To be Argued by:
GARY J. MENNITT
(*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 RESPONDENT-RESPONDENT

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Respondent-Respondent Yoel Goldman ("Goldman") respectfully submits this Memorandum of Law in Opposition to Petitioners-Appellants' Application for an Order Staying Arbitration Pursuant to Article 75 of the CPLR, NYSCEF No. 3 ("Application" or "Br.").

PRELIMINARY STATEMENT

Respondent-Respondent Yoel Goldman is in the process of pursuing claims against his disloyal joint venture partner, Zelig Weiss ("Weiss"), for flagrant breaches of his duties as the day-to-day manager of companies that Goldman and Weiss formed to develop and operate Brooklyn's prominent hotel, The William Vale (the "Hotel"). The primary agreement through which this joint venture operated contains an arbitration provision that applies to the underlying disputes. Thus, for over a year now, Goldman has been pursuing his claims before arbitrators at the American Arbitration Association ("AAA"). Goldman's claims are stated both against and derivatively on behalf of entities that Goldman and Weiss used to operate their Hotel-related joint venture: Wythe Berry LLC, William Vale Hotel LLC, William Vale FNB LLC and North 12 Parking LLC (each an "Appellant" and collectively the "Appellants"). The AAA claims stem from disloyal and fraudulent actions taken by Weiss, to enrich himself at Goldman's expense, while acting as the Managing Member of the Appellants.

This appeal is the latest in a protracted series of procedural tactics Weiss is using (and now has caused the Appellants to use) to stall a substantive hearing on claims that he orchestrated a multi-million dollar fraud. This Court must decide whether the entity Appellants (still controlled by Weiss) can avoid participating in the arbitration.

Appellants' convoluted arguments do not identify any reversible error in the well-reasoned decision of the trial court denying a stay of the arbitration. First, the trial court correctly declined to stay the arbitration because the Weiss expressly "fully acknowledged" an agreement on behalf of the Appellants that incorporates a broad, mandatory arbitration provision applicable to this dispute. The parties agreed in writing for disputes regarding the Hotel venture to be resolved in arbitration, and Appellants (i.e., the entities through which the Hotel venture operated) "fully acknowledged" "everything" in that written agreement. There is no merit to the series of flimsy arguments that Weiss continues to cause Appellants to pursue.

Second, all parties agree that the relevant agreements here are unambiguous. Weiss's attempts to muddy the waters with extrinsic evidence are misleading and procedurally improper.

Third, Goldman did not waive his right to arbitration by participating in litigation entirely unrelated to the Hotel venture. The arbitration agreement at issue is unmistakably clear that it applies to disputes "arising from this agreement,"

meaning the operating agreement of Wythe Berry LLC, i.e., the primary entity through which the Hotel venture operated. Moreover, the parties' second agreement expressly extended the original arbitration provision to cover all disputes related to the Hotel venture property. The unrelated litigation that Appellants reference waived nothing – it involved an entirely different real estate venture, with different agreements, about different land.

Fourth, the "Major Decisions" provisions of the Wythe Berry LLC operating agreement do not limit or otherwise nullify the clear, broad, and mandatory agreement to arbitrate disputes concerning the Hotel, such as the ones at issue here. No part of the "Major Decisions" clause creates a condition precedent to or limitation of the availability of arbitration. Nor, for that matter, was Goldman required to obtain the consent of Weiss before pursuing claims against Weiss in arbitration or otherwise.

The trial court correctly denied Appellants' petition for a stay, and this Court should affirm.

COUNTER STATEMENT OF QUESTIONS PRESENTED

Did the trial court correctly decline to stay the arbitration by and against Appellants, four limited liability companies, without prejudice to the scope of arbitration being raised to the AAA panel, where Appellants had each "fully acknowledged . . . without exception" a "Side Agreement" executed by the four

Appellants' two members, which expressly required that all disputes concerning the venture be resolved pursuant to a broad, mandatory arbitration agreement in one of the Appellants' operating agreements?

COUNTERSTATEMENT OF THE CASE AND RELEVANT FACTS

In or around 2013, Respondent-Respondent Yoel Goldman partnered with Weiss, the Managing Member of the Petitioners-Appellants, in a joint venture to develop and operate The William Vale Hotel real estate complex in Brooklyn (the "Hotel venture"). R. 264. The Hotel venture includes a restaurant, parking garage, retail, offices, and a community facility, (the "Hotel complex") which was jointly developed and operated by Goldman and Weiss through Petitioners-Appellants Wythe Berry LLC ("Wythe Berry"), William Vale Hotel LLC ("Hotel LLC"), William Vale FNB LLC ("FNB"), and North 12 Parking LLC ("North 12"). R. 263.

Goldman funded the development and construction of the Hotel venture through a combination of third-party financing and his own personal capital. R. 264. Weiss, who had been Goldman's partner in other ventures, was named Managing Member of Appellants, tasked with managing the venture's day-to-day operations. R. 146, 196.

Through their primary operating company, Wythe Berry, Goldman and Weiss acquired the land, developed the property, and, in 2016, opened the Hotel and several related businesses. R. 64. Weiss has always served as day-to-day manager of the

companies that operated the Hotel venture, while Goldman coordinated financing, including contributions of millions of dollars of his own capital. *Id*.

In late-2016, Goldman and Weiss agreed to re-finance the Hotel venture's original construction financing. R. 64-65. As part of the transaction, the Hotel real property fee was transferred to a new entity, Wythe Berry Fee Owner LLC ("Fee Owner"), which then leased the Hotel property back to Wythe Berry. *Id*. The process took several months, introduced new entities and interests, including a note and mortgage on the Hotel complex property, *id*., added complexity, and resulted in many new contracts and other documents. *See, e.g*., R. 187 (revision to operating agreement); 245 (Side Agreement). As part of the refinancing process, effective December 31, 2016, Goldman and Weiss revised Wythe Berry's operating agreement. R. 187 (the "Fifth Amendment").

The Fifth Amendment accounts for several changes to the Hotel venture's structure, including the creation of new operating entities, Hotel LLC, FNB, and North 12. *Id*.; R. 206; 219; 237. Under the Fifth Amendment, Weiss was entrusted as Managing Member. Goldman, who was responsible for funding the venture and contributed his own capital to it, has the authority to oversee matters relating to funding, financing, and refinancing the Hotel venture, and is vested with certain oversight and decision-making rights. *See* R. 196-98, 204.

In recognition of the arrangement's complexity, and the many new collateral

"documents that [the parties' had just] signed . . . for the purpose of obtaining financial loans," Goldman and Weiss, on their own behalf and on behalf of their entities, memorialized their agreement to several important overriding terms concerning the Hotel venture in a separate Hebrew-language document, styled "Deed of Acknowledgment, Understanding, and Clarification" (the "Side Agreement"). R. 245.[1]

The Side Agreement reinforced that the terms of the Fifth Amendment governed the parties' entire relationship concerning the Hotel venture, irrespective of entity, and included a dispute resolution provision that extended the broad arbitration clause in the Fifth Amendment to any dispute relating to the Hotel venture, irrespective of entity. To underscore that point, Weiss and Goldman expressly signed personally and on behalf of "all the corporations registered in [their] names, whether in whole or in part, and that have any relevance or connection to the said [Hotel] land and building," i.e., Appellants. R. 249; *see also* R. 44 ¶¶ 53-54 (Appellants conceding that they "fully acknowledged" the Side Agreement).

Indeed, at the outset of the Side Agreement, Goldman and Weiss made clear that it applies to both individual co-venturers and all entities "without exception" relating to the Hotel venture:

[1] There has not been any dispute as to the accuracy of the translation from Hebrew to English. R. 20 at Tr. 14:8-12.

> We, the undersigned, the partners in the land, the building, and all consequential items, rights, and powers of attorney that . . . are involved with it, at [the Hotel], i.e., on one hand Rabbi Yoel Goldman . . . and on the other Mr Zelig Weiss . . . hereby acknowledge, both on our own behalf and on that of all the corporations registered under our names, whether in whole or part, and that have any relevance or connection to the said land and building, without exception—fully acknowledge, as if doing so before a distinguished rabbinical court and also before a civil court, and thus irrevocably – and let our signatures below serve as evidence of this as if they were one hundred valid witnesses – everything that is written and made plain and explained hereinafter in the current contract.

R. 249.

The Side Agreement also includes a dispute resolution provision that requires resolution of all Hotel-related disputes, according to the dispute resolution provision in the Fifth Amendment to the Wythe Berry operating agreement:

> 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 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" . . . In any proceeding or hearing between us, from this day forward, on anything related to the said enterprise, land and building [i.e., the Hotel venture]," it shall be only and solely in accord with what is explained and made plain there.

Id. That reference to the Fifth Amendment of Wythe Berry's operating agreement points to a provision that "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. 201 ¶ 11.

Unbeknownst to Goldman at the time, very early on in the Hotel venture, Weiss began abusing his position as Managing Member. *See* R. 67-68 ¶¶ 43-53. Eventually, communication from Weiss about the venture, including reporting information about the Hotel-related operations and finances, slowed and altogether stopped. R. 113-14 ¶¶ 246-247. That information vacuum was used by Weiss to hide, among other things, that he had improperly siphoned funds from the Hotel venture to line his own pockets. R. 114 ¶ 248.

A growing rift between the partners came to a head around the time of the COVID-19 pandemic, which distressed the real estate sector and prompted the need to refinance the Hotel debt. During that time, however, despite Goldman's pleas to work together on pursuing such a refinancing, Weiss repeatedly refused to cooperate with Goldman. Weiss dishonored Goldman's oversight and decision-making rights and began to stonewall Goldman's repeated requests and demands to audit Appellants' books and records—despite Goldman's plain entitlement to those records as a member of the companies. *See* R. 68-70 ¶¶ 54-61.

In February 2021, Weiss exacerbated the situation and caused Wythe Berry to stop paying rent on a ground lease with Fee Owner—the entity that had been set up

to hold the Hotel property fee (and obligations in connection with the earlier bond issuance). In turn, Fee Owner could not make payments it owed on a note, which was being used to make bond payments for the 2016 Hotel re-financing.

Eventually, this resulted in an assignment of the note and mortgage (secured by the Hotel property) to the bondholders. *Id*. ¶¶ 62-65. Weiss then repeatedly attempted to purchase the Hotel property from Fee Owner for himself, leveraging his then-exclusive access to the Hotel venture's financial information, all in violation of his fiduciary and contractual duties. *See* R. 97-101 ¶¶ 170-182.

When Weiss was unwilling to engage in good faith discussions to address and resolve the issues he had created, Goldman sought to protect his rights—as all had agreed—through an AAA arbitration. With the information vacuum that Weiss had created by that point, however, Goldman's path to the arbitration began in 2022, with a New York Supreme Court special proceeding, seeking preliminary relief in aid of the then-forthcoming arbitration, seeking documents to support the claim. *See Goldman v. Weiss*, Index No. 653186/2022, NYSCEF No. 1 (Sept. 1, 2022) ("*Goldman v. Weiss*").

Weiss, as the Appellants' Managing Member, has caused the Appellants to pay for the legal expense of procedural roadblocks and delays, all seeking to stall and obstruct a hearing on the merits of Goldman's claims. *See id*. Along the way, Weiss has taken inconsistent positions about whether he and/or the Appellants

agreed to arbitrate the disputes at issue in the first place.

For example, in response to Goldman's Article 75 petition seeking interim relief, Weiss took the position that such requested relief was properly before AAA. *See Goldman v. Weiss*, NYSCEF No. 62 at 4-5. Yet, when Goldman then initiated arbitration seeking the same relief, Weiss filed a motion to stay arbitration arguing that Weiss and Goldman did not agree to arbitrate the disputes in part because the Side Agreement did not bind him to the arbitration provision. *Id*. at NYSCEF No. 85.

The Supreme Court denied Weiss's motion to stay arbitration, *Goldman v. Weiss*, No. 653186/2022, 2023 WL 3062155, at *1 (N.Y. Sup. Ct. Apr. 19, 2023), and the Emergency Arbitrator found that AAA properly had jurisdiction over Goldman's claims. R. 305. Yet, Weiss persisted with his delay tactics and repeatedly ignoring orders from the arbitration panel requiring production of certain records about Appellants to which Goldman was entitled. *See* R. 309-10. (Procedural Order concluding that Weiss had, by September 2023, failed to abide by *four* Orders dating back to May 2023). Indeed, only after he was found to have violated AAA orders and it became clear that there would be consequences to his procedural gamesmanship did Weiss begin producing Appellants' books and records (to which Goldman is entitled under the same agreement that includes the arbitration provision).

As the Arbitration unfolded, counsel to Appellants and Weiss insisted that Goldman had not properly stated the claims in his original Demand for Arbitration, because they were stated directly against Weiss, and that the crux of the dispute was derivative in nature. *See, e.g. Goldman v. Weiss*, NYSCEF No. 85 at 5-6; NYSCEF No. 5 at 36 ¶ 5. Accordingly, the parties and the AAA panel agreed to a scheduling order to amend the demand, i.e., so that Appellants could be formally added as parties. R. 314-15. As Weiss had insisted, Appellants were then eventually named in the Amended Demand, which Goldman filed on October 13, 2023, consistent with the agreed scheduling order. *See* R. 139. Counsel to Appellants and Weiss received and accepted service on their behalf. NYSCEF No. 5 at 244.

PROCEDURAL HISTORY

On November 14, 2023, more than a month after they were added as parties to the arbitration, Weiss caused Appellants to commence the Article 75 special proceeding below, seeking a stay of arbitration pursuant to CPLR § 7503(b). R. 31-53. Appellants (controlled by Weiss) contended that the arbitration agreement bound only Weiss and Goldman to arbitrate—not the Appellants (despite the Managing Member of Appellants insisting that they be named as parties).[2] R. 31.

[2] On a parallel track, Weiss also raised similar arguments in a dispositive motion in the AAA proceeding, contending that the arbitration claims could not proceed at all because they are derivative, and he only agreed to arbitrate with Goldman rather than with Appellants (who had agreed to arbitrate in the Side Letter). R. 311. That AAA motion is stayed pending this appeal.

In their petition. Appellants conceded that they "fully acknowledged" the Side Agreement (which incorporates the Fifth Amendment's arbitration clause). R. 44 ¶ 54.

Goldman responded to Appellants' petition on November 28, 2023, filing both a memorandum of law in opposition to their application to stay the arbitration, and a Verified Answer. R. 257, 279. Goldman argued that Weiss, as the Managing Member of Appellants, bound them to the arbitration by signing the Side Agreement which expressly incorporated the Fifth Amendment's arbitration provision on their behalf, which Appellants concede they fully acknowledged. R. 269-272. Because there is a valid and broad arbitration agreement with Appellants, Goldman argued the issue of arbitrability is reserved for the AAA panel under well-established New York law. R. 272-74.

On December 14, 2023, Justice Ostrager (who had earlier in the year similarly denied Weiss's previous motion to stay the same proceeding) denied the Appellants' application for a stay. R. 5-6, 7-30. The court's ruling was expressly without prejudice to raising the arbitrability issues with the AAA panel, who had already been overseeing the arbitration for the better part of a year. R. 5-6, 7-30.

On December 21, the day before discovery requests were due to be served in the AAA proceeding, Weiss caused Appellants to appeal Justice Ostrager's decision and seek an emergency stay of the arbitration pending resolution of the appeal

explaining that "in the event that [Goldman] propounds discovery requests directed toward [Appellants], the Appellants will be forced to respond and potentially produce documents in late January." NYSCEF No. 3. Later that day, Justice Rodriguez reviewed and denied the emergency stay application *ex parte*, without requesting argument and without prejudice to raising the stay application to a full Panel of this Court. NYSCEF No. 4.

When no stay was entered, on December 22, discovery requests were exchanged in the arbitration. NYSCEF No. 5 at 37 ¶ 9. Goldman served requests on both Weiss and Appellants. *Id*.[3]

On December 22, 2023, the AAA panel granted Weiss's request to submit a motion to dismiss, R. 311, in the arbitration on the narrow issue of whether the claims by or against Appellants were arbitrable, setting the deadline for January 3rd. NYSCEF No. 5 at 37 ¶ 10. In response, Weiss sought another extension. *Id*. ¶ 11.

On January 23, 2024, this Court stayed "all arbitration proceedings, pending determination of the [] appeal … on the condition that the appeal is perfected for the June 2024 Term of this Court." NYSCEF No. 20. The AAA panel was informed of and has acknowledged this stay.

[3] Although some requests are made only to Weiss as opposed to the Appellants, all of the requests directed to the Appellants are also directed to Weiss. *Id*. at 36-37 ¶¶ 5, 9.

Appellants perfected their appeal in this matter on March 18, 2024.

STANDARD OF REVIEW

When reviewing an order granting or denying a stay of arbitration, this Court assesses whether the trial court appropriately confined its "inquiry [to] . . . whether or not the dispute is encompassed by the governing arbitration provision." *Rio Algom, Inc. v. Sammi Steel Co.*, 168 A.D.2d 250, 251 (1st Dep't 1990) (emphasizing that "[t]he policy of this State is to favor and encourage arbitration as a means of expediting the resolution of disputes and conserving judicial resources"). The arbitration provision itself is reviewed *de novo*. *E.g., MPEG LA, LLC v. Samsung Elecs. Co., Ltd.*, 166 A.D.3d 13, 17 (1st Dep't 2018); *Duane Reade, Inc. v. Cardtronics, LP*, 54 A.D.3d 137, 140 (1st Dep't 2008).

To the extent that analysis identifies any "tensions" or "potential clash[es] . . . between an arbitration clause and [other parts of the relevant agreement]," *Matter of Smith Barney Shearson Inc. v Sacharow*, 91 N.Y.2d 39, 47 (1997), the Court of Appeals has held that "New York courts [should] interfere 'as little as possible with the freedom of consenting parties' to submit disputes to arbitration," *id.* at 49-50 (quoting *Matter of 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.,* 78 N.Y.2d 88, 93 (1991)).

ARGUMENT

I. The Trial Court Properly Declined to Stay the Ongoing Arbitration Because Appellants' Managing Member Agreed "On Behalf" of Appellants to Resolve Disputes According to the Broad Arbitration Clause in the Wythe Berry LLC Operating Agreement

Twice now, the trial court has correctly denied attempts by the Managing Member of Appellants (Weiss), to derail the ongoing AAA arbitration where his business partner, Respondent Goldman, has accused him of committing a multi-million-dollar fraud in connection with his disloyal management of the Hotel joint venture. R. 5-6. First, in early-2023, the trial court denied Weiss's first attempt to evade the ongoing arbitration. There, the court correctly held that "[w]here, as here, there is a broad arbitration clause and the parties' agreement specifically incorporates by reference the rules of the [AAA] providing that the arbitration panel shall have the power to rule on its own jurisdiction, courts will leave the question of arbitrability to the arbitrators." *Goldman,* 2023 WL 3062155, at *1. In doing so, the court relied on *Dentons US LLP v. Zhang*, 211 A.D.3d 631 (1st Dep't 2022) ("*Dentons*"), in which this Court affirmed the denial of another attempt to stay an arbitration based on a contract with "a broad arbitration clause, similar to the clause here, that was applicable to 'all disputes of any kind.'" *Goldman*, 2023 WL 3062155, at *1. Thus, the trial court correctly reasoned that arbitration must proceed: "In light of the broad language in the Fifth Amendment's arbitration clause and the clause's specific incorporation by reference of the rules of the American

Arbitration Association which delegate the threshold issue of arbitrability to the arbitrator[.]" *Id.* at *2.

Against that backdrop—only eight months later—Justice Ostrager correctly denied a second attempt by Weiss (this time, on behalf of Appellants rather than individually) to stay the exact same arbitration, based on the exact same arbitration provision. R. 5-6. As the trial court appropriately recognized: "these LLCs [through which Weiss brought the second challenge to the arbitration] are the vehicles through which Mr. Weiss conducted business with respect to the hotel, which is the subject of most of the dispute." R. 10 at Tr. 4:5-9. Moreover, as the court correctly reasoned, "the preface of [the Side Agreement] indicates that Weiss was acting on behalf of [Appellants] in signing the 'side agreement,'" and that document "incorporated the Fifth Amendment to the parties' operating agreement with its broad arbitration clause." *Id.* The arbitration clause at issue requires that arbitrability questions be arbitrated, and thus the lower court correctly denied the stay. *See Goldman*, 2023 WL 3062155, at *1 (quoting *Dentons*, 211 A.D.3d at 631).

A. Appellants' Managing Member, Zelig Weiss, Bound the Appellants to Arbitrate by Signing the Side Agreement on Their Behalf

Appellants concede that, through their Managing Member, they acknowledged the Side Agreement, R. 15 Tr. 9:15-19 (counsel for Appellants: "Everyone acknowledges it without exception, including the petitioners. And we don't dispute that they acknowledged it."), and that the Side Agreement incorporates

by reference a broad, mandatory agreement to arbitrate. R. 44 ¶¶ 53-56. Yet Appellants contend, without support, that "just because all entities (including the [Appellants]) 'acknowledged' the existence of the Side Agreement, does not mean that every single obligation is applicable to every entity." Br. at 21; *see also* R. 44 ¶¶ 53-54. Specifically, Appellants insist that the use of "between us" in the Side Agreement's dispute resolution clause signals a deviation from the document's broader scope, which is memorialized prominently at the outset of the document—i.e., "everything" in the Side Agreement extends to all Hotel-related entities owned by Goldman or Weiss "without exception." R. 249

Neither the Side Agreement's plain language nor New York law allow for that absurd result. Indeed, nowhere does the Side Agreement define the phrase "between us" to mean only between Goldman and Weiss personally. To the contrary, at the outset of the Side Agreement, the document prominently memorializes that Goldman and Weiss (Appellants' Managing Member), were signing both for themselves and on "behalf" of companies "under their names", whether held "in whole or in part," that relate to the Hotel venture. R. 249. Moreover, later *in the same sentence*, the signatories emphasized that their signature on behalf of their companies was intended to cover "everything that is written" thereafter:

> on one hand Rabbi Yoel Goldman, Party A, and on the other Mr Zelig Weiss, Party B, hereby acknowledge, *both on our own behalf and on that of 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 – fully acknowledge*, as if doing so before a distinguished rabbinical court and also before a civil court, and thus irrevocably—and let our signatures below serve as evidence of this as if they were one hundred valid witnesses – *everything that is written and made plain and explained hereinafter in the current contract*.

R. 249 (emphasis added).

Indeed, when an individual, such as Appellants' Managing Member, Weiss, signs an agreement that expressly purports to bind others, the law considers "the legal effect of the agent's acts as being the act of the principal." *Federated Adjustment Co. v. Sobie*, 90 A.D.2d 806, 806 (2d Dep't 1982); *see also Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995) ("Traditional principles of agency law may bind a nonsignatory to an arbitration agreement."). Thus, Weiss's express agreement to bind Appellants is sufficient to bind them because his agency is established and unchallenged – he is the Managing Member and "responsible for the management and business affairs of the Compan[ies] and day to day operation and functioning of the [Hotel] Property." R. 196 ¶ 7(a); *see also* R. 211, 224, 237.

Furthermore, because Weiss bound Appellants to "*everything* that is written and made plain hereinafter" in the Side Agreement, that necessarily includes the Side Agreement's dispute resolution clause, which expressly incorporates the agreement

to arbitrate in the Fifth Amendment:

> 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'[.]

R. 249 (emphasis added).

"When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *Revis v. Schwartz*, 192 A.D.3d 127, 134 (2d Dep't 2020), *aff'd*, 38 N.Y.3d 939 (2022) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). "[A]ll writings which are part of the same transaction are interpreted together" and "[o]ne application of this principle is the situation in which the parties have expressed their intention to have one document's provision read into a separate document." *Id.* at 138 (quoting 11 Richard A. Lord, Williston on Contracts § 30:25 (4th ed. 2020)).

The Side Agreement expressly incorporates the dispute resolution agreement in the Fifth Amendment, and the two were executed within a couple of months of one another, as part of the same transaction to refinance the Hotel venture. Br. at 19-21; R. at 264-65. The parties left no doubt that the Fifth Amendment's arbitration agreement applies to Appellants, which Weiss and Goldman directly referenced in

the Side Agreement.

B. Wythe Berry is Also Bound to Arbitrate by the Plain Terms of the Arbitration Provision in its Amended Operating Agreement

Independently sufficient to bind Wythe Berry to arbitrate, its own operating agreement so provides. Appellants concede that "Wythe Berry LLC's operating agreement, the Fifth Amendment, does contain an arbitration provision," yet insist that it does not bind Wythe Berry because the entity is purportedly not bound by its own foundational operating agreement. Br. 14-15. Appellants do not contend that any New York court (including the court below) has *ever* endorsed that view or anything like it. Rather, to fashion their argument, Appellants resort entirely to a handful of out-of-state decisions, applying non-New York LLC statutes and law.

In doing so, Appellants ignore the well-settled New York law principle that courts enforce formational documents against non-signatory entities (Wythe Berry did not sign its own operating agreement, the members did so) where there is a clear intent to bind. Thus, "[w]here, as here, the agreement clearly is intended to bind the corporation and it is referred to in the agreement, wherein responsibilities and obligations are placed on it, the agreement is binding on the corporation as if it were a signatory." *Jannace v. Boeggeman*, 165 Misc.2d 960, 962 (Sup. Ct., Westchester Cty. 1995), *aff'd in part*, 237 A.D.2d 332 (2d Dep't 1997).

Indeed, Wythe Berry's operating agreement was crafted so as to *repeatedly* place obligations on it. *E.g.*, R. 144-45 ((First) Wythe Berry Operating Agreement,

Section 9, describing reports that *"[t]he Company* shall furnish to each Member"); R. 179 (Fifth Amendment, Section 7(e): "[I]n 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.") (emphasis added). Therefore, in an action to enforce Wythe Berry's obligations to its members pursuant to its operating agreement, Wythe Berry is a proper party. *Jannace*, 165 Misc.2d at 962; *see also Forty Cent. Park S., Inc. v. Anza*, 130 A.D.3d 491, 492 (1st Dep't 2015) (affirming denial of motion to dismiss cause of action plead against LLC for failing to fulfill its obligations under operating agreement, which were separate and apart from managing member's obligations under same LLC operating agreement); *Cortazar v. Tomasino*, 211 A.D.3d 677, 679 (2d Dep't 2022) (affirming dismissal as to an individual defendant finding the agreement forming the LLC imposed an obligation on the LLC to take certain actions, and not the individual member of the LLC); *Lau v. Lazar*, 130 A.D.3d 413, 414 (1st Dep't 2015) (reasoning that causes of action against LLC member for alleged "breach[es] of the operating agreement[] should be dismissed because '[a] member of a limited liability company cannot be held liable for the company's obligations by virtue of his [or her] status as a member thereof').

Appellants similarly ignore a line of New York cases that have expressly extended this principle to arbitration agreements. In those cases, limited liability

companies and close corporations have been required to arbitrate based on arbitration provisions in formational documents that the entities themselves have not signed.

For example, *Lane v. Abel-Bey* involved a dispute among stockholders of a close corporation and the entity itself, where a stockholders' agreement—containing a provision that required the arbitration of "[a]ll disputes arising in connection with this agreement"—had been "executed by all the parties to th[e] proceeding except [the entity]." 70 A.D.2d 838, 838 (1st Dep't 1979), *aff'd*, 50 N.Y.2d 864 (1980). As here, the stockholder in *Lane* was alleging, *inter alia*, "improper payments by the [entity] to the [other] party-stockholders." *Id.* at 839. After finding "a reasonable relationship to the dispute and the subject matter of the underlying agreement to warrant the application of the agreement's arbitration clause," this Court enforced the arbitration against the entity, reasoning: "[a]lthough [it] failed to execute the agreement which contains the provision to arbitrate, [the entity was still] so bound" because "all the stockholders [of the entity] sign[ed] [the] stockholder's agreement." *Id.* ("This rule is applicable even where stockholders have executed the agreement but the corporation has not."); *see also, e.g.*, *Hoffman v. Finger Lakes Instrumentation, LLC*, 7 Misc.3d 179, 181 (Sup. Ct., Monroe Cty. 2005) (imputing intent to arbitrate with non-signatory LLC where "[t]he broad language of the arbitration clause reveals that the members intended that virtually all disputes

pertaining to the LLC to be submitted to arbitration"); *cf. Berman v. Tierra Real Est. Grp., LLC*, 23 Wash. App. 2d 387, 392 (2022) (Washington LLC bound to arbitrate based on arbitration clause in operating agreement because, similar to New York's LLC law, Washington's statute "provides that limited liability company agreements govern the relations between the limited liability company and the members"). Wythe Berry is similarly bound to arbitrate disputes arising from its operating agreement before AAA.

C. Appellants Have Not Identified a "Course of Dealing" That Changes the Meaning of the Arbitration Agreement and, In Any Event, Did Not Raise a "Course of Dealing" Argument Below

For the first time on appeal, Appellants seek to escape the plain language of the Side Agreement (which binds them to arbitrate) by pointing to "Goldman and Weiss's course of dealing." Br. 24. That is, Appellants contend that because Goldman did not invoke the arbitration agreement in two unrelated civil actions, it confirms Appellants' reading that the Side Agreement's incorporation of the arbitration provision "only applies to disputes between Goldman and Weiss personally." Br. 24-25. That argument is legally flawed.

Appellants' "course of dealing" argument is completely unsupported by any authority (from New York or elsewhere) that an individual's decision not to invoke an arbitration provision in unrelated litigation, involving different parties and concerning different issues, can establish a "course of dealing" or the meaning of

anything. Indeed, Appellants' argument is at odds with how New York courts have interpreted and applied the concept of a "course of dealing"—i.e., "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *Unisys Corp. v Hercules Inc.*, 224 A.D.2d 365, 368 (1st Dep't 1996).

In New York, "[t]he law is clear that a course of dealing can only be established by the previous conduct of the parties to the contract," *Hanover Ins. Grp. V. City of N.Y.*, 2013 NY Slip Op 32125(U), ¶ 5 (Sup. Ct., N.Y. Cty. 2013) (citing UCC 1-205), and it is similarly "settled law that a single instance cannot establish a course of dealing." *Mapinfo Corp. v Spatial Re-Eng'g Consultants*, 02-CV-1008 DRH, 2006 WL 2811816, at *9 (N.D.N.Y Sept. 28, 2006) (collecting authorities); *see Rotuba Extruders, Inc. v Ceppos*, 46 N.Y.2d 223, 230 (1978) ("[B]y no stretch of the imagination could [a single transaction] constitute the 'sequence of previous conduct' that it would take to comprise a . . . 'course of dealing.'").

Here, the two lawsuits upon which Appellants rely only involved Wythe Berry and not the other Appellants, and neither involved disputes arising out of the Fifth Amendment or the Side Agreement. In the first action, *Wythe Berry Fee Owner LLC v. Wythe Berry LLC et al*, Index No. 514152/2021, NYSCEF No. 2 (Sup. Ct., Kings Cty. June 11, 2021), Weiss caused Wythe Berry to withhold rent payments from Fee

Owner (the ground lessor for the Hotel venture). When Fee Owner sued Wythe Berry for breach of the lease, Goldman and Weiss were joined as personal guarantors. *Id*.[4] In the other, *Goldman v. Rose Castle Redevelopment II LLC, et al.,* Index No. 510224/2021, NYSCEF No. 1 (Sup. Ct., Kings Cty. Apr. 30, 2021) (the "Rose Castle Litigation"), Goldman sued Weiss and several others because of Weiss's misconduct in connection with an entirely different real estate venture, involving different property and different agreements. Goldman's litigating positions, taken in unrelated litigation against Weiss, plainly do not and cannot establish a course of dealing sufficient to inform the interpretation of this arbitration provision.

In any event, Appellants' "course of dealing" argument cannot be squared with their contention that the Side Agreement is "clear" and its language "plain." Br. at 2, 19, 22. "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous." *Greenfield v. Philles Recs., Inc*., 98 N.Y.2d 562, 569 (2002) (citing *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157 (1990)). Appellants contend otherwise. Br. 24-26.

Appellants' illogical "course of dealing" argument is also procedurally flawed because Appellants did not make this argument in the trial court and thus the parties

[4] The Weiss-controlled Wythe Berry controlled the litigation and their misconduct in that case led to a finding of contempt. *Id*. NYSCEF No. 297 (Sept. 30, 2022).

were unable to develop the factual record before the trial court regarding this argument. This Court should not consider this flawed argument for the first time on appeal. *AutoOne Ins. Co. v. Negron*, 148 A.D.3d 534 (1st Dep't 2017) (declining to consider an argument that was raised for the first time upon appeal); *Brodsky v. New York City Campaign Fin. Bd.*, 107 A.D.3d 544, 545 (1st Dep't 2013) ("An issue raised for the first time on appeal is unpreserved for review and this Court has the discretion to decline to consider the issue.").[5]

II. The Trial Court Applied Settled New York Law and Properly Deferred to a Panel of AAA Arbitrators Who Have Been Dealing with the Same Underlying Dispute for Well Over a Year

As Appellants concede, where the court finds that there is an agreement to arbitrate, under New York law, "then everything else goes to [AAA]." R. 19 at Tr. 13:21-23; *see, e.g.*, *Matter of John W. Cowper Co., Inc.,* 72 A.D.2d 934, 934 (4th Dep't 1979) ("Once an agreement to arbitrate has been determined, it is for the arbitrator to interpret the agreement in order to decide which issues are subject to arbitration and which are not."), *aff'd on other grounds,* 51 N.Y.2d 937 (1980). Appellants other arguments do not identify reversible error. Accordingly, this Court should affirm the denial of a stay.

[5] In the Special Proceeding below, Appellants raised the Rose Castle Litigation in connection with a waiver argument, which is addressed immediately below in section II.A, *infra*. Appellants did not raise the lease litigation at all.

A. Goldman Did Not Waive Arbitration

Goldman's supposed procedural participation in the Rose Castle Litigation raised by Appellants does not waive his right to arbitrate with Appellants because "[n]ot every foray into the courthouse effects a waiver of the right to arbitrate[.]" *Stark v. Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 67 (2007). Indeed, Appellants' argument that Goldman waived his right to arbitrate future disputes by litigating an unrelated case in 2021 has no merit because the dispute resolution mechanism agreed in the Side Agreement was specific to the Hotel venture and related "land and building," R. 249. Thus, Goldman's commencement of the Rose Castle Litigation, which concerned a different dispute about entirely different property, could not waive his right to arbitration pursuant to the Fifth Amendment and Side Agreement.

In the Rose Castle Litigation, Goldman sought relief specific to the facts of that case (i.e., damages for the breach of other, unrelated agreements and a vendee's lien that has nothing to do with the Hotel venture), distinct from the Hotel venture-related issues in the ongoing Arbitration. *See Radzievsky v. Macmillan, Inc.*, 170 A.D.2d 400 (1st Dep't 1991) ("[T]he claims asserted in this action are entirely separate from those raised in the arbitration proceeding, and distinct remedies are sought in each proceeding. . . . under these circumstances, no waiver of arbitration may be implied."); *Denihan v. Denihan*, 34 N.Y.2d 307, 310 (1974) ("[A]s to claims

separate and distinct, no waiver of arbitration may be implied from the fact that resort has been made to the courts on other claims arising under a common agreement which remains in full force and effect."). Because the scope of the arbitration agreement in the Side Agreement and Fifth Amendment, is specific to "anything related to the said [Hotel venture], land and building," R. 249, and the Rose Castle Litigation had nothing to do with "said [Hotel venture] land and building," *id.*, Goldman did not waive any rights to arbitrate that are relevant to the Hotel venture.

Even if Goldman had somehow waived his right to arbitrate by failing to move to compel arbitration in the Rose Castle Litigation (he did not), such a waiver would only apply to disputes with Wythe Berry. Hotel LLC, FNB and North 12 were not involved in the Rose Castle Litigation, and thus arbitration by and against them could not have been waived. In any event, as courts have made clear, waiver arguments are "presumptively reserved for the arbitrator's resolution." *Mulvaney Mech., Inc. v. Sheet Metal Workers Intern. Ass'n Loc. 38*, 351 F.3d 43, 45 (2d Cir. 2003).

B. The Appellants' Operating Agreements' Major Decisions Provisions Do Not Nullify or Limit the Agreement to Arbitrate

i. This Arbitration Agreement Does Not Exclude Any Disputes

The Appellants' operating agreements do not, as Appellants maintain, "restrict the Companies' consent [to arbitrate] to disputes involving only limited dollar amounts." Br. 27. Nor do the operating agreements create a condition precedent to Goldman's claims in the arbitration. Br. 28.

To make that claim, Appellants selectively quote language from the Major Decisions schedules to the operating agreements. Br. 27. But to adopt the reading urged by Appellants, the Court would have to supply new terms not part of the agreement or, at the very least, "distort the meaning of those [terms] used to make a new contract for the parties under the guise of interpreting the writing," either of which would be improper. *Morlee Sales Corp. v. Manufacturers Trust Co.,* 9 N.Y.2d 16, 19 (1961) ("It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed."); *Emcee Personnel v. Morgan Lewis & Bockius, LLP,* 269 A.D.2d 353, 353 (2d Dep't 2000) (same).

On its face, the Major Decisions provision upon which Appellants rely does not purport to address disputes *between members concerning the rights of the members themselves*. In full, the Major Decisions provision provides:

> "Notwithstanding the grants of authority under Section 11(a) of the Original Agreement, in no event will the Company take any of the action listed on Schedule 1 annexed hereto (each a "Major Decision") without the prior written approval of both Class A Members."

R. 198. One of the Major Decisions listed on Schedule 1 is as follows:

> "the commencement, defense, or discontinuance of any actions in the nature of legal proceeding in any court, before any governmental agency, of [*sic*] in arbitration, where the amount in dispute is in excess of $500,000 other than actions arising out of the ordinary course of leasing or operating the Property, such as eviction and unlawful

> detainer actions against defaulting tenants, except that all decisions involving criminal matters (other than code violations), shall be Major Decisions[.]"

R. 204 (vii).[6]

The plain language of the Major Decisions provision does not evidence an intent to restrict derivative claims brought by Appellants' members, nor actions between its members. That provision evinces an intent to govern actions between Appellants and third parties. In sharp contrast, claims involving the rights and duties under the LLC operating agreements are exactly the type of dispute contemplated by the Fifth Amendment and the Side Agreement's arbitration clause itself. R. 201 ("any dispute arising out of this agreement"). It would have been very strange for the LLC members to require pre-approval by both of them to seek resolution of a dispute between them. They did no such thing.

Appellants' reliance on *Miriam Osborn Mem'l Home Ass'n v. Kreisler Borg Florman Gen. Const. Co*., 306 A.D.2d 533 (2d Dep't 2003), is misplaced. *See* Br. 27-28. There, a construction contract provided that "[t]he Owner or the Construction Manager may, by written notice to the other, seek Arbitration of any claim," with the express limitation that "[d]isputes arising between the Owner and the Construction Manager, wherein the amount of each of the other party's claim

[6] The Major Decision provisions of the other Appellants' operating agreements are identical. R. 212, 217, 237-38, 243.

does not exceed One Hundred Fifty Thousand Dollars ($150,000), shall be decided by arbitration." *Id*. The Court held that the arbitration provision was expressly qualified by limitation to smaller disputes within the agreed cap. *Id.* ("The provision of the agreement which provided that the parties would submit 'any claim' to arbitration was qualified by the later provision . . . .").

There is no parallel in the agreements here. None of the relevant provisions purport to modify, let alone abrogate, the broad agreement to arbitrate in the Fifth Amendment. While Appellants point to a Major Decision schedule provision that identifies actions where the amount in dispute exceeds $500,000, Br. 27, that provision does not purport to modify the availability of AAA as a forum.

ii. There is No Condition Precedent to this Arbitration Agreement

The language Appellants advance from the Wythe Berry operating agreement's Major Decisions schedule is not a condition precedent to arbitration. "[A] contractual duty ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition." *Mullany v. Munchkin Enters., Ltd.*, 69 A.D.3d 1271, 1274 (3d Dep't 2010) (internal quotation marks and citations omitted). Courts have repeatedly held that hallmarks of conditions precedent are precondition terms like "if," "unless," or "until." *See MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009); *Latham Land I, LLC v. TGI Friday's, Inc.*, 96 A.D.3d 1327, 1329 (3d Dep't 2012).

"Noticeably absent from . . . the contractual limitation at issue here, is any language making the provisions of that paragraph an express condition precedent to submission of a claim to arbitration." *United Nations Dev. Corp. v. Norkin Plumbing*, 45 N.Y.2d 358, 364 (1978) ("Consequently, the question of compliance with the conditions contained in that paragraph must be determined by the arbitrator, rather than by the court."). The Major Decisions provision contains nothing, express or implied, indicating an intent to require member preapproval as a limitation to the availability of arbitration provision as a *forum* for dispute resolution. Indeed, the Major Decisions provision's references to defense or discontinuance of an arbitration *presupposes* that such a forum is already available. R. 204 (identifying a Major Decision of Wythe Berry as the decision whether to "discontinu[e] or defen[d] . . . actions . . . in arbitration").

Nor do any of the Appellants' authorities support the proposition that the Major Decisions clause at issue—which "does not employ clearly conditional terms such as 'if,' 'unless' or 'until,'" *Latham Land I, LLC*, 96 A.D.3d at 1329—constitutes an *express* condition precedent qualifying the same agreement's earlier express written agreement to arbitrate. R. 201. To the contrary, in *Application of Travelers Indem. Co*. (upon which Appellants rely, *see* Br. 28), the arbitration provision itself used the term "if" to indicate expressly a conditional agreement to arbitrate. 195 A.D.2d 35, 37 (1st Dep't 1993) ("*If* any person making claim

hereunder and the company do not agree that such person is legally entitled to recover because of [a first condition], or do not agree as to [a second condition], *then*, upon written demand of either, the matter . . . shall be settled in arbitration.") (emphasis added).

A review of the filings in the other cases cited by Appellants reveals contracts that *expressly signal conditions precedent* in ways that are *miles apart* from what Appellants advance here. For example, in *Anagnostopoulous v. Union Tpk. Mgmt.,* 300 A.D.2d 393 (2d Dep't 2002), the provision at issue provided that "[c]laims . . . shall be referred initially to the Architect for decision" and that "initial decision by the Architect *shall be required as a condition precedent to . . . arbitration . . . of all Claims* between the Contractor and Owner arising prior to the date final payment is due." *Id.*, Petitioner-Appellants App. Br., 2002 WL 32724201, at *20 (Mar. 4, 2022) (quoting R. 39-40) (emphasis added); *see also, e.g.*, *All Metro Health Care Servs. v. Edwards*, Petitioner-Respondent's App. Br., 2008 WL 6691289, at *9 (June 18, 2008) (agreement expressly stated "the Undersigned will not commence any action or proceeding against any Borrower to recover all or any part of the Subordinated Debt not paid when due . . . *unless and until* the Senior Debt shall be paid in full") (emphasis added); *Museum of City of New York v. Loc. 1665,* Petitioner-Respondent Br., 2004 WL 5363255, at *4 (Oct. 6, 2004) (collective bargaining agreement set out sequenced four-step dispute resolution provision where arbitration clause appeared

at step four) (quoting R. 57-59).[7]

That type of express condition precedent to an arbitration agreement appears nowhere in the Fifth Amendment or Side Agreement. Nor does New York law permit a condition precedent to be inferred based on the type of language advanced from the Major Decisions schedule.

iii. Even if there Were an Applicable Condition Precedent, Appellants Should Be Estopped from Relying on It

Even if the Major Decisions provisions did establish a condition precedent, it is well settled that a "party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition." *ADC Orange, Inc. v. Coyote Acres, Inc*., 7 N.Y.3d 484, 490 (2006). As Goldman alleged in his Amended Demand and as recognized by the AAA panel, Appellants through Weiss had completely suspended communications with Goldman in all (including required reporting concerning the Hotel venture), even after being ordered by AAA panel to produce such information. R. 67-70 (Goldman's Amended Demand alleging that Weiss repeatedly refused to engage with Goldman, even concerning a refinancing opportunity.); *id*. 309-10 (Arbitration Procedural Order 4 which found that Weiss had failed to comply with four separate

[7] *Matter of Lavar C.*, 185 A.D.2d 36, 40 (4th Dep't 1992), which Appellants may have cited in error, *see* Br. 30, does not involve a condition precedent at all, let alone a condition to arbitration.

AAA orders requiring disclosures of Appellants' books and records to Goldman over the course of 7 months even *after* the arbitration had commenced). Accordingly, any request to Weiss to add Appellants to the arbitration, even if that were a condition precedent, would have been futile and thus excused under New York law. *ADC Orange, Inc.*, 7 N.Y.3d at 490.

C. The Petition Is Independently Defective Because, Even on Appellants' Cramped Reading of the Arbitration Agreement, Claims and Disputes Being Pursued in the Arbitration Are Excluded from the "Major Decisions" Provision at Issue

All of the claims in Goldman's Amended Demand are arbitrable, and under AAA rules it is, in any event, for the arbitrators to decide whether the Major Decisions provision has any application here. Were this Court nonetheless to consider the application of the Major Decisions clause, Appellants still would not be entitled to the stay they seek because several claims and disputes in the arbitration also fall within express exceptions to the Major Decisions provision upon which Appellants rely.

Specifically, the Major Decisions provision at issue does not, on its face, purport to cover claims in the nature of equitable or declaratory-relief proceedings (i.e., as opposed to legal proceedings), and likewise specifically excepts "actions arising out of the ordinary course of leasing or operating the Property." R. 204(vii). Indeed, several claims and disputes in the arbitration unmistakably involve relief in the nature of an equitable proceeding (i.e., rather than a legal proceeding) and/or

arise from Weiss's disloyal operation of the Hotel complex in the "ordinary course of leading or operating the Property." *E.g.*, R. 104-108, 135-36 (Count I seeking declaratory and injunctive relief for Weiss's refusal to provide Goldman access to the Appellants' books and records as required by their operating agreements); *Id*. 108-10, 136-37 (Count II seeking declaratory and injunctive relief for Weiss's violations of the Major Decisions provisions of Appellants' operating agreements); *Id*. 125-30, 135-37 (Count VIII seeking an equitable accounting); *id*. 130-32, 135-37 (Count IX seeking relief for Weiss's breaches of fiduciary duties to Appellants by causing other Weiss-owned companies to occupy commercial space at the Hotel complex, for years, without paying any rent). Thus, even on Appellants' cramped reading of the agreements, Weiss's consent would not be required for a substantial part of the arbitrable dispute. R. 204.

Well-settled New York law provides that the entire controversy must be non-arbitrable before a stay of arbitration will be granted. *Silverman v. Benmor Coats, Inc*., 61 N.Y.2d 299, 302 (1984) ("[A]rbitration will not be stayed unless the entire controversy is non-arbitrable."). Where parts of the controversy are broader than an arbitration agreement, public policy in New York permits the arbitration to proceed so that the arbitrator can fashion relief that is within the scope of the arbitrator's authority. *Id*. at 309. Thus, Appellants are not entitled to a stay of the entire arbitration because they have not and cannot demonstrate that the entire controversy

is non-arbitrable. Instead, because there is plainly an agreement to arbitrate a substantial part of this controversy, the arbitration must proceed so that the arbitrators may determine if any claims are beyond their remit. *Matter of John W. Cowper Co., Inc*., 72 A.D.2d at 934 ("Once an agreement to arbitrate has been determined, it is for the arbitrator to interpret the agreement in order to decide which issues are subject to arbitration and which are not."); *Stillman v. Stillman*, 80 A.D.2d 356, 359 (1st Dep't 1981) (same), *aff'd*, 55 N.Y.2d 653 (1981). Accordingly, the Order denying the Verified Petition to stay the arbitration must be affirmed.

D. New York Law Does Not Allow Arbitration Provisions to be Used to Shield Disloyal Fiduciaries from Their Obligations (Here, Zelig Weiss, Appellants' Managing Member)

The trial court appropriately rejected Appellants' position that Goldman should be forced to "have an arbitration adjudicating the rights and obligations of [him] and Weiss that do[es not] include the LLCs through which Mr. Weiss conducted business." R. 10 at Tr. 9:10 - 4:13. As Justice Ostrager recognized, "these LLCs are the vehicles through which Mr. Weiss conducted business with respect to the hotel, which is the subject of most of the dispute that exists between Mr. Goldman and Mr. Weiss." R. 10 at Tr. 4:5 - 4:9. Weiss himself has insisted that any arbitration or action for Weiss's disloyal acts against Appellants and Goldman would require the inclusion of Appellants as parties. R. 311. Moreover, if Appellants' Major Decisions argument were to succeed, Weiss would then claim to be able to

prevent *any* derivative action against him altogether, *whether in court or in arbitration*, which seeks to hold him accountable for his disloyal acts against Appellants and Goldman by invoking the Major Decisions provision. Br. 27-30; R. 204(vii). Appellants do not dispute, and have never disputed, that under their reading of this provision, Weiss could "veto" and foreclose in any forum, derivative claims by the companies that seek to hold him accountable for his misconduct—based on the exact same argument that his consent is required before any claim could proceed against him. *Compare* R. 276 (Goldman's Trial Court Brief raising this consequence of Appellants' argument), *with* R. 328-339 (Appellants' Trial Court Reply not responding to it) *and* Br. (Appellants' Brief still not addressing it).

In addition, Appellants' purported reading of the Major Decisions provision would violate New York Limited Liability Company Law § 417 because it would effectively limit the personal "liability of any manager if a judgment or other final adjudication adverse to him establishes that his or her acts or omissions were in bad faith or involved intentional misconduct or a knowing violation of law or that he or she personally gained in fact a financial profit or other advantage to which he was not legally entitled or that with respect to a distribution[.]" *See TIC Holdings, LLC v. HR Software Acquisitions Grp., Inc*., 301 A.D.2d 414, 415 (1st Dep't 2003) (claims for intentional wrongdoing and bad faith render contractual provisions limiting liability for breaches of fiduciary duties ineffective "under both

longstanding general common-law principles and the specific governing statutes"). Especially because the derivative claims Goldman is pursuing on behalf of Appellants seek to hold Weiss accountable for egregious breaches of fiduciary duties, including the duty of loyalty, owed to Appellants, any demand that Weiss agree to the derivative arbitration against him would have been futile, and therefore the condition precedent excused. *Segal v. Cooper*, 49 A.D.3d 467, 468 (1st Dep't 2008) (plaintiff had adequately alleged that "a demand to initiate a [derivative] lawsuit would have been futile" because "a majority of the controlling members of the limited liability company were interested in the challenged transactions").

There is a proper forum through which Goldman and Appellants can adequately hold Weiss to account for his misconduct. That forum is AAA as the parties long ago agreed.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's denial of the stay of the arbitration against Appellants and lift any remaining temporary stay.

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CERTIFICATE OF COMPLIANCE

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