part, it states that "[t]his Agreement shall be construed and enforced in accordance with, and governed by, Delaware law." (R. 58-91, § 11.5.)

Thus, the Operating Agreement and Delaware law, together, provide the sole lens through which the IAS Court should have examined the issue of subject matter jurisdiction.[33]

The relevant provision of the Act is Section 18-1001 ("Right to bring action"). It provides:

> "A member or an assignee of a limited liability company interest may bring an action in the Court of Chancery in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed."

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[32] Indeed, the policy of the Act is "to give maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." *Id*., § 18-1101(b); *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999) ("The basic approach of the Delaware Act is to provide members with broad discretion in drafting the Agreement").

[33] New York Law Limited Liability Company Law § 801 provides that "... (a) the laws of the jurisdiction under which a foreign limited liability company is formed govern its organization and internal affairs..." *See also Aon Risk Servs. v. Cusack*, 102 A.D.3d 461, 463 (1st Dept. 2013) (it is the policy of New York courts to enforce parties' choice of law provisions).

DE Code § 18-1001.

Simply put, any right of Remaining Plaintiff Members to bring a derivative action on behalf of the Company was created and governed by Section 18-1001 of the Act. It is clear that this provision expressly provides for jurisdiction to hear a derivative action in the Delaware Court of Chancery.

Notwithstanding the foregoing, the IAS Court erred by not providing deference to the clear and unambiguous terms of the Operating Agreement and Section 18-1001. In particular, because the Operating Agreement does not have a forum selection clause providing for a forum other than Delaware, the inclusion of the provision that Delaware law governs the Operating Agreement vested exclusive jurisdiction of any derivative action in the Delaware Court of Chancery.

Auriga Capital Corp v. Gatz, 2005 Slip Op 30461(U) (Sup. Ct., Westchester County 2005) is on point. In *Auriga*, the Court determined that sole jurisdiction to hear an action relating to the removal of a manager is in the Delaware Court of Chancery. To reach this conclusion, the court noted that Section 18-110 of the Act, like Section 18-1001, provides for jurisdiction in the Delaware Court of Chancery. The Court then emphasized that because the LLC agreement did not have a forum selection provision,

the fact that it referenced Delaware law as the governing law had the effect of an exclusive forum selection clause, designating the Chancery Court of Delaware as the sole forum for all actions under Section 18-110 absent clear language in the LLC agreement to the contrary. *See also Elf Atochem N. America Inc. v. Jaffari*, 727 A.2d at 292 (explaining that Delaware law provides for jurisdiction of derivative suits in the Delaware Court of Chancery but that the parties may bargain for forum selection clause that can effectively contract away their right from bringing suit in Delaware). Here, the Company's members *did not* bargain for the selection of an alternative forum selection clause that would have permitted the Remaining Plaintiff Members to file a derivative action in New York. Therefore, the amended derivative complaint was required to be filed in the Delaware Chancery Court.

Neither Section 18-1001 nor the Operating Agreement was addressed by the IAS Court in its analysis of subject matter jurisdiction. Remarkably, in response to this argument, the IAS Court only reasoned that "[d]isputes governing the internal affairs of Delaware LLC's are routinely litigated in New York. (R. 4-25 at 14.) However, this general proposition of law, which is not disputed by the Cicos, fails to address the specific legal and factual issues raised by the Cicos with respect to the IAS Court's lack of subject

matter jurisdiction over the amended derivative complaint that was filed by the Remaining Plaintiff Members.

In addition, the IAS Court never addressed the holding in *Auriga Capital Corp.*, where the specific statute governing jurisdiction in the Delaware Chancery Court, along with express terms of the operating agreement, were carefully reviewed by the New York trial court to determine that it did not have subject matter jurisdiction. Instead, the IAS Court relied upon cases that are inapposite under these circumstances and easily distinguishable. (*Id*. at 14-15.) In fact, none of the cases relied upon by the IAS Court address the issue of commencing a derivative action in New York on behalf of a Delaware LLC whose operating agreement provides for the exclusive application of Delaware law.[34]

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[34] *See, e.g., Estate of Calderwood v. ACE Grp. Int'l*, 157 A.D.3d 190, 193, n.3 (1st Dept. 2017) (finding that estate of a LLC member was not a member of LLC because Section 18-705 of Delaware LLC Act does not override LLC agreement, which, in any event, expressly provided for exclusive jurisdiction in New York); *Wandel v. Dimon*, 135 A.D. 515, 516 (1st Dept. 2016) (finding that in a derivative action commenced in a New York court, the shareholder of a **Delaware corporation** must satisfy the demand futility pleading standard under Delaware law); *Otto v. Otto*, 110 A.D. 3d 620 (1st Dept 2013) (plaintiff failed to file a petition in the Delaware Chancery Court in order to have the certificates of cancellation of a Delaware LLC nullified or revoked before proceeding in New York); and *Capone v. Castleton Commodities Intl. LLC*, 2016 Misc. LEXIS 1053, at * n.3, 5-6 (Sup. Ct., N.Y. County, March 29, 2016, *aff'd* 148 A.D.3d 506 (1st Dept. 2017)) (finding any claims against a dissolved Delaware LLC, whose operating agreement is governed by Delaware law but expressly provides for jurisdiction in New York courts, may not proceed in the absence of such nullification from the Delaware Court of Chancery).

Had the IAS Court correctly analyzed the clear language of the bargained for terms in the Company's Operating Agreement and Section 18-1001 of the Act, which it did not, it would have dismissed the amended derivative complaint for lack of subject matter jurisdiction and denied any amendment thereto.

POINT II

THE CANCELLATION OF THE COMPANY BY THE DELAWARE SECRETARY OF STATE PRECLUDED ITS CLAIMS

The IAS Court erred by failing to dismiss the amended derivative complaint and deny the cross-motion because the Delaware Secretary of State cancelled the Company, thereby preventing the prosecution of Company claims under Delaware law.

Section 18-803(b) of the Act provides that no claims are permitted to be filed on behalf of a cancelled limited liability company until such time as a nullification of the certificate of cancellation is obtained from the Delaware Court of Chancery. Here, the record evidence demonstrates that the Company was "Cancelled" on November 26, 2016.[35] (R. 301.)

[35] Carla Cico's court submission on January 18, 2017, informed the Remaining Plaintiff Members that the Company had been cancelled by the Delaware Secretary of State on November 26, 2016, approximately a year after the Cicos were removed as managers of the Company and purportedly replaced by Saudi Investments. (*See* Dkt. No. 49.)

Despite notice of such cancellation on January 18, 2017, the Remaining Plaintiff Members filed the amended derivative complaint on March 28, 2018, without first obtaining a nullification of the cancellation. As such, the IAS Court should not have permitted the Company's claims to proceed only on the basis of a Good Standing Certificate, which was obtained from the Delaware Secretary of State on April 19, 2018, i.e., well over a year *after* the Company was cancelled and three weeks *after* the amended derivative complaint was filed. (R. 430-432.) The IAS Court overlooked the fact that a Good Standing Certificate is not the equivalent of a nullification or revocation of a Company's cancellation under Delaware law. *See Meissner v. Yun*, 150 A.D.3d 455, 456 (1st Dept. 2017) (declining to afford full faith and credit to a good standing certificate obtained in a sister state administrative action that was not comparable to a judicial proceeding addressing the issue); *see also Otto v. Otto,* 110 A.D.3d 620 (1st Dept. 2013) (requiring the obtaining of a nullification of the certificate of cancellation in the Delaware Chancery Court in order to bring derivative suit). Therefore, the Company's claims in the amended derivative complaint should have been dismissed and the cross-motion to amend denied.

In any event, even if nullification of the cancellation through a Delaware court proceeding was not required, the IAS Court still should not

have permitted the Respondents to proceed in this litigation because the Good Standing Certificate was illicitly obtained. In particular, approximately fifteen (15) months after being informed of the Company's cancellation, Sirio, one of the Remaining Plaintiff Members, took it upon itself to individually file a Certificate of Revival on behalf of the Company to obtain a Good Standing Certificate from the Delaware Secretary of State. (R. 432.)

Significantly, Sirio failed to provide an affidavit to the IAS Court describing the circumstances under which it filed the Certificate of Revival on behalf of the Company and obtained its Good Standing Certificate. It is clear, however, that given the timing of its unauthorized action, Sirio was acting in its own self-interest and without authority under the terms of the Operating Agreement, which expressly provides that the Company is a manager-managed limited liability company. (R. 58-91, § 5.1.) Simply put, Sirio had no authority to act on behalf of the Company by filing the Certificate of Revival.[36] To the contrary, any actions taken by Sirio on behalf of the Company were done in breach of Section 5.19 of the Operating Agreement (*Id*., § 5.19 ("No Member is an agent of the Company solely by

[36] The Original Member Plaintiffs (including Sirio) named Saudi Investments the Company's manager in the Manager Resolution adopted on November 23, 2015.

virtue of being a Member and no Member has the authority to act for the Company solely'"').) Under the terms of the Operating Agreement, only the Company's manager is authorized to act on its behalf.

Undoubtedly, Sirio obtained the Good Standing Certificate for the Company under false pretenses. Martino Zamboni, a manager of Sirio, falsely represented to the Delaware Secretary of State, among other things, that he was authorized to execute the Certificate of Revival on behalf of the Company. (R. 432.) Accordingly, the Company's Good Standing Certificate was obtained illegally. Therefore, IAS Court should have also dismissed the action and denied the cross-motion for this reason. *See In re Grupo Dos Chiles, LLC*, 2006 Del. Ch. LEXIS 54 (Del. Ch. March 10, 2006, Civil Action No. 1447 N) (finding Delaware limited liability company's good standing not properly restored by member of LLC).[37]

[37] Sirio also improperly obtained the Company's Certificate of Authority from the New York Secretary of State in order to avoid dismissal. (R. 435-436.) For this reason, too, the Company's claims should have been dismissed. *See* New York Law Limited Liability Company Law § 808 (a).

POINT III

THE FEBRUARY 21, 2018 ORDER PRECLUDED RESPONDENTS FROM RE-FILING DIRECT CLAIMS ON BEHALF OF THE COMPANY

The Original Plaintiff Members (including each Remaining Plaintiff Member) intentionally permitted the Company to default under Judge Kornreich's June 27, 2017 Order by failing to retain new counsel for the Company within the period of time permitted. In doing so, the Original Plaintiff Members (including each Remaining Plaintiff Member) possessed full knowledge of the adverse consequences that would flow from any decision that did not result in the retention of new Company counsel to replace KDW. Thus, because new counsel was intentionally not retained for the Company to replace KDW, it was no surprise that the Company's direct claims were dismissed by Judge Kornreich pursuant to the February 21, 2018 Order.

In light of the foregoing, there was no basis for Judge Schecter to allow the Company to once again re-file direct claims in this action simply because the Remaining Plaintiff Members requested another chance to do so.[38] The Original Plaintiff Members (including each Remaining Plaintiff

[38] The Second Amended Complaint represents the fifth complaint filed in the dispute with the Cicos, i.e., two complaints were filed in the federal action and three different complaints have been filed in the New York Action.

Member) had a full and fair opportunity to litigate the Company's direct claims. However, they made the strategic litigation decision to intentionally allow the dismissal of those claims. To be sure, at that time, the Remaining Plaintiff Members were content to limit the New York Action to the prosecution of their direct individual claims, which they incorrectly believed were viable causes-of-action. It is only after their strategy backfired that the Remaining Plaintiff Members sought to belatedly and inexcusably revive the Company's direct claims to the prejudice of the Cicos. Under no circumstances should the IAS Court have granted the Remaining Plaintiff Members a "do over."

A. Judge Schecter Disregarded the Narrow Relief Granted to the Remaining Member Plaintiffs by Judge Kornreich in the February 21, 2018 Order Which is the Law of the Case

The only relief granted by Judge Kornreich to the Remaining Plaintiff Members in the February 21, 2018 Order (and not to the Company) was the right to file an amended derivative complaint on behalf of the Company if they were "capable" of properly pleading demand futility. (R. 96-97 ("ORDERED…the Remaining Plaintiffs [Remaining Plaintiff Members] have leave to file an amended derivative complaint to the extent set forth herein.").) Because their individual claims were unsustainable, and with

absolutely no other relief available, the Remaining Plaintiff Members filed the amended derivative complaint on March 28, 2018. (R. 33-57.)

Carla Cico moved to dismiss the first amended derivative complaint because, among other reasons, demand futility could not be properly pled by the Remaining Plaintiff Members as a matter of law.[39] (R. 177-180.) Recognizing the futility of pursuing the first amended derivative complaint, the Remaining Plaintiff Members never attempted to defend the amended derivative complaint and immediately reversed course. In response, they filed a cross-motion for leave to amend the amended derivative complaint to re-file the Company's direct claims, i.e., the same Company claims that were dismissed by Judge Kornreich in the February 21, 2018 Order.

Disregarding Judge Kornreich's June 27, 2017 Order and February 21, 2018 Order, Judge Schecter improperly granted the Remaining Plaintiff Members' cross-motion to amend the amended derivative complaint. Judge Schecter's ruling was err because it allowed the Remaining Plaintiff Members to circumvent the adverse consequences of their earlier litigation decision to not retain substitute counsel for the Company, which resulted in the dismissal of the Company's direct claims.

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[39] *See* Mot. Seq. 10.

It is clear that Judge Kornreich's February 21, 2018 Order did not grant the Remaining Plaintiff Members (or the Company) additional time to retain new Company counsel (beyond the deadline that had previously been set in the June 27, 2017 Order) to avoid dismissal of the Company's direct claims. The sole relief granted in the February 21, 2018 Order was provided to the Remaining Plaintiff Members, i.e., the right to the file of an amended derivative complaint on behalf of the Company if demand futility could be pled. Nothing more, nothing less.

More specifically, Judge Kornreich's June 27, 2017 Order required the Company to retain new counsel within the 30-day deadline set and stated "…if not, the corporate plaintiff [the Company] will be in default and the defendants may move to dismiss the corporate plaintiff's action against them…" (R. 267.) In turn, because no counsel was retained for the Company by the deadline, the Cicos moved to dismiss.[40]

Among other things, the February 21, 2018 Order granted the Cicos' motion to dismiss the Company's claims because, according to Judge Kornreich, "the Company defaulted in August 2017" by failing to retain new counsel in accordance with the terms of her June 27, 2017 Order.[41] (R. 95.)

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[40] *See* Mot. Seq. 007

[41] A motion to dismiss a civil action for failure to prosecute is generally granted "where a party unreasonably neglects to proceed" CPLR 3216 (a). Here, the Original

Judge Kornreich also ruled that "[n]ow that the Company has defaulted, the *Remaining Plaintiffs* [Remaining Plaintiff Members] must decide whether they will seek leave to file an amended complaint in which they replead their claims derivatively." (Emphasis added.) (R. 96.) Again, the Remaining Plaintiff Members never requested this relief and no relief was granted to the Company.

The doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as judges and courts of coordinate jurisdiction are concerned "in order to prevent the relitigation of issues of law that have already been determined at an earlier stage in the proceeding." *Belknap Webb & Tyler LLP v. Stewart*, 2014 N.Y. Slip. Op. 32677(U) (Sup. Ct. N.Y. County 2014)(citing *Brownrigg v New York City Hous. Auth*., 29 A.D.3d 721, 722 (2nd Dept. 2006)). In light of Judge Kornreich's February 21, 2018 Order, Judge Schecter should not have permitted the Remaining Plaintiff Members (with assistance from the Original Plaintiff Members through the adoption of the Valla Resolution) to circumvent the Company's default

Plaintiff Members (including the Remaining Plaintiff Members) made no effort to retain new counsel by the August 2017 deadline set in the June 27, 2017 Order. In fact, examination of the record below reveals that there is absolutely no excuse for this failure.

simply by cross-moving to amend the amended derivative complaint, especially since it was the Original Plaintiff Members who knowingly and unjustifiably failed to retain new counsel for the Company by the deadline set in Judge Kornreich's June 27, 2017 Order. *See Holloway v. Cha Cha Laundry*, 97 A.D.2d 385 386 (1st Dept. 1983) ("once an issue is judicially determined, either directly or by implication, it is not to be reconsidered by Judges or courts of coordinate jurisdiction in the course of the same litigation"). "Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a 'full and fair' opportunity to litigate the initial determination." *People v. Evans*, 94 N.Y.2d 499, 502 (2000). Here, it cannot be argued in good faith that the Original Plaintiff Members (including each Remaining Plaintiff Member) did not have a full and fair opportunity to retain new counsel to avoid dismissal of the Company's claims in accordance with Judge Kornreich's June 27, 2017 Order.

Moreover, the Remaining Plaintiff Members failed to reargue, renew, appeal or otherwise object to the June 27, 2017 Order (which required the Company to appear with counsel or face default and dismissal) or the February 21, 2018 Order (which dismissed the Company's claims for failing to appear with counsel). *See also Hampton Valley Farms, Inc. v. Flower &*

Medalie, 40 A.D.3d 699, 700 (2nd Dept. 2007) (reversing lower court granting plaintiff's motion to vacate default because prior motion to vacate default and denial of leave to reargue prior motion to vacate default constituted law of the case).

Accordingly, Judge Schecter should have dismissed the amended derivative complaint and denied the Remaining Plaintiff Members' cross-motion to amend.

B. Judge Schecter's Disregard of the Requirements of CPLR 5015(a)(1) Was Err

It is beyond dispute that Judge Kornreich's February 21, 2018 Order dismissed the Company' direct claims on default for failing to retain new counsel. Thus, Judge Schecter erroneously permitted the Remaining Plaintiff Members to do an end run around CPLR 5015(a)(1) by allowing them to re-file the defaulted Company claims in this action. It is well established that in order to obtain relief from a judgment or order on the basis of a default pursuant to CPLR 5015 (a)(1), the moving party must provide a reasonable excuse for the failure to appear and must demonstrate that the case or defense has merit. *Goldman v. Cotter* 10 A.D.3d 289, 291 (1st Dept. 2004).

Here, even if Judge Schecter had properly instructed the Remaining Plaintiff Members of their obligation to comply with the requirements of

CPLR 5015(a)(1) on behalf of the Company, such requirements were not met. Indeed, they could not have been met as a matter of law. The record is devoid of any facts that even remotely suggest that there was a reasonable excuse for the failure to retain substitute counsel for the Company by the deadline set in the June 27, 2017 Order. To the contrary, the Original Plaintiff Members (including each of Remaining Plaintiff Members, who were represented by the Valla Law Firm at the time) deliberately allowed the Company to default, thereby resulting in the dismissal of the Company's direct claims. *See Espinoza v Concordia Intl. Forwarding Corp*., 32 A.D.3d 326, 327 (1st Dept. 2006)(dismissing action for plaintiff's failure to appear at scheduled court conference); *Sloan v. Kopp*, 272 A.D. 795 (3rd Dept. 2000), *lv denied* 95 N.Y.2d 763 (2000) (affirming dismissal where plaintiff failed to demonstrate reasonable excuse explaining why substitute counsel was not retained and did not submit an affidavit).

In addition, "a party's failure to retain counsel when provided sufficient time in which to do so does not constitute a reasonable excuse for a default." *Abbott v. Crown Mill Restoration Dev*., LLC, 109 A.D. 3d 1097 (4th Dept. 2013*); see also Anderson & Anderson LLP-Guangzhou v. N. Am. Foreign Trading Corp*., 165 A.D. 3d 511 (1st Dept. 2018) (upholding dismissal of complaint without prejudice for non-compliance with discovery

order and finding that "[p]laintiffs had plenty of time and opportunities to obtain new counsel but failed to do so."

In any event, even if the Remaining Plaintiff Members had demonstrated a reasonable excuse for the Company's failure to retain new counsel by the deadline imposed by Judge Kornreich, which they did not, the record below contains no affidavit of merit from someone with personal knowledge of evidentiary facts establishing a meritorious cause of action on behalf of the Company. *See Kalisch v. Maple Trade Fin. Corp*., 35 A.D.3d 291 (1st Dept. 2006) ("Assuming, *arguendo*, that plaintiff demonstrated a reasonable excuse for her failure to appear at a scheduled conference, she wholly failed to establish a meritorious cause of action. No affidavit of merit was annexed to the motion papers.")

In short, Judge Schecter had no valid basis for effectively vacating the Company's default by granting the cross-motion to amend simply because the Remaining Plaintiff Members were seeking yet another opportunity to avoid the consequences of their earlier litigation strategy, which included the deliberate decision to allow the Company to default on its direct claims.

The cross-motion to amend was nothing more than calculated skullduggery conceived of by the Remaining Plaintiff Members in order to

circumvent Judge Kornreich's earlier rulings and the requirements of CPLR 5015(a)(1), all to the detriment of the Cicos.

The Appellate Division has recognized that the only course of action permitted under the law in a situation, like here, where a plaintiff's claims have been dismissed without prejudice, is to purchase a new index number to commence another action, but only so long as the new action is within the applicable statute of limitations. *See Espinoza*, 32 A.D.3d 326, 327-28.

CONCLUSION

For the reasons above, the Cicos respectfully request this Court to reverse Judge Schecter's October 30, 2018 Order (a) denying the Cicos' motions to dismiss the amended derivative complaint and (b) granting the Respondents' cross-motion for leave to amend the amended derivative complaint.

Dated: May 28, 2018

Respectfully submitted,

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This computer generated brief was prepared using a proportionally spaced typeface.

Name of typeface: Times New Roman

Point Size: 14 pts

Line Spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum is 10,231.

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

Favourite Limited, Claudio Gatelli, Graziano Sghedoni, Alberto Brentegani, Sirio Srl, and Upper East Side Suites, LLC,

Plaintiffs-Respondents,

—against—

Benedetto Cico, Carla Cico,

Defendants-Appellants,

151 East Houston Acquisition LLC, ABC Corps 1-20, and John Does 1-20,

Defendants.

New York County
Clerk's Index
No. 652857/16

Appellate Division
Case No.
2018-5365

1. The index number of the case is 652857/16.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on May 27, 2016 by service of summons and complaint; a motion to dismiss the complaint was served on July 27, 2016 by defendants Benedetto Cico and 151 East Houston Acquisition LLC.

5. The nature and object of the action is breach of contract, breach of fiduciary duty, unjust enrichment, accounting, fraud and conversion.

6. This appeal is from a Decision and Order of the Honorable Jennifer G. Schecter, entered in favor of plaintiffs, against defendant Benedetto Cico on October 30, 2018, which denied defendant's motion to dismiss the amended complaint and granted plaintiffs' cross-motion for leave to file a second amended complaint. (Motion Sequence 009) This appeal is also from a Decision and Order of the Honorable Jennifer G. Schecter, entered in favor of plaintiffs, against defendant Carla Cico on October 30, 2018, which denied defendant's motion to dismiss the amended complaint. (Motion Sequence 010)

7. The appeal is on a full reproduced record.