

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

-----X
RUBEN ELBERG, individually and derivatively on
behalf of ROYAL CP HOTEL HOLDINGS LP, and
ROYAL HI HOTEL HOLDINGS LP,

Index No: 657021/2022

Plaintiff

Against

TAMARA PEWZNER, individually, as co-executor and
co-trustee of the Estate of Jacob Elberg, and as
Co-Manager of ROYAL ONE REAL ESTATE, LLC,
ROYAL REAL ESTATE MANAGEMENT LLC,
ROYAL LIC REAL ESTATE MANAGEMENT LLC,

Defendants.

-----X

**AFFIRMATION IN
OPPOSITION TO
MOTION AND IN
SUPPORT OF CROSS-
MOTION**

STATE OF NEW YORK }
 }ss.:
COUNTY OF NEW YORK }

John M. Leventhal and Barry Kamins, affirm the following to be true:

1. John M. Leventhal and Barry Kamins are members of the firm, Aidala, Bertuna & Kamins, P.C. the attorneys for defendants, Tamara Pewzner, as representative of Royal One Real Estate, LLC, Royal Real Estate Management LLC, Royal Hotel & Resorts LLC, Royal CP Hotel Holdings LP, Royal HI Hotel Holdings LP and make this affirmation in support of the within opposition to Plaintiff's Motion in Lieu of Complaint and in support of the within Cross-Motion to Dismiss this action or to convert Plaintiff's motion into a Complaint and provide time for Defendants' Answer and for Removal to the Surrogate's Court, Queens County, where these issues surrounding the proceeds of the merger are currently pending or alternatively, to impleading all interested parties from the Surrogate's Court proceeding who have a legal interest in these monies, so they can be heard on the issue of their distribution.

2. Annexed to Defendants' affirmation is the affidavit of Joseph Buble', C.P.A., dated July 26, 2022, a partner at accounting firm, Citrin Cooperman, the accountant for the defendant LLCs at the time of their merger and someone intimately familiar with these entities having worked with their prior owner, Jacob Elberg, during his lifetime to file their taxes and do their accounts. Mr. Buble' identifies that, after deductions for State and Federal taxes, payments of liens and other obligations, the net proceeds of this merger transaction is little more than \$6 million. As the November 30, 2012 limited partnership agreements specify, and this Court ratified in plaintiff's declaratory judgment action, it is the "net proceeds" that are subject to distribution. (See Ex. "E" Royal HI Agreement and Ex. "F" Royal CP agreement, both at par. 3.4.2)
3. Within Plaintiff's motion is a misrepresentation to this Court that a calculation of a distribution should come from total gross consideration of approximately \$36 million and not, as the contracts specify, net proceeds which are approximately \$6 million.
4. Plaintiff's motion seeks monetary damages of approximately \$20 million to be paid by the Defendants, from a merger transaction in 2016, by a Motion in Lieu of Complaint. "CPLR 3213 is intended to provide a speedy and effective means of securing a judgment on claims presumptively meritorious. In the actions to which it applies, 'a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless.' (First Preliminary Report of Advisory Committee on Practice and Procedure, p. 91; NY LegisDoc, 1957, No 6(b), p 91.) However, in order to qualify for CPLR 3213 treatment, it is incumbent upon the appellant to show that the accounts stated, on which its action is based, '(are) instruments for the payment of money only.'" *Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc.*, 37 N.Y.2d 151 at 154 (Ct. App. 1975)

” In those cases in which use of the CPLR 3213 procedural device has been denied, it has been held that the actions were not based on instruments for the payment of money only...

In each of these cases the document sued upon required something in addition to the defendant’s explicit promise to pay a sum of money.” *Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc.*, 37 N.Y.2d 151 at 154 (Ct. App. 1975)

5. Plaintiff does not base his motion on any instrument for the payment of money only or “defendant’s explicit promise to pay a sum of money,” *Interman Indus., supra*, and therefore this motion is improper. A copy of the Summons and Complaint in Declaratory Judgment is annexed as Exhibit “C”. This Court’s January 20, 2021 Order in Declaratory Judgment is annexed as Exhibit “A” holding that the November 30, 2012 agreements apply to these limited partnerships and the Court’s decision, Annexed at Ex. “B” is this Court’s March 17, 2021 decision that Ruben is a 40% minority member of the defendant LLCs. This Court discussed this motion during a separate Order to Show Cause hearing for a restraining order under the Ruben Elberg v. Crabapple, Corp, et al., action under index no. 653373/2016. The transcript of these proceedings of July 26, 2022, is annexed as Exhibit “D”. During this hearing the Court stated:

THE COURT: I'm just, I know, now hearing what it is you are saying. I know what your opposition is going to be to the summary judgment in lieu of complaint. I understand what I'm about to read. You're going to tell me that I can't determine the amount due within the four corners of the agreement, that's in sum and substance what your papers are going to tell me...but would it be a fair characterization that that would be in sum and substance the position of Ms. Pewzner?

MR. LIEBMAN: I think the position is mainly one of disagreement as to the amounts that were –

THE COURT: Right, an amount. I can't determine it on a summary judgment in lieu, and that this is not appropriate for summary judgment in lieu because you can't decide it within the four corners of the instrument. That's what you're going to tell me, right Mr. Liebman?

MR. LIEBMAN: Yes.

THE COURT: Okay. So if that's the case, and I don't know what I'm going to think of your papers because I have not read them, and, Mr. McCarthy, if you think that there's a basis for me to agree with them -- let me try it differently -- if you think that the Appellate Division would be sympathetic to Mr. Liebman's position that there is a disagreement as to the amount such that I can't grant, and it's not the kind of thing that can be decided on a summary judgment in lieu, would your client, do you think, be willing to go to an accountant, that you each would propose one, I choose, or you each propose two, and I choose, and that whatever the accountant decides, that will be the number and you guys will agree; would Mr. Elberg agree to that?

MR. McCARTHY: I think the issue is that it's more set for an inquest because there's going -- we are going to end up with parties submitting two entirely different definitions of capital contributions, alleged loans. There's going to be factual issues. I am confident in our papers --

THE COURT: That sounds like a trial.

MR. McCARTHY: Correct.
(Hearing Transcript, Ex. "D" at Pg. 25-27)

6. "Where proof outside the instrument is necessary to establish the underlying obligation, the CPLR 3213 procedure does not apply" *Maglich v. Saxe, Bacon & Bolan, P.C.*, 97 A.D.2d 19 at 21 (1st Dep't 1983) As stated by Plaintiff's attorney, McCarthy, there are factual issues between the parties, that foreclose the use of the CPLR 3213 procedure.
7. As shown by Mr. Buble's affidavit, the bulk of proceeds, after deduction of State and Federal taxes, went to repayment of loans. At the time of the merger, one loan, held by New Fund LP and Westlead Bridge, LLC, had already gone into foreclosure and an action in foreclosure on this loan had issued. (Ex. "G") Shefa Funding, LLC, a company solely owned by Jacob Elberg, held loans against the LLC's property which was repaid in the amount of over \$4.4 million at the time of merger. (Ex. "H") Additionally there were numerous small money loans made by Jacob Elberg to keep these real estate ventures afloat during his lifetime. We know this not only from the accountant Jacob dealt with, but also

from the testimony of Ruben Elberg himself to that fact.

8. In a June 22, 2017 deposition of Ruben Elberg conducted by Capital One Taxi Medallion Finance, as creditor of Ruben Elberg, (Ex. "I"), Ruben identified all the monies provided to the real estate projects by Jacob as "loans" that were transferred to the real estate entities with the intention that they be paid back when the real estate entities were refinanced.

Ruben testified:

<u>PAGE</u>	<u>LINE</u>	<u>TEXT</u>
33	15	Q. So from 2003 to 2012, you borrowed money from each of those [Taxi Medallion] entities?
	17	A. Yes.
	22	Q. So you took equity out?
	23	A. Yes.
	24	Q. But you view that as a loan from the company to you or as a capital distribution?
34	2	A. No, it was a loan, it was loans.
36	20	Q. Is there any document reflecting the loan between those entities and you in one case and those entities between you and your father?
	24	A. No.
38	22	Q. That's not my question. My question's when the money was borrowed by you from Merill and Spindle and borrowed by you and your father from Jerub, when is that due to be paid back to those entities?
39	3	A. <u>It was due to be paid back after a refinancing of the hotel</u>

project that we were going to stabilize or a sale of the hotel project that we were going to stabilize.

7 Q. Is there anything in writing that says that's when it's due back?

9 A. No.

(See deposition of Ruben Elberg in *One Taxi Medallion Finance v. Jeb Management Corp. and Ruben Elberg*, Supreme Court, Suffolk County Index No. 608014/2015, Exhibit "I")

9. According to Ruben's testimony, Jacob loaned monies to the real estate entities that he intended would be paid back by a refinance of those real estate entities, clearly identifying them as loans to these real estate projects that had to be paid back as soon as financially feasible. That no loan documents were created for these transfers was identified by Ruben as being the custom and practice of the Elbergs when monies were transferred between their entities; however Ruben, Jacob and their accountants knew that these were loans that were required to be repaid to Jacob so he could repay the medallion entities that loaned these funds.
10. Jacob did, however, take the added precaution of writing the word "loan" on many of the checks that he issued for the use of these real estate ventures. Annexed as Exhibit "J" are various checks Jacob issued for use by the real estate entities where he wrote the word "loan," in the memo section.
11. At the reading of Jacob Elberg's will, Ruben also made it clear to all of his family members and estate attorneys Jack Fitzgerald, Esq., David Portal, Esq. and Meghan Schubmehl, Esq. that these monies from Jacob were loans. In that context, Ruben advised all present that all the monies provided from Jacob Elberg were in fact loans that had to be paid back and that, according to Ruben, after payment of these loans there would likely be little or no profit from the real estate ventures.

12. In her annexed affidavit, Tamara Pewzner identifies the recording of the Will reading, and identifies the statements made by her brother Ruben Elberg during this Will reading, which now assist us in understanding that the monies Jacob used to support these real estate ventures were loans which he, and Ruben, understood needed to be paid back before any profit share or distributions could be made. A transcript of this Will reading is annexed as Exhibit "K" and an audio file of the Will reading attached as Exhibit "L."

13. In her affidavit, Ms. Pewzner identifies her brother Ruben as making each of the statements recorded attributed to him in this transcript.

<u>PAGE</u>	<u>LINE</u>	<u>TEXT</u>
18	7	RUBEN ELBERG: I have a question.
	9	JACK FITZGERALD: Sure.
	10	RUBEN ELLBERG: My dad, on this real estate that Tamara is discussing, owes close to the \$13 million to the Medallions that my mother owns. That money is not additional money that my father owns. He borrowed money from all the cab corporations, and we have documentation that's been filed with the tax returns, his tax returns in the past, and –
	21	RUBEN ELBERG: He owes loans of over \$13 million to the Medallions that my mother owns as passable without any tax liability. Why would we pay tax on \$13 million of additional

<u>PAGE</u>	<u>LINE</u>	<u>TEXT</u>
		value <u>that my father loaned money to another corporation</u> where he is going to have to repay those monies back? I'm just thinking out loud and I'm asking a question. I don't know if it's legitimate.
19	12	JACK FITZGERALD: It's all part of his pot of assets and, to the extent that he had loan obligations, those are a deduction against that pot of assets, so there is a net value.
	17	RUBEN ELBERG: Net value is going to be practically zero.
	19	DAVID PORTAL: You mean, what, on the real estate?
19	21	RUBEN ELBERG: On the real estate, after he pays off what he owes.
20	2	RUBEN ELBERG: I just want to be clear, I don't want my mother paying hundreds of thousands of dollars or the family paying taxes <u>when he outright loaned money from the cabs, and they have to be repaid. That was a clear agreement. His accountant knows it.</u>
	25	DAVID PORTAL: It never got to the level. I wouldn't say fortunately or unfortunately, it just didn't you know what I mean, of where we spoke to the accountant. I know he has an accountant at a place called Citrin –
21	7	RUBEN ELBERG: Cooperman, correct.
	12	RUBEN ELBERG: Very good firm.
	14	DAVID PORTAL: Yeah, yeah, it's a very fine firm.
	16	RUBEN ELBERG: Very fine firm.

<u>PAGE</u>	<u>LINE</u>	<u>TEXT</u>
22	23	RUBEN ELBERG: I don't want to make a statement in any governmental agency that we have, above and beyond the yellow cabs, another \$13 million or \$20 million in additional assets when they're owed to the cabs. It's just not right.
24	7	RUBEN ELBERG: I had a relationship with <u>my father</u> when I was involved in a limited partnership with him on this, and he <u>was always clear that those monies have to be repaid, first and foremost, before you get any profit sharing out of potential profits out of this investment. So, he was clear. He always want to return the money to the cabs.</u> He never wanted to owe the cabs a penny, and that's what we want to make sure it happens.
33	4	RUBEN ELBERG: So, are you saying we're going to have to get an appraisal?
	7	JACK FITZGERALD: Yes.
	8	RUBEN ELBERG: And basically, come to an understanding that, after the appraisal is done, that the value of this is X, that there is monies owed to two or three people and that will be assigned to those people, correct?
	15	DAVID PORTAL: As of the date of the death, that's when the evaluations need to be done or measured by.
	19	RUBEN ELBERG: And then, <u>once we take out the monies owed to people, including Mr. Jacob Elberg, who is owed the bulk of the</u>

money, which is over \$13 million.

- 70 11 RUBEN ELBERG: I have a question.
- 13 JACK FITZGERALD: sure
- 14 RUBEN ELBERG: And I don't want to complicate things, but I don't want things to be complicated because two corporations that was in my name, but its my father's because we had an agreement, but he never had a chance to transfer it to his name – its my father's.

(Transcript of Will reading, Exhibit "K," *emphasis added*, audio file of Will reading, Ex. "L" at 15:20 to 17:44, 18:27-19:31, 25:30-26:15 and 52:20-52:40)

14. By his statements, Ruben Elberg identifies the monies used by Jacob Elberg to support the real estate ventures as "loans," and even identifies the amount of loans due and owing to Jacob Elberg as "over \$13 million." Ruben is specific that all loans are to be paid back to the estate of Jacob Elberg before the distribution of any profit share which Ruben now demands from these transactions. It is therefore clear that the affidavit and financial form of Joe Buble', the accountant, showing the amounts available for distribution as little over \$6 million, mirrors the testimony of Ruben Elberg given to Capital One and his statements made against pecuniary interest during his father's Will reading, that all the monies Jacob contributed were loans that were properly returned to the estate of Jacob Elberg, none of which should be considered as "profit" or "net proceeds" nor should any of that money be made subject to distribution until after all loans made by Jacob Elberg were paid back to his estate.

15. As plaintiff claims a 40% share of net proceeds through his Class D limited partner status, and 40% of the remainder of proceeds that would flow to the LLCs based on this Court's

finding that he is a 40% member of the LLCs, Plaintiff would be demanding a combined 64% share of net proceeds.¹ A 64% share of the net proceeds of \$6.038 million would be \$3,864,320 from the figures as computed by Mr. Buble' in his affidavit.

16. No matter the computation, these defendants cannot pay more money than was yielded as net proceeds from this transaction, which Mr. Buble' shows as approximately \$6 million. Any judgment requiring payment beyond such sums would require a looting of funds from other entities, including lender, Shefa Funding, which was repaid on a Note and Mortgage it held against the real estate entities (Ex. "H"), the return of funds paid to a third-party holder of a judgment in foreclosure on the real estate entities properties (Ex. "G") and would require that State and Federal authorities return the transfer and capital gains taxes paid during the merger transaction. The funds properly repaid Jacob's Estate, over which both the Plaintiff and Defendants' representative, Pewzner, were entrusted, cannot be looted of funds properly repaid to Jacob on his loans, which are intended, by his will, (Ex. "M") to be for the sole benefit of his widow Esma Elberg.
17. As there is a dispute as to whether the amount due to Reuben should be the net proceeds from the merger, as determined by the LLC's accountant Buble', or some other amount, as claimed by Plaintiff, no award of a sum certain could be given, and summary judgment on this issue should be denied.

¹ From 100% of net proceeds, a 40% deduction of plaintiff's Class "D" share would leave 60% for the LLCs as Class C limited partner. The finding of Ruben as a 40% LLC member would provide Ruben 40% of this share, or 24% of the total. The combined maximal share claimed by Ruben is therefore 64% of net proceeds, according to the contracts.

II. DEFENDANTS' REQUEST TRANSFER OF THIS ACTION TO THE SURROGATES COURT OF QUEENS COUNTY OR IN THE ALTERNATIVE TO INTERPLEAD INTERESTED PARTIES

18. Annexed as Exhibit "M" is a copy of the Will of Jacob Elberg wherein he leaves all of his worldly possessions for the benefit of his wife and widow, Esma Elberg. Esma has been deprived of the proceeds of Jacob's estate since her husband's death in 2013 and was awaiting determination of her rights in the Surrogate's Court Queens County where this estate is venued and pending. As shown above, the entirety of the state entities came from Jacob's borrowing of monies from his taxicab assets from Capital One Taxi Medallion Finance. As a consequence, Capital One has filed a Motion in Lieu of Complaint against Jacob's Estate, as guarantor, on these loans, for over \$21 Million, plus interests and costs. A copy of their Motion in Lieu of Complaint is annexed as Exhibit, "N." A tentative settlement between the Estate and Capital One Bank is the subject of a petition, pending for the Surrogate's approval (Ex "O") and would be affected by decisions of this Court, either by denuding the Estate of assets based on Plaintiff's misrepresentations and/or miscalculations, or by this Court's restraint of funds from the Estate of Jacob Elberg which are beyond that required to pay Ruben the share of "net proceeds" as determined by the LLC's accountant, Joseph Buble', C.P.A. A recovery action filed by the Estate against Ruben regarding his claims to Estate Assets was awaiting this Court's decision in declaratory judgment and is now pending in the Surrogates Court, Queens County, and is annexed as Exhibit "P"
19. This Court's restraint of funds that are well beyond the approximate \$3.8 million that could credibly be claimed by Plaintiff, prevents the Estate of Jacob Elberg from paying its creditors or in funding the testamentary trust Jacob left for his widow, Esma Elberg. As

shown in the Affidavit of her daughter Tamara Pewzner, Esma has been deprived of any benefit of her husband's Estate during the pendency of these actions and now, by order of this Court, is threatened to lose her entire inheritance due to an improper calculation of monies due her. The Last Will and Testament of Jacob Elberg, (Ex. "M") leaves all benefit of his assets at the time of his death to his widow, Esma.

20. In addition to main beneficiary Esma, estate creditor, Capital One Taxi Medallion Finance, there also are the interests of trust contingent beneficiaries, Shalom Elberg and Michael Elberg, Jacob's sons, who have not been named in the matters pending before this Court but who are, nevertheless, interested in its outcome and have a right, with the widow, to be heard as to the ownership of these assets. All of these issues are currently the subject of various proceedings currently pending in the Surrogate's Court, Queens County.

21. CPLR §325(e) provides that "where an action pending in the supreme court affects the administration of a decedent's estate which is within the jurisdiction of the surrogate's court, the supreme court, upon motion, may remove the action to such surrogate's court upon the prior order of the surrogate's court."²

22. Moreover, SCPA §201(3) vests the Surrogate's Court with full and complete jurisdiction "in law and in equity to administer justice in all matters relating to estates and the affairs of decedents***and determine all questions, legal or equitable, arising between any or all of the parties...having any claim or interest therein." Indeed, the interests of justice "dictate

² 1 The cases hold that the "requirement" of prior consent has been superseded by the provisions of the New York State Constitution, which authorizes the Supreme Court to transfer actions over which it has concurrent jurisdiction with the Surrogate's Court without the Surrogate Court's prior consent. N.Y. Const. art. VI, § 19(a); *Benjamin v. Morgan Guar. Trust Co. of New York*, 173 A.D.2d 373, 374 (1st Dep't 1991); *Birnbaum v. Cent. Trust Co.*, 156 A.D.2d 309(1st Dep't 1989).

a strong preference for removal (to Surrogate's Court] where the affairs of an estate are involved." *Birnbaum v. Cent. Trust Co.*, 156 A.D.2d 309 (1st Dep't 1989) [action brought against administrators of an estate concerning the disposition of partnership property, in which the estate had a 50% interest, was transferred from Supreme Court to the Surrogate's Court as the action fell within the jurisdiction of the Surrogate's Court and the Surrogate was already familiar with the case history]; *See also Carmel v. Shor*, 250 A.D.2d 475, 476, (1st Dep't 1998)["CPLR 325(e) expresses a preference for removal to Surrogate's Court of all matters affecting the administration of a decedent's estate] and *Hollander v. Hollander*, 42 A.D.2d 701 (2d Dep't 1973) [action was transferred to the Surrogate's Court as the alleged wrongs concerned the non-probate of a purported will and the conversion of the assets of a decedent's estate].

23. Actions directly affecting the execution of a decedent's testamentary plan or concerning a major asset of the decedent's estate, or actions in which the Surrogate's Court has already acted in the case, is familiar with the facts of the case, or is uniquely suited to hear the dispute, are instances which warrant removal from the Supreme Court to the Surrogate's Court. *Berger v. Ickovicz*, 175 Misc. 2d 677, 680 (Sup. Ct. Kings County 1998); *see also, Hoffman v. Sitkoff*, 297 A.D.2d 205 (1st Dep't 2002)[transfer was warranted because the agreement in question was "so inextricably connected" with a will that the dispute "affect[ed] the administration of the estate] and *Hollander v. Hollander*, 42 A.D.2d 701 (2d Dep't 1973)[action was transferred to the Surrogate's Court as the alleged wrongs concerned the non-probate of a purported will and the conversion of the assets of a decedent's estate].

24. Accordingly, "wherever possible, "litigation concerning a decedent's estate should be resolved in Surrogate's Court. *Benjamin v. Morgan Guar. Trust Co. of New York*, 173

A.D.2d 373, 374 (1st Dep't 1991) ["wherever possible, all litigation involving the property and funds of a decedent's estate should be disposed of in Surrogate's Court"] quoting *Peekskill Community Hosp. v. Sayres*, 88 A.D.2d 657 (2d Dep't 1982) ["wherever possible, all litigation involving the property and funds of a decedent's estate should be disposed of in Surrogate's Court"]; See also *Nichols v. Kruger*, 113 A.D.2d 878 (2d Dep't 1985) [transfer to Surrogate's Court was warranted where the alleged wrongs concerned the attempted conversion of decedent's assets and partial frustration of the decedent's testamentary plan].

25. Here, Plaintiff is functionally requesting this Court to convert monies repaid on loans made by entities owned and controlled by Jacob Elberg, including Notes held by his wholly owned entity, Shefa Funding (Ex. "H") and to transfer them to Ruben Elberg. To the extent this Court would rule on the rights of the parties to assets held in Jacob's Estate, such ruling directly affects the affairs of the Decedent and the administration of Jacob's Estate, including the claims of his widow, creditors and remaindermen children. It also affects disputes already pending between the Estate and Ruben pending since Jacob's passing including claims by Ruben to Jacob's taxi medallions and those Jacob kept in Ruben's name but were acknowledged by Ruben as owned by Jacob. The Queens County Surrogate's Court already has jurisdiction over this dispute.
26. As the Queens County Surrogate's Court has already exercised jurisdiction over this estate, and since whenever possible litigation involving the property and funds of a decedent's estate should be disposed of in Surrogate's Court, transfer to Surrogate's Court is warranted.
27. On that basis, Defendants request that this Court transfer this action, pursuant to CPLR §325(e) to the Surrogate's Court, Queens County, where a petition regarding Ruben's claims to Estate assets (Ex. "P") is already pending, as is a petition for a determination of

a settlement between the Estate and its creditor, Capital One Taxi Medallion Finance, (Ex. “O”).

Defendant’s Alternative Request for Interpleader

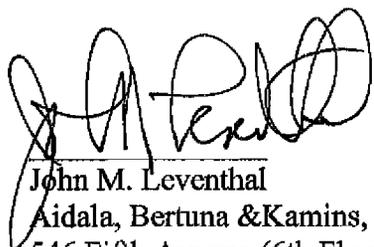
28. Given the interests of the various unnamed parties including Esma Elberg, Capital One Taxi Medallion Finance and Estate remaindermen, Shalom Elberg and Michael Elberg, it is requested that in the event this Court decides not to transfer this case to the Surrogate’s Court for further determination of the issues identified herein, then we alternatively request that the Court approve defendant’s motion for interpleader as these various parties have a justiciable interest in the proceeds of this Estate, and a right to be heard on these issues.
29. “The Code provision for interpleader by order, upon motion, was not intended to create a new ground for interpleader, but to enable a person sued on a claim, where an action of interpleader could be brought, to bring the third person, making a claim to the fund or property, into court in a summary way upon motion, as stated in the section quoted, without the expense and delay to the stakeholder that would result from an action of interpleader. It is not a new, but a concurrent and more simple, remedy.” *Pouch v. Prudential Ins. Co. of America*, 204 N.Y. 281, 284 (1912); *See also, Greenway Mews Realty, L.L.C. v. Liberty Insurance*, 200 A.D.3d 519 (1st Dep’t 2021) (interpleader actions were proper vehicles for resolution of each party’s entitlement to funds paid by contractor’s insurers.)

CONCLUSION

30. Plaintiff's counsel has presented inaccurate information to this Court regarding the amount of "net proceeds" subject to distribution under the limited partnership agreements. To the extent that such discussions of Plaintiff's claims were not integral to this Court's order denying Plaintiff's request for a TRO on its Order to Show Cause for Contempt, we respectfully request the Court either to resettle this Order or to issue an Order vacating those provisions relating to the distribution of merger proceeds. In the event this Court intends to decide this issue under the caption in the Declaratory Judgment action, Defendants request renewal so that their proofs on this issue, including the affidavit of the LLCs accountant, Joseph Buble' and the testimony and admissions of Ruben Elberg can be considered on this issue, in aiding the Court to determine whether there is a question of fact that precludes an award of summary judgment.
31. As the rights of the parties as well as the rights of non-parties, including the Estate of Jacob Elberg, widow Esma Elberg, Estate creditor, Capital One Taxi Medallion Finance, and Estate remaindermen, Shalom Elberg and Michael Elberg, are all affected by the question of distribution of these proceeds, Defendants' respectfully request that their motion to transfer this action for final determination to the Surrogate's Court of the State of New York, Queens County be granted. As the estate proceeding in the Surrogates Court of Queens County has been commenced, the question of the relative rights among the various parties should be determined in that court.

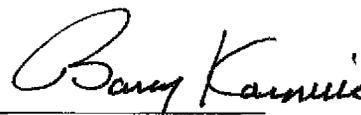
32. If for any reason the Court decides to retain this matter for determination by this Court, it is respectfully requested that all interested and necessary parties, including the Estate, widow Esma Elberg, Capital One Taxi Medallion Finance and Estate remaindermen, Shalom Elberg and Michael Elberg, be interpleaded so they can be heard on these issues that affect their ultimate rights to these monies, and for such other and further relief as this Court deems proper under the circumstances.

Dated: New York, New York
August 22, 2022



John M. Leventhal
Aidala, Bertuna & Kamins, P.C.
546 Fifth Avenue (6th Floor)
New York, NY 10036
212-486-0011

Yours, etc.



Barry Kamins
Aidala, Bertuna & Kamins, P.C.
546 Fifth Avenue (6th Floor)
New York, NY 10036
212-486-0011

CERTIFICATION

I certify pursuant to Uniform Rules for Trial Courts Section 202.8-b that the attorneys' Affirmation was prepared on a computer using Microsoft Word with a typeface of Times New Roman and a font size of 12. The total number of words is 5,115 words.



John M. Leventhal