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

BERNICE L. HARRIS and ALLISON HARRIS SCHIFINI, individually and derivatively on behalf of TJ MONTANA ENTERPRISES, LLC,

Plaintiffs,

-against-

BETSY HARRIS a/k/a BETSY SAVAGE, TAMARA HARRIS, individually and as Preliminary Executor of the Estate of Steven Harris, Deceased, ANDREW LICHTENSTEIN, and TJ MONTANA ENTERPRISES, LLC,

Defendants.

Index No. 656962/2017

Assigned Justice:
Hon. Nancy M. Bannon

Motion Sequence No. 1

MEMORANDUM OF LAW OF DEFENDANT BETSY HARRIS (i) IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND (ii) IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT, DISMISSAL, AND SANCTIONS

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Table of Contents

Page

Table of Authorities

Cases **Page(s)**

Statutes

Civil Practice Law and Rules

New York Codes Rules and Regulations

Other Authorities

Defendant Betsy Harris respectfully submits this memorandum of law: (i) in opposition to Plaintiffs'[1] pre-discovery motion for partial summary judgment; and (ii) in support of her cross-motion for (a) partial summary judgment on Defendants' first counterclaim, (b) dismissal of Plaintiffs' complaint, and (c) sanctions against Plaintiffs' counsel, Jules A. Epstein, Esq.

Preliminary Statement

Plaintiffs' motion is best summed-up as follows: a *pre-discovery* summary judgment motion by *plaintiffs*, on a claim not even pleaded in their complaint, predicated upon a highly-suspicious document comprised of countless confounding terms, which is thoroughly illegible, unauthenticated, does not even provide what Plaintiffs seek in the first place, and which has been revoked and superseded by two recent, clear, and unambiguous controlling documents. Plaintiffs' motion is frivolous to its core.

Unable to lay any substantive claim to summary judgment—and incapable even of moving for such extraordinary relief in a procedurally proper manner—Plaintiffs revert to their modus operandi of ad hominem attacks and name-calling. So Steven's valid and binding Assignment and Will become a "Suspect Assignment" and a "Suspect Will," and his loving partner of over 45 years (who he chose *over* the (ex-)wife, Bernice) becomes the "Mistress" (Pl. Memo. at 8). Such sewer tactics are unbecoming of Plaintiffs and their attorney, Jules A. Epstein, Esq., and they speak volumes about the substantive (in)adequacy of their motion.

Plaintiffs' counsel also purports to invent an entirely new set of facts in his memorandum. Plaintiffs' counsel fabricates his own allegations concerning Steven's intentions, Steven's conversations with Tamara, and Steven's relationship with Betsy—***none*** of which is within Plaintiffs' counsel's personal knowledge yet ***all*** of which he submits to the Court as

[1] Unless otherwise defined herein, capitalized terms have the meaning ascribed to them in the accompanying Affidavit of Betsy Harris, sworn to August 24, 2018.

"undisputed" (Pl. Memo. at 4). ***Plaintiffs' counsel, Jules A. Epstein, Esq., even goes so far as to actually rewrite the Suspect Agreement and then pass off his alterations to the Court as a direct quote***. That's not just chutzpah; that's sanction-worthy.

But the Court need not pay heed to Plaintiffs' personal attacks or delve into the phony "facts" fabricated by their counsel. It is enough to deny Plaintiffs' motion because it is procedurally defective and substantively meritless.

Plaintiffs' motion is procedurally (and hopelessly) defective. Not only is Plaintiffs' motion grossly premature (pre-discovery summary judgment), it fails even to authenticate the Suspect Agreement it purports to rely on, precluding summary judgment as a matter of law. Worse yet, the Suspect Agreement upon which Plaintiffs' motion hinges is utterly confounding, substantially illegible, of dubious authorship, and of highly questionable authenticity. Plaintiffs *themselves* cannot even manage to agree on which is the operative version of the Suspect Agreement (incredibly, they submit *multiple* versions). Without even reaching the merits (or lack thereof), Plaintiffs' motion fails.

Plaintiffs' motion is substantively (and hopelessly) meritless. Nowhere does the Suspect Agreement provide clearly and unambiguously for any membership transfer to Bernice, which disembowels even a prima facie showing on this motion. On the contrary, time and again, the Suspect Agreement actually contemplates the very assignment carried out by Steven, who validly and effectively revoked the Suspect Agreement by way of his Will and an Assignment that he himself drafted. Incredibly, Plaintiffs' grossly pre-mature motion even seeks summary judgment concerning Steven's valid and binding Assignment—an issue that is addressed nowhere in Plaintiffs' skeletal Complaint.

In fact, nearly all of Plaintiffs' Complaint must be dismissed. Plaintiffs' first cause of action seeks a declaration that Bernice owns Steven's membership interest in the Company, which means only Bernice (not Allison) has standing to seek a declaration to that effect; inasmuch as Allison purports to assert this claim, it must be dismissed. Plaintiffs' remaining claims—consisting of fanciful (and fictitious) garden-variety claims of financial malfeasance (mostly against Steven, Plaintiffs' "husband" and "father")—impermissibly commingle direct and derivative claims, which, under controlling law, mandates dismissal.

Plaintiffs are not entitled to summary judgment—not now (on this grossly-premature, pre-discovery motion) and not ever. On the contrary, should the Court assign *any* probative value to the unauthenticated documents and facts submitted by Plaintiffs, it is ***Defendants*** who must be granted summary judgment in ***their*** favor. There can be no question that Steven unequivocally and unambiguously bequeathed and assigned (in his own handwriting) his membership interests in the Company to Defendants—which is precisely what the Suspect Agreement empowered him to do ("Steven Harris may also freely assign an interest in his share of the partnership to family members…"). That is what Steven wanted. That is what Steven intended. That is what Steven did. And that, respectfully, is what the Court must enforce.

Facts

Unlike the sham "facts" alleged by Plaintiffs' *counsel*, Jules A. Epstein, Esq. (in an unsworn memorandum), the true facts relevant to this motion are set forth in the accompanying Affidavit of Betsy Harris, sworn to August 24, 2018 ("Betsy Aff."), to which the Court respectfully is referred. Because Plaintiffs have offered no facts of probative or evidentiary value, it is the facts sworn to by Defendants that are conclusive for purposes of this motion.

Argument

Point I

PLAINTIFFS ADDUCE ABSOLUTELY NO ADMISSIBLE EVIDENCE IN SUPPORT THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Because "it serves to deprive a party of his day in court," "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue…or where the issue is even arguable" (*Henderson v City of New York*, 178 AD2d 129 [1st Dept 1991]). On such a motion, the court is bound to draw all reasonable inferences in favor of the non-moving party (*S.J. Capelin Associates, Inc. v Glove Mfg. Corp.*, 34 NY2d 338 [1974]); *Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). And, especially relevant for this motion, the movant's already heavy burden becomes nearly impossible to carry "[o]n a pre-discovery summary judgment motion, where there is less immediacy and insufficient knowledge of the facts, [and so] patience is all the more warranted" (*QBE Ams., Inc. v ACE Am. Ins. Co.*, 2014 NY Slip Op 51330(U) [Sup Ct, NY Co 2014]). Plaintiffs fail these standards miserably.

In fact, if ever there was a pre-discovery summary judgment motion to be granted, it would never be Plaintiffs' motion here, which is comprised of no affidavit from anyone with personal knowledge of the relevant facts (contrary to the plain language of CPLR 3212), nor even authentication of the hopelessly confounding and suspicious documents it purports to rely upon. Without even addressing its substantive (in)adequacy, there can be no question that Plaintiffs' motion must be denied as procedurally defective.

A. The Fictitious Allegations Of Plaintiffs' Attorney—Made Without Any Personal Knowledge—Have Absolutely No Evidentiary Value

Even as they move for *pre-discovery* summary judgment, remarkably, Plaintiffs fail to submit an affidavit from themselves or from anyone else with personal knowledge of the facts. Instead, they rely on the supposition of their attorney, Jules A. Epstein, Esq., who has absolutely no personal knowledge of the parties' history or dispute, but nevertheless weaves his own speculative, self-serving version of the "facts" in an unsworn memorandum. That is grossly inadequate on a summary judgment motion (CPLR 3212).

Nor can Plaintiffs rely upon the so-called "Verified Complaint," which is verified only by Allison—not by Bernice. Bernice's refusal or inability to submit ***any*** sworn testimony about the "facts" is a telling (and crippling) deficiency in Plaintiffs' motion.

Allison's "verified" allegations do nothing to cure this flaw. Allison has no legally cognizable declaratory judgment claim here (*see* Point IV below), and her assertions, consisting primarily of conclusions of law or allegations made "upon information and belief," omit many of the unfounded and spurious allegations in Mr. Epstein's memorandum. Without limitation:

- Without personal knowledge—and without supporting testimony from Plaintiffs—Mr. Epstein himself alleges that "Steven and Bernice were married in 1961 and lived together *continuously* for 56 years…" (Pl. Memo. at 4 [emphasis added]). Unless Mr. Epstein was living with Steven and Bernice during that period, Mr. Epstein's allegation is quite the leap, especially since, unlike Mr. Epstein or his clients, Betsy swore and swears that she "met Steven in 1973 and [that *she*] lived with him until 1979" (Epstein Aff., Exhibit J, ¶ 3; Betsy Aff. ¶ 11). But Mr. Epstein simply knows better.

- Mr. Epstein's theory of this case turns on his outrageous accusation—again, without any personal knowledge—that Steven's valid Assignment and Will were part of a "money grab" by Betsy and Tamara (Pl. Memo. 2). Incredibly, the same dubious "money grab" accusations in the Complaint are made solely "***upon information and belief***" (Epstein Aff., Exhibit E, ¶¶ 24, 30, 34, 35, 37, 47, 55, and 56 [emphasis added]), and then passed off as unequivocal fact in Mr. Epstein's memorandum. Of course, summary judgment cannot be granted

upon a client's "information and belief" or her attorney's rank speculation and fabrication. But Mr. Epstein simply knows better.

- Mr. Epstein purports to relate the substance of a private conversation between Steven and Tamara (Pl. Memo. at 2), which is pure hearsay and unsupported by any admissible, sworn testimony. But Mr. Epstein simply knows better.

- Mr. Epstein alleges that "Steven *intentionally* excluded [Betsy] and Tamara from the Suspect Agreement" (Pl. Memo. at 8 [emphasis added]), but, unless Steven told this to Mr. Epstein (rendering it hearsay), Mr. Epstein has absolutely no way of knowing. But Mr. Epstein simply knows better.

And the list could go on and on. But, in sum, while purporting to set forth "facts," Mr. Epstein has absolutely no personal knowledge of any relevant facts. His own self-serving conjecture is so worthless that his ***own clients*** refuse to vouch for his claims and even ***he*** is unwilling to swear to his allegations (*Dempsey v Intercontinental Hotel Corp.*, 126 AD2d 477, 479 [1st Dept 1987] [on summary judgment, "[a]n affirmation by an attorney who does not claim to have any personal knowledge of the facts has *no probative value*"]; *Iacone v Passanisi*, 89 AD3d 991 [2d Dept 2011] [on summary judgment, "the affirmation of a party's attorney has *no probative weight*"] [emphasis added]). There are simply no facts that could possibly form the basis for summary judgment in Plaintiffs' favor.

B. Even Plaintiffs Submit *Several* Versions Of The Suspect Agreement, None Of Which Is Authenticated Properly

Plaintiffs' (and Mr. Epstein's) need to mislabel Steven's Will and Assignment as "suspect" is nothing if not ironic, since it is *Plaintiffs* who rely on a highly suspect (and confounding) document.

Plaintiffs submit at least two different versions of the Suspect Agreement on this motion: one version, "Exhibit 1" to the Lichtenstein Affidavit (Epstein Aff., Exhibit D), contains the initials "AH" in the bottom righthand corner of the first two pages, and handwritten, circled comments at the top of the first page, apparently referring to the Suspect Agreement as "Exhibit

A to TJ LLC operating agt"; another, different version, "Exhibit A" to the Epstein Affirmation, contains ***none of those markings or references***, bears a ***different*** facsimile transmission header, and ***reorders the sequence of the last three pages***.[2]

These "irregularities" (or worse) raise obvious questions. Which, if either, of these versions of the Suspect Agreement is binding? Is there, as it would seem, *still another* version of the Suspect Agreement not submitted by Plaintiffs? After all, in the submitted versions, both of which are riddled with illegible handwritten modifications and marginalia,[3] handwritten text on page 15 states that "[t]his agreement shall be *retyped and redrawn* and prepared in a *proper and final fashion* containing the text and substance of this agreement which shall be incorporated into the *formal agreement*" (Epstein Aff., Exhibit A, p.15 [emphasis added]; Epstein Aff., Exhibit D-1, p.15 [emphasis added]). So where is the "final" and "formal" version of the Suspect Agreement? Why was the "final" and "formal" document not submitted? How does the "final" and "formal" document deviate from the two versions procured by Mr. Epstein for use in this motion? And where is the elusive "TJ LLC operating agt' [?]" to which the "Lichtenstein version" of the Agreement was apparently annexed as "Exhibit A," and, is that *yet another* version of the Suspect Agreement? Lichtenstein "swears" that he and Steven executed the Suspect Agreement on December **19**, 1994 (Epstein Aff., Exhibit D at ¶ 4), yet he attaches a version of the Suspect Agreement dated December **20**, 1994 (Epstein Aff., Exhibit D-1 at p. 15)—has Lichtenstein perjured himself or is there ***yet another version*** of the Suspect

[2] Mr. Epstein also appears to have filed yet another version of the Suspect Agreement as an exhibit to Plaintiffs' Complaint (NYSCEF Doc. No. 2). "Coincidentally" (or not), that version does not contain a "page 12"—*i.e.*, the very page providing that "Steven Harris may also freely assign an interest in his share of the partnership to family members…" (NYSCEF Doc. No. 2). Is that yet another version of the Suspect Agreement, or did Mr. Epstein remove page 12 of the Suspect Agreement knowing that it undermines Plaintiffs' entire case? While Defendants respectfully leave that for the Court to decide, Defendants' answer is set forth below (*see* Point III and Point VI).

[3] The illegibility of the Suspect Agreements is *itself* grounds for denying Plaintiffs' motion (*O'Keefe v Honda Motor Co.*, 1998 US Dist LEXIS 8830, *27 [ED NY 1998] [summary judgment denied where key document was "virtually illegible" and thus had "limited probative value"]; *Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 432 [1st Dept 2010]).

Agreement? These are but a handful of the scores of irregularities and fact issues that Plaintiffs' grossly premature motion seeks to forestall inquiry of, all of which only points up the sheer frivolity of Plaintiffs' pre-discovery motion.

In any event, there is no need to ponder these questions or parse Plaintiffs' confounding and suspicious submissions because Plaintiffs have failed to authenticate *any* version of the Suspect Agreement. Like Mr. Epstein's allegations made without any personal knowledge and the Complaint's allegations hedged deliberately "upon information and belief," *neither* version of the Suspect Agreement has *any* evidentiary value on this motion.

1. Mr. Epstein Cannot Authenticate His Version Of The Suspect Agreement

Mr. Epstein certainly cannot authenticate the version of the Suspect Agreement generated as Exhibit A to his affirmation—he did not draft, negotiate, or execute it, nor does he have any personal knowledge of the Suspect Agreement, which is dated *nearly a quarter century ago* (*Legion Ins. Co. v Ne. Plate Glass Corp.*, 41 AD3d 933 [3d Dept 2007] [summary judgment improper where affiant lacked personal knowledge to authenticate documents]; *FTBK Inv'r II LLC v Genesis Holding LLC*, 48 Misc 3d 274 [Sup Ct, NY Co 2014]; *Caraballo v Denville Line Painting, Inc.*, 2005 NY Slip Op 30525(U) [Sup Ct, Bronx Co 2005]).[4]

2. Mr. Lichtenstein Cannot Authenticate His Version Of The Suspect Agreement

Nor can Mr. Lichtenstein, Plaintiffs' confederate, properly authenticate his version of the Suspect Agreement. As an alleged signatory only to ***his*** version of the Suspect Agreement, Mr. Lichtenstein might have knowledge of ***that*** version, but that does not mean he can authenticate it.

[4] Even for purposes of submitting documentary evidence on a summary judgment motion, an attorney affirmation is insufficient where, as here, the attorney lacks personal knowledge sufficient to properly authenticate the documents (*Transportation Ins. Co. v Main St. Am. Assur. Co.*, 2015 NY Slip Op 30600(U) *6 [Sup Ct, Queens Co 2015]). The documentary evidence itself must be sufficient, not a perplexing, incomplete, and preliminary jumble of alleged contracts and illegible handwritten annotations, such as the Suspect Agreement. And the attorney certainly is not at liberty to conjure up his own self-serving version of the "facts" in an unsworn memorandum, as Mr. Epstein has.

On the contrary, his affidavit, and the version of the Suspect Agreement he purports to authenticate, are inadmissible under New York's Dead Man Statute (CPLR 4519). It provides:

> a party or a person interested in the event may not be examined as a witness in their own behalf or interest, or in behalf of the party succeeding to their title or interest, against the executor, administrator, or survivor of a deceased person, concerning a personal transaction or communication between the witness and the deceased person, except where the executor, administrator, or survivor is examined in their own behalf, or the testimony of the deceased person is given in evidence concerning the same transaction or communication (37 NY Jur 2d Death 567).

That is, where a witness's interests are aligned with a party propounding testimony and adverse to the interests of the decedent or his survivors, that testimony is inadmissible (*Acevedo v Audubon Mgmt., Inc.*, 280 AD2d 91, 95 [1st Dept 2001]). And the New York Court of Appeals has confirmed that the preclusive effect of this statute applies on summary judgment motions as well: "*Emphatically*, evidence excludable under the Dead Man's Statute *should not be used to support summary judgment*" (*Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 313 [1972] [emphasis added]; *In re Christman*, 2006 NY Misc LEXIS 4368, *10 [Sur Ct, Suffolk Co 2006] ["testimony of an interested witness during a trial or hearing concerning a personal transaction between the witness and the decedent is not permitted"]). This is just such a case.

Here, Mr. Lichtenstein (Plaintiffs' crony[5]) is the consummate "interested" witness whose testimony is barred by the Dead Man Statute. For whatever reason, he clearly has a personal stake in seeing that Bernice, not Defendants, succeed to Steven's interest in the Company. Indeed, shortly after Steven's passing, it was the duo of Mr. Lichtenstein and Allison who attempted a furtive, grossly-undervalued fire sale of the Building to line their own pockets with Defendants' rightful interests in the Company's assets (Betsy Aff. ¶¶ 66-72). Mr. Lichtenstein

[5] While Mr. Lichtenstein is named as a defendant in this action, Plaintiffs' own complaint confirms that he is but a "nominal defendant" (Epstein Aff., Exhibit E at ¶ 9).

and Allison also have disposed of other Company property—including valuable real estate in Huntington Station, New York—to deprive Defendants of their rightful share to Company assets (Betsy Aff. ¶ 73). Even Plaintiffs cannot help but admit that "Lichtenstein ***supports*** [their] declaratory judgment action" (Pl. Memo. at 7, n. 3), and willingly "***joined in*** [their] motion that Bernice…acceded to the 19.35% interest Steven owned at death" (Allison Aff. ¶ 6 [emphasis added]).[6] Mr. Lichtenstein's interests plainly are adverse to Defendants' and to Steven, who, in both his Will and Assignment unequivocally expressed his desire that Defendants, *not* Bernice, succeed to his interest in the Company.[7]

Moreover, while the "Dead Man Statute does not, by its terms, prohibit the introduction of *documentary evidence* against a decedent's estate," such documentary evidence must be "authenticated by a source *other than* an interested witness's testimony concerning a transaction or communication with the deceased" (*Acevedo*, 280 AD2d at 95 [emphasis added]). And New York courts routinely deny summary judgment motions based on agreements between an "interested" witness and a decedent where the agreement is not authenticated by someone *other than* the interested witness (*see e.g. In re Steinhilber*, 2001 NYLJ LEXIS 872, *7 [Sur Ct, Suffolk Co 2001] [joint venture agreement not authenticated]; *Margolin v Margolin Lowenstein & Co., LLP*, 2006 NY Slip Op 51565(U), *9 [Sup Ct, Nassau Co 2006] [partnership agreement not authenticated]). This case is no exception.

[6] References in this form are to a July 30, 2018 affidavit given by Allison in a related litigation (Betsy Aff., Exhibit 2). Notably, Allison is willing to give sworn testimony in another related litigation, but ***unwilling*** to make sworn statements in this action, relying instead on the unsworn statements of her surrogate, Mr. Epstein, who, again, has no personal knowledge of the relevant facts. Her silence on this motion, like her mother's, is deafening.

[7] Even if there were any doubt about Mr. Lichtenstein's deep-seated personal interest in this dispute (there is none), such a question cannot be resolved on a pre-discovery summary judgment motion (*In re Terzian*, 2002 NYLJ LEXIS 2212, *6 [Sur Ct, NY Co 2002] [fact issues precluded summary judgment on the issue of a witness's alleged personal "interest" under the Dead Man Statute]).

Because neither Mr. Epstein nor Mr. Lichtenstein can authenticate the Suspect Agreement—and no other witness even attempts to do so—the Suspect Agreement can have no probative value on Plaintiffs' motion.

Point II

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT MUST BE DENIED ON THE MERITS

While Plaintiffs' pre-discovery motion for partial summary judgment fails outright because it lacks any admissible supporting evidence, even if the Court were to consider one or more of the Suspect Agreements submitted by Plaintiffs, Plaintiffs' motion would ***still*** lack any ***substantive*** merit. Nowhere does the Suspect Agreement clearly, unambiguously, and irrevocably convey Steven's membership interest to Bernice. Even pretending it did, Steven's valid and binding Will and Assignment—which post-date the Suspect Agreement and establish Steven's manifest desire to transfer his interest in the Company to Betsy and Tamara, not Bernice—unequivocally revoked and renounced any contrary or inconsistent provision in the outdated Suspect Agreement.

A. Even The Confounding And Incomprehensible Suspect Agreement Does Not Clearly And Unambiguously Convey Steven's Membership Interest To Bernice

Before exposing their legal arguments as meritless, Plaintiffs' have failed even to make out a prima facie case for summary judgment in their favor.

Plaintiffs' entire argument is premised on the notion that the Suspect Agreement "unambiguously" conveys Steven's membership interest in the Company to Bernice—"no less than three times," Plaintiffs boast (Pl. Memo. at 5). Plaintiffs are wrong. A reading of those "three times" reveals that none of them actually conveys Steven's membership interest to Bernice:

- *Article 5*: While the words "Bernice Harris" appear to be scribbled into this provision, unlike "Lichtenstein's order of acceding decedent and rights of successor interest," nowhere does the provision actually convey any interest to Bernice (much less irrevocably). On the contrary, the only clear conveyance in Article 5 was to "next of kin," which includes Tamara.[8] Indeed, this provision plainly contemplates assignment to a third-party family member (*see* Epstein Aff., Exhibit A, p.3; Epstein Aff., Exhibit D-1, p.3 ["free assignability among members of family"]; Epstein Aff., Exhibit A, p.4; Epstein Aff., Exhibit D-1, p.4 ["***any new party other than the original named party hereto above acquiring interest to the premises by assignment, purchase, inheritance, executor, etc***….[has the right] ***to be a fiduciary owner of shares entitled to receipt of their share of net proceeds and distribution of income***."] [emphasis in original]).

- *Article 7*: This provision does not deal with membership interests at all. Entitled "MANAGEMENT, RENT COLLECTIONS, DISTRIBUTION OF CASH COLLECTIONS ETC.," Article 7 deals with management of the Company, not ownership. Even the one line that Plaintiffs pluck selectively from this provision ("Bernice…shall have a power of attorney to sign…and co-manage and have a general signature...") confirms that it addresses only management interests.

- *Page 12*: This out-of-the-blue provision—buried under the heading "ARBITRATION"—likewise deals more with "co management" and "a power of attorney" if Steven and Mr. Lichtenstein are "50% co partners" (Epstein Aff., Exhibit A, p.12; Epstein Aff., Exhibit D-1, p.12). What ***is*** clear from page 12 of the Suspect Agreement is that "***Steven Harris may also freely assign an interest in his share of the partnership to family members***" (Epstein Aff., Exhibit A, p.12 [emphasis added]; Epstein Aff., Exhibit D-1, p.12 [emphasis added]).

In short, even on its face, the unauthenticated Suspect Agreement fails to plainly and clearly convey Steven's membership interest to Bernice. The Court need go no further to deny Plaintiffs' premature summary judgment motion. The inquiry should end here.

B. Steven Lawfully Revoked And Renounced His Decades-Old Distribution Plan

Even if the outdated Suspect Agreement clearly and unambiguously conveyed Steven's membership interest to Bernice (and it did not), Plaintiffs' contrived legal arguments nonetheless fall flat. They argue that the incoherent terms of the Suspect Agreement must trump Steven's

[8] Plaintiffs' own complaint in this action does not even pay lip service to the claim that Article 5 conveys Steven's interest to Bernice (Epstein Aff., Exhibit E).

valid and binding Will and Assignment, but they fail to support their argument with any relevant or controlling law. They are just plain wrong.

Even pretending the Suspect Agreement created a "testamentary disposition" (and, as demonstrated in Point II.A, it did not), it ***did not*** create an "immediately binding" and irrevocable disposition (*In re Attanasio*, 159 AD3d 1180 [3d Dept 2018]). For to be immediately binding and irrevocable, "[s]uch agreements must further evince ***a clear and unambiguous manifestation of the testator's intention to renounce the future power of testamentary disposition***'" (*Attanasio*, 159 AD3d at 1181; *Aaron v Aaron*, 64 AD3d 1103, 1104 [3d Dept 2009]). As the Court of Appeals has explained:

> For more than a century, we have repeatedly emphasized that because a will is ambulatory in nature and because ***a testator has the right to freely revoke a will until death***, an agreement not to revoke a prior will demands the most ***indisputable evidence*** of…agreement…[B]ecause the renunciation of the right to alter or revoke a will (is not) a casual matter…the Statute of Frauds…as well as the decisional law requires clear evidence of such a promise…***The law strictly scrutinizes the renunciation of the right to revoke a will and requires a threshold showing of clear and unambiguous evidence to give effect to this surrender of rights*** **(***Matter of Am. Comm. for the Weizmann Inst. of Sci. v Dunn*, 10 NY3d 82, 92 [2008] [emphasis added]).

So, a party seeking to create an immediately binding and irrevocable testamentary disposition must expressly state in the subject instrument that the disposition is irrevocable—a "requirement [that] applies with equal force to a ***contract*** that is testamentary in nature" (*Attanasio*, 159 AD3d at 1181). Here, even Plaintiffs must concede that the Suspect Agreement (whichever version) contains no such express language. This alone dooms Plaintiffs' argument.

New York courts ***routinely*** refuse to enforce subsequently revoked testamentary provisions that do not include express language unequivocally renouncing the right of future revocation (*Attanasio*, 159 AD3d at 1181 ["There is no language in this agreement evincing an

intent to make the agreement irrevocable. That alone renders the agreement unenforceable, a result consistent with decedent's subsequent revocation document."]; *In re Cleary*, 2014 NYLJ LEXIS 4977, *9 [Sur Ct, Queens Co 2014] [testamentary disposition in a contract was held unenforceable where "the terms of the purported [contract] does [sic] not indicate the Decedent intended to relinquish his right to alter his testamentary scheme."]; *Schloss v Koslow*, 20 AD3d 162, 166 [2d Dept 2005] ["The defendant's alleged promise to renounce his right of testamentation in the context of a [mutual will] was never "clearly and unambiguously delineated."]). This is just such a case.

Actually, the Suspect Agreement did just the opposite: not only did it fail to expressly (or even implicitly) relinquish Steven's right to revoke a testamentary provision, it actually repeatedly confirms that Steven could revoke and alter even an "accession" plan—for example, "***Steven Harris may also freely assign an interest in his share of the partnership to family members***" (Epstein Aff., Exhibit A, p.12 [emphasis added]; Epstein Aff., Exhibit D-1, p.12 [emphasis added]).

First, by expressly providing in the Suspect Agreement that his interests could be sold or assigned "freely" prior to his death, Steven signaled clearly that his "accession" plan was ***not*** set in stone. The Suspect Agreement confirms as much over and over again (*see* Epstein Aff., Exhibit A, p.3; Epstein Aff., Exhibit D-1, p.3 ["free assignability among members of family"]; Epstein Aff., Exhibit A, p.4; Epstein Aff., Exhibit D-1, p.4 ["***any new party other than the original named party hereto above acquiring interest to the premises by assignment, purchase, inheritance, executor, etc***….[has the right] ***to be a fiduciary owner of shares entitled to receipt of their share of net proceeds and distribution of income***."] [emphasis in original]; Epstein Aff., Exhibit A, p.12; Epstein Aff., Exhibit D-1, p.12 [Steven's "trusts and or their estates, may

become an assignee…"]; Epstein Aff., Exhibit A, p.12; Epstein Aff., Exhibit D-1, p.12 [Steven Harris may also freely assign an interest in his share of the partnership to family members…"]). Under the Suspect Agreement itself, therefore, Steven was "free" to (*and did*) revise his decades-old and outdated testamentary plan through his subsequent Assignment and Will.

Second, in one of the only clear, type-written provisions of the Suspect Agreement not covered in confounding handwritten notations, the Suspect Agreement plainly envisions a scenario where there would be a "new party…acquiring interest to the premises by assignment, purchase, inheritance, executor" (Epstein Aff., Exhibit A, p.4; Epstein Aff., Exhibit D-1, p.4). If, as Plaintiffs now urge (albeit without evidentiary or legal support), the Suspect Agreement's "accession" plan could not be altered by a subsequent assignment or will, why provide for a "new party…acquiring interest to the premises by **assignment**, purchase, **inheritance**, executor" (Epstein Aff., Exhibit A, p.4 [emphasis added]; Epstein Aff., Exhibit D-1, p.4 [emphasis added])? As Plaintiffs themselves recognize (Pl. Memo. at 22), "one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless" (*Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assocs.,* 63 NY2d 42, 46 [1984]). Yet that is precisely what would happen according to Plaintiffs' (mis)interpretation.

The New York cases cited by Plaintiffs on this issue demonstrate that they do not wish to litigate the facts of *this* case. In those cases, defendants unsuccessfully tried to defeat contracts containing testamentary dispositions merely by *labeling* them "testamentary dispositions" and claiming that they did not comply with the "statute of wills" (*see e.g. In re Hillowitz*, 22 NY2d 107 [1968]). But that is not Defendants' position. Indeed, the Suspect Agreement (pretending it has *any* evidentiary value) could contain a valid testamentary disposition, and "need not conform to the requirements of the statute of wills" (*Hillowitz*, 22 NY2d at 110). But the Suspect

Agreement does not *expressly provide* that its testamentary disposition *cannot be revoked*, as is required to make it immediately binding and irrevocable. Steven's subsequent Will and Assignment, therefore, properly revoked and renounced the Suspect Agreement. *None* of Plaintiffs' cases are to the contrary, nor do they even address the issue of a subsequent revocation of a testamentary instrument. Plaintiffs' argument lacks any supporting authority.

Recognizing the futility of their arguments under New York law, Plaintiffs take a stab at exploiting Delaware law—a gambit that fails for several reasons.

Delaware law does not apply here. Delaware law could only theoretically apply under the "internal affairs doctrine," a conflict of laws doctrine that provides that "claims concerning the relationships between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation" (*New Greenwich Litig. Tr., LLC v Citco Fund Servs. (Europe) B.V.*, 145 AD3d 16, 22 [1st Dept 2016]). But even if the Company is a Delaware entity, the internal affairs doctrine applies only to "determinations involving matters…concerning the relationships *inter se* of the corporation" (*New Greenwich*, 145 AD3d at 22). That is not the case here.

Here, depending on the outcome of this case, either Bernice or Defendants will be excluded from the Company. By definition, then, this dispute involves parties and matters beyond the Company's internal affairs (*New Greenwich*, 145 AD3d at 22 ["Since the internal affairs doctrine does not apply to those defendants who are not current officers, directors, and shareholders of the plaintiff corporation, as none of the instant defendants are…the internal affairs doctrine does not apply to the claims asserted against [them]."]; *QVT Fund LP v Eurohypo Capital Funding LLC I*, 2011 Del Ch LEXIS 97, *24 [Del Ch 2011] ["internal affairs

doctrine does not apply where the rights of third parties external to the corporation are at issue"]).

Because the internal affairs doctrine does not apply here, New York law governs, as every relevant contact is with New York: the Suspect Agreement was allegedly negotiated and executed in New York, the Company's assets are located in New York, the original parties to the Suspect Agreement and the parties to this action reside in New York, and the Company's assets were allegedly converted in New York (*In re Liquidation of Midland Ins. Co.*, 16 NY3d 536 [2011]; *Elson v Defren*, 283 AD2d 109 [1st Dept 2001]).

But even pretending Delaware law did apply here (and it does not), it would not change the outcome. Plaintiffs cite no principles of Delaware law that are distinct from, or contrary to, the New York law described above. In fact, the irrelevant Delaware cases cited by Plaintiffs are even further afield than the inapposite New York cases they cite, as those cases do not even address the key issue in dispute here—*i.e.*, the subsequent revocation of a testamentary disposition contained in a prior agreement (*In re Calderwood v ACE Group Intl. LLC*, 57 AD3d 190 [1st Dept 2017]; *Achaian, Inc. v Leemon Family LLC*, 25 A3d 800 [Del Ch 2011]).[9] No matter how hard they try, Delaware law cannot resuscitate Plaintiffs' failed claim.

In short, Steven changed his mind and exercised his legal rights. He lawfully revoked the testamentary language of the Suspect Agreement, and he assigned and bequeathed his membership interest to Defendants. That he deliberately chose to execute both an Assignment and Will to carry out his wishes does not make those instruments "suspect" or "contradict[ory]" (Pl. Memo. at 19). Just the opposite: Steven's "belt-and-suspenders" approach actually **confirms**

[9] Plaintiffs' bizarre references to a Delaware "gap-filing" (sic) provision have no relevance here (Pl. Memo. at 18).

his commitment to ensuring that Defendants are provided for after his passing (Betsy Aff. ¶¶ 44-51).[10] The Court is duty-bound to honor Steven's dying wishes and give effect to his legal rights.

C. The Suspect Agreement Did Not And Cannot Bar Steven's Assignment, Under Which He Transferred His Company Interests To Defendants

As for Steven's valid and binding Assignment—prepared by Steven himself (Betsy Aff. ¶ 50)—Plaintiffs do not even advance a bona fide argument for judgment in their favor. In fact, Plaintiffs fail to contest at all, and thus concede, the validity of Steven's assignment.

Both of Plaintiffs' versions of the Suspect Agreement provide for "free assignability among members of family" (Epstein Aff., Exhibit A, p.3; Epstein Aff., Exhibit D-1, p.3). The Suspect Agreement does not require member consent or otherwise bar Steven's valid and binding Assignment. Plaintiffs have not even attempted to establish that Defendants are not part of Steven's family; indeed, even their rank allegations in this regard are made solely "upon information and belief" (Epstein Aff., Exhibit E at ¶¶ 5-6). In reality, Defendants were obviously very much part of Steven's family, biological and otherwise (Betsy Aff., ¶¶ 11-22). Steven unquestionably viewed them as such, and he exercised his right of "free assignability among members of family" (Epstein Aff., Exhibit A, p.3; Epstein Aff., Exhibit D-1, p.3). That was his intention and his legal right (Betsy Aff. ¶¶ 41-51).

Plaintiffs have no tenable argument to the contrary. Mr. Epstein's repeatedly refers to language in paragraph 5 of the Suspect Agreement supposedly limiting assignments without member consent to "immediate" family (Pl. Memo. at 2, 6, 19, 22 and 23). But paragraph 5 contains no such language—it is the fabrication of Plaintiffs' counsel, Jules A. Epstein, Esq.

[10] Nor does the false narrative advanced by Plaintiffs' counsel, Jules A. Epstein, Esq., make any sense. According to Mr. Epstein, Defendants "[r]ealiz[ed] their failed claim under the [] Will after seeing the [Suspect] Agreement, [and] then presented" the Assignment (Pl. Memo. at 19). Both the Will and the Assignment are dated March 7, 2017. So when, according to the Epstein account, did Defendants "realize" their failed claim? And, since the Assignment is in Steven's own handwriting, does it even matter? As with so many of the allegations conjured up by Mr. Epstein and submitted to the Court as "undisputed fact" (Pl. Memo. at 4), these fanciful allegations are nothing more than the claims of an attorney willing to bend the truth to achieve his clients' goals.

(more on this in Point VI below).[11] Because the Suspect Agreement contains no "immediate family" limitation or any consent requirement for assignment to family members, "adopting the broader 'family' term," as Mr. Epstein puts it, would obviously **not** "render [such a non-existent limitation] meaningless" (Pl. Memo. 23). Rather, it would be entirely **consistent** with the Suspect Agreement's "free assignability" provisions. For that reason alone, Plaintiffs' assignment "limitation" argument fails.

But there's more. Even if the Suspect Agreement were (mis)construed to limit assignments without member consent to "blood" relatives (it does not), the Assignment ***still*** would not violate the Suspect Agreement. Because although Betsy will enjoy certain temporary *benefits* of Steven's interest during her lifetime, Steven assigned and bequeathed actual *title* and *ownership* of his interests to his daughter Tamara (56 NY Jur 2d, Estates, Powers, and Restraints on Alienation 34 ["When a life estate is created, the title or fee must always be left in some person, usually by way of remainder, but at times by way of reversion."]; *Vincent v Rix*, 221 AD 209, 211 [3d Dept 1927] [party "did not take the fee, but took a life estate [in property]"]).

As such, notwithstanding Betsy's temporary interest in the income realized by the Company (nowhere prohibited by the Suspect Agreement), the assignment of Steven's membership interest in the Company passed to Tamara.[12] Even Plaintiffs only argue that "***Betsy***…is not a family member" (Pl. Memo. at 2 [emphasis added]). Plaintiffs do not, because they simply cannot, argue that Steven's Assignment to Tamara is unenforceable. It is, and it must be honored.

[11] Defendants have tried to give Mr. Epstein the benefit of the doubt and have scoured the varying versions of the Suspect Agreement in search of any reference to the phrase "immediate family." It does not appear to exist. (Unless, of course, Mr. Epstein generates *yet another* version of the Suspect Agreement.).

[12] Again, under settled New York law, Steven revoked any (non-existent) limitation on his transfer rights through his Will and Assignment, as the Suspect Agreement itself did not expressly renounce the right of revocation but rather provided for Steven to "freely" assign his membership interest in the Company (*see* Point II).

D. Plaintiffs Cannot Possibly Obtain Summary Judgment Because They Have Not Even Asserted A Claim Concerning Steven's Valid And Binding Assignment

At bottom, even pretending Plaintiffs could somehow make out a prima facie case for summary judgment (and they cannot), they cannot possibly obtain summary judgment with respect to Steven's valid and binding Assignment because the Complaint does not even mention—let alone seek relief concerning—the Assignment (Epstein Aff., Exhibit E). Plaintiffs cannot obtain summary judgment on a claim they have not even pleaded.

Point III

IF SUMMARY JUDGMENT IS GRANTED AT ALL, IT MUST BE GRANTED IN *DEFENDANTS'* FAVOR

While the multiple, illegible, incomplete, and unauthenticated versions of the Suspect Agreement have no evidentiary value on Plaintiffs' motion, in the event the Court deems one (or more) of the Suspect Agreement's multiple versions admissible, it is ***Defendants*** who should be granted summary judgment on their counterclaim for a declaration that Defendants succeeded to Steven's membership interest in the Company (Epstein Aff., Exhibits F and G).

As demonstrated (Point II), Plaintiffs have no lawful claim to Steven's membership interest in the Company. Even the Suspect Agreement submitted (but not authenticated) by Plaintiffs, plainly and in several provisions, envisions the very scenario Steven actualized here:

- In one of the only clear, type-written provisions of the Suspect Agreement not covered in confounding handwritten notations, the Suspect Agreement plainly envisions a scenario where there would be a "new party…acquiring interest to the premises by **assignment**, purchase, **inheritance**, executor, etc." (Epstein Aff., Exhibit A, p.4; Epstein Aff., Exhibit D-1, p.4); and, even more to the point

- In one of the only clear, type-written provisions of the Suspect Agreement not covered in confounding handwritten notations, the Suspect Agreement plainly provides that "Steven Harris may also **freely assign** an interest in his share of the

partnership to family members…" (Epstein Aff., Exhibit A, p.12 [emphasis added]; Epstein Aff., Exhibit D-1, p.12 [emphasis added]).[13]

- The Suspect Agreement indicates that there is to be "free assignability among members of family" (Epstein Aff., Exhibit A, p.3; Epstein Aff., Exhibit D-1, p.3).

That's exactly what Steven did. He exercised his legal rights to transfer his membership interest to Defendants by "assignment" and "inheritance" (Betsy Aff. ¶¶ 41-51). He revoked and renounced the Suspect Agreement's "accession" plan and validly transferred his membership interests under the Will and the Assignment (Betsy Aff. ¶¶ 41-51). That was Steven's intention. That was Steven's legal right. That is what the Court must enforce.

Point IV

TO THE EXTENT ASSERTED BY ALLISON,
PLAINTIFFS' DECLARATORY JUDGMENT CLAIM MUST BE DISMISSED

Plaintiffs' declaratory judgment claim purports to be asserted on behalf of both Bernice and Allison (Epstein Aff., Exhibit E at ¶ 45 ["Plaintiffs therefore seek a declaratory judgment that…Bernice Harris is the lawful successor…"]). Plaintiffs' motion concerning the declaratory judgment claim likewise purports to be made on behalf of Bernice and Allison (Pl. Memo. at 1). Plaintiffs apparently do not understand the basic pleading requirements of a declaratory judgment claim.

A declaratory judgment claim "requires an actual controversy between genuine disputants" (*Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006]). "Therefore, the allegations must demonstrate the existence of a bona fide justiciable controversy, defined as a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" (*Palm v Tuckahoe*

[13] So damning to Plaintiffs' case are the provisions of page 12 of the Suspect Agreement that Plaintiffs' counsel, Jules A. Epstein, Esq., in filing another version of the Suspect Agreement as an exhibit to Plaintiffs' Complaint, actually pulled out page 12 (NYSCEF Doc. No. 2) (*see* Betsy Aff. ¶ 84).

Union Free School Dist., 95 AD3d 1087, 1089 [2d Dept 2012]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 284 [1st Dept 2006] ["a plaintiff found to lack standing is not involved in a controversy"]). Allison's "claim" does not pass muster.

Here, Allison is not a "genuine disputant" concerning Steven's membership interests because even Plaintiffs allege only that "Bernice Harris is the lawful successor in interest to…Steven's membership interest" (Epstein Aff., Exhibit E at ¶ 45; Epstein Aff., Exhibit E at ¶ 1 ["Plaintiffs bring this action…to enforce Bernice Harris' (sic) right to succeed to the interest of Steven Harris"]; Epstein Aff., Ad Damnum Clause ["Steven's ownership interest in [the Company] passed to Bernice Harris"]). Because Plaintiffs claim that the disputed membership interest belongs to Bernice, it is Bernice—and only Bernice—who has standing to assert a declaratory judgment claim for it (*Am. Ins. Ass'n v Chu*, 64 NY2d 379, 283 [1985]; *Goodman v Reisch*, 220 AD2d 383 [2d Dept 1995]; *Guild of Admin. Officers of Suffolk County Community Coll. v Suffolk County*, 126 AD2d 725, 727 [2d Dept 1987]). Allison, in contrast, lacks standing (*In re Liquidation of Ideal Mut. Ins. Co.*, 174 AD2d 420, 421 [1st Dept 1991] [a declaratory judgment "plaintiff must have…a legally protectable interest that is in direct jeopardy"]).

Plaintiffs' declaratory judgment claim, as asserted by Allison, must be dismissed.[14]

Point V

PLAINTIFFS' SECOND, THIRD, FOURTH, AND FIFTH CLAIMS COMMINGLE INDIVIDUAL AND DERIVATIVE CLAIMS AND MUST BE DISMISSED

Plaintiffs' remaining claims—*i.e.*, their fanciful and fictitious claims, made solely "upon information and belief," of garden-variety wrongs committed allegedly by their "husband"/"father"—also must be dismissed. The Company itself does not even believe these

[14] Betsy preserved her right to move for dismissal on this basis (Epstein Aff, Exhibit G at ¶ 66).

claims enough to pursue them (Epstein Aff., Exhibit E at ¶ 38), and, in any event, Plaintiffs commingle impermissibly individual claims and derivative claims.

The Court of Appeals has addressed the issue of intermingling individual and derivative claims, ruling that "[a] complaint the allegations of which confuse a shareholder's derivative and individual rights will…be dismissed" (*Abrams v Donati*, 66 NY2d 951 [1985]; *Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012]; *Baliotti v Walkes*, 134 AD2d 554, 555 [2d Dept 1987]). New York courts routinely do so (*see e.g. Noe v Friedberg*, 2009 NY Slip Op 30421(U), *13-14 [Sup Ct, NY County 2007] ["Individual and derivative claims may not be pleaded within the same cause of action…[and] requires dismissal of the cause of action so affected…"]; *Greenberg v Falco Constr. Corp.;* 2010 NY Slip Op 51669(U) [Sup Ct, Kings County 2010]; *Wallace v Perret*, 903 NYS2d 888, 897 [Sup Ct, Kings County 2010]). And this case is no exception.

Here, Plaintiff's complaint makes no distinction between Allison's "individual" and "derivative" claims (Epstein Aff., Exhibit E). On the contrary, as is clear from the Complaint's Ad Damnum Clause, Plaintiffs' Second, Third, Fourth, and Fifth causes of action all seek relief "in favor of Plaintiff ***Allison Harris Schifini, individually and derivatively*** on behalf of [the Company]" (Epstein Aff., Exhibit E at pgs. 11-12 [emphasis added]). This violates New York law's prohibition against the commingling of direct and derivative claims, and, under controlling case authority, mandates dismissal.[15]

[15] Betsy preserved her right to move for dismissal on this basis (Epstein Aff, Exhibit G at ¶ 69).

Point VI

PLAINTIFFS' COUNSEL, JULES A. EPSTEIN, ESQ., SHOULD BE SANCTIONED AND REPRIMANDED

In addition to denying Plaintiffs' frivolous, pre-discovery motion (and, if anything, granting Defendants' cross-motion for partial summary judgment), the Court should sanction and reprimand Plaintiffs' counsel, Jules A. Epstein, Esq.

For purposes of imposing sanctions, conduct is frivolous if it: (1) is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false (22 NYCRR 130-1.1). Here, Plaintiffs' counsel, Jules A. Epstein, Esq., has engaged in such misconduct, and he should be sanctioned and reprimanded accordingly.

Plaintiffs' motion is a ***pre-discovery*** summary judgment motion that fails even to include any valid affidavit "by a person having knowledge of the facts" (CPLR 3212[b]). It fails even to authenticate the highly dubious and different versions of the Suspect Agreement (or any documents, for that matter). So facially and procedurally defective is Plaintiffs' motion that it appears to have been intended only as a ploy to forestall discovery and drive up Defendants' litigation costs. Such tactical gamesmanship is the consummate course of action "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1). Plaintiffs' frivolous motion itself warrants sanctions and admonishment.

But even more disturbing and frivolous, Plaintiffs' counsel, Jules A. Epstein, Esq., intentionally has paraded a stream of false statements to the Court. By way of example only, Mr. Epstein represents repeatedly that Paragraph 5 of the Suspect Agreement restricts transfers of the

Company's membership interests to only "immediate family" (Pl. Memo. at 2, 6, 19, 22 and 23). Mr. Epstein even submits—in block form and within quotations—what purports to be a direct quote from the Suspect Agreement that "[t]here shall be free assignability among immediate families of the members herein" (Pl. Memo. at 6 [emphasis added]). ***That is a pure fabrication by Plaintiffs' counsel, Jules A. Epstein, Esq.*** Even after multiple searches of the Suspect Agreement's assorted versions, it appears that the word "immediate" is nowhere to be found in Paragraph 5 nor anywhere else.[16] That alone warrants sanctions (*see e.g. MZ Dental, P.C. v Progressive Ne. Ins. Co.*, 6 Misc 3d 649, 654 [Dist Ct, Suffolk Co 2004] [attorney sanctioned for "[m]aterial factual statements…falsely presented to th[e] court"]; *Banana Kelly Cmty. Improvement Ass'n, Inc. v Schur Mgmt. Co., Ltd.*, 2013 NY Slip Op 50538(U) *15 [Sup Ct, Bronx Co 2013] [attorney's "misrepresent[ation] [of] material facts to th[e] court" warranted a sanctions hearing]; *Bhardwaj v Bhardwaj*, 2009 NY Misc LEXIS 2457, *6 [Sup Ct, Nassau Co 2009]; *W.W.W. Pharm. Co. v Gillette Co.*, 808 F Supp 1013, 1028 [SD NY 1992] [sanctions imposed on attorney for "misrepresentation made in a [memorandum] submitted to the court"]).

This is not the first time Plaintiffs' counsel, Jules A. Epstein, Esq., has played fast-and-loose with the Suspect Agreement. Knowing full-well that page 12 of the Suspect Agreement—*i.e.*, "***Steven Harris may also freely assign an interest in his share of the partnership to family members***"—belies Plaintiffs' claims, Mr. Epstein actually pulled this page out of the Suspect Agreement and filed his doctored version as an exhibit to Plaintiffs' Complaint so that Defendants and the Court would never learn the full extent of the provisions on page 12 (*see* NYSCEF Doc. No. 2) (Betsy Aff. ¶ 84).[17]

[16] Unless Mr. Epstein generates yet ***another*** version of the Suspect Agreement containing the word "immediate."
[17] Unless, of course, this is ***yet another*** of Mr. Epstein's versions of the Suspect Agreement.

There is a fine line between zealous advocacy and deceptive, frivolous practice. It is respectfully submitted that Plaintiffs' counsel, Jules A. Epstein, Esq., has crossed that line. The Court should sanction Mr. Epstein to penalize him for his conduct and to deter others from similar practices in the future. At the very least, Mr. Epstein should be reprimanded.

Conclusion

For the reasons set forth above and in the accompanying affidavit, defendant Betsy Harris respectfully requests that the Court deny Plaintiffs' motion for partial summary judgment (and, should the Court deem admissible one or more versions of the Suspect Agreement submitted by Plaintiffs, grant *Defendants'* cross-motion for partial summary judgment), grant Defendants' cross-motion to dismiss and for sanctions, and grant to Defendants such other and further relief as the Court deems just and proper.

Dated: New York, New York
August 27, 2018

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