SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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In the Matter of the Application of

WYTHE BERRY LLC, THE WILLIAM VALE HOTEL LLC, THE WILLIAM VALE FNB LLC, AND NORTH 12 PARKING LLC,

Petitioners,

For an Order Staying Arbitration Pursuant to Article 75 of the CPLR

-against-

YOEL GOLDMAN,

Respondent.
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Index No. _____

Date of Purchase: _____

VERIFIED PETITION

Petitioners Wythe Berry LLC, The William Vale Hotel LLC, The William Vale FNB LLC, and North 12 Parking LLC (each a "Petitioner"; collectively, "Petitioners") by and through their attorneys, Abramson Brooks LLP and Freedman Normand Friedland LLP, as and for their Verified Petition for a judgment, pursuant to Article 75 of the CPLR, staying as to each and all of them the arbitration recently brought by respondent, Yoel Goldman ("Goldman"), respectfully allege and show as follows:

NATURE OF THE PROCEEDING

Introduction

1. In or about 2013, Zelig Weiss ("Weiss"), a real estate developer began executing on a plan to transform a grossly-contaminated real estate parcel in Williamsburg into a beautiful, upscale, world-class hotel complex.

2. Goldman heard about Weiss' plan, and wanted in. Weiss agreed to bring Goldman into the project but did so on Goldman's express representation that Goldman would fund the

development of the William Vale Hotel complex.

3. Weiss eventually made his plan a reality. He worked to design, build, and operate the William Vale Hotel, a beautiful, upscale, 183-room hotel in Williamsburg (the "Complex"). As part of owning and operating the Complex, including the William Vale Hotel, Weiss and Goldman formed limited liability companies ("LLC"), to, *e.g.*, run the food and beverage, parking, or operations of the hotel and Complex. These LLCs are the subject of this petition.

4. After the hotel was built, Goldman (through a company he owned) raised capital from the Israeli bond market to refinance the William Vale's outstanding loans ("William Vale Bonds"). Goldman had raised money on the bond market before, and while those raises were unrelated to the William Vale Bonds, he eventually defaulted on them. Goldman's default adversely impacted the William Vale Bonds and the loan he imposed on the Complex. Eventually, Goldman's inability to meet his financial obligations had a cascading effect which now has cost Weiss his ability to manage the Complex, and it may yet cost Weiss his interest in the Complex.

5. Having destroyed the main asset of the Weiss-Goldman partnership, and having his companies file for bankruptcy, Goldman sought to arbitrate against his former partner in the desperate hope of recovering something of value from the enterprise he destroyed. That arbitration is proceeding.

6. However, on October 13, 2023,[1] approximately seven months after Goldman commenced arbitration against Weiss, Goldman amended his demand for arbitration (the "Amended Demand") to name each of the LLCs (*i.e.,* Petitioners) as both claimants and respondents. The addition of Petitioners was improper because there is no applicable arbitration

[1] Goldman sent copies to Petitioners at outdated addresses. They were deemed received as of October 25, 2023.

agreement. A true and correct copy of the Amended Demand, without exhibits, is attached hereto as Exhibit 1.

7. Pursuant to CPLR § 7503(b), the Petitioners now seek a judgment staying the arbitration as to them.[2]

8. As demonstrated below, as a matter of both fact and law, the Petitioners are not a party to any agreement to arbitrate with Goldman.

9. None of the Petitioners has been served with an application to compel arbitration.

10. None of the Petitioners has participated in the arbitration. To the contrary, when Goldman brought an Article 75 proceeding in this Court seeking aid in anticipation of a forthcoming arbitration in September 2022, he named Weiss as the sole respondent. *See Matter of Goldman v. Weiss*, Index No. 653186/2022 [NYSCEF Doc. No. 1]. And when he filed that arbitration in March 2023, he again named Weiss as the sole respondent. *See Goldman v. Weiss*, AAA Case No. 01-23-0001-2090, Demand for Arbitration, a true and correct copy of the first page of which is attached hereto as Exhibit 2.

11. Goldman's attempt to force Petitioners into arbitration has no basis in any agreement.

12. Consequently, pursuant to CPLR § 7503(b), the Petitioners are entitled to a stay of arbitration as to each and all of them.

Relief Sought

13. This Article 75 proceeding, therefore, seeks a judgment:

(a) staying the arbitration as to each and all of the Petitioners;

and

[2] Weiss is not a party to this Article 75 proceeding.

(b) awarding the Petitioners such additional and further relief as the Court deems just and proper.

PARTIES

14. Petitioner Wythe Berry LLC ("Wythe Berry") is a limited liability company organized and existing pursuant to the laws of the State of New York, with its principal place of business located in Kings County.

15. Petitioner The William Vale Hotel LLC ("TWVH") is a limited liability company organized and existing pursuant to the laws of the State of New York, with its principal place of business located in Kings County.

16. Petitioner The William Vale FNB LLC ("FNB") is a limited liability company organized and existing pursuant to the laws of the State of New York, with its principal place of business located in Kings County.

17. Petitioner North 12 Parking LLC ("Parking") is a limited liability company organized and existing pursuant to the laws of the State of New York, with its principal place of business located in Kings County.

18. Respondent Goldman is a natural person who, upon information and belief, is a citizen of the State of New York, with a residence in Kings County.

VENUE

19. Pursuant to CPLR § 7502(i), venue is proper in this Court because Goldman asserts arbitration is proper in New York County (based on the arbitration provision of the Fifth Amendment to the Operating Agreement of Wythe Berry).

RELEVANT FACTUAL BACKGROUND

20. Each Petitioner is a limited liability company. The members of each Petitioner

adopted an operating agreement (collectively, the "Operating Agreements").

21. The Operating Agreement of Wythe Berry, as amended (the "Wythe Berry OA"), is attached as Exhibit 3. The Fifth Amendment to the Wythe Berry OA (the "Fifth Amendment") is the most recent one.[3]

a. The only parties to (and signatories of) the Fifth Amendment are Goldman and Weiss, each only in his individual capacity as a "Class A Member"; Jacob and Rachel Posen, each only in an individual capacity as a "Class B Member"; and Steven P. Zimmer, only in his individual capacity as a designated "Independent Director." *See* Ex. 4 at pp.1 & 17.

b. Wythe Berry, the entity itself, is defined in the Fifth Amendment as "Company," distinct from the parties/signatories; it is not identified as a party to, and is not an actual signatory of, the Fifth Amendment. *See id.* at pp.1 & 17.

22. The Amended and Restated Operating Agreement of TWVH ("TWVH AR OA") is attached as Exhibit 5.

a. The only parties to (and signatories of) the TWVH AR OA are Goldman and Weiss, each only in his individual capacity as a Member. *See* Ex. 5 at pdf pp.2 & 11.

b. TWVH, the entity itself, is defined in the TWVH AR OA as "Company," distinct from the parties/signatories; it is not identified as a party to, and is not an actual signatory of, the TWVH AR OA. *See id.* at pdf pp.2 & 11.

23. The Amended and Restated Operating Agreement of FNB ("FNB AR OA") is attached as Exhibit 6.

a. The only parties to (and signatories of) the FNB AR OA are Goldman and Weiss, each only in his individual capacity as a Member. *See* Ex. 6 at pdf pp.2 & 11.

[3] For the convenience of the Court, a true and correct copy of the Fifth Amendment it is attached separately as Exhibit 4.

b. FNB, the entity itself, is defined in the FNB AR OA as "Company," distinct from the parties/signatories; it is not identified as a party to, and is not an actual signatory of, the FNB AR OA. *See id.* at pdf pp.2 & 11.

24. The Amended and Restated Operating Agreement of Parking ("Parking AR OA") is attached as Exhibit 7.

a. The only parties to (and signatories of) the Parking AR OA are Goldman and Weiss, each only in his individual capacity as a Member. *See* Ex. 7 at pdf pp.2 & 11.

b. Parking, the entity itself, is defined in the TWVH OA as "Company," distinct from the parties/signatories; it is not identified as a party to, and is not an actual signatory of, the Parking AR OA. *See id.* at pdf pp.2 & 11.

25. Each of the Operating Agreements names Weiss as sole Managing Member. *See* Ex. 4 § 7(a) at p.10; Ex. 5 § 11 at pdf p.6; Ex. 6 § 11 at pdf p.6; & Ex. 7 § 11 at pdf p.6.

26. None of the Operating Agreements are signed by Weiss in his capacity as Managing Member. *See* Ex. 4 at p.17; Ex. 5 at pdf p.11; Ex. 6 at pdf p.11; & Ex. 7 at pdf p.11.

27. The Fifth Amendment is the only operating agreement in the entire case that contains an arbitration provision. The TWVH AR OA, FNB AR OA, and Parking AR OA do not contain arbitration provisions. *See generally*, Exs. 5-7.

28. The arbitration provision of the Fifth Amendment does not mention Wythe Berry either by name or as the "Company." In its entirety, it simply reads as follows:

> Except as otherwise provided herein, any dispute arising ***under this agreement*** (but not disputes arising under other agreements executed pursuant hereto or collateral hereto such as the Note, Guaranty and Security Agreement) shall be determined by the American Arbitration Association, New York, New York, in accordance with its rules then governing. In any arbitration proceeding the arbitrators shall award expenses of the arbitration, including reasonable counsel fees, to the party they find prevailing.

> Any award in any such arbitration may be entered to and enforced by any court of applicable jurisdiction. Any such award may include equitable relief.

Ex. 4 § 11 (the "Arbitration Clause") (emphasis added).

29. As noted above, Wythe Berry is neither a party to nor a signatory of the Fifth Amendment (or any other of the Operating Agreements). *See generally* Exs. 5-7.

30. And to restate the obvious, certainly none of the other Petitioners is a signatory of the Fifth Amendment. *See* Ex. 4.

31. Each of the Operating Agreements is governed by New York law. *See* Ex. 4 § 10 at p.15; Ex. 5 § 18 at pdf p.9; Ex. 6 § 18 at pdf p.9; & Ex. 7 § 18 at pdf p.9.

ARGUMENT

The Petitioners are Not Parties to, and therefore Not Bound by, the Operating Agreements

32. It is axiomatic that, under New York law, "a court will not order a party to submit to arbitration absent evidence of that party's unequivocal intent to arbitrate the relevant dispute." *Matter of Pharmacia & Upjohn Co. v. Upjohn Co. (Elan Pharmaceuticals, Inc.)*, 10 A.D.3d 331, 333 [1st Dep't 2004] (internal quotation marks omitted); *see also Mionis v. Bank Julius Baer & Co.*, 301 A.D.2d 104, 109 [1st Dep't 2002] ("It is a fundamental principle of New York law that in the absence of an agreement to do so, parties cannot be forced to arbitrate."); *Brenna v. A.G. Becker, Inc.*, 127 A.D.2d 951, 952 [3d Dep't 1987] ("Parties to a commercial transaction will not be compelled to arbitrate controversies unless there is an express and unequivocal agreement to that effect which does not depend on implication or subtlety."). "The burden of proof is on the party seeking arbitration" to establish an express agreement to arbitrate with respect to a particular dispute. *Matter of Cusimano v. Berita Realty, LLC.*, 103 A.D.3d 720, 721 [2d Dep't 2013].

33. The New York Limited Liability Company Law ("LLCL") defines "[o]perating

agreement" as "any written agreement ***of the members*** concerning the business of a limited liability company and the conduct of its affairs and complying with section four hundred seventeen of this chapter." LLCL § 102(u) (emphasis added). *Accord id*. § 417(a) ("***the members*** of a limited liability company shall adopt a written operating agreement") (emphasis added).

34. It defines "[m]ember" as

> a person ***who has been admitted as a member*** of a limited liability company in accordance with the terms and provisions of this chapter and the operating agreement ***and has a membership interest*** in a limited liability company with the rights, obligations, preferences and limitations specified under this chapter and the operating agreement.

Id. § 102(q) (emphases added).

35. The LLCL makes plain that a New York LLC is distinct from its members. "A limited liability company formed under this chapter ***shall be a separate legal entity***, the existence of which as a separate legal entity shall continue until the cancellation of the limited liability company's articles of organization." *Id*. § 203(d) (emphasis added). *Accord id*. § 610 ("A member of a limited liability company is not a proper party to proceedings by or against a limited liability company[.]").

36. Nothing in the LLCL states that an LLC is a party to the operating agreement adopted and entered into by the members of the LLC.

37. Nothing in the LLCL states that an LLC is bound by the operating agreement adopted and entered into by the members of the LLC.

38. In jurisdictions that had or have limited liability company laws similar on these points to the LLCL – *i.e.*, declaring the LLC to be a separate legal entity; lacking a provision affirmatively binding the LLC to the operating agreement – courts consistently have held that the

LLC is ***not*** a party to the operating agreement by operation of statute.[4]

39. In Illinois, for example, an Appellate Court held that two LLCs were not bound by their respective operating agreements.

40. The court reached that holding by noting first that Illinois law, like New York law, states an LLC is "a legal entity distinct from its members." *Trover v. 419 OCR, Inc.*, 921 N.E.2d 1249, 1254, 337 Ill. Dec. 111 [IL. App. (5th) 2010] (*citing* IL. Limtied Liability Company Act, 805 ILCS 180/5-1(c)), *lv. appeal denied*, 932 N.E.2d 1037 [IL. 2010].

41. The court then looked to the operating agreements themselves. As here, "[n]one of the members signed the agreements in a way that purports to bind the LLCs. Moreover, neither LLC is referenced in any manner on the signature page of either agreement." *Trover*, 921 N.E.2d at 1254.

42. *Trover* is especially illuminating and instructive because it concerned the same overarching issue presented by this Article 75 proceeding: Whether an LLC may be compelled to arbitrate where the only arbitration provision is in an operating agreement to which the LLC is neither a party nor a signatory. The *Trover* Court answered with a resounding "no."

> In light of the statutory guidelines, as well as the fact that the operating agreements do not reveal that the signatories were signing on behalf of or in the name of the LLCs, ***we find that neither [of the LLCs] was a party to the operating agreements and that they are therefore not bound by the arbitration clauses***

[4] Unlike New York, the legislative bodies of some jurisdictions have amended their limited liability company laws to add provisions that affirmatively state an LLC is bound by the operating agreement, and they have done so by enacting either the Revised Uniform Limited Liability Company Act ("RULLCA") or independent legislation. *See*, *e.g.*, Del. Code 6 § 18–101(9) ("A limited liability company . . . is bound by its limited liability company agreement whether or not the limited liability company . . . executes the limited liability company agreement"). Notably, despite years of opportunity, the New York Legislature never has done so. *See*, *e.g.*, Comparison of the Key Provisions of the Revised Uniform Limited Liability Company Act ("RULLCA") to New York's Limited Liability Company Law ("NYLLCL"), Exhibit A to the Executive Summary of the REPORT BY THE CORPORATION LAW COMMITTEE RECOMMENDING ADOPTION BY NEW YORK STATE OF THE REVISED UNIFORM LIMITED LIABILITY COMPANY ACT, The Association of the Bar of the City Of New York (June 2009), at p.7 (pdf p.9) ("RULLCA provides useful clarification of the effect of the operating agreement on the LLC, later members, and third parties. ***These issues are not addressed in NYLLCL***.") (emphasis added).

therein.

Trover, 921 N.E.2d at 1255 (emphases added).[5]

43. As in Illinois, so too in Virginia. The Commonwealth's Supreme Court held that where, as here, the limited liability company law affirmatively states that an LLC is a separate legal entity, does not otherwise affirmatively state an LLC is bound by the operating agreement, and the LLC is neither a party to nor a signatory of the operating agreement, the LLC is ***not*** bound by the operating agreement.

> Like a corporation, a limited liability company is a legal entity entirely separate and distinct from the shareholders or members who compose it. A derivative action is an equitable proceeding in which a member asserts, on behalf of the limited liability company, a claim that belongs to that entity rather than the member. The derivative claims asserted by [the member asserting arbitrability] belonged to [the LLC], not to [that member]. A party asserting a derivative claim is not the real party in interest, but is "at best the nominal plaintiff." Although [the members of the LLC] might have chosen to employ language that would have committed them to arbitrate their disputes with [the LLC}, they did not do so. Thus, ***there was no contractual undertaking by which [a member] had agreed to arbitrate any dispute with [the LLC]***.

Mission Residential, LLC v. Triple Net Properties, LLC, 654 S.E.2d 888, 891, 275 Va. 157 [Va. 2008] (reversing lower court holding that derivative claims were subject to arbitration) (citations omitted) (emphasis added).[6]

44. Notably, the Virginia Supreme Court reached its conclusion even though ***both*** members of the LLC also were co-managers of the LLC. *Id.* at 890 ("operating agreement provides that [the two members] are to be the sole members of [the LLC], with equal

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[5] In July 2017, the Illinois legislature amended the law such that an LLC is bound to an operating agreement whether or not the LLC itself manifested assent to the agreement. The Illinois Appellate Court held that the amendment was not retroactive. Accordingly, because the LLC was neither a named party nor a signatory to a pre-2017 operating agreement, it applied the same analysis as in *Trover* and held the LLC was ***not*** bound by the operating agreement. *See Q Rest. Grp. Holdings, LLC v. Lapidus*, 2017 IL App (2d) 170804-U at pp.4-8 [Ill. App. (2d), Dec. 21, 2017].
[6] In 2009, the Virginia legislature amended the limited liability company law such that an LLC now is bound by an operating agreement "whether or not the LLC executes the operating agreement." *See* Va. Code § 13.1-1023[A][1].

membership interests, and are to manage [the LLC] jointly"). Here, Goldman lacks the status of co-manager. *See*, *supra*, ¶ 19.

45. Federal courts have held the same way: absent a statute expressly to the contrary, an LLC that is neither a party to nor a signatory of the operating agreement is not bound by it. For example, in *Xereas v. Heiss*, 933 F. Supp.2d 1 [D.D.C. 2013], the court applied that standard and held that the LLC was not bound by the operating agreement.

> The D.C. statute applicable at the time [the members adopted and entered into the operating agreement, May 2010] stated that "[t]he members of a limited liability company may enter into an operating agreement to regulate or establish the affairs of the limited liability company[.]" This language did not reflect that a limited liability company itself was a party to its operating agreement. The Amended Operating Agreement here does not list the LLC on the signatories page, and it does not include the LLC in the first paragraph as one of the parties entering into the agreement. The "Formation and Name" section of the Amended Operating Agreement distinguishes between the parties and the LLC in stating that "[t]he parties to this Agreement agree to and do hereby form a limited liability company under the name Riot Act DC, LLC." The Amended Operating Agreement also provides that managing members have the power to legally bind the LLC. As happened in *Trover*, the parties here could legally bind the LLC to an agreement, but did not do so. ***Under these circumstances, the Amended Operating Agreement did not create a contract between the LLC and Xereas***.

Xereas, 993 F. Supp.2d at 12-13 (internal citations and footnotes omitted) (emphasis added).[7, 8]

46. In *Bubbles & Bleach, LLC v. Becker*, 1997 WL 285938 [N.D. IL May 23, 1997],

[7] *Xereas* demonstrates the all-encompassing scope of this rule, as it involved neither derivative claims nor the issue of arbitrability. Rather, the rule was applied in the context of the defendant LLC's effort to dismiss the plaintiff member's common law unjust enrichment claim. The defendant LLC argued that the operating agreement was an extant contract between the defendant LLC and the plaintiff member, and that the existence of a contract precluded as a matter of law the unjust enrichment claim. The court's holding that the defendant LLC is not a party to, and therefore not bound by, the operating agreement caused the court to deny the defendant LLC's motion to dismiss the plaintiff member's unjust enrichment claim. *Id.* at 13.

[8] In July 2011, the D.C. Council repealed the limited liability company law and enacted the RULLCA, pursuant to which an LLC "shall be bound by, and may enforce, the operating agreement, whether or not the company has itself manifested assent to the operating agreement." *See* D.C. Code § 29-801.08. As in *Q Rest. Grp.* (*supra* n.5), the *Xereas* Court applied the limited liability company law existing when the operating agreement became effective.

the operating agreement (governed by Wisconsin law) contained an arbitration clause requiring arbitration in Wisconsin under Wisconsin law. In response to the federal court action brought by the LLC in Illinois, the defendant, the managing member of the LLC, moved to dismiss the action, relying on the operating agreement's arbitration clause. The court denied the motion, noting that Wisconsin law – like the LLCL – defined an operating agreement as an agreement among the ***members*** of the LLC, and holding that the LLC was not a party to the operating agreement and, therefore, the LLC was ***not*** bound by its arbitration clause. *Id*. at *6.[9]

47. Given the undisputed and indisputable facts present here – that the LLCL is devoid of a provision that states an LLC is bound by the operating agreement of its members; that the Petitioners are neither parties to nor signatories of the respective Operating Agreement – it follows as a matter of law that the Petitioners are not bound by the Operating Agreements, including the Arbitration Clause in the Fifth Amendment.

48. Consequently, there is no agreement to arbitrate between Goldman and any of the Petitioners.

49. Accordingly, the Petition must be granted, and judgment must be entered staying the arbitration as to each of the Petitioners.

The "Side Agreement" does not provide a basis to arbitrate

50. Understanding the clear limits of the Arbitration Clause at issue in the Fifth Amendment, Goldman attempts to circumvent it in the Amended Demand. Specifically, he tries to read language in a Hebrew side agreement that Goldman and Weiss signed ("Side Agreement") into providing an unlimited consent to arbitrate all disputes, involving any entity,

[9] In April 2022, the Governor of Wisconsin signed into law 2021 Wis. Act 258, Section 616 of which repealed the state's limited liability company act and replaced it with RULLCA. As of January 1, 2023, a Wisconsin LLC "is bound by and may enforce the operating agreement, whether or not the company has itself manifested assent to the operating agreement." Wis. Stats. § 181.0106(1).

that relates to the Complex. A true and correct copy of the Side Agreement is attached hereto as Exhibit 8.

51. As demonstrated below, Goldman's purported interpretation of the Side Agreement is at odds with its clear language and purpose, and should be rejected by this Court.

44. The Fifth Amendment served numerous purposes. The purpose relevant to this Petition is that it enshrined Weiss' historical role as Managing Member of the company that owned and managed the Property and Complex, *i.e.,* Weiss was "responsible for the management of the business and affairs of the Company [*i.e.*, Wythe Berry] and the day to day operation and functioning of the Property …." Ex. 4 § 7(a).

45. In December 2016, Goldman proposed they refinance the Complex's construction loans with the William Vale Bonds. To accomplish this bond raise, Goldman told Weiss that the Property needed to be transferred to a new entity that Goldman would manage.

46. To induce Weiss into agreeing to the William Vale Bonds and the new corporate structure, Goldman agreed to sign the Side Agreement. The primary purpose of the Side Agreement was to document that Weiss would keep his historical role as the sole managing member of the entities that owned and controlled the Property and Complex, notwithstanding any operating agreement that said differently.

52. The Side Agreement achieved that purpose by making the Fifth Amendment, a document that put Weiss in control, as the dispositive agreement between Weiss and Goldman. Specifically, it stated that the "order and conduct of the rules of the partnership" between Goldman and Weiss were to be "determined solely in accord with what is explained" in the Fifth Amendment, a document the Side Agreement made the "dispositive" agreement in the event of any "dispute" between Goldman and Weiss. *See* Ex. 8 at pdf pp.5 § 2.

53. Given the purpose of the Side Agreement, the significant restructuring that was occurring, and the fact that it was drafted by rabbis who were unfamiliar with the law, Weiss and Goldman ensured that all of their entities, including Petitioners, "fully acknowledge[d]" its provisions – so that no one could try and leverage the pre-existing corporate structure and sharp tactics to circumvent the agreements. For this reason, the Side Agreement was "fully acknowledged" by Weiss, Goldman, and "all the corporation registered under our names, whether in whole or in part, and that have any relevance or connection to the said land and building, without exception." Ex. 8 at pdf pp.5.

54. But just because all entities (including Petitioners) acknowledged the document, doesn't mean that every single obligation is applicable to every entity.

55. That's what happened here. Specifically, the Side Agreement provides that

> The main and principal agreement that shall be determinative and dispositive **between us** in any case of doubt, dispute, or, G-d forbid, conflict that may perhaps arise **between us** from this day forward, shall be only and solely in accord with what is set forth and explicit in the contract that is known and called by the title "Fifth Amendment Operating Agreement", which was signed **by us** on the said date. In any proceeding or hearing **between us**, from this day forward, on anything related to the said enterprise, land, and building, it shall be only and solely in accord with what is explained and made plain there.

Ex. 8 at pdf pp.5 § 2 (emphasis added).

56. Goldman claims that this paragraph of the Side Agreement means the Fifth Amendment's Arbitration Clause applies to *any* dispute involving *any* entity. But the plain language of the Side Agreement belies that argument. Specifically, the language clearly states that it only applies to disputes "between us," which can only be read to mean between Goldman and Weiss, the sole signatories to the Side Agreement; corporate entities would not be referred to as "us." Indeed, the word "between" is most usually used between two disputing parties, as

opposed to "among," which would more clearly reference multiple parties.

57. But it's not only the natural reading of the clause, it's how the Side Agreement must be read in context. The language of the Side Agreement itself demonstrates that when it says "us," it refers only to Goldman and Weiss individually, and not corporate entities. Specifically, Paragraph 2 uses the phrase "by us" to refer to the signatories of the Fifth Amendment, which were Weiss and Goldman personally and not any corporate entities. *See* Ex. 8 at pdf pp.5 § 2 ("Fifth Amendment . . . which was signed **by us** on the said date."). It is thus indisputable that the Side Agreement's use of "**us**" there refers to Goldman and Weiss, and logical to conclude that it intended the same meaning (*i.e.,* just Goldman and Weiss) when it said "between **us**" both before and after in that very same paragraph.

58. That's also the law. *Giray v. Ulukaya*, 212 A.D.3d 439, 440 [1st Dept. 2023] *citing Robertson v. Ongley Elec. Co*., 146 N.Y.20, 24 [1895] ("We must read the whole instrument, and, when we find the parties using a certain word or expression in different parts of it, it is reasonable to suppose that it was always used in the same sense, unless a different meaning was plainly intended"); *Thompson v. Mun. Credit Union*, No. 21-CV-7600 (LJL), 2022 WL 2717303, at *4 (S.D.N.Y. July 13, 2022) ("Terms are presumed to have the same meaning throughout a carefully drafted document."); *Staley v. Hotel 57 Servs., LLC*, No. 22-CV-6781 (JSR), 2023 WL 4339678, at *5 (S.D.N.Y. July 5, 2023) (stating that a "well-founded principle of contractual interpretation" is that the "'same words found in different sections' be given 'the same meaning.'")

59. The intent to limit this language to disputes between Goldman and Weiss is evident from other language choices. Had the intent been to make any dispute involving any entity subject to the Fifth Amendment, the Side Agreement should have omitted any reference to

"between us." It would have said: "In any proceeding or hearing ~~between us,~~ from this day forward, on anything related to the said enterprise, land, and building, it shall be only and solely in accord with what is explained and made plain [in the Fifth Amendment]."

60. With that in mind, the list of entities that "acknowledged" the Side Agreement are irrelevant to understanding what promise was made or obligation undertaken by paragraph 2. The clear language only makes the Fifth Amendment applicable to a dispute between Goldman and Weiss personally.

61. There is thus no agreement that a Petitioner must arbitrate any dispute with another Petitioner, Weiss, or Goldman.

A. The context of the Side Agreement reinforces that it does not provide a basis to arbitrate

47. A basic rule of contract interpretation is that the document must be read as a whole, and interpretations that lead to absurd results must be rejected.

48. Applying that rule here, the language, read in context, demonstrates the Side Agreement was intended to manage disputes between Goldman and Weiss arising under the operating agreements of the new entities formed for the purpose of obtaining the William Vale Bonds.

49. That can be seen in the Whereas clause, where the phrases "these enterprises" and "said enterprise" must refer to the ***new*** enterprise(s) formed to implement Goldman's scheme:

> Whereas ***on Jan-30-2017 and also on Feb-1-2017 we signed many documents, contracts, and agreements*** which were drawn up by our attorneys ***regarding these enterprises***, among them many ***which were made and signed with the primary purpose of obtaining bonds and loans for the benefit of the said enterprises*** which we own in partnership[.]

See Ex. 8 at pdf pp.5 § 1 (emphases added).

50. The only "enterprises" for which Goldman and Weiss signed "documents, contracts, and agreements" on those dates that "were made and signed for the primary purpose of obtaining bonds and loans" were Wythe Berry Fee Owner LLC – the prospective owner of the Property– and Fee Owner's prospective sole member, Wythe Berry Member LLC. Notably, both Fee Owner and Member LLC were formed on February 1, 2017. *See* Certificate of Formation of Wythe Berry Member LLC *and* Certificate of Formation of Wythe Berry Fee Owner LLC, a true and correct copy of each of which is annexed hereto, collectively, as Exhibit 9.

51. Furthermore, the bonds and loans were "for the benefit" of only Fee Owner and Member LLC; no other "enterprises" owned jointly by Goldman and Weiss, including the Petitioners, would benefit from them.

52. The "reversion clause" of the Side Agreement further proves that its intent was to primarily regulate the new entities created to obtain the William Vale Bonds:

> And it was explicitly stipulated between us that in the event that we did not succeed in obtaining a loan from the bond, then all the other documents, contracts, and agreements that we signed would become void with [retroactive] effect from that moment [of the stipulation], except for the "Fifth Amendment" agreement.

Ex. 8 at pdf pp. 5 § 2 (bracket in original). Goldman and Weiss agreed that, if there were no bond proceeds to fund a mortgage loan to Fee Owner, then things would return to the status quo ante: Member LLC and Fee Owner would disappear, and Wythe Berry would go forward under the Fifth Amendment. None of the other Petitioners would be affected either way.

53. This interpretation is consistent with the purpose of the Side Agreement, and the intent of Goldman and Weiss in entering into it: to protect Weiss by giving him the right to invoke his status under the Fifth Amendment – Managing Member – in any dispute with Goldman arising within the new entities required to be formed to implement Goldman's scheme, *i.e.*, Member LLC and Fee Owner.

B. Goldman's conduct also proves this interpretation is correct or at a minimum, that Goldman has waived the right to arbitrate against Petitioners

54. Goldman's own actions prove that the parties never intended the Fifth Amendment's Arbitration Clause to extend to disputes that involved entities.

55. Specifically, on or about April 30, 2021 – some 23 months before commencing the Arbitration against Weiss – Goldman commenced an action in New York State Supreme Court, Kings County, against Weiss, Wythe Berry, and other LLCs in which Goldman claimed to have an interest alongside Weiss. *See Goldman v. Rose Castle Redevelopment II LLC, et al.*, Index No. 510224/2021 ("*Goldman v. RC II*").

72. In that court action, Goldman sought (and seeks) to recover from Wythe Berry $15 million. *See Goldman v. RC II*, Verified Complaint [NYSCEF Doc. No. 1] ¶¶ 32-33 & 57.

73. At no time during the more than two-and-one-half year pendency of that action has Goldman ever invoked the Arbitration Clause of the Fifth Amendment.

74. Goldman's failure to do so is, for all intents and purposes, an admission that the Arbitration Clause in the Fifth Amendment does ***not*** apply even to disputes between Goldman and Wythe Berry, and a further admission that the Side Agreement does ***not*** magically extend that Arbitration Clause to disputes between Goldman and other LLCs owned jointly by Goldman and Weiss, including the other Petitioners.

75. Furthermore, even *assuming arguendo* that the Petitioners somehow were bound by the Operating Agreements (which they are not), and specifically by the Arbitration Clause of the Fifth Amendment (which they also are not), New York law holds that the commencement of an action for a claim otherwise subject to arbitration results in a waiver by the claimant of the arbitration provision. "An arbitration provision in a contract like any other provision of a contract may be waived or abandoned by the parties, and such waiver may be evidenced by their

conduct in seeking judicial relief instead of arbitration. By serving the first summons, plaintiff waived its right to arbitration." *Esquire Industries, Inc. v. East Bay Textiles, Inc.*, 68 A.D.2d 845, 846 [1st Dept 1979].

76. Moreover, even if that waiver is claim specific (which it is not), the doctrine of judicial estoppel precludes Goldman from effectively asserting in one instance the lack of an arbitration agreement applicable to disputes between him and LLCs he owns jointly with Weiss (*i.e.*, his commencement of *Goldman v. RC II*), and asserting in another instance the existence of an arbitration agreement applicable to disputes between such parties. Notably, in *Goldman v. RC II*, Goldman secured from the Second Department a stay of enforcement of the Decision and Order of Supreme Court that canceled a Notice of Pendency that he had placed on property owned by an entity in which Goldman claimed he held an indirect interest. Goldman thus derived a "benefit" from taking the position that his claims against Wythe Berry and the other LLC defendants were not subject to arbitration, such a benefit is sufficient to trigger application of judicial estoppel. *See Hartman v. Harris*, 2008 NY Slip Op 31620 at *3-4 [Sup. Ct. Nassau Cnty June 6, 2008] (Feinman, J.) ("the doctrine of judicial estoppel is not limited to 'judgments'[; rather, it is applicable where] a party obtains relief by maintaining one position, and later in a different action, maintains another position") (citing multiple cases).

C. Alternatively, the Operating Agreements prohibit Goldman's arbitration as to Petitioners

77. Even assuming *arguendo* the Petitioners somehow were bound to the Arbitration Clause in the Fifth Amendment (which they are not), the Operating Agreements themselves prohibit Goldman from bringing either claims in the name of the Petitioners or claims against them without the consent of Weiss.

78. Each of the Operating Agreements contains a "Major Decisions" provision that

prevents each Petitioner from taking certain actions without the prior written approval of all the Members of the LLC. For example, the Major Decisions provision in the Fifth Amendment reads

> (e) Notwithstanding the grants of authority under Section 11(a) of the Original Agreement or anything contained in this Agreement, ***in no event will the Company take any of the actions listed on Schedule 1 annexed hereto (each, a "Major Decision") without the prior written approval of both Class A Members [i.e., Goldman and Weiss]***. If a Class A Member fails to respond to a request for approval of a Major Decision within fifteen (15) days after the Class A Member has received a written request for approval then the Class A Member shall be deemed to have approved the request.

See Ex. 4 § 7(e) (emphasis added).

79. One of the Major Decisions that requires the unanimous prior written approval of both Goldman and Weiss is the "commencement of arbitration … where the amount in dispute is in excess of $500,000 …." *Id*. Schedule 1 (Ex. 4 at p. 18), Item (vii).

80. Each of the other Operating Agreements lists commencement of arbitration as a Major Decision. *See* Ex. 5 § 11 at pdf p.6-7 & Schedule 1 # 7 at pdf p.12; Ex. 6 § 11 at pdf p.6-7 & Schedule 1 # 7 at pdf p.12; & Ex. 7 § 11 at pdf pp.6-7 & Schedule 1 # 7 at pdf p.12.

81. Goldman never sent Weiss a request for written approval to commence an arbitration against the Petitioners, and Weiss never provided any approval – let alone prior written approval – to Goldman for such action.

82. Accordingly, even if the Petitioners were bound by the Operating Agreements, Goldman nonetheless could not commence (and may not maintain) the arbitration as to them.[10]

[10] Although each of the Major Decision provisions contains an extremely narrow exception not applicable here, that exception notably does not embrace either claims brought derivatively in the name of the LLC or claims brought against the LLC. Given the need for cooperation among Members of limited-member LLCs, precluding the commencement of actions or arbitrations for such claims absent unanimous prior consent makes sense, in that it encourages the Members to resolve disputes amicably.

CONCLUSION

83. None of the Petitioners is a party to any agreement with Goldman to arbitrate disputes between them.

84. None of the Petitioners has appeared or participated in the arbitration.

85. None of the Petitioners has been served with an application to compel arbitration.

86. On these facts, pursuant to CPLR § 7503(b), Petitioners are entitled, as a matter of law, to judgment staying the arbitration as to each and all of them, including without limitation claims brought by Goldman whether in the name of one or more of them or against one or more of them.

* * *

WHEREFORE, on the facts set forth above, Petitioners Wythe Berry LLC, The William Vale Hotel LLC, The William Vale FNB LLC, and North 12 Parking LLC respectfully request the Court grant the Petition and, pursuant to CPLR § 7503(b), enter judgment staying the arbitration as to each and all of them, including without limitation claims brought by Goldman whether in the name of one or more of them or against one or more of them, and awarding Petitioners such additional and further relief as the Court deems just and proper.

Dated: Nassau County, New York
November 13, 2023

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ATTORNEY'S VERIFICATION

The undersigned, an attorney admitted to practice in the Courts of the State of New York, hereby affirms under the penalties of perjury:

I am a Partner at Abramson Brooks LLP, attorneys of record for Wythe Berry LLC, The William Vale Hotel LLC, The William Vale FNB LLC, and North 12 Parking LLC (hereinafter collectively referred to as "Petitioners"), each of which is a New York limited liability company.

I have read the foregoing Verified Petition and know the contents thereof; that the same is true to my own knowledge, except as in the matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true.

I am making this Verification because Petitioners are located in a county other than the one in which Abramson Brooks LLP is located. The grounds for my belief as to all matters not stated upon my knowledge are as follows:

1. Records and correspondence in my possession.

2. Communications with Petitioners' representatives.

I affirm that the foregoing statements are true.

Jon Schuyler Brooks

Jon Schuyler Brooks