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.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Respondent Goldman's brief attempts to muddy the facts and history. For this reason, Appellants clarify certain points below:

First, the issue on appeal is not whether Goldman can arbitrate his direct claims against Weiss. Everyone agrees he can. The dispute is whether Goldman can compel the **Companies** to arbitrate notwithstanding that (i) they are not parties to any arbitration agreement, (ii) the relevant arbitration agreement is limited to disputes between Weiss and Goldman in their individual capacities, and (iii) Goldman failed to obtain the required consent in any event.

Second, the Companies were not parties to the *Goldman v. Weiss*, Index No. 653186/2022 case, only Goldman and Weiss were. In that case, Weiss never insisted, or even asked (*see* Resp.11[1]), that the Companies be added to the arbitration. Weiss' position there, like the Companies' position here, was that Goldman could not assert derivative claims in arbitration and could not compel the Companies to arbitrate because they were not parties to an arbitration agreement. *Id.*, NYSCEF No. 85 at 5-6.

Third, when Goldman first initiated the underlying arbitration, he named only Weiss as a party. *See* R.140. Seven months later, on October 13, 2023, Goldman

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[1] Respondent's Brief, NYSCEF No. 24, is referred to as "Resp." The Companies' Brief, NYSCEF No. 22, as "Br." The record is referred to as "R.[page]."

amended the arbitration demand and improperly added the Companies as both claimants and respondents. R.54. Consequently, and contrary to Goldman's contention here (*See* Resp.10, 15), the Supreme Court's decision six months earlier in *Goldman v. Weiss*, No. 653186/2022, 2023 WL 3062155 (N.Y. Sup. Ct., Apr. 19, 2023), did not—and could not—hold that the Companies agreed to arbitrate their dispute.

Finally, Goldman's brief is full of unfounded accusations that Weiss is a bad actor who ran off with corporate funds. Weiss denied these claims in arbitration and Goldman has failed to prove them. What is undeniable, however, is that Goldman played fast and loose with Israeli bondholders, ran his company into bankruptcy, defaulted on hundreds of millions of dollars in loans, lost his interest in the Hotel, and is desperately dreaming up ways to try and recover his station.

ARGUMENT

A. The Side Agreement does not bind the Companies to arbitration.

The Companies' opening brief noted Goldman's argument that the Companies are bound by the Side Agreement's dispute resolution provision because they all "acknowledged" the Side Agreement. Br.21-22. It then systematically demonstrated Goldman was wrong by citing the Side Agreement's language, its purpose, and New York law. Br.21-24. Specifically, it showed (i) the dispute resolution language was limited to disputes "between us," that (ii) "between" indicated only two parties, that

(iii) "us" was not how one refers to corporations, that (iv) in certain instances, "us" could **only** mean Goldman and Weiss personally and that the law required a uniform interpretation of "us," that (v) if the agreement was as broad as Goldman claimed, it could easily have just removed the restriction of "between us," but instead, the parties chose to include it, and that (vi) in other instances, the Side Agreement has no problem referring to "corporations" or "enterprises," but the parties chose not to when it came to dispute resolution. *Id*. The brief also explained the reason every Company acknowledged the Side Agreement was to ensure no one could avoid specific obligations by leveraging the complicated corporate structures being created. Br. 20-21.

It therefore concluded that the Companies' "acknowledgement" that disputes "between" Goldman and Weiss must be arbitrated, did 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 Company—must also be resolved per the Side Agreement's dispute resolution clause. Br.24. Finally, the Companies noted that these arguments meant Goldman could not meet his burden of proving he had an agreement to arbitrate with the Companies that was *"*clear, explicit, and unequivocal.*"* *Waldron v. Goddess*, 61 N.Y.2d 181, 183 (1984).

Goldman ignored all these arguments. His most "direct" attack on them is to

claim (Resp.17) that the word "us" isn't formally defined by the Side Agreement. While true, Goldman fails to address the fact that the paragraph uses the word "us" four times, that at least one of those times indisputably refers to just Goldman and Weiss individually (Br.22),[2] and that "when we find the parties using a certain word … it is reasonable to suppose that it was always used in the same sense." *Giray v. Ulukaya*, 212 A.D.3d 439, 440 (1st Dep't 2023).

Without any ability to respond to the six arguments above, or otherwise engage with the text of the Side Agreement to prove his thesis, Goldman is left hanging his hat on the single fact that the Companies "acknowledged" the Side Agreement. So what. The Companies acknowledged the fact that Goldman and Weiss agreed to arbitrate. Merriam Webster's most relevant definitions of "acknowledge" prove this point. Acknowledge means "to recognize the rights … of," "to take notice of," or "to recognize as genuine or valid." Merriam–Webster Online Dictionary, Acknowledge. The Companies 'recognizing the rights' or 'taking notice' of the Side Agreement, or recognizing the Side Agreement as 'genuine' does not mean that they are bound by every provision of the Side

[2] *See* R.249 ("by the title 'Fifth Amendment Operating Agreement', which was signed **by us** on the said date."); R.168 ("THIS FIFTH AMENDMENT . . . to the Operating Agreement of Wythe Berry LLC . . . made . . . by and between YOEL GOLDMAN, an individual . . . ZELIG WEISS, an individual . . .."); R.142 (defining company as entity district from the parties and the signatories); R.184 (Fifth Amendment's signature page showing that members signed individually and not on behalf of Wythe Berry LLC).

Agreement.

Of course, Goldman provides no support for the contrary position that this acknowledgment means the entity has agreed to be bound by every term of that agreement, even terms that expressly do not pertain to it. Indeed, the Side Agreement's own language contradicts his argument. In it, the Companies "acknowledge … everything *that is written* … in the current contract." R.249 (emphasis added). The Side Agreement, *as written*, is limited to an agreement that Goldman and Weiss, individually, arbitrate their disputes.

Next, Goldman purports to rely on agency principles to bind the Companies to the arbitration agreement. This argument fares no better than his last. Even *if* Weiss and Goldman signed the Side Agreement as agents of the Companies, Goldman cannot compel the Companies to arbitration because, for the six reasons discussed above, the Side Agreement clearly *excludes* the Companies from the ambit of the dispute resolution clause by limiting it to disputes "between us," *i.e.*, Goldman and Weiss personally. *See* *Trina Solar US, Inc.v. Jasmin Solar Pty Ltd.*, 954 F.3d 567, 570-71 (2d Cir. 2020) (refusing to compel a principal to arbitration based on a contract that its agent signed because "the language and structure of the Contract as a whole" and "several features of the Contract persuade us that [the principal] is explicitly excluded as a principal and that the Contract does not contemplate [the principal] as a party"); *see also* *New York Wheel Owner LLC v. Mammoet Holding*

B.V., 481 F. Supp. 3d 216, 233 (S.D.N.Y. 2020) (noting that while a party with actual or apparent authority can bind a principal, "a principal is not a party to, or bound by, a contract from which it is expressly excluded.").

Finally, Goldman asserts that the Side Agreement extends the Fifth Amendment's arbitration provision to the Companies because it incorporates the provision by reference. *See* Resp.19 (quoting *Revis v. Schwartz*, 192 A.D.3d 127, 134 (2d Dep't 2020). However, this argument presupposes that the Fifth Amendment's arbitration provision applies to the Companies. As explained in the Companies' opening brief and below, the Fifth Amendment's arbitration provision does not apply to Wythe Berry LLC because that entity is neither defined as a party to, nor is it a signatory to, the Fifth Amendment; its members signed only in their individual capacity. *See* Br.14-19.

B. The Fifth Amendment does not bind Wythe Berry LLC to the arbitration provision.

Ignoring the clear language of the New York Limited Liability Company Law ("LLCL"), as well as the numerous cases cited by the Companies demonstrating that a non-signatory LLC is not a party to its own operating agreement[3] (and any

[3] Goldman's single attempt to distinguish the on-point case law cited by the Companies is a passing reference to cases as "a handful of out-of-state decisions, applying non-New York LLC statutes and law." Resp.20. But this distinction is not meaningful, as the LLC statutes at issue in the cases cited by the Companies include nearly identical language (and in some cases, identical language) to that used in New York's applicable LLCL.

arbitration provisions within), Goldman argues the Fifth Amendment binds Wythe Berry LLC to arbitrate simply by virtue of the fact that the Fifth Amendment imposes unrelated "responsibilities and obligations" on the entity. This notion is unsupported by the law, including that cited by Goldman.

Specifically, Goldman first attempts to buttress his argument through several authorities that have nothing to do with arbitration, and bear no similarities to the facts at issue. For example, *Jannace v. Boeggeman*, 165 Misc.2d 960, 962 (Sup. Ct., Westchester Cty. 1995) offers no support for Goldman under the relevant facts. In *Jannace*, the agreement at issue plainly demonstrated the shareholders intended to bind the law firm *itself* over payouts to deceased shareholders. In contrast, the Fifth Amendment contains no clause dictating that Wythe Berry LLC *itself* was bound by its dispute resolution provisions. Instead, Goldman points to Wythe Berry LLC's obligation to furnish each Member with various reports—none of which have anything to do with arbitration. Resp.21. As a result, there simply is no corollary with the payout provision at issue in *Jannace.*

Goldman's citations to other non-arbitration cases are similarly unavailing. *Forty Cent. Park S., Inc. v. Anza*, 130 A.D.3d 491 (1st Dep't 2015) simply suggests that managing members and LLCs can have different obligations under an operating agreement—a point not in contention here. *Cortazar v. Tomasino*, 211 A.D.3d 677, 679 (2d Dep't 2022), another non-arbitration case, stands for the unremarkable

proposition that "[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." If anything, *Cortazar* supports the Companies' argument through the court's underlying reasoning that a limited liability company "is a separate legal entity from its members." *Id*. *Lau v. Lazar* stands for that same proposition. 130 A.D.3d 413, 414 (1st Dep't 2015).

Accordingly, not one of these cases establishes that Wythe Berry LLC is bound to arbitrate simply because the two *wholly separate* LLC members opted to arbitrate their own disputes with one another.

Goldman cites just two cases in the arbitration context, but glosses over the facts and distorts the holdings. *Hoffman v. Finder Lakes Instrumentation, LLC*, 7 Misc. 3d 179 (N.Y. Sup. Ct. 2005) involved a defendant LLC seeking to compel arbitration against a plaintiff *who signed the operating agreement*. *Id*. at 183-185. The *Hoffman* court **did not** conclude that the LLC was bound by the operating agreement; rather, it applied the doctrine of equitable estoppel to preclude the plaintiff's signatory from arguing the LLC couldn't compel him to arbitration. *Id*. at 183-186. Indeed, the *Hoffman* court itself recognized this important distinction by noting the factual and legal distinction between a situation (like *Hoffman*) where a non-signatory LLC "seek[s] to bind the signatories to the [operating] agreement," and a situation (like here) where a non-signatory LLC "resisted arbitration" sought

by a signatory and observed this "distinction makes a difference." *Id*. at n.2. Goldman's reliance on *Hirschfeld Prods., Inc. v. Mirvish*, 218 A.D.2d 567 (1st Dep't 1995), *aff'd*, 88 N.Y.2d 1054 (1996), misses the mark for the same reason. In *Hirschfeld*, the *non*-signatories sought to compel a *signatory* to arbitration. *Id*. at 569.

Goldman also quotes from *Matter of Lane v. Abel-Bey*, 70 A.D.2d 838 (1st Dep't 1979), *aff'd*, 50 N.Y.2d 864 (1980), for the proposition that, in the context of a closely held corporation, a non-signatory entity is bound by the arbitration provision in a stockholders' agreement signed by all stockholders. *See* Resp. at 22. Besides being distinguishable because the case relates to a closely held *corporation* and not a *limited liability company*, the case is distinguishable because the Court of Appeals held the corporation waived the issue by failing to timely raise it:

> Whether the corporation was bound by the arbitration agreement of all its shareholders was a threshold question. **Inasmuch as this question was not raised by the corporation in a timely application for a stay, that issue may not now be raised by the corporation or by anyone on its behalf**

Lane v. Abel-Bey, 50 N.Y.2d 864, 866 (1980) (emphasis added). In other words, the language Goldman relies on was inapplicable dicta based on highly distinguishable facts. Moreover, the case has been criticized in later opinions: As one example, the *Hoffman* court noted that *Lane's* holding that the corporation was bound was "not embraced by the Court of Appeals." *Hoffman*, 7 Misc. 3d 179 at n.2 (emphasis

added).

Finally, Goldman cites *Berman v. Tierra Real Est. Grp., LLC*, 23 Wash. App. 2d 387, 515 P.3d 1004 (Wash. Ct. App. 1st Div. 2022). In *Berman*, the court reached the unremarkable conclusion that, under Washington law, a Washington LLC was bound by its operating agreement's arbitration clause because "Washington's limited liability company act (WLLCA) provides that 'the limited liability company agreement governs... [r]elations among the members as members ***and between the members and the limited liability company***.' RCW 25.15.018(1)(a)." *Id*. at 1008 (¶ 8) (ellipses, brackets, and emphasis all in original).

> This view is consistent with the approach taken by the Uniform Limited Liability Company Act (ULLCA), which specifically provides that "[a] limited liability company is bound by and may enforce the operating agreement, whether or not the company has itself manifested assent to the operating agreement." UNIF. LTD. LIAB. CO. ACT § 106(a) (amended 2013), 6C U.L.A. 1, 40 (2016). As ***Washington's act was substantially modeled on the ULLCA***, we may look to the ULLCA to assist in our interpretation.

Id. at 1008 (¶ 9) (emphasis added).

Indeed, while Goldman claims a provision of Washington law is "similar to New York's LLC law," *see* Resp. at 23, Goldman fails to quote, or even cite, any alleged similar New York LLCL provision; none exists.

To the contrary, the LLCL expressly states the opposite; *i.e.*, that the operating agreement of a New York LLC is entered into among the members, rather than the

entity itself. *See, e.g.*, LLCL §§ 102(u) (defining "[o]perating agreement" as "any written agreement of the members concerning the business of a limited liability company"); & 203(d) (recognizing that "[a] limited liability company formed under this chapter shall be a separate legal entity" from its members). Furthermore, unlike Washington's LLC law, the New York law is ***not*** modeled on the Uniform Limited Liability Company Act. Goldman fails to cite any authority to the contrary.

Accordingly, the Companies are not parties to, signatories of, or otherwise bound by the Fifth Amendment or any of the Operating Agreements. Consequently, no agreement to arbitrate exists between Goldman and any of the Companies.

C. Goldman and Weiss' course of dealing demonstrates that the Side Agreement does not bind the Companies to arbitration.

Goldman argues the Companies' course of dealing argument—that Goldman failed to invoke arbitration against the Companies in other disputes shows he did not believe arbitration was available—is procedurally and substantively flawed. *See* Resp.23-26. He's wrong.

Procedurally, Goldman contends the argument is waived because "Appellants did not make this argument in the trial court." *See* Resp.25-26. That is false. The Companies pointed to the litigation from June 2021[4] to argue that "the history

[4] In June 2021, the bondholders for the William Vale Bonds caused Wythe Berry Fee Owner LLC to sue Wythe Berry LLC over a breach of rent obligation and sought to enforce personal guarantees

between the parties 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." *See* R.337. Moreover, the Companies also pointed to *Goldman v. Rose Castle Redevelopment II LLC, et al.*, Index No. 510224/2021 ("*RC II*"), to argue that the arbitration clause at issue did not "extend to disputes that involved entities." *See* R.48 ¶¶ 72-74 ("Goldman's failure to [invoke the Arbitration Clause of the Fifth Amendment in *RC II*] is … an admission that the Arbitration Clause in the Fifth Amendment does ***not*** apply even to disputes between Goldman and Wythe Berry, and a further admission that the Side Agreement does ***not*** magically extend that Arbitration Clause to disputes between Goldman and other LLCs owned jointly by Goldman and Weiss, including the other Petitioners."). Goldman's procedural contention is therefore meritless.

Substantively, Goldman argues there can be no course of dealing because "a single instance cannot establish a course of dealing." Resp.24. However, the Companies' argument relies on two instances where Goldman could have compelled

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Goldman and Weiss provided over the rent obligation. Had Goldman or Weiss held a bona fide belief that the Side Agreement applied to disputes between corporations and Goldman/Weiss, they could have raised the Side Agreement to argue that the bondholders (who claimed authority over Wythe Berry Fee Owner because of Goldman's default) did not have authority over that entity because the Side Agreement installed Weiss as the managing member – not Goldman. Of course, neither Goldman nor Weiss raised that defense. Because the truth is that neither Goldman nor Weiss believed the Side Agreement applied to other entities, as opposed to just disputes between them personally.

arbitration if the Companies were bound by the Fifth Amendment's arbitration provision. *See* Br.24-25. Indeed, the Companies' argument is premised on the *only* instances where Goldman could have compelled arbitration but did not, thereby showing that Goldman has never previously taken the position that the Companies are bound by the arbitration provision.

Moreover, Goldman cannot dispute he could've compelled arbitration if, as he now claims, the Companies were subject to the arbitration provision. In *RC II*, Goldman sued Wythe Berry LLC to recover $15 million he paid pursuant to the Fifth Amendment. *See RC II*, NYSCEF No. 1 ¶¶ 43-44 & 77. If Wythe Berry LLC was bound by the Fifth Amendment's arbitration provision, Goldman could have arbitrated that claim. He did not. Similarly, in the June 2021 litigation, either Goldman or Weiss could have raised the Side Agreement to compel arbitration. But neither did because neither believed the Side Agreement extended their personal arbitration clause to the Companies. *See* *Wythe Berry Fee Owner LLC v. Wythe Berry LLC et al.*, Index No. 514152/2021 (later removed to bankruptcy court as Case No. 23-101012 (S.D.N.Y. Bankr.)).

Finally, the Companies agree with Goldman that to the extent this Court finds the Side Agreement unambiguous, the course of dealing analysis is irrelevant. But if the Court finds ambiguity (it should not), then the course of dealing clearly demonstrates the Side Agreement **does not** extend the arbitration provision to the

Companies.

D. Even if the Companies agreed to arbitrate, their Operating Agreements limit such consent to disputes under $500,000.

Goldman argues the Companies' Operating Agreements do not limit any potential agreement to arbitrate to disputes involving less than $500,000. *See* Resp.28-31. Through an internally inconsistent argument—the irony of which should not go unnoticed—Goldman claims that the Companies' plain reading of the Operating Agreements would require the Court "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." Resp.29. As shown below, the reverse is true.

Goldman argues the plain language of the Operating Agreements "does not evidence an intent to restrict derivative claims brought by Appellants' members," but rather "evinces an intent to govern actions between Appellants and third parties." Resp.30. Goldman points to no clause in the Operating Agreement that evinces such an intent, because there is none.

Instead, each Operating Agreement provides that *any* Major Decision requires the consent of both Goldman and Weiss:

> Notwithstanding . . . 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].

See R.198, R.212, R.225, R.237. This requirement nowhere indicates it only applies to decisions involving third parties. Nor does the Major Decision provision, which provides:

> the commencement, defense or discontinuance of any actions 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 . . . shall be Major Decisions

See R.204, R.217, R.230, R.243.

Nothing in these provisions limits their applicability to actions involving third parties or non-derivative claims. Indeed, the only exception to this consent requirement is stated in the Major Decision provision itself. Specifically, the provision excludes actions "such as eviction and unlawful detainer actions against defaulting tenants," as a Major Decision. And "[b]ased on the maxim expressio unius est exclusio alterius, which applies to contracts . . . '[w]here a [document] describes the particular situations in which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded.'" *Dunn Auto Parts, Inc. v. Wells*, 198 A.D.3d 1269, 1271 (4th Dep't 2021) (internal citation omitted); *Quadrant Structured Prod. Co. v. Vertin*, 23 N.Y.3d 549, 560 (2014) ("if parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission."); *Gordan v. Wilson Elser Moskowitz Edelman & Dicker LLP*, No. 22

Civ. 5212 (JPC) (JEW), 2023 WL 2138693, at * 7 (S.D.N.Y. Feb. 1, 2023) ("Applying the principal of *expressio unius est exclusion alterius*, the court determined that . . . '[b]y expressly foreclosing proceedings from arbitration, the parties in these cases strongly implied that every other controversy or dispute remains subject to arbitral resolution.'") (quoting *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396 (2d Cir.2018)). The irrefutable inference drawn from the agreements' language is that the Operating Agreements do not limit the Major Decision requirements to actions involving third parties or non-derivative claims.

Moreover, even if the Fifth Amendment's arbitration provision applied to the Companies (it doesn't), the provision prefaces the agreement to arbitrate by stating "Except as otherwise provided herein, any dispute . . . ." *See* R.201. The phrase "[e]xcept as otherwise provided herein" must have some meaning. *See County Water Auth. v. Village of Greenport*, 21 A.D.3d 947, 948 (2d Dep't 2005) ("an interpretation which renders language in the contract superfluous is unsupportable"); *Givati v. Air Techniques, Inc.*, 104 A.D.3d 644, 645 (2d Dep't 2013) ("a court should not read a contract so as to render any term, phrase, or provision meaningless or superfluous."). And that meaning is supplied by the other provisions of the Operating Agreements, which limit all agreements to arbitrate to disputes less than $500,000 unless consented by both Weiss and Goldman.

Miriam Osborn Mem'l Home Ass'n v. Kreisler Borg Florman Gen. Const.

Co., 306 A.D.2d 533 (2d Dep't 2003) is dispositive of this case. In *Miriam*, the Court found that similar language of limitation meant no agreement to arbitrate existed. Goldman attempts to distinguish *Miriam* by arguing (Resp.31) that "[t]here is no parallel in the agreements here. None of relevant provisions purport to modify, let alone abrogate, the broad agreement to arbitrate in the Fifth Amendment." But that's just incorrect. Here, like in *Miriam*, there is an arbitration provision providing that "any dispute arising under this agreement . . . shall be determined by the American Arbitration Association." *Compare* R.201 with *Miriam*, 306 A.D.2d at 533 (the parties "may, by written notice to the other, seek Arbitration of any claim, dispute or other matter arising out of or relating to this Agreement."). And like in *Miriam*, the Operating Agreements later narrowed the consent to arbitration to disputes involving less than $500,000. *Compare* R.198, R.204 with *Miriam*, 306 A.D.2d at 533 ("However, the agreement further provided that "[d]isputes . . . wherein the amount of each of the other party's claim does not exceed One Hundred Fifty Thousand Dollars ($150,000), shall be decided by arbitration.").

Finally, Goldman suggests that whether the Companies agreed to arbitrate disputes over $500,000 is for the arbitrators to decide. *See* Resp.26. That's wrong. "[I]ssues implicat[ing] whether the parties formed a valid contract to arbitrate . . . [are] properly decided by the court in the first instance." *Fritchler v. Draper Mgmt.*, 203 A.D.3d 623 (1st Dep't 2022); *Miriam*, 306 A.D.2d at 533 ("[T]he rule is clear

that unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute, a party cannot be compelled to . . . arbitration") (quoting *Bowmer v. Bowmer*, 50 N.Y.2d 288, 293-94 (1980)). And here, the issue is whether the Companies formed a contract to arbitrate disputes over $500,000. It is thus for the Court to decide. And like in *Miriam*, the Court should decide that the Companies limited their consent to arbitration of disputes involving less than $500,000.

E. Even if there was a general uncapped consent to arbitration (there isn't) Goldman failed to satisfy a condition precedent and the Companies aren't estopped from asserting it.

The Companies previously argued that the Major Decisions provision and the corresponding consent provision are, at the very least, a condition precedent to initiating arbitration. *See* Br.28-30.[5] Goldman disagrees because the provisions do not contain purportedly magic words like "if," "unless," or "until." He's wrong.

At the outset, the satisfaction of a condition precedent is a threshold determination to be made by the court, regardless of whether the arbitration provision is narrow or broad. *See United Nations Dev. Corp. v. Norkin Plumbing Co.*, 45 N.Y.2d 358, 364 (1978) ("Notwithstanding the existence of a broad

[5] In their opening brief, the Companies inadvertently cited *Matter of Lavar C.*, 185 A.D.2d 36, 40 (4th Dep't 1992) instead of *Application of Travelers Indem. Co.*, 195 A.D.2d 35, 40 (1st Dep't 1993), where the court held that petitioner's "obligation to seek the consent of Travelers to a tort settlement is a condition precedent to arbitration."

arbitration clause, compliance with contractual limitations, expressly made conditions precedent to arbitration by the parties' agreement, is a question for threshold judicial resolution."); *see also* *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."); *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 . . . an issue of fact to be decided by the court.").

And as to Goldman's argument that the Operating Agreements do not contain magic words, New York law does not *require* the use of terms such as "if," "unless," or "until" for a provision in the contract to constitute a condition precedent. The cases relied on by Goldman show that use of such magic words constitutes "unmistakable language of condition," not that those terms are required. *See* *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009) ("We have recognized that the use of terms such as 'if,' 'unless' and 'until' constitutes 'unmistakable language of condition.'"); *Latham Land I, LLC v. TGI Friday's, Inc.*, 96 A.D.3d 1327, 1329 (3d Dep't 2012) (noting that the provision "does not employ clearly conditional terms such as 'if,' 'unless' or 'until'" but nonetheless continuing to further analyze the parties agreement to determine whether the provision is a

condition precedent).

To put it simply, while these magic words unmistakably constitute condition precedent, the lack of magic works does not automatically defeat the condition precedent nature of the provision. *See* *ALJ Capital I, L.P. v. David J. Joseph Co.*, 48 A.D.3d 208, 208 (1st Dep't 2008) ("despite the lack of explicitly conditional language, [notice] was unmistakably required by the agreement's 'Cure Period' provision prior to the assertion of a claim for repayment."); Restatement [Second] of Contract § 226 ("No particular form of language is necessary to make an event a condition, although such words as "on condition that," "provided that" and "if" are often used for this purpose.").

Instead, the ultimate question in determining whether a contract imposes a condition precedent is whether it requires "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises.'" *IDT Corp. v. Tyco Grp.*, 13 N.Y.3d 209, 214 (2009). Here there can be no doubt the Operating Agreements require consent of both Goldman and Weiss before "commencement" of "arbitration, where the amount in dispute is in excess of $500,000 . . .." *See*, *e.g.*, R.198, R.204.

Moreover, the Operating Agreements do use magic words: phrases synonymous with "until" or "unless." Specifically, the Operating Agreements provide that "*in no event* will the Company take any of actions" that constitute a

Major Decision, such as "commencement . . . of [] arbitration, where the amount in dispute is in excess of $500,000," "without prior written approval of both" Goldman and Weiss. *See, e.g.*, R.198, R.204. In other words, the Operating Agreements provide that unless and until both Goldman and Weiss consent, the Company will not commence arbitration where the amount in dispute is in excess of $500,000.

This reading is also consistent with Goldman's own arbitration filings. *See* R.60 ¶ 19 (Goldman's Demand stating Operating Agreements "require[ed] both Parties' consent before making a 'Major Decision' . . ."); R.74 ¶ 80 (Goldman's Demand stating, "as to any substantial decision regarding the Hotel venture, defined as 'Major Decisions,' the Fifth Amendment prohibits Weiss taking action 'without prior written approval of both Class A Members.").

Consequently, the Operating Agreements require Goldman and Weiss' consent before initiating arbitration where the amount of the dispute exceeds $500,000. Here, there is no such consent and therefore the arbitration must be stayed.

Goldman, however, argues the Companies are estopped from relying on the condition precedent because he claims the Companies' have "frustrated or prevented the occurrence of the condition." *See* Resp.34. But Goldman hasn't even attempted to seek consent from Weiss. Therefore, it is entirely unclear how Weiss could have

frustrated or prevented the occurrence of the condition.[6] *See* *Ferguson v. Hannover Ruckversicherungs-Akteiengesellschaft*, No. 04 Civ. 9254, 2007 WL 2493692, at *23 (S.D.N.Y. Aug. 21, 2007) (holding that "without some indication of an active role in frustrating Shareholders' ***attempts*** to obtain release from Sun Life, the Court cannot find that [defendant] has violated the doctrine of prevention") (emphasis added).

Recognizing no such attempt occurred, Goldman claims Weiss has completely suspended communications with Goldman. Even assuming that is true, Goldman has a remedy within the Operating Agreements, which provide that "[i]f a Class A Member fails to respond to a request for approval of a Major Decision within fifteen (15) days after the Class A Member has received a written request for approval then the Class A Member shall be deemed to have approved the request." *See, e.g.*, R.198. Therefore, if Goldman sends a written request, and Weiss doesn't timely respond, he's deemed to have consented. But since Goldman hasn't even attempted to send a written request, he cannot claim that Weiss or the Companies have frustrated his ability to seek such a request.

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[6] This rationale simply cannot apply where both parties agreed they must further consent before arbitration can proceed. If it did, the consent requirement both parties negotiated and agreed to would be rendered a nullity. As any party could seek permission, get rejected, and file anyway citing this "frustration" caselaw. That cannot be the law. *See* *Miriam*, 306 A.D.2d at 533 (upholding requirement for further consent to arbitration).

F. Arbitration must be stayed regardless of whether some claims are arbitrable.

Attempting to sidestep the Operating Agreements' limitation on consent to arbitration to disputes under $500,000, Goldman argues this Court should not stay arbitration because *some* of his claims are arbitrable. *See* Resp.35-37. Goldman misconstrues the Companies' argument.

The issue here is not one of arbitrability – *i.e.*, the issue is not whether certain claims are subject to the arbitration clause; rather the issue is one of formation or, in the alternative, condition precedent to arbitration. Specifically, the Companies' argument is that—to the extent this Court finds that the Companies agreed to the Fifth Amendment's arbitration provision (they did not)—the arbitration must still be stayed either (i) because the Companies' consent would unequivocally be limited to disputes under $500,000 or (ii) because Goldman failed to satisfy the condition precedent of obtaining further consent. Both of these issues are threshold questions which a **court** must decide regardless of whether the arbitration agreement is broad or contains a delegation clause. *See* *All Metro Health Care Servs.*, 57 A.D.3d at 893 ("whether a condition precedent to arbitration exists and whether it has been complied with, is for the court to determine."); *Fritchler*, 203 A.D.3d at 623-624 ("[I]ssues implicat[ing] whether the parties formed a valid contract to arbitrate . . . [are] properly decided by the court in the first instance."); *Doctor's Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 251 (2d Cir. 2019) ("parties may not delegate to the

arbitrator the fundamental question of whether they formed the agreement to arbitrate in the first place" because "[t]o take the question of contract formation away from the courts would essentially force parties into arbitration when the parties dispute whether they ever consented to arbitrate anything in the first place"). Goldman's reliance on *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 302 (1984) is misguided because the Court there was concerned with arbitrability, not whether the parties **formed** an arbitration agreement or **satisfied** the condition precedent. *See Id.* at 309.

Goldman also asserts that a stay would be improper because certain claims in the arbitration are equitable and fall outside the Major Decisions provision. *See* Resp. at 35-36. Goldman misconstrues the Operating Agreements. It is irrelevant whether some claims seek equitable relief while others seek damages. The Operating Agreements provide that consent of Goldman and Weiss is required for "commencement . . . of [] arbitration, where *the amount in dispute is in excess of $500,000*[.]" *See, e.g.*, R.204. The Operating Agreements' limitation is not concerned with individual claims, but rather about the dispute as a whole. And here, the amount in dispute in arbitration is, indisputably, greater than $500,000. *See, e.g.*, R.123, 137 (alleging that Weiss converted millions of dollars and unjustly enriched himself and seeking disgorgement).

Goldman next asserts that some of his claims fall within the exception of the

Major Decisions provision, which provides that "actions arising out of ordinary course of leasing or operating the Property" are not Major Decisions. *See* Resp.35. However, Goldman conveniently omits that the Operating Agreements define the meaning of "actions arising out of ordinary course of leasing or operating the Property" as actions "such as eviction and unlawful detainer actions against defaulting tenants." *See, e.g.*, R.204. Clearly, Goldman's claims in arbitration, which involve allegations of complex fraud and breach of fiduciary duties, are not claims that arise in the "ordinary course" or eviction actions/unlawful detainer actions.

G. The Arbitration provisions do not shield disloyal fiduciaries from their obligations.

As a final attempt to avoid the unambiguous language of the Operating Agreements, Goldman asks this Court to ignore the plain meaning because he would be foreclosed from seeking relief greater than $500,000 in any forum. Goldman's argument is misguided.

The Operating Agreements give both Goldman and Weiss the discretion to consent or withhold consent to the Companies' "commencement, defense, or discontinuance of any action 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[.]" *See, e.g.*, R.204. But this discretion is not unlimited because New York imposes an obligation to use discretion in good faith under the implied covenant of good faith and fair dealing. *See* *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d

384, 389 (1995) ("Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance" and "[w]here the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion."). In other words, contrary to Goldman's suggestion, neither Goldman nor Weiss can foreclose derivative claims by the Companies in any forum. Instead, both Wess and Goldman must use their discretion rationally and in good faith.

And there are multiple reasons why Weiss or Goldman could refuse consent to arbitrate a derivative claim, and instead require litigation in court. For example, a reasonable member of a limited liability company could determine it is in the Companies' best interest that the claim be brought in court instead of arbitration because the cost of arbitration is significantly higher than the cost of court litigation as it includes high filings fees, arbitrators' compensation, and multitudes of other costs. *See* *Ronald J. Offenkrantz*, Arbitrating Commercial Issues: Do You Really Know the Out-of-Pocket Costs?, 81-Aug. N.Y. St. B.J. 30 (discussing the high cost of commercial arbitration); *see also* AAA Commercial Arbitration Fee Schedule. Alternatively, a member might want to preserve the safeguards provided by the right of appellate review in court, something that just doesn't exist in arbitration. *Verille v. Jeanette*, 163 A.D.3d 830, 830 (2d Dep't 2018) ("Judicial review of arbitration awards is extremely limited.").

Goldman's reliance on *Segal v. Cooper*, 49 A.D.3d 467 (1st Dep't 2008) only reinforces the fact that neither Weiss nor Goldman are shielded from liability. *See* Resp.39. In *Segal*, the court excused the plaintiff from making a demand on the controlling members before initiating a lawsuit because "a demand to initiate *a lawsuit* would have been futile." 49 A.D. 3d at 468. Therefore, in the event Goldman files a lawsuit, a court could find that Goldman was excused from satisfying the condition precedent from bringing a lawsuit on account of futility. But *Segal* does not extend to arbitration. That is because "arbitration is essentially a creature of contract" and, therefore, parties "are free to enlarge, restrict, modify, amend or terminate their agreement to arbitrate." *Wolf v. Wahba*, 164 A.D.3d 1405, 1407 (2d Dep't 2018). And here, the Parties' agreements restricted the Arbitration Provision to disputes below $500,000 or, at the very least, modified the Arbitration Provision by requiring consent of both Goldman and Weiss prior to initiating arbitration involving disputes greater than $500,000.

H. Goldman Waived Arbitration.

Goldman mischaracterizes his own claims in the *RC II* litigation to argue he hasn't waived arbitration. *See* Resp.27-28. In that litigation, Goldman brought a lawsuit against Wythe Berry LLC and other defendants stemming from a settlement agreement between Goldman and Weiss concerning their disputes related to Wythe Berry LLC and other entities. *See RC II*, NYSCEF No. 1; *id.*, NYSCEF No. 53

("Settlement Agreement"). The Settlement Agreement noted that Goldman and Weiss are members of Wythe Berry LLC and stated that it was "Regarding Wythe Berry and The William Vale Hotel." Settlement Agreement at 1-6. Although certain claims "concerned a different dispute about entirely different property" (Resp.27), in other claims Goldman sought to recover $15 million he had paid to Wythe Berry LLC. *See RC II*, NYSCEF No. 1 ¶¶ 32-33, 76-80, 83-86, & Prayer for Relief §§ E & G. Goldman made the payment in an effort to reclaim an 18% interest he lost not only in Wythe Berry LLC, but also in each of the Companies, when his earlier breaches of his obligation to fund the "Hotel Venture" forced Wythe Berry LLC to bring in an outside investor. *See* Settlement Agreement § I.B. ("Redemption of 55 Wythe Investor LLC") at 1-4; *see also RC II*, NYSCEF No. 52. ¶¶ 17-18. Consequently, Goldman's argument that the prior litigation is not related to Wythe Berry and the other Companies (Resp.27-28) is plainly false.

The *RC II* litigation lasted three years, and involved extensive discovery, motion practice, and appeals. Accordingly, by bringing the *RCII* action in court, and then litigating it doggedly for almost three years, Goldman waived arbitration.

Finally, contrary to Goldman's assertion (Resp.28), whether a party waived its right to arbitration is for a court, not the arbitrator, to decide. *See Barrier Assocs., Inc. v. Eagle Eye Advance LLC*, 77 Misc. 3d 1218(A), at *12 (Sup. Dec. 8, 2022) ("The issue of waiver of arbitration is to be determined by the courts even when the

arbitration agreement incorporates by reference rules requiring the arbitrator to determine issues of arbitrability") (citing *21st Century N. Am. Ins. Co. v Douglas*, 105 A.D.3d 463, 463-464 (1st Dep't 2013) (deciding whether arbitration was waived even though arbitration agreement expressly incorporated AAA rules providing for arbitrator to determine existence, validity, and scope of arbitration agreement)).

CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Court reverse the trial court and stay arbitration against them.

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Respectfully submitted,

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