To be Argued by:
PETER JAKAB
(Time Requested: 15 Minutes)

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 and CARLA CICO,

Defendants-Appellants,

– and –

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

Defendants.

Appellate Case No.: 2018-5365

BRIEF FOR PLAINTIFFS-RESPONDENTS

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QUESTIONS PRESENTED

1. Did the trial court providently exercise its discretion to grant Plaintiffs-Respondents leave to file the Second Amended Complaint?

Answer: Yes

2. Did the trial court correctly rule that Plaintiff Respondent UESS was a company is good standing in its charter state of Delaware such that it can maintain this action?

Answer: Yes

PRELIMINARY STATEMENT

This is an action by a company, Upper East Side Suites LLC ("UESS"), and some of its investors against its former sole co-managers, Benedetto and Carla Cico, brother and sister. $4.75 million was invested in the company. All of it is gone. Every cent. That is very unusual. *Some* money is left behind by even the worst of history's scam artists, like Bernard Madoff, who left $826 million behind, and Charles Ponzi himself, whose investors received 30 cents on the dollar.

It is all the more unusual because the investment was in Manhattan real estate—44-46 East End Avenue to be precise. UESS purchased it in 2007 and sold it in 2013. To be sure, even Manhattan real estate prices can fluctuate, and some loss is certainly possible. But a complete wipe out of every dollar speaks for itself that there is wrongdoing afoot.

Another strong indicator of wrongdoing is how Defendants have litigated this case: six sets of motions to dismiss, all based on procedural, technical, and/or collateral grounds. Dkt. 5, 38, 102, 196, 207, 283, 337. Their tactics are those of culpable wrongdoers grasping at any straw to try to avoid the merits. Justice Kornreich and Justice Schecter below recognized this and, while they could not prevent the filing of these successive motions, they lifted the discovery stay and have pressed the action forward through paper and electronic discovery to

depositions, expressing their exasperation[1] and declining to dismiss each time the Cicos would file one of these motions to dismiss.

Two of the Cicos' failed motions are on appeal before this Court. This Brief addresses their appeal from the October 30, 2018 Order granting leave to file the Second Amended Complaint. The companion Brief addresses Defendants' appeal from the June 17, 2019 Order denying their Motion to Dismiss that same Second Amended Complaint. Because we were not permitted by the Court's rules to file a single consolidated Brief, there will be a great deal of repetition and overlap in the Preliminary Statement, Statement of Facts, and Procedural History sections of the two Briefs. For this, Respondents apologize.

STATEMENT OF FACTS[2]

UESS was formed for the sole purpose of purchasing a residential building on Manhattan's Upper East Side, and operating a short-term rental business using its units in the manner of "Air-B-N-B." R. 6, 401-02 at ¶46. The Cicos solicited investment, promising potential investors a preferred 10% rate of return from any cash flow generated by UESS in the form of regular periodic distributions from the

[1] E.g., R. 15 at n.15 (calling out the Cicos' "propensity for advocating clearly erroneous arguments").

[2] The Statement of Facts is drawn from the Second Amended Complaint, (R. 393-429, Dkt. 282), the allegations of which are to be taken as true for purposes of the motions to dismiss and for leave to amend involved on these appeals. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

operations of UESS. R. 173. According to the Cicos, in response to their solicitations and in reliance on their representations, UESS received $4.75 million in investment from Plaintiffs and other investors. R. 6, 393-94 at ¶¶1-2.

The Cicos' first act of mismanagement, waste, and fiduciary violations took place right away. R. 94 at ¶2. They caused UESS to enter into a contract to purchase a building at 44-46 East End Ave. ("Property") without having sufficient funds and financing to close the transaction. R. 140-41 at ¶¶ 5-12, 408 at ¶90. The contract had no financing contingency. R. 420 at ¶148. Therefore, threatened with losing UESS's down-payment, the Cicos secretly caused UESS to take out private loans from Carla Cico and other affiliates of Defendants at high interest rates in order to close. R. 394 at ¶3, 408 at ¶90, 425 at ¶163. Those loans were not refinanced, but rather were repaid in a manner benefitting the lenders. Thus, the Cicos began secretly and unlawfully enriching themselves and their affiliates.

For the next period of years the Cicos managed UESS as a short-term rental operation. R. 6, 183 at ¶5, 329 at ¶3. But rather than receive periodic distributions, as promised, the investors received nothing. R. 400 at ¶39. Their requests for information, accountings, and distributions were met with delays, excuses, and lies. R. 394 at ¶6. On information and belief, Defendants managed UESS in a manner so as to divert the funds generated by its business, and rightfully belonging to UESS, to themselves, their affiliates, and their separately owned entities, like

USABOUND, again, unlawfully enriching the Cicos. R. 19 at n. 19, 171, 173, 190 at ¶¶ 43, 45, 46, 402 at ¶49, 418 at ¶138. In the entire time the Cicos managed UESS, the investors received nothing, no distributions, no return of capital, not a dollar. R. 399 at ¶33, 400 at ¶39.

In about 2011, New York passed a law making the short-term rental business illegal. R. 191-92 at ¶¶ 52-53, 329 at ¶4, 407 at ¶85. The Cicos ignored it. *Id*., 411 at ¶107. Violations and penalties were issued by authorities against UESS and the Property. *Id.*, R. 183 at ¶6. The Cicos ignored them, continuing to run the business illegally to their enrichment. Id., R. 191-92 at ¶¶ 52-53. The Cicos then caused UESS to default on its mortgage for the Property, triggering maximum rate default interest, late fees, penalties, attorneys' fees, and other expenses. R. 6, 412 at ¶112. The defaulted mortgage was sold by the lending bank to a vulture fund, a *lis pendens* was filed against the Property and foreclosure proceedings were commenced. R. 100-01, 329 at ¶4, 412 at ¶113. Not until they were faced with imminent loss of the Property, did the Cicos cause UESS finally to put the Property up for sale; with UESS's back to the wall, the sale was on a distressed sale basis. R. 114-15 at ¶8, 412-13 at ¶¶115-17.

The Property sold for less than market value and, indeed, less than UESS had paid for it six years earlier. R. 394 at ¶4. Most of the proceeds of the sale went to the vulture fund to satisfy the maximum rate default interest, late fees,

penalties, attorneys fees, and other expenses caused by the Cicos' mismanagement in defaulting on the mortgage. *Id*., R. 413 at ¶117. The Cicos disbursed much of the rest of the proceeds to repay their own loans to UESS and those of their affiliates, to pay their own expenses and those of their businesses, like $140,000 for hotel rooms for the guests their company booked for the period after the sale of the Property. R. 329 at ¶3, 413-14 at ¶119, 423 at ¶159(h). Unbelievably, the Cicos caused UESS to take out a $1.8 million loan from the buyer of the Property at high interest, and then disbursed from the proceeds of the sale of the Property over $130,000 in interest and fees on this loan. R. 100, 141 at ¶13, 394 at ¶6.

Following the closing of the sale of the Property, UESS was left with less than $750,000. R. 13, 415 at ¶127. But the Cicos concealed this fact. R. 415-16 at ¶128. They lied to the investors repeatedly and in writing about the purchase price of the Property, saying it was $11.8 million, when actually it was $10 million. Id., R. 6-7 at n3, 101, 415 at ¶127, 442. Defendants lied repeatedly and in writing about the assets remaining in UESS, claiming that they were over $5 million, then $3.75 million, and engaging in a series of frauds, including forgeries of bank documents, to placate the investors, who were demanding distribution of the funds. R. 13 at n13, 109, 409 at ¶96, 418-19 at ¶127. The UESS Operating Agreement permits only the purchase, operation, and sale of the Property and assets related to the Property; it mandates dissolution and distribution of assets following the sale of

the Property. R. 58-91. No distributions were ever made. R. 13, 187 at ¶26, 190 at ¶43.

Instead, the last remaining assets—every dollar—of UESS were used as the down-payment on a contract for the purchase, with unknown partners, of a hotel property at 151 East Houston Street ("Houston Property"). R. 6, 330-31 at ¶5, 394-95 at ¶7. The Cicos refused to distribute the remaining funds from the sale of the Property to the investors because the Cicos wanted to continue to have a place from which to run their lucrative-for-them short-term rental business to their enrichment. R. 404 at ¶60, 416 at ¶130. Moreover, the investors were expecting distribution of the $3.75 million and more that the Cicos had represented were the remaining assets of UESS, when actually less than $750,000 remained. R. 13, 415 at ¶127. But the Cicos instead, without authorization, perpetuated their fraud and breaches of fiduciary duty by placing all of UESS's remaining assets into a series of contracts with the owner of the Houston Property. R. 414-15 at ¶124-26. The Houston Property contracts had no financing contingency and the Cicos failed to obtain the financing to close the transaction, defaulted under the contracts, and forfeited the down-payment. R. 115 at ¶9, 126 at ¶5, 394-95 at ¶7, 400 at ¶37.

UESS is left with no assets, the Cicos having either taken or lost every dollar of its $4.75 million (R. 6, 393-94 at ¶¶1-2) by means of a combination of their self-

dealing, conversion, mismanagement, waste, all in violation of their fiduciary duties of care, loyalty and candor, and in violation of the Operating Agreement.

The Opening Brief contains many factual inaccuracies. But most of them are irrelevant to this appeal and merit no attention. But some are so basic and central to the case, that a brief look is in order.

First, the Cicos assert that their "effort to acquire the 151 East Houston Hotel [was] a proposed transaction that was approved by resolution at investor meetings in Verona, Italy in May 2013." Opening Brief at 12. This is false. For this assertion, the Cicos cite "R. 112-119 ¶¶8-9 and R. 99-111." Opening Brief at 12. The Court will search these pages, as well as the rest of the Record, in vain for any evidence that the investors ever approved the purchase of any other property. The sale of the East End Avenue property was approved and distribution of the proceeds (the amount of which we now know was being wildly exaggerated by the Cicos) to the investors was expected.

In about November 2015, when some of this conduct was beginning to come to light, a majority of the members of UESS removed the Cicos as managers. R. 401 at ¶41. The UESS Operating Agreement provides that managers may be removed by a majority of the membership votes, but a replacement manager cannot be appointed without a 75% super-majority vote. R. 75-76 at §5.14, 77-78 at §5.17. A resolution was passed by a majority for a replacement manager, but it did not

have the 75% vote of the membership needed, because the Cicos owned, directly or indirectly, more than 25% of the membership interests of UESS. R. 120-22.

PROCEDURAL HISTORY

Briefly, UESS and a number of investors originally brought this action. The Cicos' initial motions to dismiss resulted in stays of discovery. R. 339-40. Only The Cicos, as UESS's former managers, had the list of UESS members and their respective contact details and percentage interests held. When the Cicos challenged whether a majority of membership interests had authorized UESS to act, Plaintiffs' prior counsel (Kelley, Drye & Warren) was not in a position to determine it and for that reason, among others, moved to withdraw as counsel. Current counsel replaced them. R. 95.

At that juncture, the Cicos' respective motions to dismiss the Complaint were pending. By Order dated February 21, 2018, the trial court ruled on those motions to dismiss by holding that the claims against the Cicos were owned by UESS, not by the individual investors, and therefore must be brought either by UESS directly or derivatively on its behalf by the investors. *Id*. Plaintiffs were given leave to replead. R. 96.

In the circumstances, Plaintiff investors were left with no choice but to bring the action derivatively on behalf of the Company. They had no access to the

member list and could not arrange a vote to authorize UESS to bring suit directly. Plaintiffs complied with the February 21, 2018 Order and filed the First Amended Complaint ("FAC") bringing the claims derivatively. R. 51-55 at ¶105-25.

Defendants indicated they would move to dismiss the FAC and briefing schedule was set. In parallel with that briefing, the court below lifted the discovery stay and expressly ordered certain specified limited discovery, including the turnover by the Cicos to Plaintiffs of the UESS investor membership list. R. 392, 339-40. On about May 9, 2018, Plaintiffs received the investor membership list from the Cicos. Dkt 176, R. 120-22. Upon receiving the investor membership list, Plaintiffs' counsel proceeded diligently. A membership vote was noticed and held to authorize UESS to pursue claims against the Cicos. R. 8 at n.4, 255.

The vote passed, over the vocal objections of the Cicos and their affiliates, thus dispensing with the need for a derivative complaint. R. 267. Plaintiffs filed a cross-motion for leave to serve the Second Amended Complaint ("SAC"), which brought the claims directly on behalf of UESS against the Cicos. R. 333-35. Defendants opposed the cross-motion on some of the grounds involved on this appeal. R. 444-45. The court below granted the cross-motion. R. 4-25.

The court below summarized this process, and the circumstances that led to and justified it:

> "The court did not and does not fault plaintiffs for previously failing to plead derivative claims because, at the time this action was

> commenced, such claims were being prosecuted by the Company directly, and thus there was no need (and, indeed, no ability) to plead derivative claims. The posture of the action changed when the Company defaulted, thereby creating the need for the Remaining Member Plaintiffs to pursue the claims derivatively. We have now come full circle as the Company has now sought to take over its claims and assert them directly. Though defendants complain about this procedural maneuver, it is well settled Delaware law that the company can take over derivative claims and prosecute them how it sees fit so long as the company makes that decision through an independent committee *(Zapata Corp. v Maldonado,* 430 A2d 779, 784·89 [Del 1981]; *see In re Oracle Corp. Deriv. Lit.,* 808 A 2d 1206, 1210-12 [Del eh 2002]). While this is not the classic case of a derivative plaintiff resisting losing control of the action (here, the defendants oppose the Company taking over), since derivative claims are assets of the company *(see Sciabacucci Liberty Broadband Corp.,* 2018 WL 3599997, at *10 [Del Ch July 26, 2018]), it would be wrong to prevent the Company from pursuing its own claims at the behest of the majority of its unconflicted members." (R. 8)

This process is given a tortured treatment in the Opening Brief, pp. 16-24, complete with screaming adverbs, and tales of dark strategy reversals, parties unable to follow an order, Justices unable to understand one another, signature pages in Italian and English, the list goes on, all in the hopes of creating a Minoan labyrinth of technical nonsense in which this Court will get lost. It is almost cartoonish and certainly one of the best examples of the lengths to which the Cicos go to run from the merits like the plague.

As explained above, what happened was very simple. The Cicos, who alone held the membership list, challenged whether UESS was authorized to bring direct claims against them. Left with no choice at the time, Plaintiffs-Respondents filed a

derivative complaint. Diligently upon receipt of the membership list, Plaintiffs-Respondents noticed a vote of the UESS members to authorize UESS to prosecute these claims directly, and, when the vote passed, re-filed UESS's direct claims about less than five months after they were dismissed without prejudice.

The trial court heard Appellants' tortuous arguments and recognized them for what they are: an attempt at merits avoidance by casting the CPLR and the rulings of the trial court as a set of inflexible, hyper-formal technicalities to be applied blindly and without regard to substantial justice. The trial court rejected them in no uncertain terms, holding that they are "baseless," "wrong," "clearly erroneous legal arguments," and giving examples of each. R. 5-23.

Following the filing of the SAC, the Cicos again filed motions to dismiss, asserting, among others, the grounds involved on the related companion appeal. The trial court denied the motions to dismiss. These appeals followed.

ARGUMENT

I.

STANDARDS ON MOTIONS TO DISMISS AND FOR LEAVE TO AMEND

On a motion to dismiss pursuant to CPLR 3211, the Court is required to accord Plaintiffs the benefit of all favorable inferences which may be drawn from the complaint, without expressing opinion as to whether Plaintiffs can ultimately establish the truth of their allegations before a trier of fact. *Campaign For Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 318, 631 N.Y.S.2d 565 (1991) (minimal standard necessary to resist dismissal of a complaint).

Indeed, the Court must "accept the facts as alleged in the complaint as true, accord Plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within *any* cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d at 87-88 (1994) (citations omitted) (emphasis added);

Therefore, the complaint is legally sufficient if the Court determines that Plaintiffs are entitled to relief on any reasonable view of the facts. *Campaign For Fiscal Equity, Inc.,* 86 N.Y.2d 318, 655 N.E.2d 631 (1991). In the present case, application of this standard warrants affirmance.

For leave to amend a complaint, the standard of review is abuse of discretion. *Kimso Apts. LLC v. Gandhi*, 24 N.Y.3d 403, 411 (2014)("Applications to amend

pleadings are within the sound discretion of the court …, which may be upset by us only for abuse as a matter of law"). CPLR 3025(b) provides:

> "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just…."

In the absence of prejudice to the defendants, the amendment of a pleading is to be freely granted. *Sotomayor v. Princeton Ski Outlet Corp.*, 199 A.D.2d 197 (1st Dept. 1993).

> "Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law. …A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]. McGhee v Odell, 96 A.D.3d 449, 450 (1st Dept 2012) (citations and quotation marks omitted)."

Capitol Records, LLC. v. Harrison Greenwich LLC, 44 Misc.3d 202, 206, 984 N.Y.S.2d 274, 277 (N.Y. Supr. 2014).

"The determination of whether to allow the amendment is committed to the court's discretion, and the exercise of that discretion will not be overturned absent a showing that the facts supporting the amendment do not support the purported claim or claims." *Peach Parking Corp. v. 346 W. 40th St., LLC*, 42 A.D.3d 82, 86 (1st Dept. 2007).

The trial court recognized that the SAC is neither palpably improper nor insufficient as a matter of law and providently exercised its discretion to grant leave to file it. It should be affirmed.

II.

THE ISSUE IS MOOT, BUT SUBJECT MATTER JURISDICTION EXISTED

Appellants' first argument on this appeal is that Delaware law requires all derivative litigation against Delaware companies to be brought in the Delaware Chancery Court. Opening Brief at 28-33.

First, the point is plainly moot; there are no longer any derivative claims in this action. R. 393-429, Dkt. 282. The SAC states direct claims only. It is puzzling why Appellants would press this point, particularly without addressing its self-evident mootness.

The Court will recall that between the Trial Court's February 2018 Order holding that the claims belong to UESS, not the individual members, and July 2018 when UESS asserted its claims directly in the SAC following a vote so authorizing it, Respondents had filed a FAC containing derivative claims. R. 33-57. Here, Appellants are persisting in the argument that this Court had no subject matter jurisdiction over the FAC's derivative claims and should have dismissed them. Opening Brief at 28.

But a dismissal for lack of subject matter jurisdiction is, by definition, not an adjudication on the merits and therefore any dismissal would be without prejudice.[3] Accordingly, even if Appellants were right, there would be no obstacle to granting leave to file the SAC with its direct claims, as the trial court did, thereby mooting this point about exclusive jurisdiction over derivative claims. The Cicos choose to ignore this self-evident point.

Second, the argument is mistaken. The Delaware statute providing jurisdiction for derivative claims is *permissive* not exclusive, providing that "a member … *may* bring an action in the Court of Chancery…." Delaware Limited Liability Company Act Section 18-1001 (emphasis added). Curiously, the Cicos quote this language but ignore the fact that nowhere does it provide for exclusive jurisdiction. Opening Brief at 29. Indeed, as the trial court pointed out, derivative actions involving Delaware entities are routinely litigated throughout the country, including in this Court. R 13-14; *E.g.*, *Deckter v. Andreotti*, 170 A.D.3d 486 (1st Dept. 2019); *Wandel v. Dimon*, 135 A.D.3d 515 (1st Dept. 2016); *SPFPA Ret. Fund v. Mack*, 93 A.D.3d 562 (1st Dept. 2012); *F5 Capital v. Pappas*, 856 F.3d 61, 82 (2d Cir. 2017)("district court properly exercised jurisdiction over the derivative

[3] *E.g.*, *Dyer v. Cahan*, 150 A.D.2d 172, 172 (1st Dept. 1989). "We note that where an action is dismissed for lack of subject matter jurisdiction, a new action may be commenced within six months after the dismissal…(CPLR 205[a]; see Parker v. Mack, 61 N.Y.2d 114, 472 N.Y.S.2d 882, 460 N.E.2d 1316 [1984];" *Saccheri v. Cathedral Properties Corp.*, 16 Misc. 3d 111, 114 (App. Term. 2007); *Deutsche Bank Nat. Tr. Co. v. Abbate*, 25 Misc. 3d 1216(A) (Richmond Supr. 2009) ("the court lacked subject matter jurisdiction to adjudicate the present case [and] the defendants are consequently entitled to a dismissal without prejudice"); CPLR 5013.

state law claims" under Delaware law). In *Vertical Computer Sys., Inc. v. Ross Sys., Inc.*, 11 A.D.3d 375, 379 (1st Dept. 2004), this Court cited the very Delaware statute on which Appellants rely when permitting a derivative case to proceed in the New York courts:

> "Delaware law, which controls here, provides that a member of a limited liability company may bring an action in the right of such company if 'members with authority to do so have refused to bring the action or if an effort to cause those ... members to bring the action is not likely to succeed.' (6 Del. Code § 18–1001)"

The case law databases are filled with literally hundreds of other examples throughout the nation's state and federal courts. The suggestion that the Delaware Chancery Court has exclusive jurisdiction over all derivative actions has no basis in the statute and is contradicted by cases legion in number. Appellants cite Opening Brief at 30-31) only an unpublished Westchester Supreme Court decision, which did not involved derivative claims, and a Delaware Supreme Court decision that simply held that an exclusive forum selection clause in a contract is enforceable over the Delaware statute's permissive language designating the Chancery Court as a possible forum. Neither has any application here.

For these reasons, the decision of the trial court should be affirmed.

III.

UESS WAS PROPERLY REINSTATED AFTER PAYING ITS TAXES; THE "NULLIFICATION" PROCEEDING, ON WHICH APPELLANTS INSIST, PERTAINS ONLY TO DISSOLVED COMPANIES

Appellants insist that UESS has been "cancelled" and may be revived only through a proceeding "seeking nullification of the certificate of cancellation" in Delaware Chancery Court. This is mistaken. A company that fails to pay its franchise tax becomes "void" under Delaware law and is easily revived by simply paying what is owed. That is precisely what UESS did and immediately regained its good standing, as evidence by the Certificate of Good Standing issued by the Delaware Secretary of State. R. 430-32.

Delaware law provides "If any corporation ... neglects or refuses for 1 year to pay the State any franchise tax or taxes, which has or have been, or shall be assessed against it, or which it is required to pay under this chapter ... the charter of the corporation shall be void." 8 Del. C §510. Delaware law further provides that a corporation can be reinstated by filing a certificate and paying its past due taxes. 8 Del. C. § 312(e). Section 312(e) provides that the reinstatement "shall validate all contracts, acts, matters and things made, done and performed within the scope of its certificate of incorporation by the corporation, its officers and agents during the time when its certificate of incorporation was forfeited or void pursuant to this title, or after its expiration by limitation, with the same force and effect and to all intents

and purposes as if the certificate of incorporation had at all times remained in full force and effect."

By contrast, "cancellation," a "nullification" proceeding, and the cases cited by Defendants -- *Otto v. Otto*, 110 A.D.3d 620, 974 N.Y.S.2d 54 (1st Dept. 2013) ("dissolved Delaware limited partnership and limited liability company"); and *Meissner v. Yun*, 150 A.D.3d 455, 456 (1st Dept. 2017)("Yun had dissolved Manhattan Review LLC") -- all pertain to a dissolved company, which UESS has never been. This passage, in which the Southern District rejects the same argument the Cicos are attempting here, is instructive:

> "'Dissolution' of a corporation is a specific legal term and is not the legal equivalent of a corporation declared inactive for non-payment of franchise taxes. The procedures for dissolution in Delaware can be found in 8 Del. C. § 275. Nowhere in Delaware's General Corporation Law, or its Corporation Franchise Tax Law, is a corporation whose charter has been forfeited for non-payment of taxes, referred to as dissolved. It is consistently referred to as void. *See* 8 Del. C. §§ 312-13, 510. Moreover, Delaware statute specifically mandates that a corporation cannot be dissolved or merged until all due or assessable franchise taxes have been paid. *See* 8 Del. C. § 227."

Soho Int'l Arts Condominium v. City of New York, 2005 WL 1153752, 75 U.S.P.Q.2d 1025 at n.19 (S.D.N.Y. 2005).

The trial court's rejection of this argument is easily affirmed. Recognizing this, the Cicos next assert that UESS was not authorized to pay its taxes and obtain the Certificate of Good Standing because it is "a manager-managed limited liability

company." Opening Brief at 35. This is incorrect. UESS is now a member-managed limited liability company under the default provisions of the Delaware Limited Liability Company Act (the "Act") Section 18-402. This point is the primary subject of the companion appeal, Case No. 2019-5580, being briefed and heard simultaneously with this appeal. Rather than repeat the explanation and citations here, the Court is respectfully referred to Respondents' Brief therein and specifically to pages 7-8 and 13-17, inclusive.

Next, the Cicos contend that even if UESS were a member-managed LLC, its member had no authority to revive the company and obtain the Certificate of Good Standing needed to prosecute this action. As detailed in Respondents' Brief in the companion appeal, as well as in the trial court's decision from which that appeal is taken, UESS became a member-managed LLC under the Act when the Cicos were removed as its managers under the OA by a majority vote of the members, but blocked the appointment of any replacement managers, which requires a supermajority of over 75%. As explained above, as well as in the trial court's decision in the companion appeal, a majority of UESS members have voted to authorize and direct UESS to bring direct claims against the Cicos. When the Cicos brought to the parties' and the Court's attention that the company had lost its good standing in Delaware and could not maintain this action, UESS acting through a member, paid its taxes and obtained its Certificate of Good Standing.

The vote to authorize the prosecution of this action against the Cicos necessarily encompassed authority to take such action as was reasonably necessary to do so, including to pay UESS's taxes and obtain the Certificate of Good Standing. Those acts were authorized and ratified by the vote.

Accordingly, Appellants' appeal on this point is meritless.

IV.

LEAVE TO FILE THE SAC WAS PROPERLY GRANTED

The Cicos' final assertion, which goes on for ten pages (Opening Brief 37-46), boils down to this:

1. the February 21, 2018 Order dismissed UESS's direct claims without prejudice on default because it had no lawyer and granted the individual plaintiffs leave to file a FAC to state the claims derivatively;

2. the October 30, 2018 Order granting UESS leave to file the SAC with its direct claims contradicts the February 21, 2018 Order, which had not granted that relief;

3. the law of the case doctrine prohibits this.

The Cicos' assertion, perhaps their high-water mark thus far in merits avoidance, ignores the central facts and events that led to the SAC, and misunderstands the basic principles of the law of the case doctrine.

Very importantly, between the dismissal without prejudice of UESS's direct claims and UESS's request to reassert them shortly thereafter, came the following critical events:

1. The Cicos had taken the position that without the consent of a majority of the members of UESS, it could not bring its claims directly against them.

2. However, the Cicos were also in exclusive possession of the membership list and information for UESS.

3. Following the February 21, 2018 Order, the trial court held several conferences, both in person and telephonically.

4. Those conferences produced several discovery orders. R. 339-40, 392. Among them was the April 24, 2018 Order to "provide Plaintiffs with a list of the company's members and equity splits." R. 392.

5. The Cicos' production of documents and information pursuant to those orders—including a complete list of the UESS members, together with the percentage ownership share of each—were indispensable to the solicitation and receipt of the consents of a majority of the UESS members to authorize UESS to prosecute its direct claims against the Cicos.

6. The Cicos produced this information on May 9, 2018. Dkt 176, R. 120-22.

7. Plaintiffs used that information to solicit, by letters to all members in both languages dated June 1, 2018, and receive the consents necessary to authorize UESS to bring these claims against the Defendants directly. R. 341-91.

8. The consents of a majority of the UESS members were received by Plaintiffs' counsel in early July (*id*.) and the cross-motion for leave to amend was filed less than three weeks later.[4]

[4] The Cicos produced documents and information relating to and reflecting the disposition of the proceeds of the East End Ave sale and the contracts for the Houston Property purchase. Dkt. 175-180 and 193-194. These documents disclosed for the first time that the Cicos took or lost every penny of the $4.75 million that the investors had entrusted to them. R. 6, 393-94 at ¶¶1-2. This evidence formed the basis of many of the allegations and claims in the Second Amended Complaint. R. 393-429; Dkt. 282

These changes in material circumstances much more than justified the trial court's exercise of its provident discretion under CPLR 3025 to grant leave to amend the complaint to re-assert the direct claims.

The law of the case doctrine is inapplicable for numerous independent reasons, any one of which would be sufficient to reject the Cicos' assertion of it.

First, the doctrine "applies only to legal determinations resolved on the merits." *Perini Corp. v. City of New York*, 122 A.D.3d 528, 528 (1st Dept. 2014). "The doctrine of law of the case 'applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision, and to the same questions presented in the same case." *Aurora Loan Servs., LLC v. Dorfman*, 170 A.D.3d 786, 787 (2nd Dept. 2019). There was no legal determination made in the February 21, 2018 Order dismissing without prejudice the UESS direct claims for its failure to retain counsel at that time.

Second, the doctrine is inapplicable to discretionary rulings, such as granting leave to amend. *E.g.*, *Allstate Ins. Co. v. Buziashvili*, 71 A.D.3d 571, 572 (1st Dept. 2010) ("doctrine does not apply to discretionary rulings such as case management decisions"); *People v. Carmichael*, 73 A.D.3d 622, 622 (1st Dept. 2010) ("Since the decision … is a matter of discretion, the law of the case doctrine did not operate to preclude the trial court from exercising its own discretion on this issue"); *Hamilton v. Ctr. for Urban Cmty. Servs.*, 29 Misc. 3d 133(A) (New York Cty App. Term

2010) ("the law of the case doctrine is inapplicable to discretionary disclosure rulings"); *Dorfman*, 170 A.D.3d at 787 ("The doctrine did not apply to the November 29, 2012, order, since it was a case management decision, which was based on the discretion of the court"). Both the February 21, 2018 Order and the October 30, 2018 Order dealt with leave to amend the complaint and were discretionary rulings under CPLR 3025 to which the doctrine is inapplicable. *Perini*, 122 A.D.3d at 528 (1st Dept. 2014).

Third, the doctrine is itself discretionary with the court applying it. *People v. Evans*, 94 N.Y.2d 499, 503 (2000) ("law of the case is necessarily 'amorphous' in that it 'directs a court's discretion,' but does not restrict its authority"). The doctrine:

> "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power." In other words, applying "the law of the case" doctrine is "a matter of judicial discretion and not a limitation on the court's power." *Silverberg v. Dillon,* 73 A.D.2d 838, 840, 423 N.Y.S.2d 760 (4th Dept.1979).

People v. Gervais, 195 Misc. 2d 129, 134 (Supr, NY Cty. 2003).

Here, the trial court exercised its discretion and to the extent the Cicos assertion is that it was an abuse of its discretion, the assertion is nonsense.

Fourth, the doctrine of law of the case does not bind *this* Court.

> "The doctrine of the law of the case does not bind appellate courts, and thus, this Court is not bound by the law of the case established by the prior determination. Accordingly, this Court is free to

> consider that branch of the plaintiff's motion which was for leave to amend the complaint on the merits. Under the circumstances presented here, we conclude that leave to amend the pleading should be permitted."

Hothan v. Mercy Med. Ctr., 105 A.D.3d 905, 905–06 (2nd Dept. 2013)(numerous citation omitted). Accordingly, this Court is free to affirm even if the doctrine *were* applicable below.

For these reasons, the ruling below should be affirmed.

CONCLUSION

For the reasons set forth above, the decision of the trial court should be affirmed in its entirety.

Dated: October 30, 2019
New York, NY

Respectfully,

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