SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

DAVID ARONOV, INDIVIDUALLY AND AS A MEMBER OF 290 13TH STREET, LLC SUING ON BEHALF OF HIMSELF AND OTHER MEMBERS OF 290 13TH STREET, LLC SIMILARLY SITUATED AND IN THE RIGHT OF 290 13TH STREET LLC,

Plaintiffs,

-against-

EUGENE A. KHAVINSON, MIKHAIL KREMERMAN, MICHAEL KHAVINSON, VYACHESLAV FAYBYSHEV, YANA SOSKIL, VITALY KOCHNEV, ARTYOM KIRZHNER, MIKOLA VOLYNSKY, ALEXANDER BOGUSLAVSKY, OMNI BUILD INC. AND 290 13TH STREET, LLC,

Defendants.

Index No.: 500499/2016

Hon. Patria Frias-Colon

Mot. Seq. 5

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION UNDER CPLR § 4404(A) FOR JUDGMENT NOTWITHSTANDING VERDICT

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Defendants Eugene A. Khavinson, Mikhail Kremerman, Michael Khavinson, Vyacheslav Faybyshev, Yana Soskil, Vitaly Kochnev, Artyom Kirzhner, Mikola Volynsky, Alexander Boguslavsky, Omni Build Inc. and 290 13th Street, LLC, submit this memorandum of law in support of their motion under CPLR § 4404(a) for judgment notwithstanding verdict.

PRELIMINARY STATEMENT

This is an action by a Plaintiff named David Aronov, a 3.33% member of a Limited Liability Company called 290 13th Street, LLC ("Company") against all members of the Company, including the Operating Managers of the Company, namely Messrs. Eugene Khavinson, Mikhail Kremerman and Vyacheslav Faybyshev, for allegedly deceiving Plaintiff into becoming a member with promises that his and other members' capital contributions would be used to convert a property located at 290 13th Street, Brooklyn, New York ("Property") into condominiums to be sold to the public.

Despite the fact that the Operating Managers did eventually complete the conversion and did eventually sell the condominiums, Plaintiff was unhappy because the overall financial outcome of the project yielded a net loss on his initial (and only) capital contribution of $150,000, even though all the Members of the Company also suffered similar losses in accordance with their membership shares in the Company, hence, in much greater percentage than the Plaintiff.

After he received his distribution of $125,253, Plaintiff commenced this action against all the Members of the Company, alleging that his loss was due to improper payments made by the Operating Managers to their friends and family in the form of hidden payments and fake loans, without informing him, despite the fact that these payments were proper and despite the fact one of the Operating Managers, Eugene Khavinson, was Plaintiff's employer, who informed Plaintiff on a daily basis about the activities surrounding the Property conversion.

Plaintiff alleged that his loss was also due to the mismanagement by the Operating

Managers, while choosing to overlook the severe injury of a worker of a sub-sub-Contractor at the Property's construction site, which no one could have foreseen, resulting in a lawsuit filed against the Company. As part of a lawsuit, attorneys for the injured worker placed a lien on the Property, making it virtually impossible to sell the developed Property (construction of which had been completed while the suit was in progress). The lawsuit undermined the commercial success of the project because carrying costs of the project needed to be paid while the lawsuit was pending and no Members of the Company (including Plaintiff) wanted to pay carrying costs.

Despite these unforeseen barriers, the Operating Managers devised a clever and sound plan to rescue the project from this lawsuit by negotiating a reasonable settlement with the injured worker, finding zero-interest funding from sources other than the Company and its Members, paying the settlement amount, causing the lien to be lifted, and eventually selling the condominiums.

Instead of recognizing the gargantuan efforts by the Operating Managers in salvaging a more than adequate return on investment given these unforeseen events, Plaintiff accused them of fraud, conversion, unjust enrichment and breaches of fiduciary duty and dragged the Company into a costly seven-year long lawsuit that completely drained the Company and the Operating Managers of substantial financial resources.

After a two week trial involving several witnesses and dozens of exhibits comprising mainly Company financial documents and tax returns, the jury entered a verdict in favor of Plaintiff on his claims for conversion, fraud and deceit, unjust enrichment, breach of the duty of loyalty, accounting and breach of fiduciary duty, even though no reasonable juror could have entered such verdicts given the testimony that was provided and the evidence that was introduced. For the reasons to follow, Defendants' motion for judgment notwithstanding verdict must be granted.

LEGAL STANDARD

Under CPLR § 4404(a), "the court may set aside a verdict or judgment entered after trial, and direct that judgment be entered as a matter of law, if the verdict was not supported by legally sufficient evidence"—*i.e.*, if there is "no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by the jury on the basis of the evidence presented at trial." *In re New York City Asbestos Litig.*, 148 A.D.3d 233, 236 (1st Dept. 2017), *aff'd sub nom. Matter of New York City Asbestos Litig.*, 32 N.Y.3d 1116 (2018). "The criteria to be applied in making this assessment are essentially those required of a Trial Judge asked to direct a verdict." *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 (1978).

ARGUMENT[1]

I. The Court Should Enter a Directed Verdict of No Liability on Plaintiff's Breach of Fiduciary Duty Claim.

At trial, Plaintiff presented several theories of liability on his claim for breach of fiduciary duty against the Operating Managers, including: (1) taking out loans without the unanimous consent of the members; (2) adding members to the LLC without getting the written agreement of all of the members; (3) making payments to third-parties who were not part of the LLC; (4) failing to ensure that the prime contractor for the project was adequately insured against personal injury claims; and (5) taking out a $750,000 loan without the unanimous consent of the members, then lending that $750,000 to the prime contractor and then failing to collect on that loan. The jury found that the Operating Managers were liable for breaching their fiduciary duty to the Company. The verdict should be set aside because the evidence at trial failed to support a finding of breach under any of these theories.

[1] References to "[Ex. __]" are to exhibits attached to this motion, which are listed in the affirmation of Oleg Mestechkin.

A. Taking Out Loans From Third Parties Without Unanimous Consent Of The Members.

The jury found that the Operating Managers breached their fiduciary duty by taking loans from certain third parties, while failing to obtain unanimous consent of the Members before taking out the loans.[2] For the following reasons, the evidence in the record failed or, at least, was insufficient to support a verdict of breach of fiduciary duty on these grounds.

First, the evidence required to support any verdict for breach of fiduciary duty resulting from the taking of these loans was insufficient because this evidence failed to show any harm or injury resulting from the Company's taking these loans.

As this Court is aware, harm is a necessary element of any claim for breach of fiduciary duty. *See* *Madison Hudson Assocs. LLC v. Neumann*, 44 A.D.3d 473, 484 (1st Dept. 2007) ("In the absence of any factual showing of injury . . . , Madison's breach of fiduciary duty claim was properly dismissed"); *Oshman v. Yasser*, 183 A.D.2d 648, 649 (1st Dept. 1992) (dismissing fiduciary duty claim where "there is no evidence that plaintiff suffered any harm as a result of any breach").

Where a claim for breach of fiduciary duty is based on a defendant taking out a loan that presumably harms the plaintiff by encumbering the plaintiff with debt, the Second Department has held that such a claim must be dismissed if the loan was ultimately repaid because plaintiff has suffered no harm as a result of that loan. *See* *Wallkill Med. Dev., LLC v. Catskill Orange Orthopaedics, P.C.*, 178 A.D.3d 987, 989 (2d Dept. 2019) ("defendants also submitted evidence that [they] ultimately repaid that loan, placing Catskill Orange in no worse a position than it had been in prior to the draw down of that line of credit. Accordingly, we agree with the Supreme

[2] *See, e.g.*, Testimony adduced by Plaintiff on the direct examination of Vyacheslav Faybyshev (Faybyshev Tr. at 29:13 – 33:8 [Ex. I]) and Eugene Khavinson (Khavinson 12/7/23 Tr. at 71:19 – 72:5 [Ex. F]).

Court's determination . . . dismissing the breach of fiduciary duty . . . causes of action").

Here, the Operating Managers testified that the challenged loans were taken by the Company to pay for materials and services needed for the condominium conversion. For example, when asked about a "check made payable to 290 13th Street LLC" for $20,000 from 2546 East 17th Street Realty LLC, dated August 6, 2010, Mr. Khavinson testified that the check "was a small loan to 290 13th Street LLC from a company which was controlled by [Vyacheslav] Faybyshev for a short term loan to buy material before our shareholders had put additional funds to the company not to slow down the construction." (Khavinson 12/7/23 Tr. at 61:21 – 62:6 [Ex. F].)

Similarly, when asked about that same loan, Mr. Faybyshev testified "It's very simple just to--probably 290 [13th Street LLC] was short with the money". (Faybyshev Tr. at 29:19-22 [Ex. I]; *see also* Faybyshev Tr. 24:17-18 [Ex. I].)

More importantly, both Messrs. Khavinson and Faybyshev testified that ***this loan along with the other challenged loans were all repaid*** by the Company (Khavinson 12/7/23 Tr. at 64:13-15 [Ex. F]; Faybyshev Tr. at 29:23–30:3 [Ex. F]) and that ***the Company never paid any interest*** on these loans (Khavinson 12/7/23 Tr. at 76:6-7 [Ex. F]; Faybyshev Tr. 37:11-13 [Ex. I]). No other witnesses, including Plaintiff, gave any contrary testimony or produced any evidence that the loans were not repaid, or that interest was paid by the Company.

Further, the documentary proof entered at trial confirmed that these loans were repaid. For example, the bank records with Chase Bank, which was entered by Defendants into evidence as Defendant's Exhibit A, reflects incoming loans as credits and repayments as debits, shows that each of the challenged loans was fully repaid without accruing any interest. (*See* [Ex. D].)

Also, the tax returns, entered into evidence by Plaintiff to show the taking of these loans, showed that the loans were repaid without accruing any interest. (*See* Company 2014 Tax Return,

at Schedule L [Ex. C]; Khavinson 12/7/23 Tr. at 71:24-72:9 [Ex. F].)

Plaintiff also alleged that the Operating Managers concocted a scheme under which Defendant Boguslavsky pretended to lend $250,000.00 to the Company for the Operating Managers to be able to defraud the Company by issuing a payment to Boguslavsky in the amount of $250,000.00. Plaintiff's theory was based solely on the Company's 2014 Tax Return, entered into evidence at trial as Plaintiff's Exhibit 4H [Ex. C].

However, the accuracy of the 2014 Return was conclusively disputed by the Company's accountant, Serge Rozenberg, who testified that a supposed loan in the amount of $250,000 from Boguslavsky to the Company and its supposed repayment to Boguslavsky was an accounting error, that there was no such loan and there was no repayment of such loan to Boguslavsky. (*See* Rozenberg Tr. 48:20-49:22; 53:12-54:3 [Ex. J].)

Indeed, financial records entered into evidence at trial, *e.g.*, the Company's Ledger (Plaintiff's Exhibit 2 [Ex. B]), and Chase Bank Statements (Defendant's Exhibit A [Ex. D]), failed to show any payment by the Company to Boguslavsky, other than return of a portion of Boguslavsky's initial investment, less Boguslavsky's share of Company losses.

In fact, all witnesses, including the Operating Managers and Defendant Boguslavsky testified that Boguslavsky never lent $250,000 to the Company and that he never received $250,000 from the Company. Documents entered into evidence at trial are devoid of any proof that the $250,000.00 were lent to the Company by Boguslavsky and that the Company issued a payment in the amount of $250,000.00 to Boguslavsky.

Based on the documents in evidence and based on the testimony of multiple witnesses, reasonable jury could not have found that the $250,000.00 was loaned to the Company by Boguslavsky and that the Company issued a payment in the amount of $250,000.00 to

Boguslavsky.

Second, there was no evidence to support the jury's verdict that the Operating Managers did not obtain consent of all Members of the Company to take the loans that were necessary for the redevelopment of the Property. The only testimony on the issue of consent for these loans was (1) Plaintiff's testimony that ***he himself*** did not give consent (*see* Aronov Day 1 Tr. at 57:2-14 [Ex. E]), (2) Defendant Khavinson's testimony that consent ***was obtained from all Members***, including Plaintiff (Khavinson 12/7/23 Tr. at 56:4-5; 62:3-15; 63:13-19 [Ex. F]), and (3) Defendant Faybyshev's testimony that he never took out loans without full consent of the operating managers but could not recall whether he received consent from the other Members (Faybyshev Tr. 18:15-21; 24:19-21 [Ex. I]).

Plaintiff never presented testimony from other Members to corroborate his own self-serving testimony that the Operating Managers failed to obtain unanimous consent to obtaining loans for the Company.

Plaintiff also never testified or provided documentary evidence that other Members did not give consent.

Accordingly, based on the evidence on record, no reasonable jury could have found that the Operating Managers did not obtain unanimous consent to take loans for the Company and, thus, violated their fiduciary duty to the Company.

B. Adding Members Without Getting Written Agreement Of All Members.

The jury found that the Operating Managers breached their fiduciary duty by admitting Aleksandra Boguslavsky as a new Member without Plaintiff's consent or that of the other Members.

The jury's verdict must be set aside because the evidence starkly contradicts Plaintiff's claim. For example, the Company's Operating Agreement [Ex. A], does not require consent of the

Members of the Company to add new Members.

Further, based on the testimony and evidence presented to the jury, no reasonable juror could have found that there was a breach of fiduciary duty because Plaintiff did not present any evidence on how he or other Members of the Company were harmed by the addition of Mr. Boguslavsky as a new Member.

As discussed, an essential element of any claim for breach of fiduciary duty is harm to the plaintiff. *See* *Madison*, 44 A.D.3d at 484; *Oshman*, 183 A.D.2d at 649. Where a plaintiff is alleging a breach of fiduciary duty based on the addition of new members without consent, the harm that s/he is typically alleging is diluting the plaintiff's membership interests, voting rights, or value. *See, e.g.,* *Beatrice Investments, LLC v. 511 9th LLC*, 177 A.D.3d 551, 551 (1st Dept. 2019). However, the inclusion of Defendant Boguslavsky as a Member ***did not change*** plaintiff's membership interests. Where there is no change in the membership interests, voting rights, or value arising from a corporate action that is alleged to change any of those rights, there can be no claim for breach of fiduciary duty claim based on that action because there is no harm to the plaintiff. *See* *Celauro v. 4C Foods Corp.*, 187 A.D.3d 836, 132 N.Y.S.3d 159, 163 (2d Dept. 2020).

Here, Mr. Khavinson testified that Mr. Boguslavsky was added as a Member to infuse capital of $150,000 for the Company's conversion project. (*See* Khavinson 12/7/23 Tr. 85:5-9 [Ex. F].) More importantly, Mr. Khavinson testified that only two Members' percentage interests were affected by the addition of Mr. Boguslavsky, *i.e.*, Mikhail Kremerman and Vyacheslav Faybyshev, who voluntarily sold their interests to Mr. Boguslavsky (Khavinson 12/7/23 Tr. at 85:19-23 [Ex. F]), and who were thus obviously not harmed by the sale to which they agreed.

More importantly, Mr. Khavinson testified, with full support of the documentary evidence in record, that after the new Member was added, Plaintiff's membership interests remained the

same as the day he joined the Company, which was three and one-third percent (*see* Khavinson 12/7/23 Tr. at 85:19-23 [Ex. F]).

Further, Plaintiff admitted that after Mr. Boguslavsky was added, his membership interests remained the same at three and one-third percent (3.33%). (*See* Aronov 12/5/23 Tr. at 66:1-3 [Ex. E]). Also, Mr. Aronov's K1 from the Company for 2014 confirms that his share of the distributions after the condominiums were sold was three and one-third percent (3.33%). (*See* 2014 Company Tax Return [Ex. C].)

Thus, the evidence at trial showed that no Members, including Plaintiff, were harmed by the addition of Mr. Boguslavsky and that no reasonable jury could have found that the Operating Managers violated their fiduciary duties by adding Mr. Boguslavsky as a Member to the Company.

C. Making Payments To Third-Parties Who Were Not Part Of The Company.

The jury found that the Operating Managers breached their fiduciary duty by making distributions to certain third-parties, including Yana Soskil (who is Mikhail Kremerman's ex-wife), Dennis Naiberg (Mr. Kremerman's son-in-law) and Mr. Kremerman's attorneys in his criminal trial, all of whom were not Members and who were not entitled to distributions under the Operating Agreement.

Based on the evidence and testimony provided to the jury, it was consistently established that the distribution in question was made strictly from the funds that were due to Mr. Kremerman, less his share of losses sustained by the Company and that, these payments were made by the Operating Managers per instructions from Mr. Kremerman.

Accordingly, no reasonable jury could have found a breach of fiduciary duty by the Operating Managers based on these payments because the evidence in the record clearly indicates that these payments were actually distributions to which Mikhail Kremerman was entitled as a Member, but which Mr. Kremerman asked Mr. Khavinson to make payable to his ex-wife, son-in-

law, and attorneys due to Mr. Kremerman's legal troubles.

For example, in response to the question "Where did the money that the LLC paid you go, who was it paid to?", Mr. Kremerman testified "Some money I asked Eugene [Khavinson] to write the check for one of my attorney. I remember he also did some checks for my son-in-law, for my wife." (Kremerman 12/8/23 Tr. at 21:11-15 [Ex. G].)

Mr. Kremerman further testified "all those money was belongs to me. Very, very simple". (Kremerman 12/8/23 Tr. at 21:15-16 [Ex. G].)

Similarly, Yana Soskil confirmed that the payments made to her were distributions made to Mikhail Kremerman which Mikhail Kremerman asked to be forwarded to her. (Soskil Tr. at 8:22-7:24 [Ex. K].)

Similarly, Eugene Khavinson provided the same testimony. (*See* Khavinson 12/7/23 Tr. at 19:25–20:2; 87:7-88:16; 108:9-13 [Ex. F].)

Thus, these payments were not payments made to third-parties who were not entitled to distributions, but rather payments to Mikhail Kremerman, who was a Member and who was entitled to these distributions.

Further, Mr. Kremerman testified that the total of these payments to his ex-wife, son-in-law and criminal defense attorney was equal to his share of the Company distributions after the sale of the condominiums, and that he received no further distributions from the Company. (*See* Kremerman 12/11/23 Tr. at 25:14-24 [Ex. H].)

The Form K-1s for the year in which these payments were made (2014) confirmed that no distributions were made to Mikhail Kremerman. (*See* 2014 Company Tax Return [Ex. C].)

The fact that Mr. Kremerman received no distributions other than the payments made to his ex-wife, son-in-law and criminal defense attorney, and the fact that those payments equal the

amount to which he was entitled as a Member also means that neither Plaintiff nor any member of the Company suffered any harm as a result of these payments that could possibly give rise to a claim for breach of fiduciary duty, since the distributions of all Members were not affected by these challenged payments. *See* *Madison*, 44 A.D.3d at 484; *Oshman*, 183 A.D.2d at 649.

Thus, no reasonable jury could have found that the Operating Managers violated their fiduciary duties by making payments to Yana Soskil, Dennis Naiberg, and Mr. Kremerman's attorneys from the distribution due to Mr. Kremerman because the evidence at trial showed that these payments were not improper distributions/payments to third-parties and that the Company's Members, including Plaintiff, were not harmed by these payments.

D. Failing To Ensure That The Prime Contractor For The Project Was Adequately Insured Against Personal Injury Claims.

The jury found that the Operating Managers were liable for breaching their fiduciary duties to the Company by failing to ensure that its prime contractor on the conversion project, Omni Build, was properly insured against personal injury claims.

No reasonable jury could have found that the Operating Managers breached any fiduciary duty by failing to ensure that Omni Build was properly insured against personal injury claims because there was no evidence presented by Plaintiff showing that the Operating Managers should have, or even could have, known that Omni Build's insurance carrier would refuse coverage.

The only evidence presented at trial was that Omni Build did, indeed, have insurance, and that Omni Build's insurer did not provide coverage. (Faybyshev Tr. at 6:16-23; 7:20-25 [Ex. I].)

Plaintiff did not introduce Omni Build's insurance policy itself and did not identify any provisions of the policy that the Operating Managers could have, or should have, understood would result in Omni Build's insurance carrier refusing coverage.

Thus, there was no evidence at presented to show that the Operating Managers failed to

satisfy their duty of care to the Company, such that no reasonable jury could have found that the Operating Managers violated their fiduciary duties by failing to ensure that Omni Build was properly insured against the claims eventually brought by Jerzy Snop.

E. Taking Out A $750,000 Loan Without Unanimous Consent, Then Lending $750,000 To The Prime Contractor and Failing To Collect On That Loan.

The jury found that the Operating Managers were liable for breaching their fiduciary duties to the Company and Plaintiff by taking out a loan for $750,000 from 35 West End Avenue LLC ("35 West End") without Plaintiff's consent, and then lending that money to Omni Build and failing to collect on that loan.

Based on the testimony and evidence presented to the jury, no reasonable juror could have found that there was a breach of fiduciary duty based on these acts because (1) taking out the loan from 35 West End and then lending that money to Omni Build was the only way to ensure that the condominium conversion would not fail, and is thus protected by the business judgment rule, (2) the Operating Agreement does not preclude the Operating Managers from lending money to third parties, including Omni Build, so long as the loan was made in the best interests of the Company, and thus there is no breach, (3) the loan taken from 35 West End was repaid without accruing any interest, and thus there was no harm to the Company from borrowing this money, and (4) part of that loan to Omni Build has been repaid and there is still an outstanding balance on the loan that is owed by Omni Build with interest, which Omni is not refusing to repay but requires additional time to do so, and thus, it is, at least, premature to find that there is any harm to the Company from lending that money to Omni Build.

As Mr. Khavinson explained, the Company needed to take out a short-term (a few days) zero-interest $750,000 loan from 35 West End and then lend it Omni Build as part of a strategy to address the consequences of the unforeseen personal injury lawsuit filed by a worker at the

construction site where the Company's condominiums were being converted. (Khavinson 12/7/23 Tr. at 71:12-8 [Ex. F].)

The injured worker, Jerzy Snop, filed a lawsuit against Omni Build, the Company, and Eugene Khavinson, to recover damages for personal injury. (*Id*. at 42:7-43:6.) As part of that lawsuit, Mr. Snops' attorneys placed a lien on the condominiums that were being converted by the Company thereby effectively preventing those condominiums from being sold for several years. (*Id.* at 46:4-6.)

Meanwhile, the carrying costs on the property, including real estate taxes, insurance, and mortgage, needed to be paid by the Company at a time when the Company no longer had any funds and no Members wanted to contribute any additional funds. Thus, the Operating Managers decided that it was in the best interests of the Company to settle the lawsuit with Mr. Snop as quickly as possible. (*Id.* at 45:10-21.)

The settlement amount offered by Mr. Snop was $1,750,000. The insurance carrier for the subcontractor which employed Mr. Snop agreed to pay $1,000,000 toward the settlement amount. (*Id.* at 43:10-13.) However, Omni Build's insurance carrier refused to cover any claims made by Omni for Mr. Snops' injury and no Members wanted to contribute any funds to the settlement amount. (*Id*. at 55:19-23.) Thus there was a real danger that the settlement, and, consequently, the fate of the entire project, was in jeopardy.

The Operating Managers needed to find a source for the remaining $750,000 settlement amount. If the Operating Managers did not find $750,000, there was no settlement entered and the Mr. Snop's lawsuit would continue, the litigation costs, and the carrying costs for maintaining the properties (with no funds in the Company's accounts) would pose a severe threat to the continued operation of the Company and possibly a loss of all capital invested into the Company – a

possibility that no Members wanted. (*Id.* at 45:10-21.)

The Operating Managers faced a tough choice between (a) paying a portion of the settlement amount from the Company's proceeds from the sale of the Property, without any prospects of recovering said portion of the settlement payment and, thus incurring a permanent loss for the Company or (b) lending the required amount to Omni to settle the lawsuit with Mr. Snop and to enable Omni Build to proceed with a lawsuit against its insurance brokers that sold Omni Build a patently deficient insurance coverage policy, with a condition that Omni Build repay the loan back to the Company so that the Company could distribute these funds to its Members.

Using sound business judgment and acting within the powers granted to them under the Operating Agreement, the Operating Managers decided that they would borrow $750,000 from 35 West End and then lend it to Omni Build to fund the rest of the $1,750,000 settlement payment.

Once the settlement was paid jointly by Omni Build and the sub-subcontractor's insurance carrier, the liens would be released, the condominiums could be sold, proceeds could be distributed, and there would be no further liabilities on the Company or its Members.

The reason the Operating Managers decided to loan the money from 35 West End to Omni, as opposed to using 35 West End's loan to pay the settlement amount directly, was so that Omni would have standing to sue their insurance broker to recover that loan money. (*Id.* at 44:14-15.)

The Operating Managers were confident that Omni Build would be successful in their lawsuit and would be able to repay that loan back to the Company, which in turn, would result in additional distributions to its Members from the repaid loan. (*Id.* at 44:14-15.)

The Operating Managers plan has worked. Specifically, Mr. Khavinson testified that, as a result of Omni Build's lawsuit against its insurance brokers, in 2021, Omni Build was able to recover $468,000, which it immediately repaid to the Company. (*Id*. at 48:7-11; 48:18-23.) Further,

based on the testimony of Mr. Faybyshev, Omni Build is planning to repay the remainder of the borrowed funds that it still owes to the Company. (Faybyshev Tr. at 9:15-16 [Ex. I].)

Based on this testimony, no reasonable jury could have found a breach of fiduciary duty.

Specifically, the overall purpose of taking out the loan from 35 West End and lending it to Omni Build was to allow the Company to settle the Mr. Snop litigation, lift the liens on the condominiums, sell those condominiums and fulfill the purpose of the Company, which was to convert the condominiums and sell them for profit.

Had the Operating Managers not taken these measures, the Company would likely have been bankrupted since the Company had no funds, there was a pending lawsuit with Mr. Snop that would have entailed legal costs and a possible multi-million-dollar judgment, and there were ongoing carrying costs of thousands of dollars per month.

These kinds of actions taken by the managers of a company to protect the welfare and interests of a company have long been held to be protected by the business judgment rule, which "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes". *Consumers Union of U.S., Inc. v. State of New York,* 5 N.Y.3d 327, 360 (2005), *quoting Auerbach v. Bennett,* 47 N.Y.2d 619, 629 (1979).

Thus, no reasonable jury should have overlooked these actions for what they were, namely measures that rescued the Company from ruin, such that no reasonable jury should have found a breach of fiduciary duty based on this conduct.

Further, the act of lending the settlement payment money to Omni Build cannot give rise to a breach of fiduciary duty. Specifically, there is nothing in the Operating Agreement that prevents the Operating Managers from making loans. (*See* Operating Agreement [Ex. A].) The

only limitation on this conduct by the Operating Managers is that the Operating Managers must do so "to effectuate and carry out the purposes and business objectives of the Company, and to maximize Company profits" (Operating Agreement, Article IV, Sec. B [Ex. A].) As discussed, *infra*, the very purpose of lending this money to Omni Build was to keep the Company from being ruined by financial burdens and to allow the condominiums to be sold.

Furthermore, the loan that was taken by the Company from 35 West End was repaid with no interest and thus there was no harm to the Company from borrowing this money. As discussed, where there is no harm, there can be no claim for breach of fiduciary duty. *See* *Madison*, 44 A.D.3d at 484; *Oshman*, 183 A.D.2d at 649.

Finally, $468,000 of the $750,000 loan to Omni Build has been repaid and there is still an outstanding balance on the loan that is owed by Omni Build with interest, and thus, the Company has not suffered any harm from lending that money to Omni Build since most of it has been recovered and the Company has a legal claim for the remainder. Where there is no harm, there is no viable claim for breach of fiduciary duty. *See* *Madison*, 44 A.D.3d at 484; *Oshman*, 183 A.D.2d at 649. Thus, no reasonable jury should have found a breach of fiduciary duty based on the decision by the Operating Managers to lend money to Omni Build.

II. The Court Should Enter a Verdict of No Liability on Plaintiff's Breach of the Duty of Loyalty Claim.

Plaintiff Aronov's claim for breach of duty of loyalty (Fourth Cause of Action) is based the same facts and seeks the same damages as his claim for breach of fiduciary duty (Tenth Cause of Action), and should be dismissed as duplicative of his breach of fiduciary duty claims. Further, since the breach of the duty of loyalty claim is based on the same facts and seeks the same damages as the breach of fiduciary duty claims, the jury's verdict on the breach of duty of loyalty claim must also be set aside for the same reasons that the jury's verdict on the breach of fiduciary duty

claim must be set aside. (*See* Section I, *supra*.)

III. The Court Should Enter a Verdict of No Liability on Plaintiff's Fraud Claim.

The jury found that the Operating Managers committed fraud despite the fact that Plaintiff presented no evidence on one critical element of his fraud claim, namely scienter. It is well-settled that the "elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages". *Eurycleia Partners, LP v. Seward & Kissel, LLP,* 12 N.Y.3d 553, 559 (2009).

Here, Plaintiff's Amended Complaint alleges that Defendants falsely represented to Plaintiff that "Company funds would be used for the benefit of the Company" when, in fact Defendants "used Company funds to pay for separate projects which were unrelated to the Company". (Am. Compl. ¶¶ 87-92 [Dkt. 115].)

Where a claim for fraud is based on the failure of the defendant to fulfill a promise made to the plaintiff, the plaintiff must show that ***at the time plaintiff entered into the contract***, the defendant had no intention of fulfilling that promise. *See, e.g.*, *Boylan v. Morrow*, 63 N.Y.2d 616, 619 (1984) ("plaintiff has failed to state a fraud cause of action inasmuch as a present intent not to carry out the promise of future action is not alleged"); *Abelman v Shoratlantic Dev. Co., Inc.*, 153 A.D.2d 821, 822 (2d Dept. 1989) ("amended complaint was totally devoid of factual allegations that the defendants knew, at the time the statements were uttered, that they were false, and that at that time the defendants had the then present intent to deceive"); *Brown v. Lockwood*, 76 A.D.2d 721, 732 (2d Dept. 1980) ("In order to establish actual fraud it was incumbent upon plaintiff to . . . that at the time he contracted, the defendant had no intention of making the required loan").

The required scienter cannot be established by the fact that the defendant eventually failed to fulfill the agreed-upon promise. *See Abelman*, 153 A.D.2d at 822 ("Any inference drawn from

the fact that the expectation of performance was not realized is insufficient to sustain a plaintiff's burden of showing that a defendant falsely stated his intentions"); *Brown*, 76 A.D.2d at 732-33 ("Where the only proof is that the defendant failed to keep his promise, it is insufficient to establish that the defendant did not intend to perform at the time the promise was made."); *Lanzi v. Brooks*, 54 A.D.2d 1057, 1058 (3d Dept. 1976) ("any inference drawn from the fact that the expectation did not occur is not sufficient to sustain the plaintiff's burden of showing that the defendant falsely stated his intentions").

Here, the jury's verdict in favor of Plaintiff Aronov's fraud claim cannot stand because Plaintiff presented no evidence whatsoever upon which ***any fact finder***, much less a reasonable one, could find that the Operating Managers had no intention of fulfilling their promise to use Company funds for the Company's benefit at the time Plaintiff became Member of the Company.

Further, even if Plaintiff could rely on the Operating Manager's post-promise conduct to establish their scienter at the time of the challenged representations (which they cannot do as a matter of law), Plaintiff would not be able to make this showing ***as a matter of fact*** because the Operating Managers ***did, in fact, use Company funds for Company projects***, including converting the condominiums and selling them for the benefit of the Company's Members.

Thus, the jury's finding that the Operating Managers are liable for fraud based on their supposed misrepresentations cannot stand because no reasonable jury could have found that the Operating Managers committed fraud based on the absence of any evidence of scienter.

IV. The Court Should Enter a Verdict of No Liability on Plaintiff's Conversion Claim Because the Funds Supposedly Converted Were Used for Partnership Purposes.

The jury found that the Operating Managers were liable on Plaintiff's claim for conversion, based presumably on the improper payments made by the Operating Managers to Mikhail Kremerman's ex-wife, son-in-law and criminal defense attorney. No reasonable jury could have

entered a verdict of liability on this claim based on these facts for three reasons.

First, to establish a cause of action for conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights. *Fiorenti v Cent. Emergency Physicians, PLLC.*, 305 A.D.2d 453, 454-55 (2d Dept 2003); *Indep. Discount Corp. v Bressner*, 47 AD2d 756, 757 (2d Dept. 1975).

Here, the money that was paid to Mikhail Kremerman's ex-wife, son-in-law and criminal defense attorney came from distributions to Mr. Kremerman pursuant to his rights as a Member of the Company to receive distributions. (*See* Operating Agreement, Article V, Sec. F ("The Company shall distribute to the Members from time to time all cash (regardless of the source thereof) of the Company, which is not required for the operation, or the reasonable working capital requirements of the Company").) As these funds belonged to Mr. Kremerman, Plaintiff had no legal right or immediate superior right of possession to those funds, such that no reasonable juror could have found the Operating Managers liable for converting these funds by paying them to Mikhail Kremerman's ex-wife, son-in-law and criminal defense attorney.

Second, where the actions giving rise to the conversion claim were authorized, a claim for conversion must be rejected. *LM Bus. Assoc., Inc. v State*, 124 A.D.3d 1215, 1216-17 (4th Dept. 2015) ("defendant's exercise of control over the computers did not constitute conversion inasmuch as it had the proper authority to exercise such control"); *B & C Realty, Co. v 159 Emmut Properties LLC*, 106 A.D.3d 653, 656 (1st Dept. 2013) (no conversion where plaintiff "tacitly concedes that possession of the money was authorized").

Here, the Operating Managers paid Mr. Kremerman's distributions to his ex-wife, son-in-law and criminal defense attorney at ***the direction of Mr. Kremerman***. (*See* Section I.C, *supra.*)

Therefore, the Operating Managers were ***authorized*** to make those payments from the rightful owner of those funds, such that no reasonable juror could have found the Operating Managers liable for converting these funds by paying them to Mikhail Kremerman's ex-wife, son-in-law and criminal defense attorney.

Third, where the plaintiff suffers no harm, a claim for conversion must be denied. *Waldman v New Phone Dimensions, Inc.*, 109 A.D.2d 702, 704 (1st Dept. 1985) ("Since no injury resulted from the alleged conversion …, no cause of action has been stated").

Here, the funds paid to Mikhail Kremerman's ex-wife, son-in-law and criminal defense attorney came from distributions to Mr. Kremerman pursuant to his rights as a Member of the Company, and do not belong to Plaintiff, the Company, or any other Members. Since no party other than Mr. Kremerman had a legal right to those funds, no party suffered any harm as a result of those payments, such that that no reasonable juror could have found the Operating Managers liable for converting these funds by paying them to Mikhail Kremerman's ex-wife, son-in-law and criminal defense attorney.

To the extent that Plaintiff argues that its claim here is based on the supposed $250,000 loan to Mr. Boguslavsky or the $750,000 loan to Omni Build, there was no legally sufficient evidence to support a verdict based on these loans.

As discussed in Section I.A, *supra*, there was no evidence that any loan for $250,000 was made to Mr. Boguslavsky. In fact, the only evidence of record concerning this loan, specifically, the testimony of the Company's accountant, Mr. Serge Rozenberg, overwhelmingly disproved the existence of any such loan. Thus, there is no actionable conduct to support a conversion claim based on this non-existent loan.

With respect to the $750,000 loan to Omni Build, the overwhelming testimony adduced at

trial showed that $468,000 was repaid to the Company and that the Company is still entitled to collect the remainder from Omni Build. Thus, there is no evidence that any funds belonging to the Company have been converted by anyone, such that no reasonable jury can enter a verdict of liability on Plaintiff's conversion claim.

V. The Court Should Enter a Verdict of No Liability on Plaintiff's Unjust Enrichment Claim.

The jury found that the Operating Managers were liable on Plaintiff's claim for unjust enrichment, based presumably on the improper payments made by the Operating Managers to Mikhail Kremerman's ex-wife, son-in-law and criminal defense attorney.

The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. *Nasca v Greene*, 216 A.D.3d 648, 650 (2d Dept. 2023); *Travelsavers Enterprises, Inc. v Analog Analytics, Inc.*, 149 A.D.3d 1003, 1006 (2d Dept. 2017).

No reasonable jury could have entered a verdict of liability on this claim because the evidence in the record and testimony of witnesses at trial is devoid of any elements of the unjust enrichment with respect to any defendant.

For example, the money that was paid to Mikhail Kremerman's ex-wife, son-in-law and criminal defense attorney belonged to Mr. Kremerman. To the extent that those individuals could be said to have been enriched by those payments, they were not enriched at Plaintiff's expense, or at the Company's expense because those funds belonged to Mr. Kremerman.

To the extent that Plaintiff argues that its claim here is based on the supposed $250,000 loan to Mr. Boguslavsky or the $750,000 loan to Omni Build, there was no legally sufficient evidence to support a verdict based on these loans.

As discussed in Section I.A, *supra*, there was no evidence that any loan for $250,000 was made to Mr. Boguslavsky. In fact, the only evidence of record concerning this loan, specifically, the testimony of the Company's accountant, Serge Rozenberg, overwhelmingly disproved the existence of any such loan. Thus, there is no actionable conduct to support an unjust enrichment claim based on this non-existent loan.

As for the $750,000 loan to Omni Build, the overwhelming testimony at trial showed that $468,000 was repaid to the Company and that the Company is still entitled to collect the remainder. Thus, there is no evidence that Omni has been enriched at the Company's expense, such that no reasonable jury can enter a verdict of liability on Plaintiff's unjust enrichment claim.

CONCLUSION

For the foregoing reasons, Defendants' motion pursuant to CPLR § 4404(a) for judgment notwithstanding verdict must be granted, along with such other and further relief as this Court deems just and proper.

Dated: January 12, 2024
Brooklyn, New York

Respectfully submitted,

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Certification Pursuant to 22 NYCRR 202.8-b

Pursuant to the Uniform Civil Rules for the Supreme Court and the County Court, Section 202.8-b, the preceding Memorandum of Law contains 6919. This count was determined, per the terms of Section 202.8-b, using the word count feature of the word-processing program used to prepare this document. The total word count of this document is less than the limitation of seven thousand words (7,000) words as proscribed by the Uniform Civil Rules.

These statements are certified to be true, and this document is certified to be in compliance with Section 202.8-b of the Uniform Civil Rules for the Supreme Court and County Court by the signature of the undersigned attorney.

Dated: January 12, 2024
Brooklyn, New York

Respectfully submitted,

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