SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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In the Matter of the Application of

FGLS EQUITY LLC, a New York State Limited Liability Company in Dissolution, by its Managing Member and Liquidator, Steven Turchin,

Petitioner,

For a decree judicially winding up the affairs of FGLS EQUITY LLC pursuant to Section 703(a) of the New York Limited Liability Company Law and for Declaratory Relief.

INDEX NO. 157170/2019

MOTION DATE 07/26/2019

MOTION SEQ. NO. 001

DECREE APPROVING PLAN OF LIQUIDATION

-and-

Sajust, LLC, and Larry Warshaw, as the sole Trustee of Carol Ann Enterprises, Inc. Pension Plan,

Respondents-Counterclaimants,

-against-

FGLS EQUITY, LLC,

Petitioner-Counterclaim Defendant.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 19, 20, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion for a DECLARATORY JUDGMENT.

Petitioner FGLS Equity LLC (FGLS), a New York limited liability company in dissolution, by its Managing Member and Liquidator Steven Turchin (Turchin), brings this special proceeding seeking a decree approving its proposed Plan of Liquidation (the Liquidation

Plan) pursuant to Section 703 (a) of the New York Limited Liability Company Law (LLC Law) and CPLR 3001.

Respondent-Counterclaimants Sajust LLC (Sajust), and Larry Warshaw as the sole Trustee of Carol Ann Enterprises, Inc. Pension Plan (Carol Ann), object to the Liquidation Plan to the extent that it provides that FGLS will forgo suing certain parties associated with the late Steven Mendelow (the Mendelow parties).[1] In that connection, the respondents' counterclaim seeks a judgment declaring that Turchin's decision to preclude them from pursuing a derivative action on behalf FGLS against the Mendelow parties is not protected by the business judgment rule, and declaring that the Mendelow Foundation is precluded from participating in a distribution from FGLS. FGLS moves to dismiss the counterclaim.

For the reasons set forth below, the relief requested by the petition is granted in its entirety and the counterclaim is dismissed.

BACKGROUND

The following facts are taken from the Verified Petition (Pet.) (Dkt. 1),[2] the answer and counterclaim (Dkt. 44), and the various submissions of the parties and are undisputed unless otherwise indicated. FGLS was formed in 2002 by Steven Mendelow (Mendelow), an accountant and financial advisor who practiced at (among other places) Konigsberg & Wolf (K&W), a New York accounting firm (Pet. ¶ 1). Mendelow had previously set up an entity called C&P Associates (C&P) as a "feeder fund" to invest his own family's and his

[1] The Mendelow parties are Cara Mendelow and Pamela Christian, individually and in their capacities as the executrices of the Estates of Steven Mendelow and Nancy Mendelow; C&P Associates, Ltd.; and C&P Associates, Inc.

[2] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

clients'money in Bernard L. Madoff Investment Securities (BLMIS). Mendelow created FGLS as a new BLMIS feeder fund, apparently to separate his family's investments in C&P from those of his clients (*id.* ¶¶ 2, 4-5). Pursuant to Section 5.1 of the FGLS Operating Agreement (the Operating Agreement) (Dkt. 8), the management of FGLS was at all times vested in both Steven Mendelow and his wife Nancy Mendelow as Operating Managers.

In November 2002, Mendelow funded FGLS by transferring $3,149,075 from the C&P BLMIS account to the FGLS BLMIS account (the Rollover transfer) (Pet. ¶ 6). This transfer purportedly represented the value of his client's membership interests in C&P as follows:

Sands Family Partnership	$615,986.00
Dubarry 5th Ave. Profit Sharing Plan	$472,040.00
Glenn Schlossberg	$90,557.00
Zena Saunders	$90,557.00
Tiana Schlossberg	$129,367.00
Anna Lee Schlossberg	$77,620.00
Carol Ann Ent. Profit Sharing Plan	$882,972.00
Larmen Realty	$789,976.00
	$3,149,075.00

(Steven Turchin Letter dated December 13, 2018, p. 2) (Dkt. 12). Some of these funds were later transferred into other accounts within FGLS, eventually ending up in these accounts:

Sands Family Partnership	$615,986.00
Dubarry 5th Ave. Profit Sharing Plan	$472 ,040.00
Tiannalee LLC	$388,101.00
Sajust LLC	$1,672,948.00
	$3,149,075.00

(*id.* at 3).

After these initial transfers, some of those members invested additional funds in FGLS. Several new clients thereafter also became members of FGLS and invested money in it (*id.*), and the company ultimately attracted a total of 41 members (FGLS Capital Account Balances) (Dkt. 13).

FGLS lost virtually all of its money in its BLMIS account after BLMIS was discovered to be a Ponzi scheme in late 2008 (Pet. ¶ 7). On June 25, 2009, FGLS filed a claim for its losses with Irving Picard (the Trustee), who was overseeing the liquidation of BLMIS in the United States Bankruptcy Court for the Southern District of New York. The Trustee did not immediately grant FGLS's claim, but instead initiated litigation against FGLS to deny it. After adverse rulings against the Trustee in other cases, he dropped the case against FGLS in September 2015 (Pet. ¶ 9). However, the Trustee continued an adversary proceeding he had commenced against the Mendelow parties in 2010 (*Picard v Mendelow*, et al, Adv. Pro. No. 10-04283 (SMB) (Bankr SD NY 2010) (the Mendelow action) (Dkt. 32) to recover over $14 million in allegedly fraudulent transfers from BLMIS.

On October 7, 2015 the Trustee made a formal determination of FGLS's claim, allowing it in the amount of $3,450,000. He calculated this sum, representing FGLS' net equity by applying the "net investment method," deducting the actual cash amount withdrawn from its BLMIS account from the actual cash amount invested. The Trustee did not give FGLS any credit for "fictitious profits," meaning profits reflected on the BLMIS account statements but never in fact realized by BLMIS (Pet. ¶¶ 9-10). He also disallowed any credit for the $3.15 million Rollover transfer from C&P to FGLS because, at the time of the transfer, C&P had withdrawn $2,584,921 more from its BLMIS account than it had deposited into it and, therefore, its balance consisted entirely of fictitious profits with no actual net equity to transfer (*id.* ¶ 10; Turchin 12/13/2018 Letter at 5).

By the time the Trustee made this determination, the courts supervising the BLMIS liquidation had upheld the net investment method he employed in calculating the value of FGLS' accounts (*see generally Matter of BLMIS*, 654 F3d 229 [2d Cir 2011]). However, the issue of

how to treat inter-account transfers such as the Rollover transfer had not been settled. Accordingly, on November 5, 2015, FGLS, through its prior counsel, Arkin Solbakken LLC (Arkin), filed an objection to the Trustee's determination to disallow the Rollover transfer (Pet. ¶ 12). The legal basis for that objection was undercut a few months later when a federal district court held that inter-account transfers premised on fictitious profits should not be credited, and that determination was upheld on appeal the following year (*see Diana Melton Trust v Picard [In re BLMIS]*, 2016 WL 183492 [SDNY 2016], *affd sub nom Sagor v Picard [In re BLMIS]*, 697 F Appx 708 [2d Cir 2017]).

Steven Mendelow continued to serve as manager of FGLS until his death on June 7, 2016. Nancy Mendelow succeeded him as manager of FGLS (*id.*, ¶ 13).[3] In January 2017, she retained the law firm of Clayman & Rosenberg LLP (the Rosenberg firm) to replace the Arkin law firm (Rosenberg letter 1/27/2017 (Dkt. 53). The Rosenberg firm had previously filed a notice of appearance in the Mendelow action in November 2016 (Dkt. 74), but it is not clear whether it was also unofficially also representing FGLS at that time, or possibly earlier.

Nancy Mendelow died on June 17, 2017 (Pet. ¶ 13). By letter dated June 27, 2017 (Dkt. 54), the Rosenberg firm advised FGLS' members that they would be required to take action consistent with the Operating Agreement to elect a new Operating Manager, to dissolve FGLS, or take other appropriate action. In this connection, the Operating Agreement provides that FGLS was to be dissolved once Steven and Nancy Mendelow were either terminated or ceased to be managers (Operating Agreement §§ 5.1 & 10.1) and that the liquidation was to be performed

[3] Section 5.1 of the Operating Agreement indicates management of FGLS was at all times vested in both Steven and Nancy Mendelow as Operating Managers, but apparently Steven Mendelow exercised primary if not exclusive control of the company during his lifetime.

by a person elected by the owners of a majority interest in the company (*id.* § 10.2). By letter dated October 3, 2017 (Dkt. 55), the Rosenberg firm further suggested that FGLS retain new counsel, citing a potential conflict of interest. Specifically, it pointed to the firm's representation of the Mendelows in their personal dealings with the Trustee and noted the expressed position of various FGLS members that the Mendelows should not share in any recovery from the Trustee.

In January 2018, the estates of Steven and Nancy Mendelow settled the Mendelow action by paying the Trustee $9.7 million (the Settlement Agreement) (Dkt. 33). The Settlement Agreement order approved the settlement without any finding of facts about the Mendelow parties' conduct, and paragraph 3 of the Settlement Agreement provides:

> No Admission of Liability. This Agreement memorializes a settlement of disputed claims and is not in any way to be construed as an admission of liability, or of any issue of fact or law, by any Party hereto. [The Mendelow Parties] deny actual knowledge of the BLMIS fraud or willful blindness with respect to circumstances suggesting such fraud or that in any other respect they acted in bad faith.

In November 14, 2017, Turchin, an accountant with an investment interest in FGLS, was elected as the managing member and liquidator of FGLS (Pet. ¶ 14). He received the votes of 91.07% of the members of FGLS with positive capital (FGLS Minutes 11/14/2017), including the proxy votes of the Objectors (Dkt. 51). Turchin asserts that he learned FGLS had approximately $65,000 in a Bank of America account, and that a few days after his election he requested that the bank make him the signatory on it (Turchin Reply Aff. ¶ 26) (Dkt. 50). In February 2018, after it appeared that the bank would give him access to the funds, he retained the law firm of Yeskoo, Hogan & Tamlyn (the Yeskoo firm) to represent FGLS in securing monies from the Trustee and liquidating the company (*id.* ¶ 27). On March 17, 2018, the Yeskoo firm filed a claim letter (Dkt. 14) against the Estate of Nancy Mendelow.

The Yeskoo firm thereafter discussed with the Trustee's counsel how to resolve the parties' still-ongoing dispute over the disallowance of the $3.15 million Rollover transfer. The firm was advised that the Trustee intended to move the bankruptcy court to approve his determination of FGLS' claim, and that FGLS could raise its objection then (Yeskoo Reply Aff. ¶ 5) (Dkt. 52). In May 2018, the Yeskoo firm read in the Trustee's most recent report that in order to expedite payment to customers, his office was departing from its past practice and paying the undisputed portion of any disputed claims (*id.* ¶ 6). The Trustee at first refused FGLS' request for an immediate distribution on the ground that some of FGLS' members had received distributions from the Madoff Special Victim's Fund (MSVF) but then offered to compromise the dispute by deducting $1,166,337 from any monies paid to FGLS (*id.*, ¶¶ 7-8). FGLS rejected this offer, and the Yeskoo firm made a formal demand for full payment by letter dated July 30, 2018 (Dkt. 57).

In September 2018, the Trustee's counsel advised the Yeskoo firm that it had consulted with the Securities Investor Protection Corporation (SIPC) about the issue of deducting the MSVF payments, and the SIPC had decided against such deductions (Yeskoo Reply Aff. ¶ 9). On September 14, 2018, the Trustee sent FGLS $2,204,668 toward its $3,450,000 claim (Turchin 12/13/2018 Letter at 7). By order dated November 30, 2018 (Dkt. 11), the bankruptcy court granted the Trustee's motion to overrule FGLS' objection to disallowance of the Rollover transfer and confirmed his determination that FGLS' total allowed claim was $3,450,000.

By letter dated December 13, 2018 (Dkt. 12), Turchin apprised FGLS' members of his progress. He informed them that FGLS had recovered a total of $2,704,688, consisting of the September payment from the Trustee plus an additional $500,000 in SIPC insurance received in June. Additionally, he set forth his calculations of each member's net equity in the company as

of December 31, 2017. He reported that the amounts invested (excluding the Rollover transfer) by members with positive capital accounts were as follows:[4]

Mark Weinberg	$989,290.00	19.21%
Carol Ann Ent. Pension Fund	$888,399.00	17.26%
England, Eihys	$726,150.00	14.11%
Schupak Group Def. Ben Plan	$432,948.00	8.41%
Goldner, Dina	$396,657.00	7.71%
Goldner, Jonathan	$352,698.00	6.85%
Schupak Group P/S Plan	$304,589.00	5.92%
Mendelow Family Foundation	$256,357.00	4.98%
Brown, Mark	$213,429.00	4.15%
Mendelow, Peggy	$181,488.00	3.53%
Levine, Jedd	$88,196.00	1.71%
Sajust LLC	$84,398.00	1.64%
The May, LLC	$60,986.00	1.18%
Axelon, Jon	$60,765.00	1.18%
Turchin, Steven	$52,387.00	1.02%
Kremins, Rochelle	$47,386.00	0.92%
Sands Family Partnership	$10,792.00	0.21%
	$5,146,915.00	

(Turchin 12/13/2018 Letter at 3). Turchin also identified the members who had withdrawn more than they invested and, thus, had a negative balance in their capital accounts, as follows:

Larry Warshaw	(705.00)
Monroe Warshaw	(705.00)
S&J Associates	(2,692.00)
Anna Lee Schlossberg	(2,769.00)
Glen Schlossberg	(3,224.00)
Zena Saunders Schlossberg	(3,229.00)
Tiana Schlossberg	(4,614.00)
Roth, Zach & Merideth	(7,820.00)
Goldfarb Revocable Trust	(9,608.00)
Stacy Sidak Estate	(9,654.00)
Steven Mendelow	(10,386.00)
Nancy Mendelow	(10,479.00)
MAJ Partners	(15,734.00)
C&P Purchase Money Plan	(25,125.00)
Susan Jordan	(25,310.00)
Larmen Realty	(28,172.00)

[4] For ease of analysis, the court has listed the members in order of descending percentage ownership, rather than alphabetically as they appeared in the Liquidation Plan.

C&P Defined Benefit Plan	(31,462.00)
Tele Data P/S Plan	(35,791.00)
Robert Elkins ITF J.Ranzer	(41,670.00)
Robin Silna 1997 Trust	(103,581.00)
Jeffrey Silna 1997 Trust	(131,759.00)
PO Capital LLC	(237,195.00)
Tiannalee	(452,777.00)
Dubarry 5th Ave P/S Plan	(548,472.00)
	(1,743,933.00)[5]

(*id.* at 4). In the letter, Turchin also set forth the terms of the proposed Liquidation Plan:

> FGLS will base any distributions of the monies received from [the Trustee] on the current member capital accounts calculated in the same way that [the Trustee] calculated the payment to FGLS: net deposits less net withdrawals. No credit will be given to members for the initial transfer [the Rollover Transfer] of monies from C&P Associates. The recalculated capital accounts of members are set forth in Section 3. FGLS will not commence any litigation the Mendelow Estates or their counsel. FGLS will distribute the money received from [the Trustee] to date, less expenses and a reserve of $150,000. The expenses incurred to date consist of approximately $75,000 in legal and accounting fees, and $5,000 in compensation to me calculated at a reduced hourly fee of $250 per hour.
>
> Members with positive adjusted capital accounts should expect to receive approximately 48% of the value of their account.

(*id*. at 10-11).

In explaining his decision adopt the net investment method to calculate distributions and to disallow the Rollover in such calculations, Turchin relied upon federal court precedents upholding that approach (*id.* at 5-6). Although Turchin acknowledged that there were colorable claims that could be asserted against the Mendelows and their attorneys, he noted the existence of the potential defenses of statute of limitations and lack of standing as reasons for forgoing such litigation. He also identified several other impediments to suit: the Trustee's potential right, as assignee, to lay claim to whatever funds FGLS might recover from the Mendelows; the

[5] The letter miscalculates this sum as -1,744,182.00.

possibility that FGLS might be required to advance the Mendelow Estates their attorneys' fees under the indemnification provisions of the Operating Agreement; the uncertainty regarding the sufficiency of the Mendelows' assets to satisfy any judgment obtained; and the expense and delay entailed by any litigation (*id.* at 8-10).

Turchin requested that the members respond with their approval or objections to the plan by January 15, 2019 and stated that he would seek court approval of the plan in the event of any objections (*id.* at 11). By letter dated March 28, 2019 (Dkt. 15), he advised FGLS' membership that some members had objected to his decision to disallow the Rollover transfer, and that members representing a significant portion of the company's positive capital had objected to his decision not to sue the Mendelow parties, as well as to his decision to make a distribution to the Mendelow Foundation. With respect to the proposed Mendelow litigation decision, he stated that he was considering a settlement agreement whereby the members who wished to sue on behalf of FGLS could do so upon condition that some or all of the distributions due them would be escrowed to fund the lawsuit and indemnify FGLS against any expenses. Turchin also noted that the Trustee had sent another payment of $94,150.50, bringing the total received by FGLS to $2,898,838.50.

PROCEDURAL HISTORY

The parties were unable to resolve their differences and the instant proceeding was brought by way order to show cause and Verified Petition on July 23, 2019. The Petition asserts that there exist objections to Turchin's recalculation of the capital accounts employing the net investment method without credit for fictitious profits (Pet. ¶ 19); to his disallowance of credit for the Rollover transfer (*id.* ¶ 20); and to his decision to forgo litigation against the Mendelow parties (*id.* ¶ 23). It identifies the objecting members as the Sands Family Partnership, the

Dubarry 5th Avenue Profit Sharing Plan, Tiannalee LLC, Sajust, Carol Ann, the Schupak Group Deferred Benefit Plan, Mark Weinberg, and the Schupak Group Profit Sharing Plan (*id.* ¶ 6). The Petition seeks a judicial resolution of the parties' disputes pursuant to LLC Law § 703 and a declaration pursuant to CPLR 3001 approving the Liquidation Plan (*id.* at 10 [prayer for relief]). The Petition does not mention the existence of a dispute over whether the Mendelow Foundation in entitled to participate in the distribution.

Of the eight allegedly objecting members listed in the petition, only respondents Sajust and Carol Ann (the Objectors) submitted papers to participate in this proceeding. The Objectors timely filed an answer setting forth their objections, accompanied by a counterclaim (Dkt. 44). The counterclaim references a proposed derivative action (Counterclaim ¶ 73) alleging that the Mendelow parties, with the assistance of the Rosenberg firm, secured the benefit of the Rollover for themselves to the detriments of FGLS, and also caused FGLS damages consisting of lost interest by failing to procure the payment of $2,704,688 from the Trustee when it was first made available in October 2015. Insofar as the counterclaim sought relief against the Mendelow Family Foundation (MFF), by stipulation dated October 31, 2019 (Dkt. 45), the parties amended the briefing schedule to extend Petitioner's time to respond to November 8, 2019 and to allow MFF to respond by December 6, 2019.

In its response, Petitioner sought dismissal of the counterclaim. By stipulation dated December 17, 2019 (Dkt. 64), the parties agreed that the dismissal application should be treated as a cross-motion to which the Objectors would be entitled to respond by December 20, 2019, with Petitioner entitled to a further reply by December 30, 2019. In their response, the Objectors sought additional relief, in the form of an order requiring that the decision as to whether FGLS should file a direct action against the Mendelow parties be based upon a majority vote of FGLS'

members (Respondents-Counterclaimants' Opp. Mem. at 2, 18-20). Oral argument was held on January 9, 2020. At the proceeding, counsel for the Objectors asserted that he was also representing two other members of FGLS, Mark Weinberg and the Sands Family Partnership (Sands), who opposed the Liquidation Plan (1/9/ 20 Tr. 3:19-21). He also averred that he had spoken on the phone to another member, Eilhys England, who was "outraged" and (apparently) opposing the plan (*id.* at 19:1-9).

RELATED LITIGATION

As relevant here, the Objectors previously commenced litigation in this Court in 2010 against Steven Mendelow, K&W, and Paul Konigsberg regarding their investments in FGLS (*Warshaw v Mendelow* et al, Sup Ct, NY County, Index No. 652173/2010) (the Warshaw action) (Dkt. 58). Additionally, FGLS member Mark Weinberg (Weinberg) sued those same parties in 2010 (*Weinberg v Mendelow et al*, Sup Ct, NY County, Index No. 652222/2010). Both actions were settled on confidential terms in 2014 (Tr. 54:17-19). Additionally, simultaneously with the filing of Objectors' answer and counterclaim, Sajust commenced an action against the Mendelow parties, also relating to its investment in the company (*Sajust v Mendelow et al*, Sup Ct, NY County, Index No. 655962/2019) (the Sajust Direct Action) (Dkt. 26).

DISCUSSION

The Application to Confirm the Liquidation Plan

The Court's power to grant relief in this special proceeding[6] is governed by the provisions of the LLC Law, as read together with the Operating Agreement. FGLS was dissolved as a

[6] CPLR 103[b] provides that "[a]ll civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized"; *see Application of Greene*, 88 AD2d 547, 451 ([1st Dept 1982]). Unlike the dissolution and winding up provisions of BCL § 1008(a), LLC Law § 703[a], does not specifically direct the institution of a "special proceeding." However, it does require an "application" to the court -- effectively a

matter of law by operation of LLC Law § 701 (a) (2), which provides that "[a] limited liability company is dissolved and its affairs shall be wound up upon . . . the happening of events specified in the operating agreement." As previously noted, FGLS' Operating Agreement provides that FGLS was to be dissolved once the Mendelows ceased to be managers, which happened upon the event of Nancy Mendelow's death in June 2017.

LLC Law § 703 (a) provides that in the event of a dissolution, the members of an LLC may wind up its affairs unless the operating agreement provides otherwise. Here, FGLS' Operating Agreement specifically provides that upon dissolution, its members shall elect, by majority vote, a person to serve as a liquidator, in this case Mr. Turchin. However, that section further provides that "the court may, upon application of a member, wind up the limited liability company's affairs . . . and in connection therewith may appoint a receiver or liquidating trustee." Although this court may not appoint a receiver or trustee because such an order would be inconsistent with the express terms of the Operating Agreement (*see, e.g., LNYC Loft, LLC v Hudson Opportunity Fund I, LLC*, 154 AD3d 109, 114 [1st Dept 2017] [declining to uphold the appointment of an outside special litigation committee where the operating agreement did not permit the delegation of such authority to nonmembers]), the statute leaves room for the court to supervise the winding up in other respects.

Section 703 (a) does not define the precise extent of the Court's powers, but the Court is free to "fashion remedies to speak to the omissions in the LLC statute" (*id.*; *see Tzolis v Wolff*, 10 NY3d 100 [2008]). The court may thus resort to common law and equitable remedies not

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motion. Because a special proceeding is "a hybrid between an action and a motion" *Carlos L. v Sandy C.*, 51 Misc3d 506, 507 [Fam Ct, Queens Co 2016], *quoting* 3 *Weinstein–Korn–Miller N.Y. Civ. Prac.* ¶ 401.03 at 4–8 [2nd ed. 2005]), the court concludes that the relief here was properly sought here by way of petition (*see, e.g., Naples v Olin*, 66 AD3d 1310 [3d Dept 2009] [application for winding up brought as special proceeding pursuant to LLC Law § 703{a)]).

specifically enumerated by the statutory language (*Gottlieb v. Northriver Trading Co. LLC*, 58 AD3d 550, 551 [1st Dept 2009]). It also may look to analogous sections of the Business Corporations Law (BCL) for guidance (*see Tzolis*, 10 NY3d at 108-109). In this connection, BCL § 1008 (a) is of some relevance, providing that the Court "may make all such orders as it may deem proper in all matters in connection with the dissolution or the winding up of the affairs of the corporation." Accordingly, this Court determines that it has jurisdiction to consider and resolve the issues raised by the Petition and the Objectors.

"It is settled that a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment, requiring the court to decide the matter upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" (*Matter of Karr v Black*, 55 AD3d 82, 86 [1st Dept 2008] [quotation marks omitted], *lv denied* 11 NY3d 712 [2008], quoting CPLR 409 [b]); *see also Gonzalez v City of New York*, 127 A.D.3d 632, 633 [1st Dept 2015]).

Discovery is curtailed by CPLR 408, which requires leave of court for all demands other than a notice to admit. The Court has "broad discretion in granting or denying disclosure" and "must balance the needs of the party seeking discovery against such opposing interests as expediency and confidentiality" (*Bramble v New York City Dep't of Educ.*, 125 AD3d 856, 857 [2d Dept 2015]). The party seeking discovery bears the burden of "showing that the discovery sought was likely to be material and necessary to the prosecution or defense of [the] proceeding" (*Stapleton Studios, LLC v City of New York*, 7 A.D.3d 273, 275 [1st Dept 2004]) and that it would not "unduly delay" resolution of the matter (*Bramble*, 125 AD3d at 857).

The first two issues raised by the Petition – the recalculation of the members' capital accounts to exclude fictitious profits and the disallowance of the Rollover in that calculation –

are no longer the subject of objections (*see* Answer ¶¶ 19-20, 22). What remains is a challenge to Turchin's entitlement to the protection of the business judgment rule with regard to his decisions to refrain from suing the Mendelow parties, and to permit the Mendelow Family Foundation to participate in distributions from FGLS. The Objectors charge that Turchin lacks impartiality due to conflicts of interests arising from his association with Steven Mendelow and the K&W accounting firm. They also allege conflicts arising from his later work at Citrin Cooperman, LLP, a successor to K&W, and assert that his conduct as liquidator demonstrates bad faith and a breach of the duty of care.

As a threshold matter, the Objectors contend that petitioner has failed to make a prima facie case by not submitting competent evidence and characterize petitioner's supporting affirmation of counsel and its legal conclusions as inadmissible hearsay. Insofar as the Petition was merely seeking approval of the Liquidation Plan, however, the accompanying exhibits were sufficient to establish the right to the limited relief sought. Petitioner has submitted the Operating Agreement, the Liquidation Plan, a list of the members' capital accounts, proof of Turchin's election as managing member, and his reasons for adopting the plan. A factual dispute might have arisen had the Objectors challenged the accuracy of Turchin's calculation of the capital accounts (*see e.g. Trustco Bank, Nat. Assn. v Strong*, 261 AD2d 25, 27 [3d Dept 1999] [petition dismissed where federal partnership tax return contradicted claim that limited partners owed a debt to the partnership]), but that is not the case here.

Instead, as noted, Objectors take issue with Turchin's decision to forgo litigation against the Mendelow parties and his decision to include the Mendelow Foundation in the distribution of FGLS' assets. In this regard, Objectors erroneously suggest that petitioner bears the burden of proffering evidence that the business judgment rule is applicable. To the contrary, under the

business judgment rule, corporate board members and officers are "presumed to be acting 'in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes' " (*Jones v Surrey Co-op. Apts., Inc.*, 263 AD2d 33, 36 [1st Dept 1999], *quoting Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). Accordingly, the party challenging the company's decision must make an affirmative showing of bad faith, self-dealing, discrimination, breach of fiduciary duty, or other misconduct (*id.; see Gonzalez v. Been*, 145 AD3d 434, 435 [1st Dept 2016]; *Pokoik v Pokoik*, 115 AD3d 428, 432 [1st Dept 2014]).

The Objectors' reliance on *Cohen v Seward Park Hous. Corp.* (801 NYS2d 231 [Sup Ct, NY County 2005]) is misplaced, as the only issue there was whether the applicability of the business judgment rule could be resolved at the pleading stage. Notably, the trial court specifically distinguished the procedural posture of the action before it from those special proceedings, such as this one, which are decided under the summary judgment standard pursuant to CPLR 409 (b). Thus, the Objectors misstate the law in asserting that they may rest on the allegations of their counterclaim and need only plead facts sufficient to raise a reasonable doubt as to whether Turchin has acted impartially.

Instead, what the Court must determine is whether Objectors have met their evidentiary burden to defeat Turchin's reliance on the business judgment rule. As relevant to that issue, the Objectors have submitted excerpts of deposition testimony taken in the Warshaw action from three accountants employed by the Konigsberg firm during Turchin's tenure there (Alfred M. Pruskowski, Gregory Scheetz, and Marshall Zieses); documents relating to the indictment and guilty plea of Paul Konigsberg; a list of K&W clients with investments with Madoff for whom the firm prepared tax returns, including returns prepared by Turchin; and an affidavit submitted in the Warshaw action from an accountant, Stuart Rosen, concerning his negotiations with Steven

Mendelow, the Konigsbergs and Steven Merdinger (Merdinger) to form a successor firm to K&W. The evidence in the record regarding the relationship of Steven Mendelow and K&W with Madoff, and Turchin's relationship to Mendelow and K&W, is as follows:

Alfred. M. Pruskowski's Deposition Testimony (Dkt. 36)

Pruskowski, K&W's human resource director and ethics consultant (Pruskowski Dep. at 21:12-24, 16:21-22) testified that he understood that K&W had about 75 employees (*id.* at 16:23-17:2) and was managed by Paul Konigsberg, his brother Robert Konigsberg, and Steven Mendelow. Paul Konigsberg was the sole shareholder and senior tax partner, and Robert Konigsberg was the managing partner (*id.* at 45:4-16). Mendelow held himself out as a partner, although he was not legally entitled to be a partner because he was not a CPA (*id.* at 38:25-39:10). Pruskowski thought Mendelow was allowed to participate in management because he had a large book of clients, was able to attract new clients, and generated income through commissions, contingent fees and kickbacks from insurance brokers, pension planners and tax shelters (*id.* at 45:21-46:22).

Based on his discussions with other K&W partners, Pruskowski did not know of anyone in the firm who received profit distributions other than the Konigsberg brothers and Mendelow. The rest of the partners received only salaries (*id.* at 55:5-12). He understood that there was an unwritten agreement between them that Mendelow would receive 50% of fees for business he procured and the Konigsbergs would receive 25% apiece, with the three each receiving third of the fees generated by the Konigsberg clients (*id.*, 55:16-56:10).

Paul Konigsberg saw Madoff in his office, and received gifts from Madoff, including a watch and a trip to Switzerland (*id.* 56:20-58:13; 116:14:20). To the best of Pruskowski's knowledge, Mendelow also had a direct relationship with Madoff (*id.* at 47:6-8) and he thought

that both Konigsberg and Mendelow were closer to Madoff than anyone suspected (*id.* at 117:5-7). He believed that Madoff was very secretive, and that no one had access to him except a select circle which included Konigsberg (*id.* at 121:2-11). Both Mendelow and Paul Konigsberg recommended that clients invest with Madoff (*id.* at 165:15-22; 169:5-19; 202:2-203:14) and Madoff insisted that investors who came to him through other channels retain K&W as their accountants (*id.* at 170:5-75). One large account that Madoff referred to K&W was that of Norman Levy and his organization, which generated around $1 million in annual fees for the firm (*id.* at 171:3-173:3).

Pruskowski understood that K&W had an arrangement to receive $35,000 a month from Madoff's company, but K&W's billing records indicated that the firm never actually devoted any time to earn that payment (*id.* at 47:11-21; 53:19-54:10). He did not know of anyone at the firm who discussed that monthly billing with Mendelow or the Konigsbergs (*id.* at 54:11-14). He indicated that Ira Weinberg, who prepared Mendelow's tax returns, might know whether Mendelow was receiving payments for recommending investors to Madoff (*id.* at 206:23-207:7).

When discussing Madoff's extraordinary investment performance, some of the partners of K&W ascribed it to his genius (*id.* at 139:15-142:3). Pruskowski personally opted out investing with Madoff because he thought the returns were too good to be true and because he did not trust Mendelow or anyone associated with him (*id.* at 155:23-156:24). Pruskowski shared his skepticism with other members of K&W, including possibly Mendelow and Robert Konigsberg (*id.* at 158:20-159:3). Other partners were also puzzled about how Madoff made his money (*id.* at 161:15-23).

Pruskowski received complaints that Mendelow would pressure K&W employees to take positions on financial statements or tax returns that they knew were improper, fraudulent, or felt

uncomfortable with (*id.* at 80:11-1:24). He testified that Mendelow coerced them to do so through a highly abusive management style intended to strip them of their self-respect, screaming and ranting on a daily basis, throwing things, and having seemingly psychotic moments (*id.* at 76:14-77:83:7-84:8; 87:18-88:2). When Pruskowski received complaints about such conduct, he told the employees that Mendelow was the engagement partner and they would need to listen to him rather than Pruskowski (*id.* at 81:25-82:12). If they then appealed to Robert Konigsberg or the quality review partner, Howard Koenig, Mendelow would exert his influence over them and nine out of ten times the position would be resolved in the manner Mendelow wanted (*id.* at 82:14-23; 86:4-18, 89:25-90:20). Pruskowski believed that the employees reported these problems to him to place their objections on the record and avoid being blamed later (*id.* at 89:7-19), as they knew that they would ultimately be overruled by Mendelow or one of the Konigsbergs (*id.* at 92:6-93:10).

Pruskowski named eleven employees who came to him with complaints about Mendelow's demands: Turchin, Dennis Bond, Mark Geringer, Steven Haggler, Gregory Scheetz, Rubin Sherman, Gregory Scheetz, Peter Wagner, Ira Weinberg, Steve Weingrow, Gregory Scheetz, and Rubin Sherman (*id.* at 83:110-84:8). He described Turchin as one of the "accounting staff people" who came to K&W from one of the firm's apparel industry clients. He asserted that Turchin often "shook his head" at some of the things Mendelow asked him to do with respect to financial statements and tax returns (*id.* at 94:14-16; 96:18-24).

Gregory Scheetz's Deposition Testimony (Dkt. 37)

Scheetz, a tax manager at K&W (Scheetz Dep. at 15:21-25), substantially confirmed Pruskowski's testimony regarding how the Konigsbergs and Steven Mendelow were solely responsible for the management of K&W (*id.* at 16:14-19). He also confirmed that Mendelow

bullied its accountants into making fraudulent entries in financial statements and tax returns (*id.* at 20:17-21:11) but said his conclusions were based upon "indirect knowledge" imparted to him by his colleagues (*id.* at 21:8-19). He understood that the Konigsbergs and Mendelow received undisclosed kickbacks or fees from oil and gas companies for placing K&W clients in certain tax shelters (*id.* at 29:1-15). He also testified that K&W prepared fraudulent tax returns for one of Madoff's wealthiest investors, Norman Levy (*id.* at 71:15-72:4), and that he had shared his view with members of the tax department that Madoff's use of paper, rather than electronic, records for his trading activity was unusual (*id.* at 179:9-23). However, he never had discussions with anyone at K&W about whether Mendelow recommended that its clients invest with Madoff (*id.* at 91:5-15) or required Madoff investors to retain K&W for accounting services (*id.* at 92:3-10).

Marshall Zieses's Deposition Testimony (Dkt. 38)

Marshall Zieses also confirmed the management structure of K&W (Zieses Dep. 27:3-28:4) but was not privy to the compensation arrangements between the Konigsbergs and Mendelow (*id*. at 28:7-17). He handled approximately 100 Madoff-related accounts at K&W (*id.* at 136:23-137:2) and sent some of the statements to Turchin (*id.* at 159:23-25). He recalled reading a Barron's magazine article about Madoff, titled "Don't Ask, Don't Tell," but did not remember it being passed around K&W (*id.* at 221:9-23).

Zieses asserted that when K&W was reorganized into KMR, he was not informed as to what percentage of the profits Steven Mendelow was to receive from it (*id.* at 57:18-23). When KMR was succeeded by Citrin in 2011, most of its staff joined the new firm (*id.* at 63:25-64:12). He understood that the Konigsbergs and Mendelow became consultants there but did not know of their financial arrangements (*id.* at 63:12-24).

Paul Konigsberg's Guilty Plea

In June 2014, Paul Konigsberg pled guilty to federal securities violations of falsifying the records of a broker-dealer and investment advisor (Dkt. 30). The indictment to which he pled (Dkt. 29) charged, *inter alia*, that he caused Madoff Securities to fail to keep proper records as required by the SEC and filed fraudulent tax returns based on securities transactions that appeared in client accounts statements but were not reflected in Madoff's books and records.

The Rosen Affidavit (Dkt. 39)

Rosen asserts that Mendelow and the Konigsbergs told him that they were equal economic partners at K&W (Rosen Aff. ¶ 4). In late 2010 he agreed to form the KMR accounting firm with them, with Mendelow and the Konigsbergs acting as consultants and each receiving $500,000 in exchange for transitioning their clients from K&W to KMR (*id.* ¶¶ 2, 7). However, Rosen backed out of the deal when he learned of the Trustee's allegations in the Mendelow action (*id.* ¶ 6).

The K&W Client List (Dkt. 35)

This list contains approximately 300 entries relating to K&W clients. Pruskowski testified that he believed it was prepared by Marshall Zieses to identify those clients who had accounts with BLMIS (Pruskowski Dep. at 182:18-25). The list identifies, by initial, the K&W employee responsible for completing the client's tax return and the partner who oversaw the account (*id.* at 182:25-:183:21). Turchin's initials appear next to fifteen of the entries.

The Turchin Reply Affidavit (Dkt. 50)

In response, Turchin has submitted an affidavit detailing his work with K&W and its successors. He avers that he is a CPA who spent most of his career in the apparel industry, coming to K&W in 2000 after his employer, a K&W client, went out of business (Turchin Reply Aff. ¶¶ 2-3). He joined the firm as a staff accountant in the accounting and audit department (*id.*

¶ 3). His position as one of about 15 such accountants was at the lowest professional rung at K&W, there being about ten non-income partners above him and, above them, the income partners (the Konigsbergs and Mendelow) (*id.* ¶ 11).

Turchin denies that he had a deep or long-term professional relationship with Steven Mendelow (*id.* ¶ 13). He considered Mendelow to be a bully and disliked him (*id.* ¶¶ 10, 13). He did not consider Mendelow his mentor and did not socialize with him (*id.*). He never worked on or saw Mendelow's personal tax returns or trading statements and did not know that he was receiving extra profits in his BLMIS accounts (*id.* ¶ 14). However, he knew that Mendelow permitted some small clients of his to invest in BLMIS and asked to invest $50,000 after he received a modest inheritance from his mother (*id.* ¶ 21). Mendelow had never discussed the possibility of Turchin investing in BLMIS before that request and did not ask for anything in return from Turchin (*id.*).

Turchin states that not all of the taxpayers on the K&W client list had BLMIS accounts, and only seven of the ones whose returns he worked on did. All of them had only indirect investments in BLMIS rather than their own BLMIS accounts, and he relied on the 1099s issued by the direct account holder. Most of his work at K&W did not involve BLMIS accounts but, instead, involved audits and accounting matters for apparel industry firms (*id.* ¶¶ 7-8).

Turchin states that he was not aware of any improper relationship between K&W and BLMIS and did not know that BLMIS was a Ponzi scheme. He thought BLMIS was a good investment and that the firm was fortunate to refer clients to it. He did not work on the FGLS or C&P accounts and had very little occasion to discuss either of them with Paul Konigsberg or Mendelow (*id.* ¶ 15). He did not participate in any of the discussions at K&W where employees questioned or joked about the warning signs of fraud at BLMIS and would not have invested in it

if he knew there was a problem. He never saw any news articles questioning Madoff's success, including the Barron's article, and recalls that all K&W employees were shocked when Paul Konigsberg held a firm-wide meeting to announce that BLMIS had collapsed (*id.* ¶¶ 18-19).

Turchin left K&W to work at Citrin in 2011 after the publicity surrounding Paul Konigsberg's relationship with Madoff led to a downturn in K&W's business. K&W's accounting practice was transferred to Citrin, a large firm with approximately 400 employees, and Turchin was one of many K&W employees who went there. The Konigsbergs were involved with Citrin for only a short time and Mendelow served as a consultant there until his death. Turchin did not work on the FGLS account while at Citrin, which was handled by Marshall Zieses (*id.* ¶ 22).

Turchin stopped working full time at Citrin upon his retirement in 2013 but did special projects for it on a per diem basis from then until 2019 (*id.* ¶ 23). He was asked to manage and liquidate FLGS at the request of Zieses and several FGLS members who had become clients of Citrin after Zieses himself declined due to the fact that he was not a member (*id.* ¶ 24). His election was organized by Abraham Goldner, whose wife and son were FGLS investors, and who solicited the proxies, including those of the Objectors (*id.* ¶ 25).

Based on a review of the entire record, the court concludes that the Objectors have failed to meet their burden to rebut the presumption in favor of the business judgment rule. Their own evidence confirms that Madoff's Ponzi scheme was a closely-guarded secret within the firm known only by the Konigsbergs and Mendelow, and at best was only the subject of suspicion to other employees at K&W. There is no support in the record for their implication that Turchin was aware of the misconduct, much less that he actively participated in it. Rather, the evidence supports Turchin's account that he was merely one of many low-level staff accountants with an

adversarial relationship with Mendelow and limited involvement servicing K&W's BLMIS accounts. The Objectors' reliance on cases in which the protection of the business judgment rule was denied in view of conflicts arising from close business and personal ties between corporate officers and directors is, thus, misplaced (*see e.g. Bansbach v Zinn*, 1 NY3d 1 [2003]; *Marchand v Barnhill*, 212 A3d 805 [Del 2019]; *In re Oracle Corp. Deriv. Litig.*, 824 A2d 917 [Del Ch 2003]). The Objectors' assertion that Turchin had a deep personal relationship with Mendelow is pure speculation, which is insufficient to support a claim for breach of fiduciary duty (*Matter of Kenneth Cole Prods., Inc.*, 27 NY3d 268, 278 [2016]; *Kassover v Prism Venture Partners, LLC*, 53 AD3d 444, 450 [1st Dept 2008]). The Objectors' insistence that Turchin lacks impartiality because he ignored a "blizzard of red flags" at K&W is also not supported by the record.

The Objectors' remaining contentions amount to mere disagreements over the legal merits of the proposed claims against the Mendelow parties, and the feasibility of pursuing them. As relevant here, LLC Law § 409 (b) provides:

> In performing his or her duties, a manager shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:
>
> . . . .
>
> (2) counsel, public accountants or other persons as to matters that the manager believes to be within such person's professional or expert competence.

As a non-lawyer, Turchin was entitled to rely on the Yeskoo firm's advice (*see e.g. Wall v Dhanya, LLC*, 2009 WL 10715194, *4 [Sup Ct, NY County 2009] [LLC's operating manager who lacked the expertise of a CPA entitled to rely on statements and reports of retained business management firm under section 409 (b)]; *Allen v Murray House Owners Corp*., 174 AD2d 400, 404–405 [1st Dept 1991] [condominium board refuted allegation of bad faith by demonstrating

reliance on counsel]). The fact that advice of counsel may be mistaken does not, by itself, establish bad faith or breach of fiduciary duty (*see Buffalo Forge Co. v Ogden Corp.,* 555 F Supp 892, 904 [WDNY 1983], *affd* 717 F2d 757 [2d Cir 1983]; *Gordon v Nationwide Mut. Ins. Co.,* 30 NY2d 427, 433 [1972]).

For these reasons, it is unnecessary to review at length or resolve the parties' numerous arguments regarding the possible legal merits of any claims against the Mendelow parties or the defenses thereto, including the dispute over whether to pursue claims against the Mendelow Foundation or withhold a distribution to it. It suffices to say that arguments made by both sides regarding the statute of limitations, standing, the Trustee's rights as assignee, and the Mendelows' right to contractual indemnification, are at a minimum colorable. The proposed actions are not as simple as enforcement of an absolute and unconditional promissory note or entry of a confession of judgment. In particular, Objectors' core case against the Mendelows to recoup the allege benefit they received from deposits in C&P pre-dating the Rollover transfer is handicapped by the absence of C&P's records and the uncertainty over whether the benefit factored in to the negotiated settlement with the Trustee.

In any addition, the record supports that there is a reasonable basis for petitioner to conclude, in the exercise of business judgment, that any litigation could delay a distribution to the members for years, and that the attendant attorneys' fees could completely deplete the funds available.[7] Furthermore, the record is devoid of information regarding the assets of the Mendelow parties, or whether any potential judgment against them would be collectible.

[7] Objectors also argue that Turchin's proposal that a portion of their distribution be escrowed to fund their proposed litigation and indemnify FGLS further demonstrate his bad faith and conflict of interest. The Objectors did not accept this offer, and their allegation of bad faith is again based upon speculation that Turchin was merely doing the bidding of the Mendelow parties. Likewise, their contention that Turchin's refusal to appoint a special litigation committee due to

The Court, in its discretion, declines to grant discovery under CPLR 408. First, the Court notes that the Objectors, along with Mr. Weinstein, have already engaged in years of litigation against Steven Mendelow, Paul Konigsberg, and K&W without uncovering anything to implicate Turchin in their misconduct or suggest that he is beholden to them. Nor has it been suggested that the Trustee has done so in over a decade of pursuit of claims arising out of Madoff's scheme. Second, it is of some significance that the Objectors voted to elect Turchin in 2017 despite their acquisition, through their prior litigation, of the information they now claim disqualifies him. They do not claim that their proxies were procured by fraud or that Turchin's history with K&W and Citrin was concealed from them. Accordingly, their objections appear to be based more in their dissatisfaction with his business judgment than concerns over his impartiality.

The Motion to Dismiss the Counterclaim

Because the counterclaim seeks declarations that Turchin's decision to forgo litigation is not protected by the business judgment rule, and that the Mendelow Foundation is not entitled to a distribution, it is dismissed for the reasons discussed above. The Court declines to address the Objectors' additional arguments regarding the statute of limitations as untimely raised and notes that, in any event, they would not alter the Court's determination regarding petitioner's exercise of business judgment. Likewise, the Objectors' new argument that Turchin's election was tainted by the involvement of Zieses is untimely and without evidentiary support in the record. Their contention that Sajust and Sands were singled out for harmful treatment by the decision to reduce their capital accounts reduced based on the Rollover transfer, also untimely, is without merit

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his independence being called into question assumes the truth of the accusation that he is controlled by the Mendelows.

because Turchin merely followed the methodology approved by the federal courts for the treatment of inter-account transfers.

The Application to Refer the Decision to Pursue Litigation to FGLS's Members

In connection with their opposition to dismissal of the counterclaim, the Objectors ask that the Court refer the decision to pursue litigation against the Mendelow parties to a vote of FGLS' members. They assert that a majority of FGLS' voting interests now supports the litigation. They arrive at that conclusion by noting that the Objectors together with Weinberg hold a 38% interest, and that Sands' has submitted an affidavit endorsing their position. Although Sands' positive capital represents less than a 1% interest, the Objectors urge that for voting purposes it should be calculated without the reduction based on the treatment of the Rollover transfer. They likewise argue that if Objector Sajust's approximately 2% interest was calculated without reduction for the Rollover transfer, the combined interests favoring the litigation would exceed 50%. At oral argument, Objector's counsel further contended that England had also expressed interest in the lawsuit and asserted that including her interest together with the Schupac Groups (which were originally listed as objectors in the Petition) would bring the total in favor to approximately 77%.

This application must be denied for several reasons. First, it is premised entirely upon the Objector's argument, rejected above, that Turchin's decision must be nullified because he acted in bad faith by providing the members with legally erroneous information regarding the timeliness and merits of FGLS claims. Second, the purported objections of other members have not been formally presented to the Court. Third, no member timely objected to the treatment of the Rollover transfer, and to disregard it for voting purposes would permit members without positive capital to vote in violation of § 4.5 of the Operating Agreement. Finally, such a vote

would also contravene § 5.4 (C) of the Operating Agreement, which vests the power to commence litigation in the managing member.

Petitioner's Application to Increase the Reserve

In view of the commencement of the Sajust Direct Action, petitioner has requested that the Liquidation Plan be amended to provide that FGLS be authorized to establish a reserve higher than $150,000 to cover any additional indemnity claims or extra expenses associated with that litigation (Petitioner's Opp. Mem. at 27-28). The Court declines this application, without prejudice. Petitioner has not proposed an upward cap on the reserve, and it would be imprudent to authorize unlimited litigation expenses that could significantly reduce or delay the distributions.

Accordingly, it is hereby

ORDERED and **DECLARED** that the relief sought by Verified Petition is **granted**; it is further

ORDERED that the counterclaim is **dismissed**; and it is further

ORDERED that FGLS may proceed with the following plan of liquidation:

(a) FGLS will base any distributions of the monies received from the Trustee pro rata on the member capital accounts calculated in the same way that the Trustee calculated the payment to FGLS*, i.e*, net deposits less net withdrawals;

(b) No credit will be given to members for the initial transfer of monies from C&P Associates;

(c) The members' capital accounts are as reflected on Exhibit 6 to the Petition;

(d) The members are barred from bringing any claims against FGLS, its managing member, members and agents except for the amounts owed to them for their distributions, with the exception of the already commenced action entitled *Sajust v Mendelow et al*, NY Co Index No. 655962/2019, which FGLS reserves the right to challenge;

(e) FGLS will not commence any litigation against the Mendelow Parties, their counsel, or any other persons, and will not seek to recover negative capital accounts from its members;

(f) FGLS will distribute the money received from the Trustee to date, less expenses and a reserve of $150,000; and

(g) Future payments received from the Trustee and the reserve, less expenses, will be distributed in the same manner at a time reasonably chosen by the managing member.

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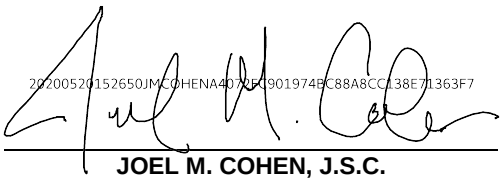

5/20/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
		GRANTED		**DENIED**	X	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**