

Fiduciary Duties of New York LLC Managers: Cases

1. *Automated System Outsourcing Provider LLC v. Roth*, Mem. Decision, Index No. 605697/99 (Sup Ct NY County Oct. 26, 2000) (Freedman, J.)

The complaint sets forth four causes of action against Roth and ApparelNet: first, they breached a statutory duty under N.Y. Ltd. Liab. Co. Laws § 409(b) (McKinny 2000) to plaintiffs to act “in good faith and with that degree of care that an ordinary prudent person would use under similar circumstances;” second, they breached their common law fiduciary duty to plaintiffs; . . .

The gist of the first cause of action is that, by stealing Worldwide’s business opportunity, ApparelNet indirectly stole ASOP’s. Moreover, Ltd. Liab. L. § 409(b) applies on its face to all managers, whether or not they actively manage the company. . . .

For analogous reasons, the second cause of action, for breach of common-law fiduciary duty, is also dismissed, except with respect to ASOP’s claim against ApparelNet. As a manager and half-owner of ASOP, arguably ApparelNet is a fiduciary of ASOP.

2. *Dagan v. Rothstein*, Decision & Order, Index No. 6835/00 (Sup Ct Kings County May 2, 2002) (Aronin, J.)

It is undisputed that defendants, as managers of plaintiffs LLC’s are fiduciaries with a duty of loyalty and an obligation to act in the best interests of those whose interests they are to protect (*see Drucker v. Mige Associates, II*, 225 AD2d 427, 428 [1st Dept., 1996]). Consequently, managers must perform their duties in good faith and with that degree of care that an ordinary prudent person in a like position would use under similar circumstances (*see*, Limited Liability Company Law § 409). A breach of this duty of loyalty may constitute a fraud for which the managers may be removed.

3. *TIC Holdings, LLC v. HR Software Acquisition Group, Inc.*, 194 Misc.2d 106 (Sup Ct NY County June 28, 2002) (Cahn, J.), *aff’d*, 301 AD2d 414 (1st Dept Jan. 14, 2003)

The complaint's first cause of action alleges that Spivak breached his fiduciary duty to TIC, by, inter alia: attempting to gain a prospective economic advantage with respect to TIC; failing to advise TIC and its members of his conflicts of interest; creating a situation in which he was interested primarily against TIC; failing to protect TIC's interests in its negotiations with HRSAG; and improperly purporting to execute the note purchase agreement on TIC's behalf. . . . Since TIC's claims could potentially result in an adjudication adverse to Spivak, which establishes that his acts were in bad faith, or involved intentional misconduct, or a knowing violation of the Limited Liability Company Law, defendants have failed to establish that the manager release releases

Spivak from liability for all of those claims. Therefore, Spivak's motion for dismissal based on a claimed release is denied.

4. *Blue Chip Emerald LLC v. Allied Partners, Inc.*, 299 AD2d 278 (1st Dept. Nov. 26, 2002)

The key fact overlooked by the IAS court is that the Hadar defendants, as coventurers and, in particular, as managing coventurers (*see Birnbaum v Birnbaum*, 73 NY2d 461, 465, citing *Meinhard v Salmon*, 249 NY 458, 468), were fiduciaries of BCE in matters relating to the Venture until the moment the buy-out transaction closed, and therefore "owe[d] [BCE] a duty of undivided and undiluted loyalty * * *" (*Birnbaum v Birnbaum*, 73 NY2d at 466, citing *Matter of Rothko*, 43 NY2d 305, 319, and *Meinhard v Salmon*, 249 NY at 463-464). Consistent with this stringent standard of conduct, which the courts have enforced with "[u]ncompromising rigidity" (*Meinhard v Salmon*, 249 NY at 464), it is well established that, when a fiduciary, in furtherance of its individual interests, deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make "full disclosure" of all material facts (*Birnbaum v Birnbaum, supra*). Stated otherwise, the fiduciary is obligated in negotiating such a transaction "to disclose any information that could reasonably bear on [the beneficiary's] consideration of [the fiduciary's] offer" (*Dubbs v Stribling & Assoc.*, 96 NY2d 337, 341). Absent such full disclosure, the transaction is voidable (*see Matter of Birnbaum v Birnbaum*, 117 AD2d 409, 416).

5. *In re Die Fliedermaus LLC*, 323 B.R. 101 (Bankr. S.D.N.Y. Mar. 30, 2005) (Gropper, U.S.B.J.)

The LLCL further provides that a "manager shall perform his or her duties as a manager ... in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." LLCL § 409. This "is the same fiduciary standard applied to corporate directors." 16 *N.Y. Jur. Business Relationships* § 2107. Thus, absent any language in the Organization Agreement to the contrary, and none is alluded to, the Victor Defendants had the right to manage and control the Debtor and therefore were in a *prima facie* fiduciary relationship with the Debtor.

6. *Nathanson v. Nathanson*, 20 AD3d 403 (2d Dept. July 5, 2005)

However, in his role as manager of the company, the defendant Barry Nathanson had a statutory duty to perform his duties "in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances" (Limited Liability Company Law § 409 [a]). Under the circumstances of this case, the plaintiff's allegations that Barry Nathanson engaged in self-dealing by deferring payment of certain priority distributions so that interest on the unpaid distributions could accrue at a 12% interest rate were sufficient to state a cause of action for breach of fiduciary duty.

7. *Salm v. Feldstein*, 20 AD3d 469 (1st Dept. July 11, 2005)

As the managing member of the company and as a co-member with the plaintiff, the defendant owed the plaintiff a fiduciary duty to make full disclosure of all material facts (see *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 465, 541 N.Y.S.2d 746, 539 N.E.2d 574, citing *Meinhard v. Salmon*, 249 N.Y. 458, 468, 164 N.E. 545; *Blue Chip Emerald v. Allied Partners*, 299 A.D.2d 278, 750 N.Y.S.2d 291).

8. *Willoughby Rehabilitation & Health Care Center, LLC v. Webster*, 13 Misc3d 1230(A) (Sup Ct Nassau County Oct. 26, 2006) (Austin, J.)

Pursuant to Limited Liability Company Law § 409, "a manager shall perform his or her duties as a manager * * * in good faith and with a degree of care that an ordinary prudent person in a like position would use under similar circumstances." The acts of working in concert and managing a limited liability company clearly gives rise to a relationship among the members which is analogous to that of partners who, as fiduciaries of one another, owe a duty of undivided loyalty to the partnership's interests. *Birnbaum v. Birnbaum*, 73 NY2d 461, 466, rearg. den., 74 NY2d 843 (1989). See also, *Meinhard v. Salmon*, 249 NY 458, 463-4 (1928).

A partner, and by analogy, a member of a limited liability company, has a fiduciary obligation to others in the partnership or limited liability company which bars not only blatant self-dealing, but also requires avoidance of situations in which the fiduciary's personal interest might possibly conflict with the interests of those to whom the fiduciary owes a duty of loyalty. *Salm v Feldstein*, 20 AD3d 469, 470 (2nd Dept. 2005); and *Nathanson v Nathanson*, 20 AD3d 403, 404 (2nd Dept. 2005).

Although Defendant maintains that the mere membership in a limited liability company does not impose a fiduciary duty on its members, she offers no authority to support this proposition. It is not mandatory that a fiduciary relationship be formalized in writing. Any inquiry into whether such obligation exists among the parties to a business arrangement is "necessarily fact specific to a particular case." *Weiner v Lazard Freres & Co.*, 241 AD2d 114, 122 (1st Dept. 1998).

9. *Finkelman v. Greenbaum*, 14 Misc3d 1217(A) (Sup Ct Nassau County Jan. 10, 2007) (Austin, J.)

The third cause of action asserts that Greenbaum breached his fiduciary duty to Finkelman in connection with his activities as the managing member of various limited liability companies in which Greenbaum and Finkelman are members. The managing member of a limited liability company owes a fiduciary duty to the other members. *Salm v. Feldstein*, 20 AD2d 469 (2nd Dept. 2005). To the extent that Greenbaum misused or misappropriated funds of the limited liability companies in which Finkelman and he were members, the complaint states a cause of action upon which relief can be granted.

10. *Tzolis v. Wolff*, 39 AD3d 138 (1st Dept. Feb. 8, 2007) (Marlow, J.), *aff'd*, 10 NY3d 100 (Feb. 14, 2008)

We also reject defendants' challenges to the causes of action for breach of fiduciary duty and for aiding and abetting the breach. Accepting the truth of plaintiffs' allegations, as CPLR 3211 requires on a motion to dismiss (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]), they advance a potentially viable claim for breach of fiduciary duty (*see Limited Liability Company Law* § 409 [a]; *Birnbaum v Birnbaum*, 73 NY2d 461, 465-466 [1989]; *Salm v Feldstein*, 20 AD3d 469 [2005]).

11. *Matter of Marciano (Champion Motor Group, Inc.)*, 2007 NY Slip Op 34071(U) (Sup Ct Nassau County Dec. 7, 2007) (Warshawsky, J.)

It is settled that "a member of a limited liability company, has a fiduciary obligation others in the partnership or limited liability company which bars not only blatant self-dealing, but also requires avoidance of situations in which the fiduciary's personal interest might possibly conflict with the interests of those to whom the fiduciary owes a duty of loyalty" (*Willoughby Rehabilitation and Health Care Center, LLC v. Webster*, 13 Misc.3d 1230(A), 2006 WL 3068961 at 4 (Supreme Court, Nassau County 2006) *see also*, *Salm v. Feldstein*, 20 AD3d 469 470; *Nathanson v. Nathanson*, 20 AD3d 403; *Out of the Box Promotions LLC v. Koschitzki*, 15 Misc.3d 1134(A), 2007 WL 1374501 at 7 (Supreme Court, Kings County 2007); *Finkelman v. Greenbaum*, 14 Misc.3d 1217(A), 2007 WL 102464 at 4 (Supreme Court, Nassau County 2007) *cf.*, *Tzolis v. Wolff*, 39 AD3d 138, 146).

12. *Berman v. Sugo, LLC*, 580 F. Supp. 2d 191 (S.D.N.Y. June 12, 2008) (Patterson, U.S.D.J.)

Counter-Defendants argue that the Counterclaims only summarily allege that Leven owed a fiduciary duty and nowhere allege the basis of such duty. Read in the light most favorable to Counter-Plaintiffs, however, the Counterclaims can be read broadly to assert that Leven's fiduciary duty arose out of Weinstein and Leven's relationship as co-members and joint owners of Sugo. Federal and state courts have recognized that members of a limited liability company, like partners in a partnership, owe a fiduciary duty of loyalty to fellow members. *E.g.*, *Solutia Inc. v. FMC Corp.*, 456 F.Supp.2d 429, 442 (S.D.N.Y.2006) (stating that when parties enter a joint venture, they "owe to one another, while the enterprise continues, the duty of the finest loyalty" (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928))); *Maillet v. Frontpoint Partners, L.L.C.*, No. 02 Civ. 7865, 2003 U.S. Dist. LEXIS 9832, at *7-8, 2003 WL 21355218, at *3 (S.D.N.Y.2003) (applying the "well settled [law] ... that a partner in an organization owes a fiduciary duty of loyalty to fellow partners in that organization" to members of a limited liability company); *Salm v. Feldstein*, 20 A.D.3d 469, 470, 799 N.Y.S.2d 104 (N.Y.App.Div.2005) (stating that "[a]s the managing member of the company and as a comember with the plaintiff, the defendant owed the plaintiff a fiduciary duty to make full disclosure of all material facts" and that because of his fiduciary relationship, "the disclaimers contained in the contract, upon which the defendant relies, did not relieve

him of the obligation of full disclosure"); *Willoughby Rehab. & Health Care Ctr., LLC v. Webster*, No. 12431-04, slip op. at 4, 13 Misc.3d 1230 (N.Y.Sup.Ct. Oct. 26, 2006) ("A partner, and by analogy, a member of a limited liability company, has a fiduciary obligation to others in the partnership or limited liability company which bars not only blatant self-dealing, but also requires avoidance of situations in which the fiduciary's personal interest might possibly conflict with the interests of those to whom the fiduciary owes a duty of loyalty.").

13. *Lio v. Zhong*, 21 Misc3d 1107(A) (Sup Ct NY County Sept. 28, 2008) (Gische, J.)

The managing members of LLC have a fiduciary obligation to the other members. LLCL § 409; *Nathanson v. Nathanson*, 20 AD3d 403 (2d Dept. 2005).

14. *Out of the Box Promotions, LLC v. Koschitzki*, 55 AD3d 575 (2d Dept. Oct. 7, 2008)

As a manager of the company, Koschitzki owed a fiduciary duty to both of the plaintiffs (*see* Limited Liability Company Law § 409[a]; *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 465–466, 541 N.Y.S.2d 746, 539 N.E.2d 574; *Nathanson v. Nathanson*, 20 A.D.3d 403, 404, 799 N.Y.S.2d 83).

15. *McGuire Children, LLC v. Huntress*, 24 Misc3d 1202(A) (Sup Ct Erie County June 17, 2009) (Curran, J.)

Nevertheless, the agreements the parties entered into include the five (5) operating agreements pertaining to the government projects (Exs. 3-7). The agreements establish that Huntress (along with Eisenbaum) was the managing member of the LLCs as well as a fellow member in the LLCs with McGuire Children. It is well-settled under New York law that managing members of an LLC owe a fiduciary duty to the LLC and to their fellow LLC members (*Out of the Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 578 [2d Dept 2008]; *Nathanson v Nathanson*, 20 AD3d 403, 404 [2d Dept 2005]; *Lio v Zhong*, 21 Misc 3d 1107[A] [Sup Ct NY County 2008]; *In re Die Fliedermaus, LLC*, 325 BR 101 [B Ct SDNY 2005]). The courts also have held that members of an LLC owe fiduciary duties to each other essentially on the theory that they are akin to partners (*Willoughby Rehab. and Health Care Ctr, LLC v Webster*, 13 Misc 3d 1230 (A) [Sup Ct NY County 2006], *order aff'd* 46 AD3d 801 [2d Dept 2007] ["(a) limited liability company is (a) hybrid business entity having attributes of both a corporation and a partnership . . . The acts of working in concert and managing a limited liability company clearly give[] rise to a relationship among members which is analogous to that of partners"]; *see also Berman v Sugo, LLC*, 580 F Supp2d 191, 204 [SDNY 2008]; *Kim v Ferdinand Capital LLC*, 2007 NY Misc LEXIS 5431 [Sup Ct NY County 2007]). Managing members, however, like managing partners, have a heightened duty to their fellow LLC members (*Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989], *rearg denied*, 74 NY2d 843 [1989]; *Auld v Estridge*, 86 Misc 2d 895, 902 [Sup Ct Nassau County 1976], *aff'd* 58 AD2d 636 [2d Dept], *lv denied* 43 NY2d 641 [1977]; *Meinhard v Salmon*, 249 NY 458, 468 [1928]).

The fiduciary duties Huntress assumed by serving as managing member of the five (5) LLCs include most pertinently the obligation to make full disclosure of all material facts involving the LLCs (*Albert v 28 Williams St. Corp.*, 63 NY2d 557, 569 [1984], *rearg. denied* 64 NY2d 1041 [1985]; *Meinhard v Salmon*, *supra*; *Lio v Zhang*, *supra*; *Ajettix, Inc. v Raub*, 9 Misc 3d 908, 913 [Sup Ct Monroe County 2005]). Huntress also owed McGuire Children a "duty of undivided and undiluted loyalty" requiring him to "single-mindedly pursue the interests" of McGuire Children, the fellow LLC member to whom this duty of loyalty was owed (*Birnbaum*, 73 NY2d at 466).

Huntress' fiduciary duties to McGuire Children do not arise out of the language of the operating agreements but out of the relationship he voluntarily entered into by agreeing to become a member in an LLCs and their managing member (*Anderson v Weinroth*, 48 AD3d 121, 136 [1st Dept 2007]; *Charles v Onondaga Community College*, 69 AD2d 144, 146 [4th Dept], *appeal dismissed* 48 NY2d 650 [1979], *citing Albermarle Theater, Inc. v Bayberry Realty Corp.*, 27 AD2d 172 [1st Dept 1967]). Unlike the "business judgment rule" codified in Limited Liability Company Law ("LLCL") § 409(a) and Business Corporation Law ("BCL") § 717 which typically generates derivative causes of action by members and shareholders against managing members and directors, respectively (*see generally Tzolis v Wolff*, 10 NY3d 100 [2008]; 16 NY Jur. Business Relationships § 2107 [2008]; 1-6 NY Practice Guide: Business and Commercial § 6.13 [2008]; 2-7 White, New York Business Entities P B717.01 [2009]), the fiduciary duties owed by partners and LLC members are owed directly to one another and ordinarily cause harm first to the fellow partner or LLC member (*see generally Billings v Bridgepoint Partners, LLC*, 21 Misc 3d 535, 539 [Sup Ct Erie County 2008]; *Willoughby Rehab and Health Care Centers*, *supra*).

16. *DeFazio v. Wallis*, 2009 NY Slip Op 31598(U) (Sup Ct Nassau County July 8, 2009) (Driscoll, J.)

Limited Liability Company Law § 409(a) provides that "A manager shall perform his or her duties as a manager . . . in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." This statutory obligation to act in good faith has been held to give rise to a fiduciary duty. *Tzolis v. Wolff*, 39 A.D.3d 138, 146 (1st Dept. 2007), *aff'd*, 10 N.Y. 3d 100 (2008). To the extent that the manager's fiduciary duty runs to the limited liability company, a breach of that duty must be redressed by a derivative action on behalf of the company. *Tzolis*, 10 N.Y.3d at 109. However, the majority shareholder in a close corporation owes a fiduciary duty to the minority shareholders. *Neil v. Warburg, Pincus Co.*, 39 A.D.3d 281 (1st Dept. 2007). Similarly, the manager of a limited liability company may owe a fiduciary duty directly to the other members of the LLC. *See Salm v. Feldstein*, 20 A.D.3d 469 (2d Dept. 2005) (defendant, as managing member of limited liability company, owed co-member plaintiff fiduciary duty to make full disclosure of all material facts).

17. *Cottone v. Selective Surfaces, Inc.*, 68 AD2d 1038 (2d Dept. Dec. 22, 2009)

Accepting the facts alleged in the complaint as true and according the plaintiff the benefit of every possible inference, as we must on a motion to dismiss pursuant to CPLR 3211 (see *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17), the plaintiff allegedly became a minority member and owner of the defendant Selective Surfaces, LLC (hereinafter the company), in February 2001, and was thus owed a fiduciary duty by the managing member (see Limited Liability Company Law § 409 [a]; *Out of Box Promotions, LLC v. Koschitzki*, 55 A.D.3d 575, 578, 866 N.Y.S.2d 677; *Salm v. Feldstein*, 20 A.D.3d 469, 470, 799 N.Y.S.2d 104; *Nathanson v. Nathanson*, 20 A.D.3d 403, 404, 799 N.Y.S.2d 83).

18. *DirecTV Latin America, LLC v. Park 610, LLC*, 691 F. Supp.2d 405 (SDNY Jan. 26, 2010) (Marrero, U.S.D.J.) (applying and treating as the same Delaware and New York law)

Absent provisions in an LLC agreement "explicitly" disclaiming the applicability of a fiduciary duty, LLC members owe each other "the traditional fiduciary duties that directors owe a corporation." *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *8 & n. 33 (Del.Ch. Apr. 20, 2009) (collecting cases): see also *Berman 439*439 v. Sugo LLC*, 580 F.Supp.2d 191, 204 (S.D.N.Y.2008) ("members of a limited liability company, like partners in a partnership, owe a fiduciary duty of loyalty to fellow members"). Similarly, "in the absence of a contrary provision in the LLC agreement, the manager of an LLC owes the traditional fiduciary duties of loyalty and care to the members of the LLC." *Bay Ctr. Apartments Owner, LLC*, 2009 WL 1124451, at *8; cf. *Salm v. Feldstein*, 20 A.D.3d 469, 470, 799 N.Y.S.2d 104 (2d Dep't 2005) ("As the managing member of the company and as a comember with the plaintiff, the defendant owed the plaintiff a fiduciary duty to make full disclosure of all material facts."). The fiduciary duties include a duty of disclosure and candor. See *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del.2000) ("Directors of Delaware corporations are fiduciaries who owe duties of due care, good faith and loyalty to the company and its stockholders. The duty of disclosure is a specific formulation of those general duties that applies when the corporation is seeking stockholder action."); *In re CheckFree Corp. Shareholders Litig.*, 2007 WL 3262188, at *2 (Del.Ch. Nov. 1, 2007) ("[t]his `duty of disclosure' is not a separate and distinct fiduciary duty, but it clearly does impose requirements on a corporation's board," including disclosure of "material" information); *Salm*, 20 A.D.3d at 470, 799 N.Y.S.2d 104.

19. *Chiu v. Chiu*, 71 AD3d 621 (2d Dept Mar. 10, 2010)

Further, in the eighth cause of action, the complaint sets forth in sufficient detail (see CPLR 3016 [b]) facts which, if proven, would show that the defendant Man Choi Chiu, as the managing member of the LLC, owed a fiduciary duty to the plaintiff and breached this duty by failing to make full disclosure of all material facts referable to the operation and management of the LLC (see *Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038

[2009]; *Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575 [2008]; *Salm v Feldstein*, 20 AD3d 469 [2005]).

20. *Ninkoff v. Central Park Plaza Associates, LLC*, 2010 NY Slip Op 31374(U) (Sup Ct Nassau County May 25, 2010) (Bucaria, J.)

A manager [of a limited liability company] shall perform his or her duties as a manager...in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances" (Limited Liability Company Law § 409). (See also *Cottone v Selective Services*, 68 AD3d 1038 [2d Dept 2009] [managing member of LLC owes fiduciary duty to minority member]).

21. *Staffenberg v. Fairfield Pagma Associates, L.P.*, 2011 NY Slip Op 30557 (Sup Ct Nassau County Mar. 1, 2011) (Driscoll, J.)

Limited Liability Law § 409 provides that "a manager shall perform his or her duties as a manager in good faith and with a degree of care that an ordinary prudent person in a like position would use under similar circumstances." The manager of an LLC owes a fiduciary duty to operate the company in good faith and fairness, to avoid self-dealing and make full disclosure of all material facts. *Bookhamer v. I. Katren-Berhama Textiles Co., LLC*, 52 AD2d 246 (1st Dept. 2008); *Salm v. Feldstein*, 20 AD3d 469, 470 (2d Dept. 2005). See also *Nathanson v. Nathanson*, 20 AD3d 403, 404 (2d Dept. 2005) (allegations that manager engaged in self-dealing sufficient to state cause of action for breach of fiduciary duty).

22. *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 AD3d 804 (2d Dept. Apr. 12, 2011)

Here, for purposes of determining the defendants' motion, we accept the plaintiffs' allegations that the Manager owed them a fiduciary duty (*see* Limited Liability Company Law § 409 [a]; *Birnbaum v Birnbaum*, 73 NY2d 461, 465-466 [1989]; *Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1039 [2009]; *Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 578 [2008]; *Salm v Feldstein*, 20 AD3d 469 [2005]; *Nathanson v Nathanson*, 20 AD3d 403, 404 [2005]), and that the Manager's discretionary authority to invest the plaintiffs' capital contributions and suspend withdrawals from the Fund gave rise to a fiduciary relationship (*see Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 463 [2007]; *Brooks v Key Trust Co. N.A.*, 26 AD3d 628, 630 [2006]; *Guerrand-Hermès v Morgan & Co.*, 2 AD3d 235, 237 [2003]; *Rasmussen v A.C.T. Env'tl. Servs.*, 292 AD2d at 712).

23. *Waxman Real Estate LLC v. Sacks*, 2011 NY Slip Op 51677 (Sup Ct NY County Sept. 7, 2011) (Fried, J.)

Plaintiffs insist that the breach of fiduciary duty claim is based, not on breaches of the Agreement, but on breaches of defendants' statutory duties under LLC Law § 409. Section 409(a) provides that "[a] manager shall perform his or her duties as a manager,

including his or her duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." The Appellate Division has cited section 409(a) for the proposition that a manager of a company "owe[s] a fiduciary duty" to its shareholders. *Out of Box Promotions, LLC v. Koschitzki*, 55 AD3d 575, 578 (2d Dept. 2008). Defendants have not cited to any First Department authority controverting this principle of law or supporting a conclusion that parties could waive their statutory duties under section 409(a) by contractual agreement. Therefore, I conclude that section 11.2(a) of the Agreement does not bar a claim based on LLC Law § 409(a). I further conclude that plaintiffs have adequately stated a claim for breach of fiduciary duty, insofar as it is based on section 409(a).