SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 48
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GABRIEL LAZAR and JOEL SHEINBAUM, Individually and derivatively on behalf of ATTENA LLC, HEMERA LLC and NESSA LLC,

Plaintiff(s), Index No. 654538/2019

- against -

ARIK MOR and URIEL ZICHRON,

Defendant(s).
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 48
----------X
In the Matter of the Application of GABRIEL LAZAR and JOEL SHEINBAUM, members of ATTENA LLC, HEMERA LLC and NESSA LLC,

Petitioner(s), Index No. 655110/2019

- against -

ATTENA LLC, HEMERA LLC and NESSA LLC, ARIK MOR and URIEL ZICHRON,

Respondent(s).
----------X

September 2, 2020 - Via Skype

B E F O R E: HONORABLE ANDREA MASLEY, JSC

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THE COURT: We have two matters before the Court, related matters. Let's start with the first filed, which is the 654538 of 2019 in the matter of the application of Gabriel Lazar against Arik Mor.

Who do w e have for Lazar?

MR. TRIPODI: Good morning, your Honor. Joseph Tripodi from Kranjac Tripodi & Partners. I believe we are petitioners in this case.

THE COURT: You are petitioners in the 655110 of 2019 case. In this case you are plaintiffs.

MR. TRIPODI: Okay, plaintiffs. Thank you, your Honor. My apologies.

THE COURT: In any case, we are going to refer to you as Lazar.

And for defendants who do we have?

MR. GOLDENBERG: Andrew Goldenberg from Goldenberg Law for defendants and respondents.

THE COURT: Okay. And I see Loris Baechi is also on the call. Who is that?

MR. BAECHI: I am just observing. I am one of your interns.

THE COURT: Oh, okay. I'm sorry. You weren't with us at the introductory meeting yesterday. Welcome.

MR. BAECHI: Thank you.

THE COURT: All right, counsel, young lawyers are

watching you today. Others may also be joining since my interns started yesterday.

Everyone knows to turn off their microphone unless they are speaking, including me.

So, let's start with Mr. Goldenberg who is making motions to dismiss.

MR. GOLDENBERG: Okay, your Honor. I --

THE COURT: Actually, before you get started -- and I'm sorry to interrupt before you even get started, have you attempted to assist your clients in resolving this?

MR. GOLDENBERG: Me?

THE COURT: Both of you.

MR. GOLDENBERG: Well, there was some initial discussions that we had at, I think, the first conference that focused on this being an accounting issue. I mean, when it comes down to it this is an accounting issue.

THE COURT: Exactly.

MR. GOLDENBERG: Your Honor talked about that.

My understanding is that all relevant documents have been produced by the accounting firm that does work for these LLCs. That was the basis of a lawsuit filed by Mr. Tripodi and his clients a few years ago. Since then, in this action we have produced more documents, hundreds of pages of bank statements, and we are happy to go through any additional accounting issues. I am not sure what they are.

THE COURT: Well, here is the thing. An accounting is not for me to do and it's not for you to do, it is for an accountant to do. The accountant prepares a report, then each party gets that report, and then you hire your own accountant or you go through it yourself and decide what you agree with and what you are going to challenge. That's when I get involved and have a hearing. You know, you start with the accounting, you add and you subtract, and at the end of the day you get a balance; right? Then you can move on to the issue of breach of fiduciary duty and everything else that is alleged. But until you get an accounting, we can't even start. I mean, I can hear the motions, and I will hear them, it's fine; but, you know, at the end of the day your clients don't want to work together anymore so they are going to split up, and the only way they can do that is with an accounting.

MR. GOLDENBERG: Our clients aren't the ones that are asking for an accounting here. Our position is that they have -- Lazar has everything this they need to hire their own accountants and do their own analysis if they think it is required. Our position is pretty straightforward and I will get into it.

THE COURT: Sure.

MR. GOLDENBERG: But if they want to pay for an accounting firm to come in and do a review, audit,

compilation, whatever they want to do, go ahead and do that but not at my client's cost which has already been high because we have been forced into these multiple lawsuits.

THE COURT: Actually, it will be at the cost of the LLC. That's who is going to pay for it. And you are right, they can hire an accountant, they can review the books and records, they can do all of that; but if you want me to do my job, I need to start with something. I need to start with an accounting. I'm talking about an accounting report, just to be clear. Don't start handing me documents and general ledgers and everything else, though I may ask to see such things; but, you know, I have to start with something, right? And then you both get to attack it, you know, with whatever professional advice you have.

Let's just start with the motion to dismiss. And you can go ahead, Mr. Goldenberg.

MR. GOLDENBERG: I will start with the first filed action, the plenary action here. We have 23 claims which are mostly duplicative, but the central theme of the first action is that shareholder loans or debts were issued from LLCs that have not been repaid. The facts in the first action and the second one, which is a special proceeding seeking judicial dissolution, are the same. But just given the sheer volume, I will start with the first.

I assume your Honor is familiar with the basic

facts, so I am going to go too deep into the weeks but just give a general background here.

THE COURT: Sure.

MR. GOLDENBERG: The parties are comanaging members of three LLCs. They are Hemera Attena and Nessa.

In August of 2011 defendants located real properties, multi-family houses in Harlem, to purchase. They negotiated the purchase prices, they secured financing, they signed guaranteed loans, they formed the LLCs, they hired attorneys, accountants, etcetera, and they purchased the properties.

Later that year the defendants were introduced to the plaintiffs who wanted to invest. The plaintiffs were given investment material which reflected the cost to purchase membership interest in the LLCs. And based on reviewing the investment material, plaintiffs invested and they put in money. Initially they were passive investors but became more active in the management of the company a few years into it. In the beginning, Lazar was in regular contact with the LLC's accounting firm, Eshel, Aminov & Partners. I will refer to them as EAP. And he was actively monitoring the LLC's general ledgers, bank statements, tax returns, and P and L statements. And this is during the relevant --

THE COURT: Just so the record is clear, when you

say "he," you are talking about Lazar or the accountant?

MR. GOLDENBERG: I am talking about Lazar. I will be more specific. I apologize.

Lazar was in regular contact, had meetings with EAP. EAP is the accounting firm. And this was during the relevant time period, 2012 to 2015. In 2015 the properties were sold. Before they were sold a broker came to the parties -- and the parties here are the two plaintiffs and the two defendants -- and said that they had a buyer, and that the purchase price would give everyone a substantial profit. Now, everyone agreed to this except for the plaintiffs. What they wanted was to make more money and said they would only agree to sell if defendants agree to pay them additional money out of defendants' own pocket. There was no other offer on the table, and the defendants agreed to this.

So, in 2015 the properties were sold. Plaintiffs made over two-and-a-half million dollars from their investment. This was an almost 100 percent return on their initial investment, but this wasn't enough, I guess, because after the sale plaintiffs started to complain that they didn't have a full picture of the LLC's financial state, they didn't have access to all financial documents which wasn't the case because Lazar was regularly monitoring and reviewing these documents during the relevant time period.

In fact, we have Tariel Aminov, the lead accountant at EAP, who --

THE COURT: Why don't you spell that name for the court reporter?

MR. GOLDENBERG: T-A-R-I-E-L. The last name is A-M-I-N-O-V.

He has submitted an affidavit in this action where he has testified that Lazar had constant access to the financial documents since at least the 2012 tax year. But undeterred, plaintiffs hired Mr. Tripodi's firm and proceeded to sue the LLC's accounting firm, EAP, in 2018 for the production of financial documents.

EAP produced documents that were already in plaintiff's possession. Still not happy with that result, plaintiffs proceeded to file these lawsuits claiming that defendants owe them even more money based on nonexistent loans that I will get into.

Your Honor, I submit that these lawsuits are just simply plaintiffs' latest attempts to extract even more money from the defendants. In the original complaint in this first action, the plenary action, plaintiffs have alleged shareholder loans were issued to defendants that remain unpaid. And a few months later they filed an amended complaint replacing the words "loan" with "debt," but this is a distinction without any difference. Loans and debts

are the same thing. They are a liability. But there was no liability because there were no loans.

So, the motion to dismiss seeks dismissal on various grounds based on documentary evidence, lack of legal capacity, statute of limitations, and failure to state a claim. I will start with legal capacity which I think could be dispositive of everything here.

Plaintiffs have alleged multiple derivative claims here. These are Claim Numbers 1 through 9 and 11 through 17. These are claims that are being brought on behalf of the LLCs, but because they have not alleged a pre-suit demand, no demand has been made on the LLCs, they are claiming that such a demand would have been futile, and they have a few futility allegations in their amended complaint. Now, to sufficiently allege futility, you have to look at the seminal case from the Court of Appeals, Marx v Akers, that sets forth three requirements for demand futility. None of them are met here. First, the complaint has to allege a majority of the LLC's members are interested. They are not here. There are four comanaging members. The board or the members, I should say, this is not a corporation, it is an LLC, they are evenly split.

Now, defendants claim they are not required to show majority interest because the board is evenly split, and they cite a Delaware case on this, but the Marx decision

made clear New York does not follow the approach to demand futility that's followed in Delaware. Here in New York we require a majority interest. If you don't have a majority interest -- which you don't have here, you have 50 percent -- then you have to go to the other two possible factors under Marx.

Now, the second one is does the complaint allege some sort of egregious behavior with the particularity that is required here. For starters, the failing to pay a loan that doesn't exist doesn't seem egregious to me. But setting that aside, the amended complaint is devoid of any allegations concerning the LLC's action or inaction to respond to this purported misconduct, this egregious behavior; and it is whether the LLC acted or didn't act, and whether that action or inaction was of sound business judgment that needs to be alleged. We don't have those allegations here, so that second Marx factor doesn't apply here.

Going to the third and last factor of does the complaint allege the board did not fully inform themselves about the challenged transaction, the plaintiffs don't dispute -- they haven't even alleged that.

So, your Honor, because none of the Marx factors have been met here, the claimed demand futility, all the derivative claims should be dismissed for lack of standing.

Let's go on to the documentary evidence. This is 3211(a)(1). We have multiple claims here. Claims Numbers 1 through 6 address purported loans from Hemera to defendants or from Attena to defendants. Claims Numbers 1 through 6, they should be dismissed because -- you know, we don't need an accounting to figure out was money taken in or out of these companies. What we need are bank statements which we produced which are attached to affidavits, all of them, during the relevant time period. None of the bank statements show any money transfers going to the defendants in the amounts that are alleged in this complaint. Nothing.

Now, it is not surprising that if you look at plaintiff's opposition, they are completely silent on the fact that there are no bank statements, which, of course, constitute the proof that is needed under 3211(a)(1) to flatly contradict their claim that defendants borrowed money and didn't pay that money back. If they borrowed money, it would show up in the LLC's bank accounts, which they don't. And rather than face this reality, the plaintiffs focus on the tax returns for Hemera and Attena for years 2013, 2014 and 2015, and they say, Well, you reported loans to the IRS in these tax returns; therefore, they must have existed. And they are claiming my clients are estopped from claiming otherwise. But the estoppel argument fails because it ignores the obvious errors in the prior tax returns; the

errors being that there were capital overstatements, meaning that there was more money claimed as capital contributions than actually existed in the returns, and these capital overstatements were later corrected. Mr. Lazar was aware of these capital overstatements. There were meetings with the accountants discussing these changes to the returns. So the returns were corrected in subsequent returns. So the defendants should not be held to this false proposition that they borrowed money from LLCs when the bank statements clearly show they didn't, and they corrected those errors in subsequent tax returns which supersede the prior returns. And there is one case that's directly on point here. It is the Carrieri v Kim case which is cited on Pages 7 and 8 of defendants' reply brief. I can give you the citation if you would like, your Honor.

THE COURT: Yes.

MR. GOLDENBERG: It is 2014, WL 5342524.

This is a case in the Supreme Court where Judge Rakower granted a motion to dismiss a tax estoppel claim where the amended tax return contradicted statements asserted in the original return. It's the same case here. We should not be beholding to tax returns that have the wrong information in them, okay? So for those reasons we have bank statements that clearly show no loans, Claim Numbers 1 through 6 should be dismissed based on documentary

evidence.

Now, Claim Numbers 7 through 9 are claims that deal with the $290,000 that was distributed from Hemera to defendants. Defendants then used that money to invest in another LLC with plaintiffs. Now, plaintiffs claim that this $290,000 was a secret and it was improper, but, again, documentary evidence shows otherwise. In exchange for the $290,000 distribution, defendants gave up 15-and-a-half percent of their equity interest in Hemera. We have the operating agreement which shows their original positions in Hemera at 22.7 percent. And we have a subsequent e-mail that shows it reduced to 15 percent each. This was an e-mail from 2013. In 2014 Mr. Lazar sends an e-mail to Mr. Mor where he acknowledges that the $290,000 distribution from Hemera was an investment by defendants into this other LLC, the 143 Street LLC. So to say in 2020 that this was secret or improper when we have an e-mail from 2014 where he, Lazar, is acknowledging that he understands $290,000 was taken from Hemera and put into this other LLC, it is simply a lie, it's false. The fact that it was found in the original complaint and again in the amended complaint is shocking after we have moved to dismiss pointing this out.

Finally, Claim Number 11, this is a breach of a fiduciary duty because my clients paid EAP, the accounting

firm, $10,000. This claim should also be dismissed based on documentary evidence because the LLCs were obligated to pay their operating expenses pursuant to the operating agreements. And this obligation extended to accounting expenses which totaled $10,000 because plaintiffs decided to file the unauthorized lawsuit in 2018 which first required a two-thirds member vote which they didn't get. And, by the way, the operating agreement also said that if you want to inspect the books and records of the company you have to pay for it, but they didn't do that. They decided to hire a lawyer and file a lawsuit.

I am moving on to dismissal based on (a)(7) and failure to plead a cause of action. Focusing first on the implied contract or contract claims -- these are Claims Numbers 2, 5 and 8 -- they should be dismissed because there is no evidence or allegation of an intent to be bound by any contractual terms whether it's expressed or implied. There is no indicia of indebtedness. There is no loan agreement. There is no promissory note. There is no maturity date. There is nothing. There is nothing alleged to suggest that a loan, or note, or any obligation existed between defendants and the LLCs.

Now, focusing on the breach of fiduciary duty claims, these are Claims Numbers 1, 4 and 7, there can be no breach of fiduciary duty without wrongful conduct. And

there is no wrongful conduct here because there are no loans that have not been repaid. And there can't be any resulting damages, which is another element to breach of fiduciary duty. But setting that aside, these claims should be dismissed because they are duplicative of the contract claims. They are based on the same facts, and they are seeking the same type of damages as the contract claims.

The same goes for the unjust enrichment claims. I know there are a lot of claims, your Honor. I am trying to go them.

THE COURT: Please. I had one yesterday with 47 causes of action.

MR. GOLDENBERG: Well, I am being as clear as I can.

The unjust enrichment claims are also duplicative of the contract claims. They seek -- they allege the same exact facts and seek the same damage, so they too are duplicative and should be dismissed. In addition, they should be dismissed because there can be no unjust enrichment without receipt of a tangible benefit. There is no benefit here because there are no loans. So there is no unjust enrichment claim. And this idea that, well, there is a bona fide dispute here which allows for a quasi-contract claim should also be rejected because we have documentary evidence, bank statements, that utterly refute the

contention that there was a loan agreement between defendants and the LLCs.

Lastly, your Honor, I will address the conversion claims. These are Claim Numbers 12, 13 and 15. We move to dismiss these claims. Plaintiffs offered no argument in opposition, didn't mention them. So the silence is a tacit admission that these claims should be dismissed, and that's why they should be dismissed. Setting that aside, however, the conversion claims address funds that were allegedly converted and paid to EAP and Schlaf. They weren't possessed by the defendants. So the focus isn't even on the right parties. The focus is on nonparties that supposedly received these converted funds. There is also no allegation of dominion or control of the alleged funds, no allegations that the converted monies were intended to be paid to a designated fund for plaintiffs' benefit, and no allegation that the defendants had an independent obligation to plaintiffs to return this money to them.

Now, the last grounds for dismissal is statute of limitations. We are moving under 3211(a)(5), and this is focused on the fraud-based claims. These are the additional claims that were added in the amended complaint, Claim Numbers 17 through 23. These claims are time-barred. They should be dismissed. In order to allege fraud, or conspiracy to commit fraud, or breach of fiduciary duty

based on the fraud, it must be commenced within six years from the date of the claim accrued or two years from discovery.

Plaintiffs allege in the amended complaint that they were presented with this investment opportunity to invest in these properties no later than June 2012. This is in the amended complaint, Paragraphs 13, 15 through 18, 175, and 199. So, at this point they are claiming misrepresentations were made to them that the prices that they were told were not the right purchase prices of the properties. This is what they claim induced them to invest money into the LLCs. So if these representations were made in June 2012, they should have filed this lawsuit no later than June 2018 but they didn't. They filed it in August of 2019. So let's focus now on the two-year discovery rule.

According to the plaintiffs in their amended complaint, they claim they first suspected fraudulent activities in late August, early September 2016. This is Paragraph 28 of the amended complaint. They discussed discrepancies in the tax returns and financial statements in March of 17. This is Paragraph 32 of the amended complaint. And by then, they had serious concerns regarding the capital contributions in the LLCs, Paragraph 33 of the amended complaint. So, if you are looking at these dates, they were put on notice as early as September of 2016 of this

potential fraud that they claim. And at that point, with reasonable diligence they could have discovered the purchase price of the properties. They could have gone online, typed in ACRIS and found what the purchase prices were of each property which was available to them publicly when the properties were purchased back in 2011. But instead of doing that they decided to pursue this lawsuit starting with these phantom loan claims, non-existent claims. And when they realized after receiving our motion to dismiss the original complaint, that there were some problems there, they decided to concoct these new fraud claims to hopefully save themselves from dismissal.

For all those reasons, your Honor, the first action should be dismissed. I can now go into the second special proceeding or allow --

THE COURT: Why don't we hear from Mr. Tripodi.

MR. TRIPODI: Thank you, your Honor.

In terms of your Honor's initial comments and counsel's comments concerning this being an accounting action, I just want to clarify. This is no longer an accounting-related action. This action in particular, this is a damages action. There are individual claims --

THE COURT: The problem, Mr. Tripodi, is for the Court to reach those claims there first has to be an accounting. I am not saying this is an accounting action.

What I am saying is that I need an accounting to start with. Then I can go on to the claims of breach of fiduciary duty and, you know, everything else. But I can't actually begin to reach these things, assuming they are not dismissed first, until there is an accounting. That's just the way it works.

Go ahead. Let me hear what you have to say about dismissing this action.

MR. TRIPODI: Okay. I will focus on the amended complaint, your Honor.

The first issue I will address is the standing issue, your Honor. Under Marx it is one of three factors. As long as --

THE COURT: Mr. Tripodi, I am going to turn off my microphone. There's some feedback and we are having trouble understanding you. You're fading in and out.

(Brief pause)

MR. TRIPODI: I hope this is better, your Honor.

THE COURT: Go ahead.

MR. TRIPODI: So, with respect to the standing argument, your Honor, on the derivative claims, the Marx case says that, you know, a derivative plaintiff would need to satisfy one of three elements. The first is that the demand would be futile because the majority of the board of directors -- which is the equivalent here of the comanaging

members, there are four comanaging members of these entities -- that the majority would be interested so demand would be futile. Here, your Honor, if we had served demand on the four managing comanaging members, a demand for the company to sue two of the four comanaging members, that is the definition of futility, your Honor. The defendants would not vote for the company to sue them. Again, that's a very definition of futility. There is a Delaware case we cited in our brief, your Honor -- and Delaware is, as everyone knows, the leading state as far as corporate law, and Marx is a corporate law case -- that basically says there is no point in making any demand on a board that is evenly divided. That is futility. So that in particular --

THE COURT: You do understand that I need to follow New York law here, right?

MR. TRIPODI: I do, your Honor, absolutely. But in this particular context, because the LLC law, unfortunately, is not as developed as New York corporate law, New York LLC law is not as developed, by analogy if we have two of the four members of the board, we cannot get board approval for the lawsuit. But that's only one of the factors we believe we've satisfied of the futility factors. The other one is egregiousness. When the actions are so egregious that they can't be considered the exercise of business judgment --

THE COURT: Mr. Tripodi, you are breaking up again, so I have another suggestion. Can you turn off your microphone and call me? I will put the microphone in front of my phone. So you can call me at 646-386-4381, but you have to turn off your microphone.

MR. TRIPODI: Okay. I will do that, your Honor.

(Brief pause)

THE COURT: Okay. Mr. Tripodi, you need to also turn your microphone off because there is too much feedback.

MR. TRIPODI: All I can do is turn me off Skype.

THE COURT: I think you will have to do that.

MR. TRIPODI: I will try that. So is that better, your Honor?

THE COURT: Wonderful. Much better. Thank you. So you can continue.

MR. TRIPODI: Your Honor, as far as the standing argument, it is fully addressed in our papers. Before I get into some of the facts, your Honor, I have a general statement here.

Their facts and their documentary evidence is combining the essence of their motion -- the essence of their motion is based on affidavits that they've submitted that dispute the accuracy of the allegations in our amended complaint. The First Department in Tsimerman v Janoff, 40 AD3d 242, a 2007 case said: "These affidavits which do

no more than assert the inaccuracy of plaintiff's allegations may not be considered in the context of the motion to dismiss for the purpose of determining whether there is evidentiary support for the complaint."

We submit, your Honor, that the affidavits, one from Mr. Aminov, one from Mr. Zichron, one from Mr. Mor; they basically tell a different story. They attach some e-mails that are contradicted by other e-mails, they attach random documents; but the essence is denials of our allegations. That's clearly not permissible in the context of a motion to dismiss.

THE COURT: What about the bank statements?

MR. TRIPODI: Sure, your Honor, I will address the bank statements.

The bank statements don't reflect loans because the money never came in to the accounts. When my clients objected and said, We want to see the bank statements, we want to see the accounting for everything because we question the source of the capital contributions. It wasn't clear to my client when or if or from where defendants actually made their capital contributions on the acquisition of these properties to capitalize these LLCs.

THE COURT: Can I just ask you something?

Who cares what the source of their capital contribution is? Isn't it the amount of their capital

contribution?

MR. TRIPODI: Right. And, your Honor, we believe they didn't make any capital contributions. That's part of our purchase price fraud.

THE COURT: Why do you focus on source? Who cares about the source?

MR. TRIPODI: Because, your Honor, we don't know if they were every made. And this is part of our purchase price fraud claim. Let me, though, step back on that.

The tax returns were -- after the properties were sold in December of 2015, draft tax returns were circulated in late August or early September of 2016. Those draft tax returns for the year 2015 reflected a zeroing out of these shareholder loans. My clients objected to that because there was no support. Mr. Aminov in an affidavit, Mr. Aminov said at Paragraph 8 of his affidavit, he basically says, Defendant Mor just told me to zero them out. He is a tax partner, and he and I agreed we should zero them out. So over my clients' objection, they zeroed out the tax returns. So our position is they can't deny what they represented to the federal government in tax returns. They can't deny that. They cite to a case, but the reality is my client objected. They object to, you know, Just listen to me. Mr. Mor just told the accountant to zero them out. My client objected. The subsequent returns were filed over my

clients' objections. So we can't just look past that, your Honor. You can't expect the accountant to just zero them out over my clients' objection and then say, you know, that they don't have a claim because it is not in the tax returns. The accountant just took direction from Mor. The idea that my client had any control or any ability to obtain materials from the accountant is contradicted by the fact that we, your Honor, had to file a lawsuit in 2018 seeking a preliminary injunction, a motion against the accounting firm. And that was because the accounting firm took the position that Defendant Mor had to authorize any request from our clients even though we are comanaging members and entitled to every document related to the LLCs as comanaging members. Mr. Mor directed the accounting firm not to provide us the LLC's accounting documents. We had to file a preliminary injunction which Judge Sherwood granted and directed the accounting firm to produce documents, and they did. They started to producing at the end of 2018 and into 2019. At that point we were able to start looking through the accounting documents, your Honor, not earlier. Just because they say in their affidavits my clients have full access and control to the accounting documents, that is disputed by the mountain of e-mails that will be produced in this case. In any event, they can't just say in an affidavit that we had control, had access to the accounting

documents and that is should be accepted at true because that is in clear contradiction to the allegations in our complaint. It is a clear contradiction to the fact that we had to file a lawsuit to get a preliminary injunction. And, by the way, it was granted. It was granted because Justice Sherwood recognized that as comanaging members are entitled to all these documents and we didn't get them. That, your Honor, is a critical fact here. It goes to the egregiousness of their conduct here. It goes to the standing argument.

Mr. Mor, while that action was pending, directed the accounting firm to fight us on -- specifically directed the accounting firm to fight us on every document. We have alleged this in our amended complaint. In their affidavits they say we had full access. It is just flat out wrong. And A motion to dismiss can't be decided on these disputed facts.

So with those, your Honor, my clients, all four of them, the parties, are residents of Israel. My clients were approached by the defendants in 2011 with an opportunity to make an investment in two multi-family properties in Harlem. The purchase price was represented to them as being a certain price. The closing on the first two properties occurred in February of 2012. My clients did not attend the closing. It was all handled by the defendants. They

initially retained counsel, they handled everything. My clients did not attend the closings. Representations were made concerning the purchase price of these properties, all four of these properties. And my clients are in Israel, your Honor, and have no experience in investment in real estate in America, let alone in New York. They are in Israel. They are relying on the defendants who have a duty to them to handle the closings.

So, they sent them not the actual closing statements that everyone knows is part of a real estate file. They sent them a closing summary. They sent summaries which are made up. They sent closing summaries for these closings on four properties acquired in 2012. We asked for original closing documents, but they wouldn't give them to us. We asked the accounting firm for them, and wouldn't give them to us, so we had to file that lawsuit. and while this action was pending, we issued a subpoena to the real estate lawyers who handled the initial transaction. That was December 2018. My client, Mr. Lazar, actually went and inspected the document and for the first time saw actual closing statements. Those closing statements reflect purchase prices that are different than the closing summary that the defendant prepared and provided, so it is clear fraud. The documents reflect that it's fraud because the closing summaries indicate one price that's inflated, and

then the closing statement from the actual closing reflect a whole different price. And the difference on the four properties is approximately $2 million in purchase prices.

Now, they take the position that the documentary evidence establishes there are statute of limitations questions. Well, they have an obligation to prove with their documentary evidence that conclusively establish that my clients were aware of the purchase price, facts relating to the purchase price frauds two years before we filed this lawsuit.

THE COURT: What about the fact that it is publicly available?

MR. TRIPODI: Well, your Honor, they cite a case. My clients are in Israel --

THE COURT: I am not asking you about a case. I am just saying it is publicly available. What about that?

MR. TRIPODI: Understood, your Honor; but this is a fraud claim. My clients are entitled to rely upon the representations of the defendants who are their fiduciaries. They are the comanaging members. They misrepresented.

Also, your Honor, my clients had no reason to believe that the purchase price on these properties was inaccurate, was inflated. They are in Israel. They are provided with these phony closing summaries that are to purposely get my clients to make capital contributions in

excess of what was really required.

Frankly, what really happened here, your Honor, is they inflated the purchase prices of these four properties to get my clients to contribute essentially all of the deposits on the acquisition of the properties. And we will see this in discovery. We don't believe that they actually contributed anything, nothing to the acquisitions of these four properties in 2012. So the idea that, Oh, the plaintiffs could have looked it up; well, they had no reason to look at ACRIS. There it is. They have no experience, and they are entitled to rely on their fiduciaries who made these representations to them. That goes to the reasonable reliance of the fraud element in their claim, and we cite cases on that.

Your Honor, before I issued the subpoena to the real estate counsel here in Manhattan my client actually reached out to that real estate firm on his own and asked to see the closing files. And we've alleged this. This is all in our pleadings. That lawyer responded by saying, My clients have not authorized me to give you access to the file. So the defendants instructed the real estate lawyer to not provide my clients that information who have every right as comanaging members.

THE COURT: Hold on. Hold on.

Your client was not a comanaging member until

later on.

MR. TRIPODI: Your Honor, from the very beginning they were comanaging members.

THE COURT: I thought that they didn't become comanaging members until later on.

MR. TRIPODI: No. They became -- and this is undisputed. The operating agreements list them as comanaging managers of all three LLCs, your Honor. They had a right to see everything. And Justice Sherwood recognized that in granting our preliminary injunction.

So, at every step of the way these defendants -- every step, every attempt to get documents from the accountant, to get the closing files from the real estate lawyers; they directed these professionals not to give us the documents, your Honor. And the reason why is because they knew that we would uncover the fraud. So the idea is that we could have looked at ACRIS when we had no reason to suspect this fraud, had no reason to expect purchase price fraud, no reason at all?

Your Honor, they haven't provided documentary evidence, which is their burden here, to establish that we were aware of facts from which the purchase price fraud could be inferred, that we were aware of that before August of 2017. We absolutely weren't. They actively attempted to conceal their fraud by directing these professionals not to

give us documents that we indisputably were entitled to. And that's why we didn't find out about the purchase price fraud until we finally got the real estate closing file that we have been asking for previously and have been stonewalled. So these defendants, they can't deny -- they can't direct professionals to deny access to these files and then say, Well, you should have known earlier, or you should have checked ACRIS. There is no basis for that. That is not even a close call, respectfully, your Honor.

With regard to the $290,000 loan; that loan is from Hemera and went to acquire a sixth property in 2013. This was a property that they are not comanaging members of the holding company, that's the LLC. All four of them are passive investors. It is a property on 143 Street. Again, they are passive investors. They all had equal shares in that entity that own that property. That property was also sold at the same time in December of 2015.

There is a check, undisputed a check that went from Hemera -- and, by the way, the defendants controlled the checkbook. They wrote checks. It's a March 2013 check from the Hemera account to the selling attorneys' trust account for the 143 Street property. There was a discussion about that, e-mails in 2014. My clients raised a question about it, there was an exchange, and then my clients characterizing the statements from the Defendant Mor -- and

I will read it. It is in our brief, Page 16 of our opposition brief, your Honor. The e-mail chain is attached as Exhibit 10 to Mr. Mor's affirmation. My client wrote: "It seems from what I read in your e-mail below on the face of this, the following took place." And then he goes on to describe what Mr. Mor described. What he said was: "Uriel and Arik," the defendants, "withdrew (took a loan/took a repayment of a loan) from Hemera or $290,000." That's not a distribution to the defendants. That's a loan or a repayment of a loan. They want to characterize that, your Honor, as a return of capital; but just a couple of months later the defendants wrote themselves checks from the Hemera account in the amount of $298,000 each. They wrote themselves checks without any authorization. There was no authorization for this $290,000 loan, your Honor. There's no resolution that -- they haven't attached a resolution authorizing them to take this loan. Now they come in and say it was a return of their capital. There is no resolution authorizing the return of capital. And I will submit, your Honor, that I have seen an e-mail where the defendants described that $290,000 as representing the deposit for the four of them on the 143 Street property. That will be part of discovery. So what was it? What is the explanation months later for the $298,000 that they distributed to themselves without any resolution authorizing

them?

So, your Honor, these are questions. We don't know. We need to explore this. They did these things unilaterally. They controlled the checkbooks, and they issued checks to themselves. They say it's the return of capital, the $290,000. Well, what about the $298,000, combined it's $596,000 in distributions that they issued to themselves months later? What is that?

So the documentary evidence doesn't conclusively establish that we have no causes of action, your Honor. Far from it. At best, it raises issues that can't be decided on a motion to dismiss. These are affidavits and e-mails. And we cited cases in the First Department and Second Department that e-mails aren't documentary evidence either. So for those reasons, your Honor, the claim --

THE COURT: There is actually a split between the First Department and Second Department on that.

MR. TRIPODI: As it relates to e-mails?

THE COURT: Yes.

MR. TRIPODI: Okay. But there are conflicting e-mails here. That's another point. Here there are conflicting e-mails. They characterize the $290,000 issued from Hemera as a return of capital or distribution to them, but the e-mails indicate that it was a loan. There is ambiguity. It's not clear what it was. And that can't be

decided on a motion to dismiss, respectfully, your Honor.

This has all been briefed, your Honor, so I don't want to takes too much of the Court's time.

In terms of the actual claims, the implied contract claims that we have; well, these loans, these shareholder loans that are reflected in tax returns, we've alleged they were implied contracts. If a member takes a loan, implicit in a loan is that it is going to be paid back. There is no written contract. There is no written contract at all. And the case law says that if there is no written contract, in the alternative quasi-contract claims can be pled. If the contract -- they dispute the existence of the contract. We can in the alternative allege unjust enrichment, which we have; breach of fiduciary duty, which we have. These aren't just -- these are not duplicative claims. And we have briefed that.

Your Honor, the essence of the opposition -- I can go through more if you like, but that's the essence of our opposition to the motion to dismiss.

THE COURT: And you are withdrawing claims --

MR. TRIPODI: The conversion claims, yes.

THE COURT: Okay. Thank you.

Let's see what Mr. Goldenberg has to say.

MR. GOLDENBERG: Thank you, your Honor.

THE COURT: Let me first ask you something.

How do I know that I have all of the bank records and that the records you gave me are complete? How can I rely on that? It would have to be conclusive, meaning complete. Also, how can I rely on them if plaintiff is alleging an off-book loan?

MR. GOLDENBERG: Well, to answer your first question, the bank statements include both checking and/or savings accounts for each LLC during the relevant time period. There are literally hundreds of pages of these bank statements. There are no other accounts, nor do plaintiffs claim there are other accounts. So they are conclusive. They are complete. And on the off-book loan, I don't know if I even heard that or have seen that alleged in the amended complaint. I don't know what that even means. Money was taken from where and put into where?

THE COURT: It means money was taken at the table of the sale.

MR. GOLDENBERG: I have never heard of that. Money taken from who?

THE COURT: From the purchaser of the property.

MR. GOLDENBERG: I have never heard that nor is it alleged, so I don't think that's relevant to this case. What this case is about, as I understand it from the complaint, are money was borrowed from these companies and wasn't repaid. So, you know, I have heard, Well, we want to

know the source --

THE COURT: Hold on one second. I mean, I understand what an off-book loan is.

Mr. Tripodi, so where in the amended complaint do you have the allegations of off-book loans?

MR. TRIPODI: We don't specifically allege off-book loan. What we allege, your Honor, is there are admissions in the tax returns. They control the tax returns. The defendants control the banking statements, they control the checks, they control the tax returns. They represented to the federal government that these were shareholder loans. They made that representation. They represented that to the IRS. So our position is let's inquire about that. You have represented to the federal government that you have taken these loans, so --

THE COURT: Excuse me. Are you able to answer my question?

MR. TRIPODI: Have I physically alleged off-book loan, your Honor? No, I haven't.

THE COURT: Okay. Thank you.

Mr. Goldenberg, you can proceed.

MR. GOLDENBERG: Thank you, your Honor.

Starting with the standing argument, I heard nothing from Mr. Tripodi on the egregious particularized allegation requirement. He seems to focus on only whether

or not an interested majority of members were involved in the challenged transaction; but as your Honor points out correctly, we are not in Delaware. There are no cases cited from New York that does away with the majority rule. And just to quote from the Court of Appeals decision in Marx, they make it clear that: "The Delaware approach to demand futility," they don't follow that. And that's Marx, 88 NY2d at 198. So if we are going to focus on New York law here, there is not one single case that I can find, nor is one single case cited in plaintiffs' opposition brief where a Court says, You have met the demand futility requirement when you did not have a majority interest involved in the challenged transaction.

So on affidavits and documentary evidence, Mr. Tripodi says, Well, affidavits are not documentary evidence. No, they are not. But you know what is? Bank statements. Bank statements are documentary evidence. He does not dispute that. They will tell everything you need to know here, whether money was taken out and not repaid. It wasn't. And they don't dispute that if you look at just the bank statements.

Now, Mr. Tripodi also focuses on e-mails. He says, Well, e-mails aren't documentary evidence. As your Honor points out correctly, the First Department deems e-mails documentary evidence. And we have submitted several

e-mails that we believe are relevant here to show awareness of distributions and of loans and of equity reductions. And on equity reductions -- let me just focus on that $290,000 distribution. Mr. Tripodi says to parse through the words in these one e-mail, but what about the fact that consideration was given for the money? You have an operating agreement that attaches an ownership structure, and then you have a subsequent e-mail that reduces that equity interest, and you have these distributions discussed in e-mails. I don't know what he is talking about, Well, these weren't Mr. Lazar's words, these were Mr. Mor's words that Mr. Lazar put in an e-mail. I don't understand that.

So, you've got documentary evidence in the form of bank statements, e-mails, operating agreement. This is the stuff that Courts look at routinely in resolving motions to dismiss on a 3211(a)(1) motion. And whatever the source of the capital contributions were, I don't know how that is relevant to this case at all. What is relevant here is: Did money come out of these LLCs, was it given to defendants, did they not pay it back? I don't know where source of capital contributions comes into this. Whether they put a dollar in -- "they" being the defendants -- or $2 million in, they have put this deal together, they presented investment materials to the plaintiffs, and the plaintiffs made a choice to invest and they made millions of

dollars based on that choice.

Now, Mr. Tripodi said --

THE COURT: The source really doesn't matter which is what the focus is, for some reason, by the plaintiffs; but it is whether they put money in, if that's required by the operating agreement.

MR. GOLDENBERG: It is not required by the operating agreement, as far as I know.

What happened here is that these defendants flew from Israel to New York. They did all the leg works. They put this deal together. And like you do sometimes in real estate transactions, you bring a group of people in, a consortium, and you invest. Whether they put money in or they put sweat equity in, what difference does it make to this case? This case is about loans, monies that were supposedly taken out and not repaid. I mean, you just have to look at the amended complaint. There's nothing that --

THE COURT: Hold on to that for one minute.

Mr. Tripodi, I need a little help as to where I can find your allegations that the defendants were required to invest and made capital contributions. Where is that allegation in the amended complaint?

MR. TRIPODI: Just one moment, your Honor.

(Brief pause)

MR. TRIPODI: Your Honor, in the amended complaint

it is Paragraph 13 on Page 3. We allege in 2011 Mor and Zichron represented Lazar and Sheinbaum with an opportunity to invest. In two multi-family properties in Manhattan with all four making equal contributions and owning equivalent stakes. The presentation included, among other things, representations by defendants concerning the purchase prices and deposit requirements for the properties.

THE COURT: Okay. So where in the operating agreement does it provide that everyone was supposed to make a capital contribution? Where should I look in the agreement?

MR. TRIPODI: Bear with me, your Honor.

(Brief pause)

THE COURT: This is the original Hemera operating agreement, which is NYSCEF 69. The amended is NYSCEF 74. So where in that document does it require capital contributions by everyone?

MR. TRIPODI: Your Honor, they don't dispute, your Honor, that -- they don't dispute equal contributions. We've alleged it and they don't dispute it. They don't dispute that they were required to make capital contributions.

THE COURT: That's not what I am hearing.

MR. TRIPODI: Well, if counsel could point to where in his clients' affidavit it says they weren't

required to make capital contributions, I am happy to look at it, your Honor.

THE COURT: Just a moment.

(Brief pause)

THE COURT: Okay. It is after the signatures. The capital contributions are $10.

MR. TRIPODI: They are equal capital contributions.

THE COURT: Well, they are equal contributions of $10. I don't see anything after that about --

MR. TRIPODI: It's equal membership interest for the four parties in the case. And, your Honor, we've alleged that the representation was that all four would make equal capital contributions. Those contributions were needed to actually purchase the properties. Without the capital contribution -- I mean, they didn't all send $10 in. They wouldn't have been able to acquire these properties.

Now, if they can provide, and they haven't, their written material that was provided to my clients in order to entice them into the solicitation, if there is anything in there indicating that their client would not be providing an equal capital contribution, I would like to see it. It is not attached.

THE COURT: All right. I got it. Let me go back to Mr. Goldenberg.

Mr. Goldenberg, you left off saying that the defendant put the deal together, so it would be sweat equity and not necessarily a capital contribution.

MR. GOLDENBERG: It could be either/or, your Honor, either sweat equity or capital; but, frankly, I am a little puzzled by --

THE COURT: Well, what is it here?

MR. GOLDENBERG: I'm sorry?

THE COURT: What is it here?

MR. GOLDENBERG: I don't have the exact numbers, but if you look at what the purchase prices were of -- I suppose you can look at the purchase price of the property, look at what --

THE COURT: Why don't I look at the capital contributions into the bank account? You've provided the documents, so they are there.

MR. GOLDENBERG: Then they probably show up there. But, frankly, your Honor, this is not even an issue that I am aware of. None of the claims in this complaint tie into sources of capital contributions. We are talking about shareholder loans, but now I am hearing that what really matters is what was contributed into the companies.

THE COURT: Actually, throughout their papers which I didn't understand, plaintiffs throughout their memo of law are talking about the source of contribution as

opposed to the amount of the contribution. And now Mr. Tripodi is clarifying for me that he didn't actually mean source, he actually meant whether they made contributions at all.

MR. GOLDENBERG: Well, the amended operating agreement which says that everyone equally contributed $10 for their interest.

THE COURT: Yeah. You know, I would have to go through it more closely to see, you know, what the operating agreement states as to capital contributions and whether the parties are required to make equal contributions or not. I don't know.

MR. GOLDENBERG: Well, I don't see that anywhere in the operating agreement, at least Section 1 that we just went over. It just deals with additional capital contributions, I think; but this is a -- this is something new to me, your Honor, because just looking through every claim in the amended complaint, it relates to the so-called loans or debts that are owed. And they are not tied to initial capital contributions, they are tied to purported loans in specific amounts that were taken out of Hemera and Attena, and those amounts are solely based on tax returns and nothing else. So we are not talking about source of capital contributions, we are talking about what was reported to the IRS that was later corrected.

THE COURT: Uh-huh.

MR. GOLDENBERG: Now, going to the fraud claims. I heard Mr. Tripodi admitting that ACRIS was publicly available during the time period that we are talking about. We cite two cases that are completely on point. They are found in our brief for dismissal on Pages 8 and 9. It is ECF 91. It is Brunner v Estate of Lax and Riley v Rivers. In both cases we are dealing with fraud allegations, and in both cases the Courts found they were time-barred where the plaintiff could have with reasonable diligence discovered the alleged fraud through ACRIS.

Now, those cases being directly on point based on fraud claims should dispose of all of the fraud claims, and we are only seeking dismissal based on 3211(a)(5), not documentary evidence, as Mr. Tripodi said. Those are Claim Numbers 17 through 23.

I think that covers everything I want to cover on that motion, your Honor.

THE COURT: Okay.

MR. TRIPODI: Your Honor, if I could respond to those cases that counsel just mentioned relating to ACRIS?

THE COURT: Go ahead.

MR. TRIPODI: It's in our brief. The Riley v Rivers case, that is a case where the plaintiff -- it's an accrual of statute of limitations case. In that case the

plaintiff had actually reviewed ACRIS and did not find the relevant information. Our client didn't review ACRIS at all.

The other case, Brunner versus Estate of Lax, is not even a statute of limitations case. It has nothing to do with the accrual of statute of limitations, you know, when a plaintiff knew or should have known. That had to do with reliance in a fraud claim, reliance on some third-party concerning certain facts that were in ACRIS. That is distinguishable as well because our clients had every right to rely on defendants because they were their fiduciaries. There is a fiduciary obligation. The nature of the obligation makes the reliance reasonable. There, in Brunner the Court questioned the reliance on a third-party. Brunner didn't even involve statute of limitations, your Honor.

This is all explained in the brief. Thank you, your Honor.

THE COURT: Okay.

Anything else, Mr. Goldenberg on this?

MR. GOLDENBERG: Yes. Just as I was saying in my opening, if you look at their amended complaint they are alleging, just take their words, that they suspected fraudulent activities in August and September of 2016. So at that point with reasonable diligence they could have gone on Google and found out what they needed to find out because

they were concerned about capital contributions, purchase price, etcetera.

THE COURT: Okay. Thank you.

So that's the motion to dismiss in the 654538 of 2019 case.

We are moving on to the motion to dismiss in 655110 of 2019.

MR. GOLDENBERG: Thank you, your Honor.

Here we are dealing with a special proceeding where petitioners seek to judicially dissolve the subject LLCs of Hemera, Attena, and Nessa. And we are moving for dismissal based on another action pending, a failure to state a claim, as well as documentary evidence.

In New York, dissolution of an LLC or corporation is a drastic remedy. It is not normally done. When it is, you have to meet two -- one of two narrow criteria. One, you have to allege and prove, since this is a special proceeding, that management was unable or unwilling to promote the stated purpose of the LLC or continuing to operate the LLC is financially unfeasible. And allegations of oppressive or exclusionary conduct like complaining that you didn't have access to certain documents are insufficient to warrant judicial dissolution, so petitioners here claim that the LLCs --

THE COURT: Can I interrupt a second?

MR. GOLDENBERG: Sure.
THE COURT: So, the properties are sold, right?
MR. GOLDENBERG: Yes.
THE COURT: And there is just money in an account?
MR. GOLDENBERG: I don't know if there is money in any account.
THE COURT: Okay. Well, you sell the properties and you get revenue from the sale. And the purpose of each LLC is to buy property, right?
MR. GOLDENBERG: Wrong.
THE COURT: No?
MR. GOLDENBERG: No.
THE COURT: It was not to purchase a piece of property?
MR. GOLDENBERG: That's what they used them for, to purchase the property, and --
THE COURT: But there's a general statement of what the purpose of the company is, and you are relying on that?
MR. GOLDENBERG: I am, your Honor, yes.
THE COURT: I just don't know why your clients -- you all can't get along, so why not just dissolve them and move on?
MR. GOLDENBERG: Isn't that the case in every lawsuit, you just can't get along? I agree, but --

THE COURT: Do the accounting and go your separate ways.

MR. GOLDENBERG: I want to point you to one case which is a case from 2018 in the commercial division by Judge Scarpulla. And the case is Yu v Guard Hill Estates, 2018, WL3953795. In that case, Judge Scarpulla dismissed a dissolution petition based on an operating agreement that provided that the purpose of the LLCs in question there -- which, by the way, were real estate-based LLCs. The operating agreements said that they would engage in any lawful activity. And given the broad language in those operating agreements, Judge Scarpulla said that the petitioner failed to sufficiently plead that the LLCs were operating in a manner that wasn't contemplated by the operating agreement.

So, your Honor, the focus should be on the words in the operating agreement. The statute requires that. So if you look at the operating agreement we have the broad language, so the sole purpose was not to buy and sell Manhattan property. There is a general purpose in the operating agreements. And because of that reason, the requirement that you have to show management was unable or unwilling to promote a general or stated purpose of the LLC, that fails.

And if you look at the other requirement,

continuing the LLC, was it financially unfeasible? There are absolutely no allegations, nothing in the petition about whether at not the LLCs were insolvent or can't continue to operate.

THE COURT: Well, you just told me that there may not be any funds.

MR. GOLDENBERG: I did say that, but I don't know. The bank statements will show it. But whether or not there are funds doesn't mean that they are insolvent. Insolvency is, you know, when liabilities exceed assets. It doesn't mean that they are not going to go out tomorrow and try to buy another property. It is just important to note that in New York we don't just have Courts dissolve LLCs. You have to meet strict requirements, and they haven't been met here.

Now, separately this petition should be dismissed because there is another action pending. The allegations in the dissolution action are identical to the ones that we just discussed in the first action. They allege the same wrongs. They talk about the same nonexistent loans or debts or whatever they want to call them. So because the suits arise out of the same wrongs and because petitioners have failed to show how the first action would not be sufficient to resolve the disputes in the second action, the second action should be dismissed. But if your Honor disagrees with that, the Court has the discretion to grant a stay of

the second action and --

THE COURT: Or I can just have both actions before me and deal with them together.

MR. GOLDENBERG: You could, but the requirements just haven't been met here, your Honor, for judicial dissolution. That's what they are asking for in the special proceeding. So my understanding is that the Court has to decide whether or not the LLCs should be dissolved or not. They clearly should not be dissolved, we submit, because they haven't met the requirements for dissolution.

Lastly, your Honor, on appointment of a receiver, they want a receiver appointed. We object to that. They have made no showing of the need to conserve assets for whatever interest they have in these LLCs, but if your Honor wants to appoint a receiver, they should pay for it, we should not be paying for it. And, frankly, we should not be paying for the accounting either. I know your Honor said the LLC should pay for it, but if the LLCs don't have money to pay for it, it shouldn't come out of my clients' pockets.

I rest on that motion, your Honor.

THE COURT: Okay.

MR. TRIPODI: Your Honor, with regard to the dissolution motion; the accounting, I think, comes into play and will be required upon a dissolution. The accounting will be part of the winding up of the LLCs.

THE COURT: Right.

MR. TRIPODI: That's my understanding of the procedure. But they are disputing that the -- I don't know if they are even disputing it, frankly, your Honor, that the purpose of these three LLCs was to acquire property and operate specific property. It is stated in the operating agreement. There is no question, your Honor, and they don't submit any documentary evidence that there is any other reason to have these LLCs other than to acquire, operate these --

THE COURT: But, Mr. Tripodi, looking at your own agreement for Paragraph 3 Article II, Formation: "The company is formed for any lawful business and shall have all the powers set forth in Section 202(a) - 202(q) of the New York Limited Liability Company Law." And I am reading from Exhibit 13 which is Hemera's LLC operating agreement.

So what are you saying? Is that not the purpose?

MR. TRIPODI: I understand that's the stated purpose. It is vague and incredibly broad. And there are cases that say when the general nature of the stated purpose in the operating agreement is vague it does not assist in determining the reasonable practicability of continuing the business, you have to look at the evidence presented with regard to the purpose of the company. Now, we've alleged that the purposes of these companies was to acquire all

these entities. Otherwise, your Honor, these LLCs could never be dissolved under that standard. Effectively, then, they are exempt from every being dissolved.

THE COURT: It actually says that too in the operating agreement.

MR. TRIPODI: I'm sorry, your Honor? I missed that.

THE COURT: It also says that in the operating agreement, that there is no termination. Paragraph 7 of your agreement does not have a specific date of dissolution.

Okay. What else?

MR. TRIPODI: Your Honor, I have nothing further. I will rely on our papers.

Thank you.

THE COURT: Mr. Goldenberg, anything else?

MR. GOLDENBERG: One comment, your Honor.

Mr. Tripodi says the language is vague. This is standard language found in almost every operating agreement, and it is almost identical language that Judge Scarpulla relied on to dismiss a petition seeking the same exact relief.

THE COURT: You know, I understand that, but this is a reason that I started this argument asking you about helping your clients dissolve their relationship or, you know, separate themselves. They don't want to do business

together.

Mr. Goldenberg, you are complaining that, you know, they did the lawsuit against the real estate attorneys, a lawsuit against the accountants, now there's a lawsuit against the partners or the members, and there's one to dissolve the LLC. So, what's going to be next?

Let's just say I grant these motions. You are stuck with each other. Like, you have to find a way to help your clients get away from each other. They don't want to do business.

You know, we can get rid of the lawsuits, but at the end of the day they are still stuck together. So I will do my job and resolve these motions; but you are the attorneys for your clients, and, you know, they don't want to do business together so we are all going to be back together again. Well, maybe you will -- maybe you will get a new case and get a different judge. You started with Sherwood, now you have me. What is the next lawsuit going to be?

MR. GOLDENBERG: We want you.

THE COURT: That's not where I am going.

MR. GOLDENBERG: I know.

THE COURT: What I am saying is help your clients. Be their advisors and help them resolve this problem because getting rid of this lawsuit or going forward with this

lawsuit doesn't help them. You're lawyers, so be lawyers. You are advisors. You have expertise in the law. Help your clients resolve this problem.

I am happy to get, you know, if you want a mediator. I can't get you a JHO anymore, we don't have them anymore; but there is a mediation program, and, you know, maybe -- you know, I will take this and go through everything and you will get a decision, but at the end of the day it is not resolving the problem. You know, you really need to try to help your clients.

MR. GOLDENBERG: Your Honor, if I may ask for some guidance from you on that?

Let's assume my clients are willing to entertain an accounting. How do I explain to them that they need to pay for any of it when they believe there is a clear accounting and that they didn't take any money out of these companies?

THE COURT: Well, you could show them what an accounting looks like. The term "accounting" in our world is a report from an accountant that goes through each thing.

MR. GOLDENBERG: Yeah, but accountings can be either reviews, compilations, or audits. They are very expensive under any of those three scenarios, but they vary in prices. An accounting of these LLCs I can't imagine is going to be a few thousand dollars. It is probably going to

be tens of thousands of dollars. I don't see any reason or justification for my clients to --

THE COURT: I don't actually know that that's true.

MR. GOLDENBERG: I do from my own experience doing accountings in other cases. They are very expensive.

THE COURT: Right. But, you know, the agreements do provide that if it is one of the members asking for the accounting that they pay for it.

MR. GOLDENBERG: Correct.

THE COURT: So what you could do is put in a counterclaim for the Court to decide whether the requesting party here, Lazar, would have to pay at the end. You know the LLCs would pay initially, but then the Court would make a determination of whether the LLC should pay, the defendant member should pay, or Lazar should pay. And that can be determined just like you do cost shifting for discovery. This agreement provides that if it is a member that asks for it, then they pay for it.

On the other hand, if you are moving for dissolution under the statute, it would be the LLC that would pay for it, or it would be split among the members. And then, you know, you could make that determination afterwards. Was there a breach of fiduciary duty, in which case it is not going to be shifted to one party, right? If

there was wrongdoing as the plaintiff is alleging, then you wouldn't shift it all to Lazar. It might be shifted to the fiduciary who had breached their duty. But, you know, you would have to wait for a determination at the end after an accounting for the Court to make that determination.

However, at the end of the day if you have revenue or any balance in the account -- you know, plaintiff is saying that he is owed money after the sales, someone is going to have to look at the books and say, you know, I made this capital contribution, and the proceeds from the sale are this much, and the expenses are that much, and I am owed that much. You know? So we are going to be back again even if it gets dismissed.

MR. GOLDENBERG: All right. Thank you.

THE COURT: You need to figure out a way to resolve it or help your clients resolve it, you know, instead of Lawsuit 5.

MR. TRIPODI: Your Honor my understanding is that there is a pending lawsuit in Israel over a real estate investment in, I believe, Hungary. Other than the fact of the pending lawsuit, I don't know anything about it. But that might make things even more difficult.

THE COURT: Okay. So Lawsuit 6? I think you should try to help your clients.

So, the motions are submitted. Talk to each other

and try to help your clients. You can look at the ADR list on the Commercial Division website. I don't remember how many hundred lawyers are listed there, you know, but there are also accountants listed there, nonlawyers. Judge Sherwood, actually, used one of the nonlawyer accountants to help resolve a case. So you can look at that, and if you can agree to someone on that list, we can have that person mediate, you know? So just look at the rules and the procedures. You can look at the list yourself. It has, you know, a little information about each person and what their expertise is.

MR. GOLDENBERG: In the meantime we will just wait.

THE COURT: Otherwise you will just wait. And if you can get the transcript to me, that would be very helpful.

MR. TRIPODI: One last point, your Honor. Should we assume that discovery remains stayed?

THE COURT: Yes, discovery is stayed because -- well, it sounds to me like all the documents that can be gotten are gotten, so I don't even know that there is any that -- oh, maybe e-mails.

MR. TRIPODI: We haven't had any examinations.

THE COURT: Well, hold off on that, okay?

MR. TRIPODI: We will. Thank you, your Honor.

Reporter Certification

THE COURT: So get me the transcript. Let me know if you can find a way to help them resolve it before I make a decision; all right?

Just so you know, speaking of Judge Scarpulla, her cases are being assigned out to the rest of us because we are not getting a new judge to fill her spot. Her cases will be reassigned to all the judges who are -- not all the judges, but some of the judges in the Commercial Division. Our staffs has been cut, at least mine has been cut because of the budget cuts. If anyone else leaves I am down to two law clerks. If anyone else leaves I can't fill the position. So you should know that that's going on when you talk to your clients about how long it is going to take. And I already take a long time to do decisions, and now it is going to be probably much longer. But I do have law students to help me, so that's good. Anyway, you should let your clients know about that; okay? And we will see you again eventually one way or the other.

MR. TRIPODI: Thank you, your Honor.

MR. GOLDENBERG: Thank you, your Honor S.

THE COURT: Take care. Thank you.

* * *

The foregoing is hereby certified to be a true and accurate proceedings.

Rachel C. Simone

Rachel C. Simone
Senior Court Reporter

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