To be Argued by:
DEVIN (VELVEL) FREEDMAN
(*Time Requested: 15 Minutes*)

Supreme Court of the State of New York
Appellate Division – First Department

Case No.: 2023-06011

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-Appellants,

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

- against -

YOEL GOLDMAN,

Respondent-Respondent.

BRIEF FOR PETITIONERS-APPELLANTS

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PRELIMINARY STATEMENT

The issue on appeal is whether limited liability companies can be forced to arbitrate a dispute with a party they never agreed to arbitrate with. Long-standing New York jurisprudence says no. The Supreme Court erred in holding otherwise, and its decision must be reversed.

There is no dispute that Respondent-Appellee Yoel Goldman ("Goldman") entered into an arbitration agreement with an individual, Zelig Weiss. Pursuant to that arbitration agreement, Goldman and Weiss have been arbitrating a dispute for the past year.

That said, Petitioner-Appellants, Wythe Berry LLC, The William Vale Hotel LLC, The William Vale FNB LLC, and North 12 Parking LLC (the "Companies") never entered into an arbitration agreement with Goldman or any other party. Nonetheless, seven months after Goldman initiated his arbitration against Weiss, he tried to name the Companies as a party to that arbitration. The Companies immediately initiated an Article 75 Proceeding under CPLR § 7503(b), asking the Supreme Court to stay the arbitration against them.

The Supreme Court erroneously denied the Companies' petition by failing to recognize that the Companies never formed an arbitration agreement with Goldman. The Companies, therefore, request that this Court reverse and stay the arbitration against the Companies for six reasons.

First, the Companies did not agree to an arbitration agreement with Goldman. By its clear terms, the Fifth Amendment's arbitration provision applies only to disputes between Goldman and Weiss individually.

Second, the plain language of the Side Agreement does not bind the Companies to the Fifth Amendment's arbitration provision.

Third, to the extent there is any doubt over how to interpret these agreements (and there should not be), Weiss and Goldman's course of dealing demonstrates the Companies did not agree to arbitrate.

Fourth, even if the Companies are somehow bound to the Fifth Amendment's arbitration provision (they are not), that arbitration provision includes express limitations that exclude the dispute in the underlying arbitration.

Fifth, even if the Companies were bound to the Fifth Amendment (they are not), and its consent to arbitrate didn't exclude this case (it does), Goldman still can't name the Companies to this arbitration because he failed to satisfy a condition precedent.

Finally, even if the Companies are wrong on all of the above (they are not), Goldman waived his right to arbitrate by commencing and maintaining an action that was otherwise subject to arbitration.

QUESTIONS PRESENTED

1. Did the Companies agree to arbitrate disputes with Goldman under the Fifth Amendment despite not being parties to, or signatories of, that agreement?
2. Did the Side Agreement extend the Fifth Amendment's arbitration provision to disputes between Goldman and the Companies despite the Side Agreement expressly limiting its dispute resolution provisions to disputes "between us," *i.e.,* Goldman and Weiss individually?
3. Do the relevant agreements' *express requirement* that *both* Weiss *and* Goldman provide additional written consent before bringing an arbitration over $500,000, limit the scope of the Fifth Amendment's consent to arbitrate to only disputes under that amount?
4. At a minimum, do those requirements constitute a condition precedent to arbitration that Goldman failed to satisfy?
5. Did Goldman waive his right to arbitrate his claims against the Companies by bringing a related dispute in court?

STATEMENT OF THE NATURE AND FACTS OF THE CASE

A. Factual Background

1. General Background

This case involves two individuals, Weiss and Goldman, and the Companies in which both are members. The genesis of this case began in 2013, when Weiss, a real estate developer, began executing a plan to transform a parcel of land in Williamsburg into an upscale, world-class hotel complex, eventually named the William Vale Hotel (the "Hotel"). *See* R. at 31-32.[1]

Goldman wanted to partner with Weiss in developing the Hotel. *See* R. at 31-32. Based on Goldman's express representation that he would fund the development of the Hotel, Weiss agreed to partner with Goldman. *See id.*

Eventually, Weiss transformed the land into the Hotel. *See* R. at 31-32. As part of owning and operating the Hotel, Weiss and Goldman formed the Companies to hold title and run, among other things, the food and beverage offerings, parking, and operations of the Hotel. *See* R. at 32. As part of forming the Companies, Weiss and Goldman executed separate operating agreements for

[1] This appeal is being perfected on a full reproduced record. Citations to the record are abbreviated as "R. at [page number]."

each of the Companies. *See* R. at 187-205 (Wythe Berry LLC Fifth Amendment to Operating Agreement); R. at 206-218 (William Vale Hotel LLC Amended and Restated Operating Agreement); 219-231 (Wiliam Vale FNB LLC Amended and Restated Operating Agreement); R. at 232-244 (North 12 Parking LLC Amended and Restated Operating Agreement).

After the Hotel opened, Goldman, through a company he owned, raised capital from the Israeli bond market to refinance the Hotel's outstanding loans ("William Vale Bonds"). *See* R. at 32. Previously, in an unrelated transaction, Goldman had raised money on the Israeli bond market to finance other properties unrelated to Weiss or the Companies. *See id.* After obtaining the capital from the William Vale Bonds, however, Goldman defaulted on these unrelated bonds. *See id.* This default adversely impacted the William Value Bonds and the loan he imposed on the Hotel due to cross-collateralization. Eventually, Goldman's inability to meet his financial obligations had a cascading effect which cost Weiss his ability to manage the Hotel, and will likely cost Weiss his interest in the Hotel. *See id.*

Having destroyed the main asset of the partnership, and having his companies in bankruptcy, Goldman sought to arbitrate against Weiss in a desperate hope of recovering something of value from the enterprise he destroyed.

That arbitration is proceeding before the American Arbitration Association (the "Arbitration"). *See* R. at 32.

However, on October 13, 2023, approximately seven months after Goldman commenced arbitration against Weiss, Goldman amended his demand for arbitration ("Amended Demand"). *See* R. at 32-33; *See also* R. at 54-139. In the Amended Demand, Goldman included the Companies as both claimants and nominal respondents. *See* R. at 54.

The addition of the Companies is improper because the Companies are not parties to, or signatories of, any arbitration agreement with Goldman (or, for that matter, Weiss).

2. The Operating Agreements

As part of forming the Companies, the members adopted separate operating agreements for each Company.

a. Wythe Berry LLC

The operating agreement of Wythe Berry LLC is the Fifth Amendment. *See* R. at 187-205. The only parties and signatories of the Fifth Amendment are: Goldman and Weiss, each only in their 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* R. at 187 and 203. Moreover, the Fifth

Amendment defines Wythe Berry LLC as a "Company," an entity distinct from the parties and the signatories. *See* R. at 142 (providing definition of "Company" in original Operating Agreement); *see also* R. at 187 (adopting terms and definitions from original Operating Agreement). Wythe Berry LLC is not defined as a party to, and is not an actual signatory of, the Fifth Amendment. *See* R. at 187, 188, and 203.

The Fifth Amendment has an arbitration provision requiring the signatories to the Fifth Amendment to arbitrate certain disputes. The arbitration provision provides:

> 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.

R. at 201-202.

In addition, the Fifth Amendment expressly limits the arbitration provision. Specifically, the Fifth Amendment provides:

> 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].

R. at 198. Under Schedule 1, one of the Major Decisions that requires 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 . . . ." R. at 204.

b. The William Vale Hotel LLC

The operating agreement for the William Vale Hotel LLC is the Amended and Restated Operating Agreement. *See* R. at 206-218. The only parties to and the signatories of this operating agreement are Goldman and Weiss, each only in their individual capacity as "Members." *See* R. at 207 and 216.

The William Vale Hotel LLC is defined as "Company," an entity distinct from the parties and signatories. *See* R. at 207. The William Vale Hotel LLC is not identified as a party to, and is not an actual signatory of, this operating agreement. *See* R. at 207 and 216.

The William Vale Hotel LLC's Amended and Restated Operating Agreement does not have an arbitration provision. However, like the Fifth Amendment, it requires both Weiss and Goldman to provide unanimous written approval before undertaking any Major Decisions and defines commencement of an arbitration for more than $500,000 as a Major Decision. *See* R. at 211-212; R. at 217.

c. The William Vale FNB LLC

The operating agreement for The William Vale FNB LLC is the Amended and Restated Operating Agreement. *See* R. at 219-231. The only parties to and the signatories of this operating agreement are Goldman and Weiss, each only in their individual capacities as "Members." *See* R. at 220 and 229.

The William Vale FNB LLC is defined as "Company," an entity distinct from the parties and the signatories. *See* R. at 220. The William Vale FNB LLC is not identified as a party to, and is not an actual signatory of, this operating agreement. *See* R. at 220 and 229.

The William Vale FNB LLC's Amended and Restated Operating Agreement does not have an arbitration provision. However, like the Fifth Amendment, it requires both Weiss and Goldman to provide unanimous written approval before undertaking any Major Decisions and defines commencement of an arbitration for more than $500,000 as a Major Decision. *See* R. at 224-225; R. at 230.

d. North 12 Parking LLC

The operating agreement for North 12 Parking LLC is the Amended and Restated Operating Agreement. *See* R. at 232-244. The only parties to and the signatories of this operating agreement are Goldman and Weiss, each only in their individual capacities as "Members." *See* R. at 233 and 242.

North 12 Parking LLC is defined as "Company," an entity distinct from the parties and the signatories. *See* R. at 233. North 12 Parking LLC is not identified as a party to, and is not an actual signatory of, this operating agreement. *See* R. at 233 and 242.

North 12 Parking LLC's Amended and Restated Operating Agreement does not have an arbitration provision. However, like the Fifth Amendment, it requires both Weiss and Goldman to provide unanimous written approval before taking any Major Decisions and defines commencement of an arbitration for more than $500,000 as a Major Decision. *See* R. at 237-238; R. at 243.

3. The Side Agreement

In December 2016, Goldman proposed that he raise the William Vale Bonds to refinance the Hotel's construction loans. *See* R. at 43. To accomplish this bond raise, Goldman told Weiss that the Hotel's real property needed to be transferred to a new entity that Goldman would manage. *Id.* Historically, and pursuant to the Fifth Amendment, *Weiss* was "responsible for the management of the business and affairs . . . and day to day operation and function of the Property . . . ." *See* R. at 196.

In addition, to induce Weiss into agreeing to the William Vale Bonds and the new corporate structure, Goldman agreed to sign a Deed of Acknowledgement, Undertaking – And Clarification (the "Side Agreement"). *See*

R. at 43; *see also* R. at 245-251 (the Side Agreement). The Side Agreement was drafted by rabbis in Hebrew. The primary purpose of the Side Agreement was to document that Weiss would keep his role as the sole managing member of the Companies that owned and controlled the Hotel and its real property, notwithstanding the new corporate structure naming Goldman's entity as the managing member of the new entity that owned the Hotel. R. at 43.

The Side Agreement achieved that purpose by making the Fifth Amendment – the operating agreement that put Weiss in control – as the "dispositive" agreement in the event of any "dispute" "between us"—*i.e.*, between Goldman and Weiss. *See* R. at 249. The Side Agreement was signed only by Goldman and Weiss. R. at 251.

B. Procedural History

On November 14, 2023, the Companies filed an Article 75 Petition with the Supreme Court of the State of New York, County of New York. *See* R. at 31-53. In the Petition, the Companies argued they did not agree to arbitrate with Goldman (or Weiss) under any arbitration agreement, and, therefore, the court must stay all arbitration proceedings against the Companies pursuant to CPLR 7503(b). R. at 37-50. The Companies also argued that Goldman waived his right to arbitrate against them (R. at 48-49), and that, in any event, the operating agreements prohibited Goldman from arbitrating against the Companies. R. at 49-50.

Goldman responded and the Companies replied. *See* R. at 257-302 (Response); R. at 328-342 (Reply).

On December 14, 2023, the lower court held a hearing on the petition. *See* R. at 7-30. The court ruled from the bench, stating: "I decline to stay the arbitration against Mr. Weiss's LLC. That's without prejudice to raising the issue before the arbitration panel . . . you are, of course, free to appeal my decision." R. at 26.

Subsequently, the lower court issued an order denying the Companies' petition. In its order, the court reasoned:

> Petitioner's application is denied. The Court relies on the Fifth Amendment to the operating agreement and a so called "side agreement" (NYSCEF Doc. No. 9), the preface of which indicates that Weiss was acting on behalf of Petitioners in signing the "side agreement" which incorporated the Fifth Amendment to the parties' operating agreement with its broad arbitration clause. Consequently, the Petition to stay the arbitration against the Petitioners is denied without prejudice to the Petitioners' raising with the arbitration panel the issue of whether or not the Petitioners can be bound by any arbitration award. The petition is, accordingly, dismissed.

See R. at 5-6. The Notice of Entry was issued on December 20, 2023. *See* R. at 4.

This appeal followed. On December 21, 2023, Petitioners sought a stay of arbitration from this Court arguing the Supreme Court erred, they were likely to succeed on the merits of this appeal, and that they would be irreparably harmed if the arbitration was not stayed pending this appeal. [Petitioners-Appellants' Motion to Stay, *Wythe Berry LLC et al v. Yoel Goldman*, NYSCEF Doc. No. 3].

On January 23, 2024, this Court granted Petitioners' motion and stayed the Arbitration pending this appeal. [Order re Motion to Stay, *Wythe Berry LLC et al v. Yoel Goldman*, NYSCEF Doc. No. 20].

ARGUMENT

A. An agreement to arbitrate must exist and be "unequivocal"

"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." *Mionis v. Bank Julius Baer & Co.*, 301 A.D.2d 104, 109 [1st Dep't 2002]. Indeed, "a court will not order a party to submit to arbitration absent evidence of that party's unequivocal intent to arbitrate the relevant dispute." *Pharmacia & Upjohn Co. v. Elan Pharms, Inc.)*, 10 A.D.3d 331, 333 [1st Dep't 2004] (internal quotation marks omitted); *Brennan 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."). It is undisputed that the Companies did not sign the Fifth Amendment, the other operating agreements, or the Side Agreement. *See* R. at 187 and 203; R. at 207 and 216; R. at 220 and 229; R. at 233 and 242; R. at 251. Therefore, the question before the Supreme Court was whether the Companies, as non-signatories to the Fifth Amendment, are bound by

the Fifth Amendment's arbitration provision such that an arbitration agreement was formed.

The Supreme Court found they were. As described below, that conclusion was clearly erroneous.

B. None of the Companies agreed to arbitrate disputes in their respective operating agreements because, inter alia, they are not parties to them.

As an initial matter, the operating agreements of The William Vale Hotel LLC, The William Vale FNB LLC, and North 12 Parking LLC do not contain an arbitration provision. Thus, it is beyond dispute that they did not agree to arbitrate under their operating agreements. *See generally* R. at 206-218; R. at 219-231; R. at 232-244.

Wythe Berry LLC's operating agreement, the Fifth Amendment, does contain an arbitration provision. But it does not bind Wythe Berry LLC itself because the Company (i) is not defined as a party to the Fifth Amendment, (ii) is not a signatory to the Fifth Amendment, and (iii) its members signed only in their individual capacity, and not on the Company's behalf. *See* R. at 187 and 203.

Specifically, the New York Limited Liability Company Law ("LLCL") makes plain that a New York LLC is distinct from its members. First, it defines an "operating agreement" as "any written agreement *of the members*," LLCL § 102(u) (emphasis added), and then defines "member" not as the entity itself, but

as "a person who has been admitted as a member of a limited liability company . . . and has a membership interest in the limited liability company[.]" *Id.* § 102(q). Indeed, the LLCL specifically provides that "[a] limited liability company formed under this chapter *shall be a separate legal entity* . . ." *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.").

Unlike other jurisdictions, New York's LLCL does not say that an LLC is a party to, or is bound by, the operating agreement adopted by its members. *Compare* 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."); *see also* Comparison of the Key Provisions of the Revised Uniform Limited Liability Company Act ("RULLCA") to the 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 the NYLLCL.").

Courts in jurisdictions that currently have or previously had limited liability company laws similar to New York's LLCL have consistently held that the LLC is *not* a party to the operating agreement by operation of statute.

For example, in *Trover v. 419 OCR, Inc.*, 397 Ill. App. 3d 403 (2010), the question presented to the appellate court was whether the LLC may be compelled to arbitrate based on the arbitration provision in the LLC's operating agreement where the LLC was neither a party nor a signatory. The court answered with a resounding "no." *Id.* at 1255. The court first noted that Illinois law (like New York law) states that an LLC is "a legal entity distinct from its members." *Id.* at 1254. The court then looked to the operating agreements noting, 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." *Id.* Based on these facts, the appellate court held:

> 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 [LLC] was a party to the operating agreements and that they are therefore not bound by the arbitration clauses therein.*

Id. at 1255 (emphasis added); *see also Q Rest. Grp. Holdings, LLC v. Lapidus*, 2017 IL App (2d) 170804-U (holding that the amended LLC law did not apply retroactively and because the LLC was neither a named party nor a signatory to a

pre-2017 operating agreement, the LLC was not bound by the operating agreement).

Similarly, Virginia'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 state that 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. Code §§ 13.1–1009, –1019; *C.F. Trust, Inc. v. First Flight Ltd. P'ship*, 266 Va. 3, 9, 580 S.E.2d 806, 809 (2003). 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. Code § 13.1–1042.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, 275 Va. 157 (2008) (reversing lower court holding that derivative claims were subject to arbitration) (citation omitted) (emphasis added).

State courts are not alone in these findings. Federal courts have also held that 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. In *Xereas v. Heiss*, 933 F. Supp. 2d 1 (D.D.C. 2013), the court held accordingly:

> The D.C. statute applicable at the time 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[.]" D.C. Code § 29–1018(a) (2001). 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." Am. Compl., Ex. 13, Am. Operating Agreement, Art. II, ¶ 2.1. The Amended Operating Agreement also provides that managing members have the power to legally bind the LLC. *Id.,* Ex. 13, Am. Operating Agreement, Art. VI, ¶ 6.1(b)(ii-iii). 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.*

Id. at 12-13 (emphasis added); *see also* *Bubbles & Bleach, LLC v. Becker*, No. 97-C-1320, 1997 WL 285938, at *6 (N.D. Ill. May 23, 1997) (denying defendant's motion to dismiss and holding that the arbitration provision in the LLC's operating agreement did not bind the LLC because Wisconsin law defined an operating agreement as an agreement among the members of the LLC and the LLC was not a party to the operating agreement).

This Court should hold the same. Here, Wythe Berry LLC is neither a party to nor a signatory of its operating agreement. *See* R. at 187 and 203. And because the LLCL is devoid of a provision binding the Companies to the Operating Agreements, the Companies are not bound to the Operating Agreements, including the arbitration provision in the Fifth Amendment.

Consequently, the Fifth Amendment's arbitration provision does not provide a basis for Goldman to force Wythe Berry LLC, or the other Companies, into arbitration.

C. The Side Agreement does not bind the Companies to the Fifth Amendment's arbitration provision

Goldman bears the burden of proof to establish an express agreement to arbitrate between him and the Companies. *Cusimano v. Berita Realty, LLC.*, 103 A.D.3d 720, 721 [2d Dep't 2013]. Understanding the Fifth Amendment plainly doesn't apply to the Companies on its own, Goldman tries to convert language in his Hebrew Side Agreement with Weiss into providing that consent. For that reason, he asked the Supreme Court to ignore the specific provisions of the Side Agreement, look only at the preamble, and construe it as an unlimited consent to arbitrate all disputes, involving any entity, that relate to the Hotel.

But Goldman's purported interpretation of the Side Agreement is at odds with its clear language and purpose. It should be rejected by this Court.

Specifically, the Fifth Amendment made Weiss' the Managing Member of the company that owned and managed the Hotel. *See* R. at 43. As mentioned above, when Goldman proposed they refinance the Hotel with the William Vale Bonds, transfer ownership of the Hotel into a new corporate structure, and make Goldman the managing member of those new entities, Weiss resisted. *Id*. To induce Weiss's consent, Goldman agreed to execute the Side Agreement, the primary purpose of which was to document that, notwithstanding the restructuring, Weiss would *stay* the managing member of the entities that owned and controlled the Hotel. *Id*.

The Side Agreement achieved that purpose by reiterating that the Fifth Amendment, the document that put Weiss in control (*see* R. at 196), was the dispositive agreement between Weiss and Goldman. *See* R. at 249. 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, which the Side Agreement made the "dispositive" agreement in the event of any "dispute" "between us," *i.e.,* Goldman and Weiss. *See* R. at 249.

Given the purpose of the Side Agreement, the significant restructuring that was occurring as a result of the William Vale Bonds, and the fact that the Side Agreement was drafted by rabbis who were unfamiliar with the law, Weiss and

Goldman wanted to ensure that all of their entities, including the Companies, "fully acknowledge[d]" its provisions – so that no one could try and leverage sharp tactics and the old or new corporate structure to circumvent the Side Agreement. *See* R. at 44. For this reason, the Side Agreement was "fully acknowledged" by Weiss, Goldman, and "all the corporations 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." *See* R. at 249.

But just because all entities (including the Companies) "acknowledged" the existence of the Side Agreement, does not mean every single obligation is applicable to every entity. To the contrary, the Side Agreement's language on dispute resolution is specifically limited in scope:

> 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.

See R. at 249 (emphasis added).

Goldman argues that the preamble's broad acknowledgment language and this paragraph mean the Fifth Amendment's arbitration provision 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 disputes between Goldman and Weiss, the sole signatories to the Side Agreement. Indeed, corporate entities would not be referred to as "us" and the word "between" is most usually used between two disputing parties, as opposed to "among," which would more clearly reference multiple parties.

Limiting this agreement to arbitrate disputes "between us" to disputes between Goldman and Weiss individually is not just the natural reading of the words "between us" it's also how the Side Agreement must be construed under the law. That's because the Side Agreement **indisputably** uses the word "us" in that very same paragraph to refer to just Goldman and Weiss by referencing the "Fifth Amendment . . . which was signed **by us** on the said date." *See* R. at 249 § 2. It's common ground that the Fifth Amendment was signed by Weiss and Goldman personally and **not** by any corporate entities. It is thus **indisputable** that the Side Agreement uses "**us**" to mean just Goldman and Weiss (and not Companies) at least once. Once that's established, the law tells us that every instance of "us" in that same paragraph must be read the same way:

> [w]e 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.

Giray v. Ulukaya, 212 A.D.3d 439, 440 [1st Dep't 2023] (citing *Robertson v. Ongley Elec. Co.*, 146 N.Y.20, 24 [1895]); *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 principles of contractual interpretation" is that the "'same words found in different sections' be given 'the same meaning.'").

The intent to limit this language to disputes between Goldman and Weiss is evident from other language choices too. Had the intent been to cover **any** dispute involving **any** entity, the Side Agreement would have omitted any reference to "between us." In that event, the Side Agreement would have read:

> 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, building, it shall be only and solely in accord with what is explained and made plain there.

Indeed, the Side Agreement referenced persons outside just Goldman and

Weiss without issue when it wanted to – at times referring to "corporations" or "enterprises." R. at 249. Had the Side Agreement intended to include entities in the dispute resolution provision, it would have used this more expansive language than it used elsewhere, instead of limiting the provision to just disputes "between us."

With that in mind, the fact that the Companies acknowledged the Side Agreement, including its promise that disputes "between" Goldman and Weiss should be arbitrated, does not equate to a promise that disputes which expressly fall outside the ambit of the Side Agreement's dispute resolution clause, *i.e.*, not disputes "between us," but between Goldman and a corporation – must also be resolved per the Side Agreement's dispute resolution clause.

Without language committing the Companies to also resolve their disputes pursuant to the Side Agreement – something that doesn't exist – Goldman cannot meet New York law's requirement that an agreement to arbitrate with the Companies be "clear, explicit, and unequivocal." *Waldron v. Goddess*, 61 N.Y.2d 181, 184 (1984).

D. Goldman and Weiss's course of dealing demonstrates this interpretation is correct

The history between Goldman and Weiss demonstrates this interpretation, that the Side Agreement only applies to disputes between Goldman and Weiss

personally, is both accurate and in accordance with the parties' intent.

On or about April 30, 2021—23 months before commencing the underlying Arbitration—Goldman commenced an action in the New York State Supreme Court against Weiss, Wythe Berry LLC, and other LLCs in which Goldman claimed to have an interest. *See* *Goldman v. Rose Castle Redevelopment II LLC, et al.*, Index No. 510224/2021 ("*Goldman v. RC II*"). In that action, Goldman sought to recover $15 million from Wythe Berry LLC. *See Goldman v. RC II*, Verified Complaint ¶¶ 32-33, 57. At no point during the last three years did Goldman (or Weiss) invoke the Fifth Amendment's arbitration provision over that claim. This failure is an admission by Goldman that the Fifth Amendment's arbitration provision does not apply to disputes between Goldman and the Companies, and a further admission that the Side Agreement does not magically extend the arbitration provision to disputes involving the Companies.

Goldman's other actions also prove the parties never intended the Fifth Amendment's arbitration provision to bind the Companies. In June 2021, after the bondholders took over control of Goldman's companies,[2] they caused Wythe

[2] This is a bit of an oversimplification as the exact mechanics by which the bondholders controlled Fee Owner are beyond the scope of this brief. In reality, they exerted control over the chief restructuring officer of All Year, which was

Berry Fee Owner LLC to sue Wythe Berry LLC over an alleged breach of lease obligation and sought to enforce personal guarantees Goldman and Weiss provided over that obligation. Had either Goldman or Weiss held a bona fide belief that the Side Agreement applied to disputes between the Companies and themselves – either one could have raised the Side Agreement in that litigation to either (i) compel arbitration or (ii) argue that bondholders did not have authority over Fee Owner because the Side Agreement installed Weiss (and not Goldman's company) as the managing member. Of course, despite this litigation going on for years, neither made this argument because the truth is that neither Goldman nor Weiss believed the Side Agreement applied to corporations, as opposed to just disputes between them personally.

As Goldman and Weiss's dealings demonstrate, neither Goldman nor Weiss held any legitimate belief that the Side Agreement extended the Fifth Amendment's arbitration provision to the Companies.

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the sole member of YGWV LLC, which was the managing member (according to Goldman) of Member LLC, which is the parent and sole member of Fee Owner.

E. Even if the Companies agreed to arbitrate, the operating agreements include an express limitation on that agreement, which excludes the dispute in the underlying Arbitration.

Even assuming for the sake of argument that the Side Agreement extended the Fifth Amendment's arbitration provision to disputes involving the Companies (it does not), the express language within each of the Companies' Operating Agreements restricts the Companies' consent to disputes involving only limited dollar amounts. Specifically, each Operating Agreement states that "[t]he commencement [or] defense . . . of any actions . . . in arbitration, where the amount in dispute is in excess of $500,000 . . . shall be a Major decision," and then provides "in no event will the Company take any . . . Major Decision . . . without prior written approval of both [Weiss and Goldman]. *See* R. at 198 and 204; R. at 211-212 and 217; R. at 224-225 and 230; R. at 237-238 and 243.

Therefore, even assuming *arguendo* that there was consent to arbitrate disputes brought by or against the Companies, the Companies clearly limited that consent to disputes below $500,000. Each Companies' Operating Agreement explicitly stated that *both* Goldman and Weiss needed to consent unanimously to an arbitration brought by or against the Company if the amount in dispute exceeded $500,000. And here, it is undisputed that the underlying dispute significantly exceeds the $500,000 threshold.

Stated plainly, if the dispute exceeds $500,000 (which it does), a new

consent to arbitrate is required—and no such agreement exists. See *Miriam Osborn Mem'l Home Ass'n v. Kreisler Borg Florman Gen. Const. Co., Inc.*, 306 A.D.2d 533, 533 [2d Dep't 2003] ("The provision of the agreement which provided that the parties would submit 'any claim' to arbitration was qualified by the later provision which limited arbitration to claims that do not exceed $150,000. Accordingly, the parties did not agree to arbitrate those individual claims which exceeded the $150,000 limit[.]").

Because Goldman did not obtain the required additional consent from the Companies, and because the underlying dispute exceeds $500,000, Goldman cannot force the Companies into arbitration.

F. Even if a general consent to arbitration exists and there is no dollar limitation on that consent, Goldman failed to satisfy a condition precedent

Even assuming that the Companies consented to arbitrate (they did not), and the Operating Agreements do not limit the consent to disputes below $500,000 (they do), the Arbitration must still be stayed because the requirement that Goldman and Weiss both consent before commencing an arbitration in excess of $500,000 is, *at minimum*, an unfulfilled condition precedent.

The "satisfaction of conditions precedent to arbitration" is an issue "for the court" to decide. *Application of Travelers Indem. Co.*, 195 A.D.2d 35, 40 [1st Dep't 1993]; *see also Hanover Ins. Co. v. Lewis*, 57 A.D.3d 221, 222 [1st Dep't

2008] ("Physical contact is a condition precedent to the arbitration of this uninsured motorist claim, and whether or not there was physical contact between the insured vehicle and an alleged 'hit and run' vehicle is an issue of fact to be decided by the court."); *Anagnostopoulous v. Union Tpk. Mgmt.*, 300 A.D.2d 393, 394 [2d Dep't 2002] (holding that "Supreme Court should have denied the motion to compel arbitration based upon the respondent's failure to fulfill in a timely fashion the contractually mandated condition precedent" because "[a] court has the jurisdiction to determine whether contractual conditions precedent to arbitration have been fulfilled"). This is true even if the arbitration agreement contains a broad arbitration provision. *See All Metro Health Care Servs. v. Edwards*, 57 A.D.3d 892, 893 [2d Dep't 2008] ("Notwithstanding a broad arbitration clause, the threshold determination of whether a condition precedent to arbitration exists and whether it has been complied with, is for the court to determine.").

And when the condition precedent is not satisfied, "the court properly grant[s] the application to stay arbitration." *Museum of City of New York v. Loc. 1665, DC 37*, 13 A.D.3d 129 [1st Dep't 2004] ("The governing agreement sets forth what must be construed as three conditions precedent to arbitration, and since none of those conditions had been met, the court properly granted the application to stay arbitration.").

Each Operating Agreement and, importantly, the Fifth Amendment requires the unanimous written approval of Goldman and Weiss before commencing arbitration where the amount in dispute is greater than $500,000. *See* R. at 198 and 204; R. at 211-212 and 217; R. at 224-225 and 230; R. at 237-238 and 243. In other words, the Operating Agreements set forth a condition precedent to arbitration by requiring both Goldman and Weiss to provide written consent. *See* *Matter of Lavar C.*, 185 A.D.2d at 36, 40 [4th Dep't 1992] (holding that petitioner's "obligation to seek consent of Travelers to a tort settlement is a condition precedent to arbitration").

It is undisputed that Goldman did not seek, and Weiss did not provide, written approval for commencing the Arbitration by and/or against the Companies. Because the condition precedent to arbitration is not satisfied, the Arbitration must be stayed.

G. Goldman waived arbitration

Finally, even assuming that (i) the Companies consented to arbitration, (ii) their consent is not limited to disputes under $500,000, and (iii) further consent is not a condition precedent to arbitration, the Arbitration must still be stayed because Goldman waived his right to bring claims in arbitration.

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. *See* *Esquire Indus., Inc. v. E. Bay Textiles, Inc.*, 68 A.D.2d 845, 845–46 [1st Dep't 1979] ("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.") (internal citation omitted). By bringing and maintaining the *Goldman v. RC II* action in court, and including in that lawsuit an independent claim against Wythe Berry LLC for $15 million, Goldman waived arbitration by filing litigation that involved the Companies, rather than enforcing what he now claims is his right to arbitration. Goldman cannot have it both ways.

CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Court reverse the lower court's order and stay arbitration proceedings against them.

Dated: March 18, 2024

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR Section 1250.8(j) the foregoing brief was prepared on a computer using Microsoft Word.

TYPE: A proportionally spaced typeface was used as follows:

Name of Typeface: Times New Roman

Point Size: 14

Line Spacing: Double

WORD COUNT: The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 6,991.

STATEMENT PURSUANT TO CPLR 5531

Supreme Court of the State of New York
Appellate Division – First Department

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-Appellants,

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

- against -

YOEL GOLDMAN,

Respondent-Respondent.

1. The index number of the case in the court below is 655683/2023.

2. The full names of the original parties are set forth above. There have been no changes.

3. This proceeding was commenced in Supreme Court of the State of New York, New York County.

4. The proceeding was commenced on or about November 13, 2023 by filing of a Verified Petition. Issue was then joined on or about November 28, 2023 by service of a Verified Answer.

5. This is an Article 75 proceeding for an order to stay arbitration.

6. The appeal is from the Decision and Order of the Honorable Barry R. Ostrager, Dated December 14, 2023 and entered on December 20, 2023.

7. The appeal is being perfected on a full reproduced record.