To be Argued by:
MARTHA A. CONNOLLY, ESQ.
(Time Requested: 20 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

Docket No.:
CA 18-02140
CA 18-02142
CA 18-01322

WILLIAM HOWARD, suing in the right of Archer Rd. Vista, LLC,
WILLIAM HOWARD, Individually, and
WESTSIDE DEVELOPMENT OF ROCHESTER, INC.,

Plaintiffs-Respondents,

– against –

GARY L. POOLER,

Defendant-Appellant.

– and –

ARCHER RD. VISTA LLC and GARY L. POOLER
as Manager of ARCHER RD. VISTA LLC,

Intervenors-Appellants

BRIEF FOR DEFENDANT-APPELLANT

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QUESTIONS PRESENTED

A. Was it error for the Court to award damages against Defendant personally when no allegations were made against him other than as Manager?

This question should be answered by this appellate court in the affirmative.

B. Was it error for the Court to consider Plaintiffs' duplicative cause of action for breach of fiduciary duty in view of the allegations of breach of the OA?

This question should be answered by this appellate court in the affirmative.

C. Was it error for the Court to find breach of contract where Defendant's actions were all authorized by the OA?

This question should be answered by this appellate court in the affirmative.

D. Was it error for the Court to find Defendant personally liable and award damages when Plaintiffs failed to demonstrate by clear and convincing evidence that Defendant did not act in good faith?

This question should be answered by this appellate court in the affirmative.

E. Was it error for the Court to find Defendant Pooler personally liable and award damages where §5.6(g) of the Operating Agreement states that Pooler "shall not be liable…in damages or otherwise, to the Company, any member or any other Person for any action…unless such action, decision or omission was due to fraud, bad faith or willful misconduct"?

This question should be answered by this appellate court in the affirmative.

F. Was it error for the Court to find breach of the implied covenant of good faith when Defendant's actions were taken to preserve the company and its assets?

This question should be answered by this appellate court in the affirmative

G. Was it error for the Court to fail to analyze ownership issues, and award damages to Plaintiff Howard where §3.2 of the Operating Agreement calls for "cash" and the uncontroverted evidence shows that Howard contributed no cash, and thus, as a non-member, has no right to bring his claims?

This question should be answered by this appellate court in the affirmative.

H. Was it error for the Court to award damages to Plaintiff for sales commissions where the OA precluded such payment and Howard failed to perform?

This question should be answered by this appellate court in the affirmative.

I. Was it error for the Court to award the Company damages for alleged overcharging by Pooler Enterprises on Company contracts and for overhead and profit where §5.3(b) of the OA gives Defendant, as Manager, sole discretion to engage affiliates, and evidence showed the charges were commercially reasonable?

This question should be answered by this appellate court in the affirmative.

J. Was it error for the Court to order Defendant to indemnify the Company against claims by Pooler Entities for interest or principal on additional loans not otherwise covered by the Decision below, given that §11.2(a) of the OA requires that creditor loans be repaid prior to cash capital distributions to the partners?

This question should be answered by this appellate court in the affirmative.

PRELIMINARY STATEMENT

Defendant Gary Pooler ("Pooler") appeals an improper finding of liability on a summary judgment motion and a subsequent award of damages at trial. The Court disregarded material facts at issue and granted summary judgment without considering specific language in the Operating Agreement[1] at the core of the dispute. The Court's decision following trial was predicated upon an erroneous summary judgment finding of liability, and an incorrect analysis of relevant language of the OA, and the decision and award of damages should be reversed and vacated.

The Plaintiff, William Howard ("Howard"), individually, and derivatively on behalf of the corporation, Archer Rd. Vista LLC ("ARV" or "Company"), brought claims against Pooler, the Manager of ARV. The Complaint alleged that various actions by Pooler, as Manager, amounted to breach of contract and breach of fiduciary duty. (R79-91).

On the allegations of breach of contract, the Court granted summary judgment as to liability, stating, "no question of law or fact is raised by Pooler in opposition." (R68). On the allegations of breach of fiduciary duty, the Court held that Pooler's actions amounted to self-dealing which established prima facie entitlement to summary judgment as to liability. (R71-74).

[1] Sometimes referred to herein as "OA".

In determining liability, the Court failed to apply the required standards set forth in the Operating Agreement governing the relationship between Pooler and Howard. The Operating Agreement grants broad authority to the Manager to control, direct and operate the business and affairs of the Company, including conducting business with affiliates. The potential liability of the Manager is restricted to findings of fraud, bad faith or willful misconduct.

In addition, the OA further protects the Manager by indemnifying against liability for his acts and omissions.

> "The Members and Manager shall be indemnified and the Company's employees, officers and agent may be indemnified by the Company to the fullest extent possible under the Act." (R359).[2]

Another fundamental fact is dispositive of this entire case: Pooler demonstrated that Howard never made his initial cash capital contribution required under the OA, without which Howard is not a Member of ARV, and has no rights against either Pooler or ARV based upon the allegations made in this case.

Pooler seeks an order from this Court vacating, overturning and dismissing the Trial Court's Findings, Decisions, Orders and Judgments as against him personally and as Manager of ARV.

[2] "Act" refers to New York LLC Law.

STATEMENT OF FACTS

Background on Property and Formation of Company

Howard first approached Pooler in April 2007 about investing in a land development project in the Town of Chili known as the Vista Villas, or Archer Road Subdivision (the "Property"). (R1382 ¶2; R971 ¶2). Howard presented the project as a development opportunity with 193 residential units, plus a golf clubhouse. (R1382 ¶3). Howard told Pooler the Property was worth $1.8 million, and proposed that it could be acquired for approximately that amount. (R1382 ¶4; R463 ¶13).

Prior to 2007, the Property was part of a larger parcel owned by Ballantyne Development LLC ("Ballantyne") of which Howard was a partner. (R1382-1383 ¶5). Between 2003 and 2004, Ballantyne borrowed $3.5 million from Pittsford Capital Mortgage Partners ("PCMP") to develop the entire parcel. (R1387 ¶36-40; R1210 ¶A; R1589 ¶2). In March 2006, Ballantyne transferred title to a portion of the larger parcel, at 420 Ballantyne Road, to Westside Development of Rochester, Inc. ("Westside"), for no consideration. Howard was an owner of Westside. (R1389 ¶51-53; R1200 ¶18). Eventually, when Ballantyne was unable to pay its financial obligations, creditors, including PCMP, commenced a foreclosure action. (R1390 ¶59; R1210 ¶B-C). In March 2007, Howard provided an affidavit to a representative of PCMP stating the assets of Ballantyne were essentially worthless; the receiver agreed to settle the Ballantyne debt on $3.5 million in loans for $70,000 with an

entity known as Kend Enterprises, Inc. ("Kend"). (R1388 ¶45-46; R3567 ¶1-2). Through the foreclosure action and sale of loan assets to Kend, the Property became available for sale and was pursued by Howard and Pooler. (R1382 ¶4).

Pooler and Howard knew each other before 2007. They each operated separate businesses, with Pooler involved in site work development and Howard engaged in real estate sales. In coming together to develop the Property, Howard agreed that Pooler would perform the site work and Howard would focus on relations with builders and bringing in buyers to purchase new homes or lots in the subdivision. (OA §5.5[d], R355; R972 ¶3). The Parties agreed to form a new entity, ARV, a New York Limited Liability Company. Pooler was named the Manager. (R335-374; OA §5.2, R351). Pooler was a 60% owner and Howard was a 40% owner, but each had a 50% voting share. (R374.3). In forming ARV, a comprehensive OA was developed and signed by both Pooler and Howard on September 20, 2007, with an effective date of June 29, 2007. (R338; R2672 L21-R2673 L7).

Pooler and Howard memorialized their agreement on financing the purchase of the Property in the OA, which required a "cash" Capital Contribution by Pooler of $932,316.52 and Howard of $909,000. (R345; R374.3). Pooler made his payment through an affiliated entity, Pooler Development, LLC, and the money was delivered by his attorneys, Fix Spindleman Brovitz & Goldman, P.C., to the seller's attorney. (R1384 ¶16; R1036-1038; R2669 L7-22; R3491). Pooler believed Howard

simultaneously delivered $909,000 of his own money to the seller, based on Howard personally telling him he had done so and the fact that the seller and the secured lender never contacted Pooler or pursued ARV for any additional money. (R1384 ¶17; R1385 ¶19). When closing on the Property took place, on September 20, 2007, Pooler was not in attendance, but thereafter he and Howard signed Schedule I to the OA stating each had made their initial Capital Contribution with Pooler at $932,316.52 and Howard at $909,000.00. (R374.3; R466 ¶35-36).

Upon the formation of ARV, Pooler was responsible for maintaining financial records and having tax documents prepared for Members, including Schedule K-1 (Form 1065) forms. (R361; R362). Pooler maintained the required financial records, including profit and loss statements and balance sheets, and delivered them regularly to Howard. (R464 ¶18). Pooler had annual tax returns prepared, including the specified Schedule K-1 forms, which showed from the initial filing in 2007 that the Capital Contributions of Pooler and Howard matched the entries they input on Schedule I of the OA of $932,316.52 and $909,000 respectively. (R3287-3288).

More than seven years after the formation of ARV, during discovery in 2015 related to litigation between Howard and Pooler, Pooler learned for the first time that Howard never made his initial cash Capital Contribution and had never invested any money in ARV. (R1197 ¶4; R1385 ¶20). Howard alleged in his Complaint against Pooler that "[b]oth Howard and Pooler made initial capital contributions in

excess of $900,000.00 each." (R80 ¶7). However, when Howard was questioned at trial about his Capital Contribution, Howard testified that he never made any cash Capital Contribution. (R2822 L5-9). Howard's wife and bookkeeper, Maureen Howard, testified that she was unaware of any check or payment by Howard to the Company that shows Howard ever made a Capital Contribution pursuant to §3.2 of the OA. (R1200). That Howard never made his initial cash Capital Contribution was confirmed through a Court ordered accounting of ARV by Mengel Metzger & Barr & Co., LLC ("MMB" or the "Accounting") in which the accountant stated:

> "Based upon my review of the documented transactions of ARV, I find that at no point from June 2007 through April, 2016 has Howard contributed cash into ARV. I have traced all check registers, bank statements, and all other supporting documentation for the nearly ten year period and at this point I am unable to substantiate a cash contribution from Howard. On June 23, 2016, I requested documentation supporting a cash contribution from Howard's counsel but received no supporting documents in response to this request… I cannot substantiate a contribution from Mr. Howard at any point throughout the history of ARV's existence pursuant to the full accounting I have conducted." (R981).

The closing documents for the Property purchase show a total price of $953,169.41, nowhere near the price of $1.8 million which Howard represented to Pooler. (R1036). Pooler paid one-hundred percent (100%) of the purchase price, which was booked as $932,316.52 for his cash Capital Contribution, plus the remainder as a loan by Pooler to ARV. (R981). Once Pooler understood that Howard

never made his initial cash Capital Contribution, on the advice of counsel, Pooler issued a new Schedule I to the OA correcting the ownership percentages from 60% Pooler and 40% Howard, to 100% Pooler and 0% Howard, which properly reflects that Howard made no Capital Contribution. (R524; R476 ¶88). Pooler notified Howard of this change of ownership by letter dated May 20, 2015. (R523). Additionally, Pooler made the following notation on an ARV tax filing, signed April 9, 2015, addressing the incorrect original entries for Capital Contributions:

> "I, Gary Pooler, am not certifying that the Capital Contributions are true, but instead I am filing the document to comply with the filing requirements. The capital contributions are subject to litigation, which may impact the numbers and at such time Archer Road Vista LLC will file an amended return." (R1065).

Terms of Operating Agreement

In forming ARV, Pooler and Howard negotiated many substantive subject matters and memorialized them in the OA, which governs the permissible actions, allowable and unallowable conduct, liabilities and indemnities, and overall responsibilities and obligations of Howard, as a Member, and Pooler, as Manager. The OA is the pivotal document in resolving the legal issues in this litigation. As such, pertinent sections of the OA are included here with reference to the relevant language. (R335-374.3).

§3.2. Initial Capital Contributions. (R345).
"Upon execution of this Agreement, the Members shall contribute initial Capital Contributions to the Company in cash in the amount set forth opposite their respective names on Schedule I hereto in exchange for their respective Percentage Interests as set forth in Schedule I hereto . . ."

§5.3. Power and Authority of the Manager. (R351-354).
"… the Manager shall have the full and exclusive right, power, authority, discretion and responsibility to manage, control, administer, direct and operate the business and affairs of the Company and to make all decisions and to take all actions for and on behalf of the Company necessary, convenient, desirable, appropriate or incidental in or to the furtherance of the purposes, business and objectives of the Company, including, without limitation, the right, power and authority to:" (Note: this section then goes on to list paragraphs (a) through (v), of which (f), (g) and (j) are below).

> §5.3(f). [Manager's Authority to Defend Lawsuits Against the Manager].
> "institute, prosecute, defend, settle, compromise, confess judgment and dismiss lawsuits and other judicial and administrative actions and proceedings, at law or in equity (including submissions of claims or liabilities of the Company to arbitration), brought by or on behalf of, or against, the Company, the Manager or the Members in connection with activities arising out of, connected with, or incidental to this Agreement upon such terms as the Manager may determine and upon such evidence as he may deem sufficient and to engage counsel or others in connection therewith;"
>
> §5.3(g). [Manager's Authority to Borrow Money].
> "borrow money and incur obligations on behalf of, and otherwise commit the credit of, the Company…."
>
> §5.3(j). [Manager's Authority to Repay and Refinance Debt].
> "repay, prepay (in whole or in part), refinance … any indebtedness or liabilities affecting any or all of the Company's property on such terms as the Manager deems appropriate;"

§5.4. Limitations on Authority of the Manager. (R354).
"Notwithstanding anything to the contrary in this Agreement, without the consent of a Majority in Interest of the Members, the Manager shall not have the right, power or authority to, and covenants and agrees that he shall not:"

(g) "authorize or approve the Company to borrow an amount in excess of $50,000;"

§5.5. Limitation on Authority of Members. (R355).

§5.5(b). [Members not entitled to compensation].
"Unless authorized by the Manager, no Member shall perform any services for the Company or be entitled to compensation or reimbursement of expenses therefor."

§5.5(d). [Howard responsible for lot sales and relations with builders; Pooler responsible for site development].
"Notwithstanding the foregoing, it is anticipated that so long as William Howard is a Member of the Company and so long as he performs his duties in a competent, efficient and productive manner, shall be primarily responsible for the Property lot sales and Company relations with builders. The Manager shall be responsible for all site development on the Property."

§5.6. Duties, Obligations and Liability of Manager. (R355-356).

§5.6(g). [Manager not liable, in damages or otherwise, absent fraud, bad faith or willful misconduct]. (R356).
"Notwithstanding any provision in this Agreement to the contrary, to the fullest extent permitted by law, the Manager shall not be liable, accountable or responsible, in damages or otherwise, to the Company, any Member or any other Person for any action, decision or omission by the Manager in this Agreement, unless such action, decision or omission was due to fraud, bad faith or willful misconduct by the Manager."

§5.11. Transactions with Affiliates. (R357).
"The Manager, on behalf of the Company, is permitted in his sole discretion to employ, retain, transact business or enter into contracts with or otherwise deal with any Person, notwithstanding that such Person is a Member or the Manager, is an Affiliate of the Company, the Manager or any Member…provided that such interest or relationship is known to all Managers and Members and, provided that, in the sole discretion of the Manager, such dealings are on commercially reasonable terms to the Company. If any contract, action or transaction meets the foregoing standards,

then no vote of the Members shall be required to approve such contract, action or transaction solely by virtue of the affiliated relationship involved."

§5.14. Covenants of the Company to William Howard and his Affiliates. (R358).
"The Members and Manager agree that it will cause the Company to take such action as may be necessary to (a) grant a sewer easement to Westside Development, LLC, located at 420 Ballantyne Road ("Westside"); (b) to grant land use for wet land mitigation to Westside; and (c) engage Prudential-K.A.R.E.S. as the exclusive listing agent for each of the Property's lots, provided, however, that the Prudential-K.A.R.E.S. exclusivity as listing agent shall cease in the event that it fails to produce sales of a minimum of fifteen (15) lots per year and, further, Manager and Prudential-K.A.R.E.S. shall meet quarterly to review listing agent's performance."

§5.15. Indemnification. (R359).
"The Members and Manager shall be indemnified and the Company's employees, officers and agent may be indemnified by the Company to the fullest extent possible under the Act."

§12.16. Entire Agreement. (R374.1).
"Except as otherwise provided herein, this Agreement constitutes the entire agreement and understanding of the Members and the Manager relating to the affairs of the Company and the conduct of its business and supersedes all prior agreements and understandings, whether oral or written, with respect thereto."

Site Work

Section 5.5(d) of the OA states that the Manager, Pooler, is responsible for all site development on the Property. (R355). Section 5.11 of the OA allowed Pooler to use an affiliate for the site work, provided Howard knew about it, and provided that, in Pooler's sole discretion, the terms were commercially reasonable. (R357). Pooler engaged an affiliate, Pooler Enterprises, which Howard knew about through his own solicitation of bids before the formation of ARV. (R3241-3252).

In 2007, Pooler Enterprises competed against MRI Contractors of NY, Inc. ("MRI") for site work at the Property and submitted the low bid number, prompting Howard to approach Pooler about partnering in developing the Property. (R3246-3248; R420-431). Before beginning site work, Pooler further refined the site work pricing of Pooler Enterprises, including a reduction in scope from eighty-four (84) lots to forty-one (41) lots. A summary of the Pooler Enterprises' bid pricing, along with the last competitive bid of MRI, and the actual billed prices from Pooler Enterprises for completed work, are as follows:

Date	# Lots	Total Price	Price Per Lot	Bidder	Record
2003	84	1,452,203	17,288	Pooler Enterprises	R3252
4/30/07	84	1,651,470	19,660	MRI	R420-431
6/6/07	84	1,453,178	17,300	Pooler Enterprises	R3246-3248
Jan 2008[3]	44	786,595	17,877	Pooler Enterprises	R3241-3245
Billed	41	692,080	16,800	Pooler Enterprises	R1027

The Accounting of ARV shows the total cost of site work performed by Pooler Enterprises was $692,080, which was booked as follows: $493,423.86 in 2008; $129,448.12 in 2009; and $69,208.02 in 2014. (R1027).

A comparison of the Pooler Enterprises' bids over the four-year period between 2003 and 2007 show the per lot prices remained virtually identical. At trial, Pooler explained that industry prices increased about thirty percent (30%) over this

[3] Testimony establishes that the document was issued subsequently to Pooler Enterprises' June 6, 2007 bid, even though the document was incorrectly dated January 2007 (See R2367-2368, R2695, and R2689-91).

time period, but a credit was applied to the Pooler Enterprises 2007 bid for a main sewer line that had already been installed. (R2304 L9-25). When the site work was actually performed, between 2008 and 2014, at a total cost of $16,800 per lot, the prices were lower than any previous bid submitted by Pooler Enterprises. Pooler Enterprises' reasonableness in pricing was confirmed by an expert, Peter Vars, P.E., who reviewed the scope of the site development work and issued an expert report and testified at trial that the Pooler Enterprises' prices were fair, within industry standards, and commercially reasonable. (R3625; R2537 L11-R2538 L10).

However, the Court below awarded damages of $317,146 plus interest for alleged overcharges in the site work, plus additional damages of $103,812 for alleged overhead and profit supposedly earned by Pooler Enterprises. (R16 ¶6).

Lot Sales & Relations with Builders

Prior to forming ARV, Pooler told Howard ARV needed to gross $42,000 to $45,000 per lot to make a profit. (R463 ¶14). Howard told Pooler that he had discussed the project with multiple interested builders and could get between $50,000 and $60,000 per lot. (*Id*). Howard told Pooler he could sell at least fifteen (15) lots per year, so they agreed to that number. This was documented in §5.14 of the OA. (R358). Section 5.14 of the OA names Prudential-K.A.R.E.S., a real estate company owned by Howard, as the exclusive listing agent, provided that

"exclusivity as listing agent shall cease in the event that it fails to produce sales of a minimum of fifteen (15) lots per year…." (*Id*; R2017 L16-19).

In the spring of 2008, upon the recommendation of Howard, ARV entered into a contract with Jim Biltucci of Villa Vista Development ("VVD") giving VVD exclusivity on the purchase of the first eighty-four (84) lots on the Property. (R3268-3270; R2027 L1-24). VVD agreed to buy 16 lots per year at $40,000 to $50,000 each. (R472; R3268 ¶3). Howard negotiated his own deal with VVD to be their exclusive sales representative to act as a buyer's agent for homes built by VVD; Howard was to receive sales commissions from VVD for houses they sold. (R1390 ¶62-63; R1393 ¶84; R472).

During the first four years of ARV's existence, from 2007 through 2011, Howard was only able to generate seven (7) lot sales. (R1390 ¶65; R1024). Howard's real estate company, Prudential-K.A.R.E.S., was failing to meet its obligation to sell fifteen (15) lots per year. At the same time, VVD was failing to meet its obligation to buy sixteen (16) lots per year. After four years of non-performance, Pooler, as Manager, terminated ARV's relationship with Prudential-K.A.R.E.S for failure to meet their minimum sales requirement, by letter dated July 16, 2012. (R3271). In that same letter, Pooler notified Howard that because of his lack of productivity and efficiency, Pooler was removing from Howard the right to be primarily responsible for lot sales and Company relations with builders. (*Id*).

Pooler's justification for this was that Howard failed to "perform his duties in a competent, efficient and productive manner" as required by §5.5(d) of the OA, and meet the minimum sales requirements through either Prudential-K.A.R.E.S. or VVD. (R355).

Once Howard was relieved of his duties for Property lot sales and relations with builders, Pooler negotiated and signed a contract in September 2012 with another local builder, Faber Homes ("Faber"), who committed to buy eight (8) lots per year. (R3233-3240; R2558 L25-R2559 L23). Between 2013 and 2015, Faber purchased all of the remaining thirty-four (34) developed lots comprising Phase 1 of the development. (R2559 L8-20).

In the spring of 2015, Pooler entered into good faith negotiations with Faber for the purchase of forty-seven (47) additional lots that would become Phase 2 of the development. As Manager of ARV, Pooler needed to generate sales so ARV could meet its financial obligations, including the payment of taxes (R 973 ¶13-14).

Faber engaged a real estate appraisal firm, Rynne Murphy & Associates, who generated a report dated June 22, 2015 that established a fair market value of $245,000 for the forty-seven (47) undeveloped lots that would become Phase 2. (R644-756, see Report page 2 at R646). Faber offered $235,000 for the forty-seven (47) lots, which was 95% of the appraised fair market value, but Howard refused to allow the sale to take place, citing the *lis pendens* filed when he initiated this action

against ARV. (R973 ¶13-15; R621 ¶12-14). After the potential sale to Faber fell through, no additional lots were ever sold by ARV.

Sale Commissions

The OA made Howard responsible for lot sales and gave Prudential-K.A.R.E.S. the exclusive right to sell lots. (R355; R358). The OA does not provide for any compensation to Howard for generating lot sales. In fact, the OA prohibits a Member from receiving any compensation from ARV unless authorized by the Manager. (R355).

Despite these facts, the Court below awarded Howard a judgment against Pooler for lot sale commissions of $130,900.00, and house sale commissions of $324,553.30, for a total of $455,453.30 plus interest. (R13 ¶1-R14 ¶2).

ARV Finances: Bank Financing and Pooler Loans

Pooler, as Manager of ARV, was responsible for the financial matters of ARV, including borrowing money and paying debts. (R351-354). As such, Pooler had to find ways to meet the financial obligations of the Company, including payments for site work improvements, property taxes and interest on loans.

Based on Howard's representations that Prudential K.A.R.E.S. could sell a minimum of fifteen (15) lots per year, at prices of at least $40,000 each, Pooler expected ARV's minimum annual revenue to be $600,000. (R2866 L13-17). However, Prudential K.A.R.E.S. sold only seven lots and the Company only realized

revenue of $305,000 between 2007 and 2011. (R1024). The Company could not pay its bills with the limited revenue and loans were needed to keep the Company solvent. (R985; R1029-1031).

To meet ARV's financial obligations, Pooler established a banking relationship with S&T Bank ("S&T"), which provided financing through a $3 million loan secured against the Property with interest between 3.5% and 6.0% annually; the loan was personally guaranteed by Pooler and Howard. (R436-460; R1978 L1-3; R2562 L17- 2563 L12; R2690 L3-R2691 L3; R1020-1023). ARV used proceeds from the S&T loan for a few years, but S&T required loan modifications due to ARV's lack of revenue from lot sales, and eventually stopped lending to ARV, requesting they find another lender and close out their loans. (R2564 L25-R2566 L9).

As a means to provide additional financing to ARV, and to refinance the S&T debt, Pooler provided loans through affiliated companies, including Pooler Enterprises, Pooler Realty and Pooler Development (hereinafter referred to collectively as the "Pooler Entities" and "Pooler Loans"). (R1010-1017). A complete history of all ARV transactions, including loan and refinancing transactions, for the period October 2007 through April 2016 is documented in the Accounting (R977-1067.1). ARV loan transactions in excess of $50,000.00 are described and shown at Tables 7 through 11 of the Accounting (R988-989).

In obtaining the Pooler Loans, Pooler, as Manager of ARV, acted under OA §§s 5.3(g), 5.3(j), 5.4(g), and 5.11. (See R353-357).

In the Accounting, every loan, except five, was below the $50,000 limit imposed on Pooler by OA §5.4(g). (R1010-1013). ARV obtained loans below $50,000 to pay specific Company debt obligations as they came due. The OA granted Pooler, as Manager, the authority to obtain each of those individual loans that were below $50,000. (R470 ¶56-57). The five loans over $50,000 limit were all for the specific purpose of refinancing the S&T debt. These five instances of refinancing are as follows: (R987-989).

Pooler Loans		S&T Refinancing Payments		
Date	Amount	Date	Principal	Interest & Fees
9/28/11	84,000.00	10/3/11	84,019.61	2,233.40
3/27/12	86,000.00	4/3/12	84,000.00	2,018.44
9/24/12	85,753.00	9/26/12	84,000.00	1,673.34 + 80.00 fee
3/27/13	80,000.00	3/29/13	84,000.00	848.71
10/1/13	75,000.00	10/2/13	76,400.00	646.00

Any debt incurred by the Company was authorized under the terms of the OA. (R469 ¶51-52). Each instance of indebtedness was noted on the Company financials. (R469 ¶53). All transactions were documented and recorded on balance sheets and annual tax returns, and a record was provided to Howard by delivering copies of financial statements to his bookkeeper, Mrs. Howard. (*Id.*; R465 ¶27).

The terms of the Pooler Loans were much more favorable than the loans from S&T, with interest rates between zero and 2.84%, versus the S&T Bank loans at 3.5% to 6%, and no personal guarantees by Members were required. (R990).

The total amount of interest charged on the Pooler Loans between 2008 and 2016 was $70,630. (R990). The Accounting determined that the net cash savings in interest realized by using the Pooler Loans versus financing with terms similar to S&T (if the Company could even have qualified for loans) was $95,171. (R991). Pooler secured low cost financing from the Pooler Entities for ARV and was able to fully repay the S&T debt leaving the only debt of the Company to Pooler Enterprises, whose loan balance was $784,032.02 as of April 2016. (R1015-1018).

The Court below determined that the Pooler Loans were improper loans, and awarded judgment against Pooler requiring the return of all interest paid, which amounted to $70,630. (R15¶4 – R16). The Court further required Pooler to personally indemnify the Company for the Pooler Loan balance, rather than leaving it on the Company books as a regular creditor debt to be paid back as the first priority in the event of a winding down of the Company. (R368-369).

Procedural History

This action was commenced by Summons and Complaint dated July 24, 2013. (R78). In July 2013, Plaintiffs also filed a notice of pendency against Defendant Pooler and the Company. (R563-74). Plaintiffs subsequently filed an amended

notice of pendency. (R582-89). Issue was joined in August 2013, at which time Defendant Pooler asserted counterclaims against Plaintiff. (R110-18). Intervenors-Appellants' Complaint was filed and served in June 2015 and issue was joined with respect to Intervenors' Complaint in April 2016. (R100-09; R125-35). The parties filed and briefed multiple procedural motions, including motions for accelerated judgment pursuant to CPLR 3212, a motion to extend Plaintiffs' amended notice pendency and a cross-motion for sanctions. (R136-1644).

The Trial Court granted in part and denied in part Plaintiffs-Respondents' partial summary judgment motion, which was argued in August 2015 and decided in March 2016. (R61-76). The Trial Court denied Intervenors-Appellants' summary judgment motion in March 2017. (R23-42). The motion to extend the notice of pendency was granted in July 2016. (R43-46). The sanctions application was granted in March 2017. (R24-27). A bench trial was conducted over six days during the period March 20-27, 2017. (R1935). A year later, the Trial Court issued a Bench Decision dated April 2, 2018 and an Order dated May 3, 2018 was entered on June 1, 2018. (R5-18).

Defendant-Appellant and Intervenors-Appellants seek review and reversal of the Trial Court's April 2018 Bench Decision and Order entered June 1, 2018, the prior summary judgment orders, the Trial Court's Order granting sanctions against

Defendant-Appellant and Intervenors-Appellants, and the prior Order extending Plaintiffs' amended notice of pendency.

ARGUMENT

I. THE COURT HAD NO BASIS TO AWARD DAMAGES AGAINST POOLER PERSONALLY

Gary Pooler cannot be found personally liable for any of the actions he took as Manager of the Company. All of Howard's allegations against Pooler concern his actions as Manager of the Company; none concern anything outside of that role. To establish personal liability, Howard was required to allege and prove unlawful acts by Pooler personally and not merely actions taken as Manager. He failed to do so. Despite this, the Court below found Pooler personally liable.

A primary purpose of forming an LLC is to protect the members and manager from personal liability (See New York Limited Liability Law §420). The requirement to sue defendants in their personal capacity if relief is sought against them personally applies to LLCs in New York, even where breach of fiduciary duty is alleged (*See Wang v Zhang*, 2013 NY MISC LEXIS 3888, *3-4 [Sup Ct, Queens Cty 2013]). Absent allegations against Pooler outside of his role as Manager, the Court below had no basis on which to order any damages against Pooler personally.

II. THE COURT BELOW IGNORED THE UNAMBIGUOUS LANGUAGE OF THE OPERATING AGREEMENT

A. The Operating Agreement Governs the Parties' Relationship.

The Court below erred in ignoring the unambiguous language of the OA in finding that Pooler acted inappropriately, when his actions were permitted under the OA (R335-374.3). New York Limited Liability Company Law ("LLC Law") provides the framework for operating as a Limited Liability Company ("LLC") in New York. In the absence of an operating agreement, or where the operating agreement is silent, New York LLC Law controls (*Overhoff v Scarp, Inc.*, 12 Misc3d 350, 359 [Sup Ct, NY Cty 2004]). Where parties have entered into an operating agreement to govern their LLC, courts will grant "deference to the parties' contractual agreement to form and operate a limited liability company." (*Matter of Horning v Horning Construction, LLC*, 12 Misc 3d 402, 409 [Sup Ct, Monroe, Cty 2006] [citations omitted]).

Where the operating agreement is clear and unambiguous, the parties' language controls (*Greenfield*, *supra*). New York courts have consistently held that the precise language of a written contract controls in all disputes (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]); *Liberty Home Funding v Maher* (Sup Ct, Monroe Cty, June 14, 2018, Rosenbaum, J., Index No. 2015/7804 at p.5). In the absence of ambiguity, courts need not, and must not, look outside the contract for extrinsic evidence. (*Greenfield*, *supra*, at 570; *Gilbane Bldg. Co. v St. Paul Fire*

and Mar. Ins. Co., 31 NY3d 131, 137 [2018]). Where contracts contain a merger clause, as the ARV OA did in §12.16, it is even more important that courts not look outside the language of the contract. (*See Schran v Trautman, Sanders, LLP* 20 NY3d 430, 436 [2013]).

Finally, as Justice Rosenbaum has explained, "[t]he tenets of contract interpretation are applied "with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople." (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012]). "In such cases, 'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.'" (*Ashwood Capital, Inc.,* 99 AD3d at 7, quoting *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

Despite recognizing New York's strong support for honoring unambiguous contract language, Justice Rosenbaum failed to do so below.

B. <u>The Operating Agreement Evidences the Parties' Intent to Vest Extraordinarily Broad Authority in the Manager.</u>

Pooler and Howard negotiated and executed an OA which gave extraordinarily broad powers to Pooler, as Manager. As one example, in OA §5.3, Pooler, as Manager, had:

> "the full and exclusive right, power, authority, discretion and responsibility to manage, control, administer, direct and operate the business…and to make all decisions and take all actions…necessary,

> convenient, desirable, appropriate or incidental in or to the furtherance of the purpose… of the Company, including without limitation….," (subsections (a) through (v) describing in nearly unlimited language the rights and authority of the Manager). (R351-354).

The limitations on the Manager's authority are narrow in scope and laid out in OA§ 5.4 (R354). In the absence of ambiguity, which was neither pled nor found below, no other limitations on the authority of the Manager should be read into the OA.

In comparison, OA §5.5 places significant limitations on the rights and responsibilities of Howard, and OA §5.5(a) specifically provides that "… no member shall have any right, power or authority to participate in the management or control of the Company…" (R355). Howard's sole authority was to "… be primarily responsible for the Property lot sales and Company relations with builders…," but only for so long as he was "a Member of the Company and so long as he performs his duties in a competent, efficient and productive manner." (R355). As shown in Point III, *infra*, Howard did not meet the condition precedent to become a Member of the Company, by failing to make the required cash Capital Contribution; but even if he did, he did not perform in a competent, efficient and productive manner, as required by the OA (See Point II, *infra*).

The parties further agreed, in unambiguous language in §5.6(f), that:

> "the Manager shall not be liable, responsible or accountable, in damages or otherwise, to the Company, any Member, or any other Person, for any loss, damage, expense or liability incurred by any reason of the Manager taking or failing to take any action on behalf of the Company in a manner reasonably believed by

> him to be within the scope of authority granted to the Manager by this Agreement unless it is proved, by clear and convincing evidence in a court of competent jurisdiction, that the Manager's action or failure to act was not in good faith, was not in a manner he reasonably believed to be in or not opposed to the best interests of the Company, was undertaken with deliberate intent to cause injury to the Company or with reckless disregard for the best interests of the Company, or resulted from the Manager's fraud or intentional breach of this Agreement." (R356).

If OA §5.6(f) was not sufficiently clear, the parties added OA §5.6(g) to reinforce that:

> "[n]otwithstanding any provision in this Agreement to the contrary, to the fullest extent permitted by law, the Manager shall not be liable, accountable or responsible, in damages or otherwise, to the Company, any Member or any Person for any action, decision or omission by the Manager in this Agreement, unless such action, decision or omission was due to fraud, bad faith or willful misconduct by the Manager." (R356).

The use of the term "notwithstanding any provision in this Agreement to the contrary" governs any interpretation of the Manager's potential liability. Where parties use the phrase "notwithstanding" all other clauses, this contract term is the one which "trump[s] conflicting contract terms." (*Beardslee v Inflection Energy LLC*, 25 NY3d 150, 158 [2015]; see also *BDC Fin LLC v Barclays Bank*, 607 F3d 905, 917 [2d Cir 2010]).

The clear language of the OA negotiated and agreed upon by the parties evinces an intent to vest Pooler with nearly unlimited authority, with certain exceptions discussed below.

C. Plaintiffs' Causes of Action in Breach of Fiduciary Duty are Duplicative and Must Be Dismissed.

Under New York law, "a cause of action for breach of fiduciary duty whose allegations are merely duplicative of a breach of contract claim cannot stand." (*Brinen & Associates v Krippendorff*, 2016 NY Misc LEXIS 3482, *7 [Sup Ct, NY Cty September 29, 2016] [citing *William Kaufman Org. Ltd. v Graham & James LLP*, 269 AD2d 171, 173 [1st Dept 2000], *Weight v Day*, 134 AD3d 806, 808-809 [2nd Dept 2015], and *Joyce v Thompson Wigdor & Hilly LLP*, 2008 US Dist LEXIS 43210 [SDNY June 3, 2008]).

Plaintiff has not pled, nor did the Court below find, facts other than those alleged to be a breach of contract. Each breach of fiduciary duty cause of action in the complaint "incorporates by reference and realleges the allegations in the preceding paragraphs above, as if fully set forth herein." (R88-91). Plaintiff did not even bother to plead new or different facts. "Claims are duplicative when they arise from the same facts and seek the same damages for each alleged breach." (*Brinen & Associates*, 2016 NY Misc LEXIS 3482 at *9). Consequently, causes of action in breach of fiduciary duty in this action are duplicative, and the findings of breach of fiduciary duty must be reversed and dismissed in their entirety. To hold otherwise is to allow Plaintiffs to plead breach of contract under a different guise.

D. The Court Below Based Its Findings of Breach on Actions Unambiguously Permitted Under the OA.

The Court below was required to determine if the actions or failures of Pooler, as Manager, as alleged by Plaintiffs, met the standard established by the OA for imposing personal liability. That a breach of the OA might have occurred did not end the inquiry or establish liability, nor should the Court below have substituted its own business judgment for that of the Manager's.

The Operating Agreement clearly articulates the standards by which the Manager can and cannot be found liable. Section 5.6 (f) addresses any loss, damage, expense or liability "by reason of the Manager taking or failing to take any action on behalf of the Company in a manner reasonably believed by him to be within the scope of the authority granted to the Manager." Liability will only be imposed under OA §5.6 (f) "by clear and convincing evidence" demonstrating that the Manager's act or failure to act: (1) was not in good faith; (2) was not in a manner reasonably believed to be in the best interests of the Company; (3) was undertaken with deliberate intent to cause injury to the Company; (4) was undertaken with reckless disregard for the best interests of the Company; (5) resulted from fraud; or (6) resulted from an intentional breach of the OA. (R356).

Plaintiffs failed to offer proof to demonstrate the "high probability" required to satisfy the clear and convincing standard (*Caruso v Russel P. Le Frois Builders*, 217 AD2d 256, 259 [4th Dept 1995]). The alleged actions and failures of Pooler, as

Manager, do not satisfy any of the bases for liability set forth in OA §5.6(f). As demonstrated at trial, and set forth herein, Pooler's actions as Manager served to preserve the Company and its assets and save it from insolvency, thereby promoting the best interests of the Company. Further, Plaintiffs did not plead, nor did the Court below find any fraudulent conduct. Finally, there has been no showing that Pooler, as Manager, intentionally breached the OA. With these grounds eliminated, all that remains is the alleged lack of good faith.

Given the broad powers granted to Pooler, as Manager, and that his actions served to preserve the Company at a time when lot sales for which Howard was principally responsible were well below the established rate, Pooler reasonably believed his actions were within the scope of authority granted him. The alleged actions and failures of Pooler, as Manager, complained of in this action concerned: 1) loans from Pooler Entities to the Company allegedly without Howard's consent or knowledge; 2) terminating Howard's responsibilities for lot sales and thereby denying commissions; 3) obtaining site work from Pooler Enterprises without securing formal proposals, bids or documentation; and 4) using Company funds to pay legal fees (R79-99). The proof has demonstrated that all of these actions were taken by Pooler in good faith; at a minimum, Plaintiffs have not demonstrated by clear and convincing evidence that these actions were not taken in good faith.

i. Loans to Preserve the Company.

Contrary to the holding of the Court below, the only loans requiring consent would be those exceeding $50,000, unless they were for the express purpose of repaying or refinancing debt, in which case there was no upper limit restricting the amount (R353). The five loans Pooler obtained to repay the Company's debt to S&T were permitted under OA §5.3(j) and did not require Howard's consent. Where consent is not required for a manager to take action, none will be written into an operating agreement by a court. (*See In Re E. End Development*, 491 BR 633, 635 [EDNY Bkrtcy 2013]). Given this, and given the ultimate objective of these loans – to maintain the viability of the Company – it cannot be said by a "clear and convincing" standard that Pooler did not act in good faith in making these loans.

ii. Terminating Howard's Responsibilities for Lot Sales.

The Court below held that Pooler demonstrated a lack of good faith in terminating Howard's responsibilities as exclusive listing agent for lot sales and denying him the attending commissions. In so doing, the Court noted the buyer found by Howard, VVD. Yet, the VVD contract was entered into in 2008, and required the purchase of sixteen (16) lots per year. Howard's role as exclusive listing agent was not terminated until July of 2012 (R3271), by which time not only had VVD failed to meet its purchase obligations, so too had Howard's real estate company, Prudential K.A.R.E.S., failed to meet its obligations to sell fifteen (15)

lots per year. Given that Howard's responsibility for lot sales continued only "so long as he performs his duties in a competent, efficient and productive manner," (R352) it cannot be said that Pooler failed to act in good faith as Manager, nor in disregard of his obligations by attempting to jump start languishing lot sales. The Court below may have disagreed with Pooler's decision as Manager, but it cannot be said it was not made in good faith.

iii. Pooler Enterprises Site Work.

The Court below also held that contracting with Pooler Enterprises to perform site work, without preparing formal proposals, bids or similar documentation, was a breach of the Agreement. Yet, the OA §5.5(d) expressly charged Pooler with the responsibility for site work, and OA §5.11 entitled Pooler to use an affiliate. Both parties anticipated that Pooler Enterprises would perform that work, and nothing in the OA required Pooler, as Manager, to go through a formal bid process to obtain the site work. Ultimately, Pooler demonstrated at trial the commercial reasonableness of prices charged by Pooler Enterprises. Further, nothing in the OA gives Howard any consent, or voting rights as to performance of site work, nor does the OA prescribe notice or documentation requirements. To the contrary, OA §5.5(a) precludes Howard from participating in management decisions, unless authorized by Pooler. Pooler had the exclusive right to make all management and business decisions under OA §5.3. Even if the lack of a formal bid process and documentation

is viewed as a failure, OA §7.1[a] states "[t]he failure of the Company to observe any formalities or requirements relating to the …management of its business … shall not be grounds for imposing personal liability on the Manager…" (R360).

iv. Legal Fees.

The Court below held that Pooler breached the OA, and even his fiduciary duties, by using Company funds to pay attorney's fees directly in this litigation, rather than seek reimbursement for fees paid. But in so holding, the Court not only ignored the clear language of the OA; it also ignored, while at the same time citing, New York LLC Law §420:

> Subject to the standards and restrictions, if any, set forth in its operating agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless, and advance expenses to, any member, manager or other person,…., from and against any and all claims and demands whatsoever; provided, however, that no indemnification may be made to or on behalf of any member, manager or other person if a judgment or other final adjudication adverse to such member, manager or other person establishes (a) that his or her acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated or (b) that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled.

Section 420 expressly allows for the advancement of expenses, such as attorney's fees, and only prohibits indemnification upon an adverse judgement or other final adjudication, not supported by the facts of this case. There has been no showing of bad faith, active and deliberate dishonesty, nor did any act of Pooler result in his

personal gain in fact of a financial profit or other advantage. The OA requires that Pooler, as Manager, be indemnified by the Company "to the fullest extent possible under the (LLC) Act." (OA §5.15). Pooler reasonably believed he was entitled to advance such funds, rather than seek reimbursement to pay legal fees incurred in response to allegations made about his role as Manager of the Company, and this action did not provide the basis for finding a breach of the OA or fiduciary duties.

E. The Manager is Not Liable Absent Fraud, Bad Faith or Willful Misconduct.

Section 5.6(g) of the OA further delimits the standards by which the Manager can and cannot be found liable. The Court erred in awarding damages against Pooler where there was no showing that his actions were based in fraud, bad faith, or willful misconduct.

In *Nomura Home Equity Loan, Inc. v Nomura Credit* (30 NY3d 572, 581-82 [2017]), the Court of Appeals held that contractual language limiting personal liability is enforceable and should be strictly interpreted as written. The Court of Appeals reaffirmed this ruling in 2018 in *Ambac Assurance Corp. v Countrywide Home Loans, Inc.* (31 NY3d 569, 581-82 [2018]), and reiterated the *Nomura* standard:

> "It is well settled that 'courts must honor contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities'" (*id.* at 581). "Contract terms providing for a sole remedy are sufficiently clear to establish that

> no other remedy was contemplated by the parties at the time the contract was formed, for purposes of that part of the transaction . . . especially when entered into at arm's length by sophisticated contracting parties" (*Id.* at 582 [internal citations and quotation marks omitted.])

(*Ambac Assurance Corp.,* 31 NY3d at 581-82 [2018]); see also, *Life Ins. v Noble Lowndes,* 84 NY2d 430, 436 [1994] [holding that "[a] limitation on liability provision in a contract represents the parties' Agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor."]).

Under *Nomura* and *Ambac*, the OA controls, yet the Court below ignored OA §5.6(g) and the limits it places on the Manager's liability. No damages can be awarded against Pooler unless the Plaintiff alleges and proves that Pooler violated this section by conduct that amounted to fraud, bad faith, or willful misconduct. Further, this provision, by its very language ("Notwithstanding any provision in this Agreement to the contrary. . .") trumps all other provisions in the OA addressing liability of the Manager.

Each of the three exceptions to the limitation of liability – fraud, bad faith, and willful misconduct – are unambiguously defined standards that the Plaintiff has failed to meet. OA §5.6(g) is clear, complete, and unambiguous, and thus must be enforced "according to the plain meaning of its terms." (*Greenfield, supra*, at 569; *Beardslee v Inflection LLC*, 25 NY3d 150, 157 [2015] [the intent of the parties, as

manifest in the written agreement with specifically chosen words, must control]). Further, although Howard acknowledged at trial the inclusion of a merger clause in the OA, the Court improperly considered parol evidence without ruling that the OA was in any way ambiguous (R2009, 2015, and 2096; *Schron v Troutman*, 20 NY3d 430, 436 [2013] [only upon a determination of an ambiguity may the court consider extrinsic evidence]).

i. Plaintiffs Did Not Plead or Prove Fraud.

Plaintiffs did not plead a cause of action for fraud against Pooler, nor did the Court below find any fraudulent conduct in its June Order and Decision. Fraud has very specific elements, each of which must be pled with heightened particularity under CPLR 3016(b). A recent Court of Appeals case defines the elements of a cause of action for fraud (*See Eurycleia Partners, LP v Seward & Kissell, LLP*, 12 NY3d 553, 559 [2009] ["The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages."]).

None of these elements of fraud were pled or found by the lower Court. In fact, credible testimony supports the proposition that Pooler's actions greatly benefitted the Company. As held in *Commercial Credit Corp. v Third Lafayette*, (226 AD 235, 239 [4th Dept 1929]), there can be no fraud where there is no damage.

It is undisputed that there were no fraudulent actions taken by Pooler, and therefore, he cannot be made liable under the fraud criteria.

ii. Plaintiffs Did Not Plead or Show Bad Faith.

In *Pavia v State Farm* (82 NY2d 445, 453 [1993]), the Court of Appeals affirmed the standard for bad faith as one requiring "gross disregard" for the interests of the other party. Plaintiffs have failed to show any evidence of bad faith. To the contrary, Pooler's actions showed a care for the Company that Plaintiffs' actions did not. In *Gordon v Nationwide Mut Ins. Co*. (30 NY2d 427, 437 [1972]), the Court of Appeals affirmed that bad faith must be more than a simple "error in judgment", and is not defined simply as the opposite of "good faith", but is a standard requiring a "conscious or knowing indifference" to the probability of harm (*Gordon*, 30 NY2d at 453 [1972]), or "an extraordinary showing of a disingenuous or dishonest failure to carry out a contract." (*Id*. at 437). Recently, a New York Court in *Jacal Hacking Corp. v American Tr. Ins.* (2017 NY Slip Op 30031[U] at *5 [Sup Ct, NY County 2017]) held there was no bad faith where there was no "pattern of behavior evincing a conscious or knowing indifference" to the probability of harm.

To the contrary, the actions taken by Pooler benefitted the Company and the "economic interest" of the Company (*Foster v Churchill*, 87 NY2d 744, 750-51 [1996]). The evidence at trial showed that Pooler's actions actually helped the

Company, and that Howard was the party that failed to carry out his responsibilities under the OA (R986).

The Court below had no evidence on which to find that Pooler acted in bad faith in any of his actions as the Manager of the Company. Thus, the findings must be overturned.

iii. Plaintiff Did Not Show Willful Misconduct.

The Court of Appeals defined the term "willful acts" in *Metropolitan Life Ins. v Noble Lowndes:*

> In excepting willful acts from defendant's general immunity from liability for consequential damages under §7 of the Agreement, we think the parties intended to narrowly exclude from protection truly culpable, harmful conduct, not merely intentional nonperformance of the Agreement motivated by financial self-interest.

(84 NY2d at 438-39 [1994]). Nowhere in the pleadings or the evidence at trial is there any proof of actions that fit the standard above.

At no time did Pooler deliberately act with the intention to harm the Company, and the Company has not been inadvertently harmed. Instead, the Accounting proved that Pooler's actions as the Manager protected the Company's assets from inevitable foreclosure. The Company had limited assets as a result of Howard's failure to sell lots, as he promised to do under the OA. Without the Pooler Enterprises' loans, the S&T debt would never have been paid off (R986-987).

As shown in the testimony at trial, the loans by Pooler Enterprises to the Company were commercially reasonable and benefited the Company. The Accounting showed the S&T loans carried an interest rate of between 3.5% and 6% (See R990). The Pooler Enterprises' loan rate was 0%-2.84% (*Id.,* R1018-1023). Pooler, as a prudent Manager, preserved money by restructuring the Company's debt, which is precisely what he was authorized to do under OA §5.3(j).

The evidence clearly shows that there was no willful misconduct by Pooler.

F. The Court Below Erred in Finding Breach of Implied Fiduciary Duty.

i. Facts do Not Support Finding Breach of Fiduciary Duty.

Ignoring the duplicative nature of such claim and the facts, the Court below held that the Manager breached the implied covenant of fiduciary duty. As described by the court in *Miller v HCP & Co.*:

> "The implied covenant applies only when one party "proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected." (2018 Del Ch LEXIS 40, at *22 [2018])

In *Feldmeier v Feldmeier Equipment, Inc*. (164 AD3d 1093, 1096 [4th Dept 2018), this Court held:

> "To establish a cause of action for breach of fiduciary duty, plaintiff was required to establish "(1) the existence of a fiduciary relationship (or duty), (2) misconduct by [defendants], and (3) damages directly caused by [defendant's] misconduct (citations omitted).

There is no bad faith or breach of fiduciary duty where "defendants established that each action was a legitimate and good-faith business decision entitled to protection under the business judgment rule, 'which provides that, where corporate officers or directors exercise unbiased judgment in determining that certain actions will promote the corporation's interests, courts will defer to those determinations if they were made in good faith.'" (*Feldmeier Equipment, Inc.* 164 AD3d at 1097 [2018] citing *Products, Inc., Shareholder Litigation*, 27 NY3d 268, 274 [2016] and *Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). The Court below did not so defer.

Each of the acts complained of by Plaintiff were negotiated, are permitted and were memorialized in the OA as responsibilities and rights of the Manager to effectuate the purpose of the Company. None of the Manager's actions were undertaken to the detriment of the Company; instead, the Manager acted to protect the Company from insolvency when Howard's failure to sell lots created liquidity issues. Where the actions complained of were taken in good faith, to the benefit of the Company, and to the benefit of each of its Members, there is no basis or harm to support a finding of breach of fiduciary duty.

Just as determined by the court in *Feldmeier*, each action "was a legitimate and good faith business decision entitled to protection under the business judgment rule." (See *Matter of Kenneth Cole Products, Inc., Shareholder Litigation*, 27 NY3d

268, 274 [2016] and *Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). Consequently, the cause of action for breach of fiduciary duty was dismissed.

Where the intent is to "reorganize or rehabilitate an existing enterprise, or to preserve going concern values of a viable or existing business," there is no subjective bad faith, nor should breach of implied fiduciary duty be found. (*In re E. End Dev.*, 491 BR at 633 [2013]).

The Court below failed to consider or weigh the parties' clear intent in the OA to protect the Manager from personal liability, including implied fiduciary duty. The unambiguous language of OA §5.6(f), discussed above, protects the Manager from personal liability for any action taken.

ii. The Court Below Relied on Inapposite Case Law.

In ignoring the standard established in OA §5.6(g), the Court below relied on several cases as bases for its findings of breach of fiduciary duty, including *Excelsior 57th Corp. v Lerner* (160 AD2d 407 [1st Dept 1990]), *Schneider v Wein & Malkin*, (5 Misc 3d 1011[A] [2004]), and *Levandusky v One Fifth* (75 NY2d 530 [1990]). Each of these cases is distinguishable from this case, and should be disregarded.

In *Excelsior*, plaintiffs alleged that the defendant law firm failed to disclose its dual representation of a client with conflicting interests. Such an action can never have been taken for the benefit of the plaintiff, or even with the express waiver of the client. The *Excelsior* case in turn relied on *Diamond v Oreamuno* (24 NY2d 494

[1969]). In *Diamond*, the defendant was accused of insider trading, another inherently unlawful act. Pooler's actions were not inherently wrongful, unlike defendants' dual representation in *Excelsior,* or insider trading in *Diamond*, but were undertaken to preserve the value of the Company. These cases are inapposite.

In *Schneider*, the plaintiff argued that a breach of implied fiduciary duty was evidenced by the failure of defendant to seek plaintiff's consent to business decisions. The court denied plaintiff's claim, refusing to read consent obligations into the agreement, and the claim of breach of implied fiduciary duty failed. In fact, the court held that the plaintiff ratified the actions complained of, by its knowledge and failure to object:

> "Ratification is the express or implied adoption of the unauthorized acts of another (*Holm v CMP Sheet Metal, Inc.*, 89 AD2d 229, 232, 233 [4th Dept 1982]) … One may be deemed to have ratified the acts of an [unauthorized] agent through silence when there is opportunity to speak and, under the circumstances, a desire to repudiate would normally be expressed." (*See Schneider*, 5 Misc 3d 1011[A] at *19 [2004] [citing cases]).

Finally, in *Levandusky*, the court considered a dispute between a resident and his cooperative board where the resident admitted to violating his obligations under the co-op agreement and the board was given no opportunity for oversight. The Court of Appeals upheld the co-op board's decision to require the resident to restore his residence to the state it was in before the violation took place. The case should

not be instructive to ARV, where Pooler's actions were always made in good faith and objectively worked to the benefit of the Company.

III. HOWARD LACKED THE OWNERSHIP INTEREST NECESSARY TO ASSERT CLAIMS AGAINST POOLER

Howard never made the cash Capital Contribution required of him by the OA, without which his ownership interest in the Company was null and void. Section 3.2 of the OA required:

> "Upon execution of this Agreement, the Members shall contribute initial Capital Contributions to the Company in cash in the amount set forth opposite their respective names on Schedule I hereto in exchange for their respective Percentage Interests…" (R345).

In its February 2016 Decision, the Court noted that Howard's alleged contribution was an open question. (R75). At trial, significant evidence demonstrated that Howard did not make the required cash Capital Contribution. Howard admitted as much at trial, testifying that "there was no cash that went into Archer Road." (R2822, L5-9, R 2843, L7-9). There is no proof in the record showing a cash contribution of $909,000 to ARV by Howard at any time, as required by the OA.

The Court below ignored the requirements of OA §3.2 and inexplicably failed to undertake any analysis of the issue, which it had first identified in 2016. In its April 2, 2018 bench decision, the Court stated in conclusory fashion: "…Pooler was aware of and approved of the form of Howard's capital contribution." (R17, ¶9). Yet there was no finding of what form that contribution took or that it properly

constituted a cash contribution. What is more, the Court disregarded its own Accounting. The author of the report wrote:

> "I requested documentation supporting a cash contribution from Howard's counsel but received no supporting documents in response to this request…I cannot substantiate a contribution from Mr. Howard at any point throughout the history of ARV's existence … at this point I conclude this transaction was overstated by $909,000.00." (R 981-982).

New York courts have refused to hold that non-cash contributions may be substituted for cash capital contributions. In *KSI Rockville v Eichengrun* (305 AD2d 681, 682 [2d Dept 2003]), one party argued that his non-cash services to the company constituted his contribution. However, the Second Department rejected this argument and held that where the operating agreement required cash and the member failed to contribute cash, the non-contributing party had "no financial or proprietary interest" in the LLC, regardless of prior dealings of the parties. The Court also held that the non-contributing member had no right to any distributions in the dissolution (*KSI Rockville*, 305 AD2d at 682 [2003]).

Neither is "sweat equity" permitted to be substituted for cash, one of Plaintiff Howard's various contradicting arguments here. (*LaRosa v Arbusman*, 74 AD3d 601, 603[1st Dept 2010]; *Josephthal Holdings v Weisman*, 5 AD3d 221, 221-22 [1st Dept 2004]; *In re Dissolution of M. Kraus, Inc*., 229 AD2d 347, 348 [1st Dept 1996]).

The OA requires that Howard make a $909,000 capital contribution "in cash" — an unambiguous term. In New York, cash cannot be substituted for any other word (*Commercial Credit Corp. v Third & La Fayette Sts. Garage, Inc*., 226 AD 235, 238 [4th Dept 1929] [holding that cash cannot be substituted for anything but cash][4]; *Van Ingen v Whitman*, 62 NY 513, 518-519 [1875] [transfer of special partner's interest in the assets of his old firm to his new firm "could not be considered as a cash payment."])

Here, Howard has not contributed cash to or for the Company in the manner required by the OA (*See* Accounting, pages 3-4, R981-982). The Court below disregarded this fact and precedent rejecting the substitution of non-cash for cash capital contribution, and ultimately erred in finding that Howard holds any ownership or membership interest in the Company as a matter of law.

[4] Per *Smith v Safeco Insurance* (159 AD3d 1536, 1538 [4th Dept 2018]), the Fourth Department is bound to define terms exactly as it has already defined the term previously.

IV. THE COURT ERRED IN AWARDING DAMAGES UNDER NEW YORK LAW AND UNDER THE TERMS OF THE OPERATING AGREEMENT

A. The Court Erred in Rewriting the Parties' Agreement and Awarding Damages for Commissions Where the OA Precludes Compensation to Members Without the Manager's Approval.

Even if bad faith had been pled or proven by Howard, the Court erred in awarding damages against Pooler. The Court's April 2018 Decision and May 2018 Order and Decision awards damages based on commissions even though the OA contains no language which entitles Howard to commissions (R13, ¶1; R14, ¶2; R7, ¶1; R8, ¶1). The Court based its reasoning on Howard's parol evidence testimony that commissions were contemplated in the 60%/40% ownership split. However, this not only violates the OA (which Howard admits is silent on commissions), but it ignores the merger clause of OA §12.16, and OA §5.5(b), which states "…[u]nless authorized by the Manager, no Member shall perform any services for the Company or be entitled to compensation or reimbursement of expenses therefor." (R355, R374.1).

At trial, Howard admitted that the OA said nothing about commissions, simply alleging that it had been "discussed." (R2096, L7; R2097, L5). Despite the unambiguous language of the OA, the Court awarded Howard $324,553.30, plus interest, "…as a result of Pooler's breach of the covenant of good faith and fair

dealing with respect to Howard's right to act as exclusive listing agent…" (R14,¶2; R8, ¶2).

In New York, where a contract contains a merger clause, a court is "obliged to require full application of the parol evidence rule" to avoid extrinsic evidence contradicting the terms of the writing in a manner that would "impermissibly alter the writing." (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]). In fact, the Court below was aware of this rule in 2016 when it cited *Schron* in the summary judgment decision of February 26, 2016. The Court below in 2016 determined that it is appropriate to apply the specific provisions of the subject OA in a manner that best reflects the parties' intent at the time of contract formation. It was therefore error for the Court to consider extrinsic evidence -- in the form of testimony by Howard – with respect to what was discussed regarding commissions, where the extrinsic evidence conflicts directly with the unambiguous provisions of §5.5(b) of the OA. Indeed, it is respectfully submitted that an award of commissions here, was an absurd result that, if affirmed, would render §5.5(b) of the OA meaningless.

The unambiguous language of the OA precludes Howard from being paid a commission or compensation of any kind, without the approval of the Manager (OA 5.5[b]). The Court should have, but failed to enforce the contract "according to its terms" when, based on the testimony of Howard, it awarded damages for commissions (*Reiss*, 97 NY2d at 199 [2001]; *Greenfield*, 98 NY2d at 269-270). A

court cannot rewrite, add or excise terms of a contract, thereby making a new contract for the parties under the guise of "interpreting" the writing based on an alleged prior agreement (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). There is no better example of an alleged prior agreement than Howard's mention of purported "discussions," reference to which was precluded by the merger clause (OA§ 12.16, R374.1).

Howard and the Court below both confused Howard's responsibility as the primary contact for sale of lots with the appointment of Prudential-K.A.R.E.S. as the listing agent. While Howard had a business interest in Prudential-K.A.R.E.S., they are not one and the same entity.

OA §5.14 provides, "…Prudential K.A.R.E.S.' exclusivity as listing agent shall cease in the event that it fails to produce sales of a minimize of fifteen (15) lots per year…" In 2008, Prudential K.A.R.E.S sold four (4) lots at the Property and, therefore, lost its right to exclusivity with respect to status as listing agent (R358).

Howard admitted at trial that Prudential-K.A.R.E.S. failed to sell the minimum required number of lots even in the first year (R2161, L9 – R2162, L11). The Court below improperly ruled that Howard's and Prudential-K.A.R.E.S' loss of rights was due to Pooler's acts and not their own failures to abide by the terms of the OA.

Here, reversal of the award would be consistent with the ruling in *International Technologies Marketing v Verint Systems* (157 FSupp3d 352, 367-68 [SDNY 2016] [denying damages for commissions allegedly owed after termination]; see also *Yaras v Levison Bros. Realty Corp.,* 33 AD2d 831, 832 [3d Dept 1969] [holding that it was unreasonable to infer bad faith in nonpayment of a plaintiff's commissions where defendant concluded the sale after terminating plaintiff's authority]). In the case at hand, Pooler terminated both Prudential-K.A.R.E.S' and Howard's roles in lot sales in July 2012, after only seven lots had been sold since 2007 and Howard failed to satisfy the OA requirements that he sell fifteen lots per year. (R3721). Incredibly, the Court below awarded Howard commissions for lot sales made after 2012, in which Howard and Prudential-K.A.R.E.S had no involvement. The Court below erred in awarding compensation to Howard for commissions to which he was not entitled.

Thus, not only was Howard not entitled to commissions under the OA, but Prudential-K.A.R.E.S lost its rights as the listing agent when it failed to sell the required number of lots. The Court's award of $130,900 plus interest for lot sale commissions, and $324,553.30 plus interest for house sale commissions, was error and should be reversed in its entirety.

B. The Operating Agreement Authorizes the Manager to Finance Operations Through Loans, Which Must Be Repaid First Upon Dissolution.

Paragraph 4 of the April 2018 Decision and May 2018 Order awards damages for "un-memorialized loans between various Pooler entities and the Company." (R15, ¶4; R8, ¶4). However, OA §5.3(g) allows the Manager to "borrow money and incur obligations on behalf of, and otherwise commit the credit of, the Company." (R353). The Accounting dated July 28, 2016 confirms that the loans entered into by Pooler were reasonable and to the benefit of the Company (R984-991). Memorialization of the loans in any particular form was not required on the OA, and OA §7.1(b) could not be more clear that "[t]he failure of the Company to observe any formalities or requirements relating to the …management of its business…shall not be grounds for imposing personal liability on the Manager..." (R360).

Here, the proof at trial establishes that Pooler acted to preserve the Company assets, its land, and its credit worthiness, all of which were adversely impacted by Howard's inability to complete requisite lot sales (R977-1067). Pooler refinanced the Company's debt to S&T, utilizing Pooler Enterprises, an affiliate which offered debt at lower interest rates (R989-991). The Accounting showed that the Pooler Enterprises loans saved the Company approximately $100,000 in interest and bank fees and has prevented insolvency of over $600,000.00 in debt (see Table 14, R991; see Figure 1, R986).

The Court also ignored the provisions of OA §11.2(a), which require creditor loans be repaid prior to cash capital distributions to the partners. (R368-369). Therefore, the portions of the Court's Order requiring Pooler to indemnify Company debt and essentially rewrite OA §11.2(a) should be reversed in their entirety.

Again, the Court erred in finding that Pooler damaged the Company. The proof at trial shows that without Pooler's actions the Company would have been insolvent. The Court instead chose to award damages against Pooler for authorized acts that kept the Company operating.

C. The Manager was Entitled to Have Attorney's Fees Paid by the LLC.

The parties bargained for and executed an agreement that indemnifies the Manager against any personal liability unless arising from fraud, bad faith or willful misconduct. (R356, 359, and 360). None of the Manager's acts constituted fraud, bad faith, or willful misconduct, and the decision of the Court below does not find fraud, bad faith, or willful misconduct. To the contrary, each action taken by the Manager was for the preservation of, and to the benefit of, the Company. Therefore, Pooler, the Manager, was within his rights to have the Company pay attorney's fees arising out of his actions which were for the benefit of the Company.

In *Feldmeier*, *supra*, this court held that where claims were asserted against the defendant "by reason of the fact that he was an officer or director of the [C]orporation," he was indemnified under Business Corporation Law §722(a).

Section 722(a) provides that an officer or director may be indemnified by the corporation for his "reasonable expenses, including attorney's fees actually and necessarily incurred as a result of such action or proceeding… if [he] acted in good faith, for a purpose which he reasonably believed to be in…the best interests of the [C]orporation." (*Id.* at 1095).

Similar protection exists in New York LLC Law §609, which provides:

> a) Neither a member of a limited liability company, [nor] a manager of a limited liability company …is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities...

New York LLC Law §609(b) provides that members can agree to waive statutory protection from personal liability in their OA. Howard did so agree, in OA §5.5(c), which makes him personally liable for any action outside the scope of his authority, which is limited to relations with builders and selling lots, at which he failed (R355).

No such language applies to Pooler. OA §5.15 sets forth the parties' intent to shield Pooler as Manager from personal liability, and OA §7.1 indemnifies the Manager to the fullest extent permitted by law (R359-360). There is no ambiguity in which to infer personal liability on the part of Pooler.

Instead, OA §5.3(f) gives the Manager the sole power to "institute, prosecute, defend, settle …lawsuits…brought by or on behalf of, or against, the Company, the

Manager or the Members…and to engage counsel or others in connection therewith." (R352-353).

New York LLC Law Article 420 sets out the circumstances under which an LLC may provide indemnification to its managers and members, "subject to standards and restrictions, if any, set forth in its operating agreement." The subject OA specifically indemnifies the Manager for actions arising out of the OA, until a finding of bad faith by a court of competent jurisdiction (R356). Had the parties envisioned that the Manager would pay his own legal fees in defending actions brought on behalf of the Company, they would have chosen different language, or deleted §§5.3(f), 5.15 and 7.1. Or, the parties could have inserted additional language calling for reimbursement of fees once the lawsuits were resolved in the Manager's favor. However, the parties agreed instead, in clear and unambiguous language, that the Manager shall be indemnified unless and until a finding of bad faith by a court of competent jurisdiction. This language must be enforced according to its plain meaning as intended by the parties (*Greenfield*, *supra*).

Here, the OA provides that the Company will indemnify the Manager, and pay attorney's fees arising out of lawsuits "brought by or on behalf of the Company" or against the Manager "in connection with activities arising out…or incidental to the LLC activities." (OA §§5.3, 7.1, R352-353, 360). The OA is unambiguous. Pooler is authorized to defend actions. He is authorized to initiate intervenor actions.

Pooler is fully within his rights to have the Company pay the attorney's fees incurred by him in this lawsuit. Therefore, the ruling of the Court below that Pooler's actions violated an implied covenant of good faith by having the Company pay legal fees was incorrect and must be reversed.

D. Pooler is Not Liable to Reimburse the Company for Alleged Site Work, Overcharges, Overhead and Profit.

The Court's Decision below awarded the Company $317,146.00 plus pre-judgment interest of $276,859.98…in connection with the overstatement of invoices, plus $103,812.00 in connection with overhead and profit charged by Pooler Enterprises to the Company. (R16, ¶6; R8, ¶6; R9, ¶7). The Court's Decision ignores substantial evidence of commercial reasonableness. In effect, if not reversed, on this point, the Court's Decision would require the Pooler affiliate, Pooler Enterprises, to have completed site development work for free.

Having Pooler Enterprises perform site work was authorized by OA §5.11 and a main purpose of creating the LLC. Howard had solicited bids from Pooler Enterprises for site work at the Property before he approached Pooler about purchasing the Property. Both parties anticipated that Pooler Enterprises would perform the site work, which is why Pooler, as Manager, was charged with responsibility for the site work. Plaintiff's allegation of overcharging for site work by Pooler Enterprises was contradicted at trial by expert testimony (R2537, L11 – R2538, L10; R3625) and is contrary to the law of commercial reasonableness in New

7860 does not require a party to act against its own business interests, 'which it has a legal privilege to protect'" (*MBIA Ins. v Patriarch Partners VIII*, 950 F Supp 2d 568, 618 [SDNY 2013] citing *Citri-Lite Co. v Cott Beverages*,721 FSupp 912, 924 [ED Cal 2010]).

In *MBIA*, the court held that "any rational characterization" of the commercially reasonable standard would exclude any action that would financially injure the alleged breaching party (950 F Supp 2d at 618 [2013]).

The burden of proof is on the party alleging failure to act in a commercially reasonable manner (*Leigh Co. v Bank of New York*, 617 FSupp 147, 153 [SDNY 1985]) and failure to provide evidence of what a commercially reasonable action would be in the particular circumstances results in dismissal for failure to meet the burden of proof (*MBIA,* 950 F Supp 2d at 618 [2013]). Plaintiff failed to provide evidence of commercial unreasonableness, where his expert witness admitted that he did not review the relevant documentation or even visit the project site (R477, L22-24; R2393, L18-19).

Instead, the facts showed that Pooler Enterprises submitted a competitive bid in accordance with the terms of the contract. As shown at trial, Pooler Enterprises completed substantial site work at a cost to the Company of $692,080, a price demonstrated to be commercially reasonable. By his every action, Pooler acted to

preserve the Company assets, its land, and its creditworthiness, all of which were adversely impacted by Howard's failure to complete requisite lot sales.

E. The Court Below Erred in Awarding Attorney's Fees to Plaintiff.

The Court below awarded Plaintiffs attorneys' fees and disbursements (R17, ¶10; R18; R10, ¶10). This award is a direct contradiction to the plain language of the controlling contract and New York law.

In New York, the general rule (also referred to as "the American rule") is that each litigant is required to absorb the cost of his own attorney's fees and a defendant is not required to pay plaintiff's attorney's fee absent a contractual or statutory liability, with certain limited exceptions (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 16 [1979]; *Equitable Lbr. Corp. v IPA Land Dev. Corp.*, 38 NY2d 516, 519 [1976]; *Neri v Retail Mar. Corp.*, 30 NY2d 393, 401 [1972]*; City of Buffalo v Clement Co.*, 28 NY2d 241, 262-63 [1971]; *Young v Toia*, 66 AD2d 377, 379-80 [4th Dept 1979]; *Harradine v Supervisors*, 73 AD2d 118, 121 [4th Dept 1980]).

No contractual exception to the general rule applies to ARV. Indeed, the parties' intent is clearly set forth in the unambiguous language of the OA: to protect against such personal liability (OA §§5.6[g] and 5.15; R356, 359).

Also, no fees are authorized by statute. In *Congel v Malfitano* (31 NY3d 272, 291-92 [2018]), the Court of Appeals reversed a lower court that improperly awarded attorney's fees to a prevailing party. There the Court explained: "We

conclude, however, that to award fees to plaintiffs would be to contradict New York's well-established adoption of the American Rule that 'the prevailing litigant ordinarily. . . cannot collect attorney's fees from its unsuccessful opponents.'" (*Congel*, 31 NY3d at 290-291 [2018] quoting *Hunt v Sharp,* 85 NY2d 883, 885 [1995]).

The Court of Appeals in *Congel* further clarified that "the exception is when 'an award is authorized by agreement between the parties or by statute or court rule.'" (31 NY3d at 291 [2018] quoting *Mount Vernon City School Dist. v Nova Cas. Co*., 19 NY3d 28, 39 [2012] quoting *Matter of A.G. Ship Maintenance Corp v Lezak*, 69 NY2d 1, 5 [1986]; *see also Ambac Assurance Corp. v Countrywide Home Loans*, Inc., 31 NY3d at 584 [attorney fees are incidents of litigation]). Here, there is no statute, agreement, or court rule that allows for the recovery of attorney fees.

Nor is there any public policy reason for such an award. New York has acknowledged certain extraordinary circumstances in which an award of attorney's fees may be in the public interest (*United Pickle Co. v Omanoff,* 63 AD2d 892, 893 [1st Dept 1978] [the opposing party "intentionally sought to inflict economic injury on [him] by forcing [him] to engage legal counsel…and the acts themselves must [be] entirely motivated by a disinterested malevolence"]; see also *Fugazy Travel Bur. v Ernst Ernst*, 31 AD2d 924, 925 [1st Dept 1969]; *Shindler v Lamb*, 25 Misc 2d 810, 812 [Sup Ct, NY Cty 1959] affd 10 AD2d 826 [1st Dept 1960], affd 9 NY2d

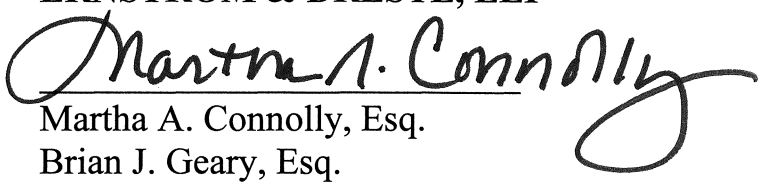
621 [1961]). New York courts also have awarded attorney's fees where the damage is not to the general public, but only where the acts involve a "high degree of moral turpitude." (*LaRosa v Dime Savings Bank,* 992 F Supp 250, 253-54 [WDNY 1997]). None of these factors or considerations are present in this case. The award of attorney's fees must be reversed.

CONCLUSION

Gary Pooler, as Manager, acted to maintain the viability of the Company. Plaintiffs failed to demonstrate that any of his actions as Manager supported a finding of personal liability, and the Court below erred in awarding damages against Gary Pooler personally. Each part of the Orders and Decisions awarding damages to Plaintiffs should be reversed. The Summary Judgment determination finding Pooler liable for breach of fiduciary duty also should be reversed. On the question of Howard's cash Capital Contribution, the Court should be directed to find no contribution and that Howard holds no financial or ownership interest, and each of the derivative claims should be dismissed as a matter of law.

Dated: April 18, 2019
Rochester, New York

ERNSTROM & DRESTE, LLP

By: 

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