SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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EDUARD GITLIN

Plaintiffs,

-against-

Index No. 012131/2007

ALEX CHIRINKIN, NELLIE CHIRINKIN, ARKADY PAVLOV, ALEX CHIRINKIN, LLC ALEX CHIRINKIN ENTERPRISES, LLC,

MEMORANDUM OF LAW

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION PURSUANT TO C.P.L.R. § 3212 FOR SUMMARY JUDGMENT

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## SUMMARY OF RELEVANT FACTS

The Plaintiffs EDUARD GITLIN and KEW APARTMENT HOLDINGS LLC, submit this Memorandum of Law in support of their motion for summary judgment pursuant to C.P.L.R. § 3212. The instant action is for fraud, breach of fiduciary duty, unjust enrichment, self dealing and misappropriation of corporate assets, aiding and abetting a breach of fiduciary duty, Violations of Debtor Creditor law, and breach of contract.

KEW APARTMENT HOLDINGS, LLC (hereinafter, "KEW" and the "Company") is a New York Limited Liability Company, which filed its Articles of Organization with the State of New York on March 21, 1997 (Affirmation of Barbara Lee Ford, Exhibit 13). The Company had two Members, EDUARD GITLIN (hereinafter "GITLIN"), and ALEX CHIRINKIN, who entered into an Operating Agreement, which is the governance document for matters relating to the Company. The Operating Agreement provides in relevant part:

> ". . . [T]he Operating Managers may not make any of the following management decisions without obtaining the consent of two-thirds in interest of the Members: A. To acquire, sell, assign, or otherwise transfer any interest in any property

(Affirmation of Barbara Lee Ford, Exhibit 14, Section 5.5 (A))

The Operating Agreement clearly indicates that each Member has a fifty (50%) interest in the Company (Affirmation of Barbara Lee Ford, Exhibit 14, Schedule A to Agreement), and Defendant, ALEX CHIRINKIN, acknowledges that he and GITLIN also split profits in other business ventures they were involved in, fifty-fifty (50-50) (Affirmation of Barbara Lee Ford, Exhibit 25, Deposition of ALEX CHIRINKIN, July 27,

2010, page 90, lines 2-25; page 91, lines 2-14). Moreover, New York Limited Liability Company Law § 402 (d)(2) provides, "(d) Except as provided in the operating agreement, whether or not a limited liability company is managed by the members or by one or more managers, the vote of at least a majority in interest of the members entitled to vote thereon shall be required to: (2) approve the sale, exchange, lease, mortgage, pledge or other transfer of all or substantially all of the assets of the limited liability company." Thus, the transfer or sale of the assets of the Company required the consent of both of the Members, EDUARD GITLIN, and ALEX CHIRINKIN, and ALEX CHIRINKIN breached the Agreement when he fraudulently transferred and then sold KEW'S interest in the Nevada properties.

There is no dispute that when the Company was initially formed, GITLIN and ALEX CHIRINKIN were close friends. They were engaged in several business ventures and the Company acquired an interest in a number of cooperative apartments in New York City; the last of the units was sold in or around the end of 2001. The management and sale of the New York City cooperative properties was overseen by Member EDUARD GITLIN, who is a real estate broker, licensed in the State of New York (Affidavit of EDUARD GITLIN, paragraph 2). There are no claims or counterclaims between the Parties in regard to the New York properties. In 1998, KEW acquired several properties in Nevada, which were overseen by Defendant, ALEX CHIRINKIN, (Affirmation of Barbara Lee Ford, Exhibits 19 and 20; Exhibit 25, Deposition of ALEX CHIRINKIN, July 27, 2010, page 174, lines 22-23 "I was running the company from '98 to 2004, 2004, 2003 actually").

In connection with the claims in this action, Defendant ALEX CHRINKIN, without the knowledge or consent of Plaintiff EDUARD GITLIN, transferred KEW'S interest in the Nevada Properties to co-defendant, ARKADAY PAVLOV, for no consideration (Exhibits 21 and 23), and then sold the properties to BM Pahrump, LLC for Four Million ($4,000,000.00) Dollars, and to the United States Government for One Million, Six Hundred and Thirty-Two Thousand ($1,632,000.00) Dollars, denying EDUARD GITLIN his share of the profits and rendering KEW insolvent (Exhibits 22 and 24). GITLIN'S share on the sale of the Pahrump Property would have been ten (10%) percent or Four Hundred Thousand ($400,000.00) Dollars, and on the Lucky Bucks Property, twenty-five (25%) percent, of Four Hundred and Eight Thousand ($408,000.00) Dollars. (Affirmation of Barbara Lee Ford, paragraphs 25-31, and Exhibits 21 through 24)

Within approximately one year of the sale of the Pahrump Property to BM Pahrump, LLC, it was resold to a company known as Celebrate Properties, LLC, a Nevada Limited Liability Company, on August 12, 2005, for Fifteen Million ($15,000,000.00) Dollars (Affirmation of Barbara Lee Ford, Exhibit 29). Based upon the foregoing, Plaintiffs KEW and GITLIN also claim consequential damages in connection with the fraudulent conveyance and the sale of the Pahrump property without their consent.

Co-Defendant, ARKADY PAVLOV, obtained an individual interest in both the Lucky Bucks Property and the Pahrump Property from the transfer to him by ALEX CHIRINKIN from KEW, without paying consideration to KEW, and was thereby unjustly enriched as a matter of law.

ALEX CHIRINKIN, as the President and a managing Member of KEW, had a Fiduciary Duty to the Plaintiffs in connection with KEW, pursuant to N.Y. Limited Liability Company Law, section 409. Defendant ALEX CHIRINKIN engaged in self dealing, the misappropriation of Company assets, and was unjustly enriched, when upon the fraudulent transfer of KEW'S assets to PAVLOV, ALEX CHIRINKIN accepted monies from AKRADY PAVLOV for his sole benefit and that of his company, VSA (Affirmation of Barbara Lee Ford, Exhibit 31, checks from Pavlov).

For a more complete recitation of the relevant facts, the Court is respectfully directed to the Affirmation of Barbara Lee Ford, Esq., and the Affidavit of EDUARD GITLIN, included with this motion.

## THE LAW OF SUMMARY JUDGMENT

Pursuant to C.P.L.R. § 3212(b), a motion for summary judgment, "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. . . . ." Id. *See*, Pleasant Hill Developers, Inc. v. Foxwood Enterprises, LLC, 65 A.D.3d 1203, 885, N.Y.S.2d 531 (2nd Dept. 2009).

Thus, a party shall be entitled to summary judgment, where the party establishes a prima facie case by submitting documentary evidence and other proof in support of its position on a motion for summary judgment. The burden is upon the party opposing summary judgment to establish a material issue of fact. Woods v. ZIK Realty Corp., 172 A.D.2d 606, 568 N.Y.S.2d 146, 147 (2nd Dept. 1991) (. . .once a movant has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to establish the existence of material issues of fact by evidentiary

proof in admissible form [*see, Alvarez v. Prospect Hos., supra at 324, 325 508 N.Y.S.2d 923, 501 N.E.2d 572]* ). *See also*, Zuckerman v. City of New York , 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980). Here, the record is replete with documentary evidence and admissions that support the Plaintiffs' motion for summary judgment, the Defendants have no credible defense, and judgment in favor of the Plaintiffs is warranted as a matter of law.

**PLAINTIFFS ARE ENTITLED TO JUDGMENT FOR BREACH OF FIDUCIARY DUTY BY DEFENDANT ALEX CHIRINKIN AS A MATTER OF LAW**

The Plaintiffs have met their burden for judgment as a matter of law. To establish a claim for a breach of fiduciary duty, the Plaintiffs must demonstrate, "(1) the existence of a fiduciary duty between the parties; (2) breach of that duty; and (3) damages suffered as a result of the breach" ; Kurtzman v. Bergstol, 40 AD3d 588, 590 (2d Dep't 2007). *See also*, Donovan v. Ficus Investments, Inc., 2008 WL 4073639, *12 (N.Y. Sup Ct. N.Y. County 2008). (In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct).

There is no dispute that during all times relevant, Defendant ALEX CHIRINKIN was the President of KEW, and managed the day to day activities of the Company. (Affirmation of Barbara Lee Ford, Exhibit 25, Deposition of ALEX CHIRINKIN, July 27, 2010, page 174, lines 22-23). Moreover, New York Limited Liability Law § 409(a) states in relevant part, "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." Id. Thus, there is no question that ALEX CHIRINKIN owed a fiduciary duty to the Plaintiffs.

Both the Operating Agreement (Affirmation of Barbara Lee Ford, Exhibit 14, Section 5.5 [A]) which provides, ". . . [T]he Operating Managers may not make any of the following management decisions without obtaining the consent of two-thirds in interest of the Members: A. To acquire, sell, assign, or otherwise transfer any interest in any property", and New York Limited Liability Law § 402 (d) (2), which provides in relevant part the, "vote of at least a majority in interest of the members entitled to vote thereon shall be required to: approve the sale, exchange, lease, mortgage, pledge or other transfer of all or substantially all of the assets of the limited liability company" Id., made it mandatory that Defendant ALEX CHIRINKIN obtain GITLIN'S consent in connection with any transfer or sale of KEW'S assets.

It is undisputed that the Defendant, ALEX CHIRINKIN, without the knowledge or consent of GITLIN, transferred both the Pahrump Property (Affirmation of Barbara Lee Ford, Exhibit 23) and the Lucky Bucks property (Affirmation of Barbara Lee Ford, Exhibit 21), and thereby breached the Agreement and his fiduciary duty to GITLIN. As a result of ALEX CHIRINKIN'S breach of fiduciary duty, KEW was rendered insolvent, and GITLIN was denied his share of the profits in connection with the sale of KEW'S assets.

Based upon the foregoing, GITLIN is entitled to judgment on the claim of breach of fiduciary duty as a matter of law.

## PLAINTIFF WAS DEFRAUDED AS A MATTER OF LAW

Plaintiff, EDUARD GITLIN, was defrauded by ALEX CHIRINKIN under both the common law and under New York Debtor and Creditor Law. Defendant, ARKADY

PAVLOV, participated in the fraud of GITLIN under New York Debtor and Creditor Law as the transferee, who received the property owned by KEW without the payment of any consideration to KEW.

**The Defendants, ALEX CHIRINKIN and ARKADY PAVLOV Violated New York Debtor Creditor Laws**

The gravamen of Plaintiffs' complaint is and always has been the fraud perpetrated against KEW and GITLIN by Defendants, ALEX CHIRINKIN and ARKADY PAVLOV.

New York Debtor and Creditor Law § 270, provides that a "Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." Id. As a Member of KEW with a fifty (50%) percent interest, there can be no question that GITLIN had a claim in regard to the assets of KEW, which became insolvent as the result of the actions of ALEX CHIRINKIN and ARKADY PAVLOV.

New York Debtor and Creditor Law § 271(1) defines "insolvency" as follows, "Insolvency. A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." Id. The only assets owned by KEW after the sale of the cooperative apartments in New York, were the Lucky Bucks and Pahrump properties in Nevada. Once those properties were transferred, KEW had no assets and was therefore, by definition, "insolvent".

ALEX CHIRINKIN, individually and as the President of KEW, violated sections 273, 274, 276, and 276(a) of New York Debtor and Creditor Law. New York Debtor and

Creditor Law § 273, Conveyances by insolvent, provides, "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without consideration." Id. The transfer by ALEX CHIRINKIN in his capacity as President and a Managing Member of KEW, of both the Lucky Bucks and the Pahrump properties without consideration to KEW, rendered KEW insolvent and unable to pay GITLIN his share of the profits.

Next, ALEX CHIRINKIN, as the President of KEW and a Managing Member of KEW, transferred the assets of KEW to ARKDAY PAVLOV, without consideration. New York Debtor and Creditor Law § 274, "Conveyances by persons in business, Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent." Id.

There is no dispute, as the President and a Managing Member of KEW, Defendant, ALEX CHIRINKIN, transferred the assets of KEW without consideration to ARKADY PAVLOV. (Affirmation of Barbara Lee Ford, Exhibits 21 and 23), and that after the fraudulent conveyances, sold the properties for large profits that he and PAVLOV misappropriated to themselves to the exclusion of GITLIN (Affirmation of Barbara Lee Ford, Exhibits 22 and 24).

The facts here also demonstrate that Defendant, ALEX CHIRINKIN, engaged in such conduct with the specific and actual intent to "hinder, delay, or defraud either

present or future creditors", in this case, Plaintiff, EDUARD GITLIN. New York Debtor and Creditor Law § 276, provides, "Conveyances made with intent to defraud, Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Id.

In addition, New York Debtor and Creditor Law § 276(a) also provides in relevant part,

> . . . where such conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, in which action or special proceeding the creditor . . . shall recover judgment, the justice or surrogate presiding at the trial shall fix the reasonable attorney's fees of the creditor . . . and the creditor shall have judgment therefor against the debtor and the transferee who are defendants in addition to the other relief granted by the judgment. (Emphasis supplied).

Id.

There is no question that ALEX CHIRINKIN, with the intent to "hinder, delay or defraud" GITLIN, orchestrated a fraud upon GITLIN by fraudulently transferring KEW'S assets to Defendant, ARKADY PAVLOV, without consideration. Importantly,

> "Actual intent need not be proven by direct evidence, but may be inferred from the circumstances surrounding the allegedly fraudulent transfer. Steinberg v. Levine. 6 A.D.3d 620, 621, 774 N.Y.S.2d 810 (2nd Dept. 2004). In determining whether a conveyance was fraudulent, courts will consider 'badges of fraud,' which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent. *Id.* The badges of fraud include lack or inadequacy of consideration, family, friendship, or close associate relationship between transferor and transferee, . . ".

Capital Contribution Services, Limited v. Ducor Express Airlines, Inc., 440 F.Supp.2d 195, 203 (E.D.N.Y. 2006). *See also*, Ford v. Martino, 281 A.D.2d 587, 588, 722 N.Y.S.2d 574, 576 (2nd Dept. 2001).

First, PAVLOV admits that his relationship with ALEX CHIRINKIN was not only a business relationship, but also one of friendship (Affirmation of Barbara Lee Ford, Exhibit 26, Deposition of ARKADY PAVLOV, October 28, 2010, page 14, lines 11-15). Next, PAVLOV has been a Doctor of Dentistry for over thirty (30) years, and in addition to owning a business in his own name, has operated businesses as a dentist under the names of Arden Dental (in which he is a sole owner) , as well as Black Diamond Dental Center and Sky View, which included partners. In each of his business ventures, PAVLOV used the assistance of professionals such as an attorney and/or an accountant (Exhibit 26, Deposition of PAVLOV, October 28, 2010, page 7, lines 2-25; page 8, lines 2-25; page 9, lines 2-25; page 10, lines 2-7). PAVLOV is also an investor in real estate (Exhibit 26, Deposition of PAVLOV, October 28, 2010, page 12, lines 2-4). and admits that he has invested in real estate in New York, and that in connection with those transactions he used an attorney and obtained a title report. (Exhibit 26, Deposition of PAVLOV, October 28, 2010, page15, lines 2-25).

Incredibly in this case, PAVLOV used none of those professionals in the transactions with ALEX CHIRINKIN that defrauded GITLIN and rendered KEW insolvent. Moreover, PAVLOV admits that although he did not make any payments to KEW, and doesn't have an ownership interest in VSA, a company owned solely by ALEX CHIRINKIN, he readily made payments in the hundreds of thousands of dollars to VSA and to ALEX CHIRINKIN personally (Affirmation of Barbara Lee Ford, Exhibit 31).

Based upon the foregoing, the Plaintiffs have demonstrated their entitlement to judgment as a matter of law on their claims under Debtor and Creditor Law, and GITLIN is entitled to his reasonable attorney's fees pursuant to New York Debtor and Creditor

law § 276(a). *See*, Ford v. Martino, 281 A.D.2d 587, 588, 722 N.Y.S.2d 574, 576 (2nd Dept. 2001).

**This Court May Order A Money Judgment In Connection With The Fraudulent Conveyance Claims**

Although, "[a]s a general rule, the relief to which a defrauded creditor is entitled in an action to set aside a fraudulent conveyance is limited to setting aside the conveyance of the property which would have been available to satisfy the judgment had there been no conveyance . . .[a] money judgment against the transferee may also be an available form of substitute relief where the transferee has disposed of the wrongfully conveyed property in some manner which makes it impossible to return (*see* Marine Midland Bank v. Murkoff, *supra*, *see also* Wasey v Holbrook, 141 App. Div. 336, 125 N.Y.S. 1087 *affd.* 206 N.Y. 708, 99 N.E. 1119)." Joslin v. Lopez, 309 A.D.2d 837, 765 N.Y.S.2d 895 (2nd Dept. 2003). *See also*, Capital Contribution Services, Limited v. Ducor Express Airlines, Inc. , 440 F.Supp.2d 195, 204 (E.D.N.Y. 2006); Ford v. Martino, 281 A.D.2d 587, 722 N.Y.S.2d 574 (2nd Dept. 2001).

**Defendant ALEX CHIRINKIN Defrauded EDUARD GITLIN Under The Common Law**

The predicate facts to demonstrate Fraud are abundantly demonstrated in the evidence here. To recover damages for fraud, the Plaintiff must "prove (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury." Jablonski v. Rapalje, 14 A.D.3d 484, 487 (2nd Dept. 2005). *See also*, Ehrlich v. Froehlich, 19 Misc.3d 1130(A), 2008 WL 1989769 (Sup. Ct.

Nassau Cty 2008) (with regard to the cause of action for fraud, the elements of a cause of action for fraud are 'a representation of fact, which is either untrue and known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury' Jo Ann Homes at Bellmore v. Dworetz, 25 N.Y.2d 112, 119, 302 N.Y.S.2d 799, 250 N.E.2d 214 (1969). *See also*, Channel Master Corp. v. Aluminum Limited Sales, Inc. 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259, 151 N.E.2d 833 (1958). )

Here, ALEX CHIRINKIN, GITLIN'S close friend, lead GITLIN to believe that KEW'S investments in the Nevada properties had not changed and that they were still owned by KEW, when in reality he had transferred the assets owned by KEW to Defendant, ARKADY PAVLOV. (Affidavit of EDUARD GITLIN, paragraph 21) (Affirmation of Barbara Lee Ford, Exhibits 21 and 23). He did so to enable him to transfer the assets to his "friend" and business partner PAVLOV, without GITLIN'S knowledge, GITLIN reasonably relied upon ALEX CHIRINKIN'S misrepresentations, and was thereby damaged by the loss of his interest in the properties and the profits derived therefrom, by ALEX CHIRINKIN and ARKADY PAVLOV.

Based upon the foregoing, the Plaintiffs are entitled to judgment on their claims of common law fraud as a matter of law.

**PLAINTIFFS' CLAIM OF UNJUST ENRICHMENT HAS BEEN DEMONSTRATED AS A MATTER OF LAW**

To prevail on a claim of unjust enrichment, "a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered. Citibank, N.A. v. Walker, 12 A.D.3d 480, 787 N.Y.S.2d 48, 49 (2nd Dept. 2004), *abrogated* on

other grounds by Butler v. Catinella, 58 A.D.3d 145, 868 N.Y.S.2d 101, 105 (2d Dep't 2008), (quoting Paramount Film Distrib. Corp. v. State, 30 N.Y.2d 415, 334 N.Y.S.2d 388, 285 N.E.2d 695, 698 (N.Y.1972)) (alteration in original). Unjust enrichment does not depend on performance of a wrongful act, however, and even innocent parties may be unjustly enriched. Cruz v. Mc Aneney, , 31 A.D.3d 54, 816_N.Y.S.2d 486, 491 (2d Dep't 2006)." Marini v. Lombardo, 79 A.D.3d 932, 912 N.Y.S.2d 693, 697 (2nd Dept. 2010).

Here, there is no written agreement with Defendant, ARKADY PAVLOV, as there is with Defendant ALEX CHIRINKIN. There is no question however, that PAVLOV was unjustly enriched at the expense of KEW and GITLIN, by obtaining the properties owned by KEW, the Pahrump property and the Lucky Bucks property, without paying consideration to KEW or to GITLIN. (Affirmation of Barbara Lee Ford, Exhibits 22 and 24). Based upon the foregoing, Defendant, PAVLOV, should be held accountable for restitution to GITLIN as a matter of law.

**PLAINTIFFS' HAVE DEMONSTRATED THAT ALEX CHIRINKIN BREACHED THE CONTRACT WITH EDUARD GITLIN AS A MATTER OF LAW**

On March 21, 1997, EDUARD GITLIN and ALEX CHIRINKIN, entered into an Agreement in connection with their Membership interest in KEW APARTMENT HOLDINGS, LLC. (Affirmation of Barbara Lee Ford, Exhibit 14). There is no question that Defendant ALEX GITLIN, violated the contract between the parties, when he transferred the assets of KEW, and then permitted them to be sold without the knowledge or consent of Plaintiff GITLIN.

Where as here, the Plaintiff has produced a written agreement between the parties, and the agreement has been breached by the Defendant, ALEX CHIRINKIN, Plaintiff is entitled to judgment as a matter of law on his cause of action for breach of contract. George S. May International Company v. Thirsty Moose, Inc., 19 A.D.3d 721, 796 N.Y.S.2d 196 (3rd Dept. 2005).

**PLAINTIFF IS ENTITLED TO CONSEQUENTIAL DAMAGES IN CONNECTION WITH THE SALE TO CELEBRATE PROPERTIES LLC**

There can be no question that ALEX CHIRINKIN did not have the right to transfer or sell the assets of KEW without the consent of GITLIN. (Affirmation of Barbara Lee Ford, Exhibit 14); New York Limited Liability Law section 402(d) (2) "Except as provided in the operating agreement, whether or not a limited liability company is managed by the members or by one or more managers, the vote of at least a majority in interest of the members entitled to vote thereon shall be required to: (2) approve the sale, exchange, lease, mortgage, pledge or other transfer of all or substantially all of the assets of the limited liability company." Id.

The Pahrump property was sold for a huge profit, Fifteen Million ($15,000,000.00) Dollars, within fourteen months of the sale of the property without GITLIN'S consent, to BM Pahrump for Four Million ($4,000,000.00) Dollars, and Defendants should be liable for the loss of the profits incurred by KEW and GITLIN in the form of consequential damages.

> [I]n order to impose on the defaulting party a further liability than for damages [which] naturally and directly [flow from the breach] i.e. in the

> ordinary course of things, arising from breach of contract, such unusual or extraordinary damages must have been brought within contemplation of the parties as the probable result of a breach at the time of or prior to contracting. . . '[t]he party breaching the contract is liable for those risks foreseen or which should have been foreseen at the time the contract was made' (Ashland Mgt. v. Janien, 82 N.Y.2d 395, 403, 604 N.Y.S.2d 912, 624 N.E.2d 1007 [1993]. It is not necessary for the breaching party to have foreseen the breach itself or the particular way the loss occurred, rather, '[i]t is only necessary that loss from a breach is foreseeable and probable.' To determine whether consequential damages were reasonably contemplated by the parties, courts must look to the 'nature, purpose and particular circumstances of the contract known by the parties . . " (Emphasis supplied).

Bi-Economy Market, Inc. v. Harleysville insurance company of New York , 10 N.Y.3d 187, 886 N.E.2d 127, 130, 856 N.Y.S.2d 505, 508 (2008). *See also*, Panasia Estates, Inc. v. Hudson Insurance Company, 10 N.Y.3d 200, 886 N.E.2d 135, 856 N.Y.S.2d 513 (2008).

Here, the parties purchased the properties located in Nevada to either develop them or to flip them to other investors. It was foreseeable, and ALEX CHIRINKIN was without question aware, that the purchaser of the Pahrump Property, BM Pahrump, which paid $4,000,000.00 for the property, was in all probability acquiring the property for the same reasons that it was purchased by KEW, to resell (flip) the property for a quick profit, and within fourteen (14) months, the Pahrump property closed with Celebrate Properties, LLC for Fifteen Million ($15,000,000.00) Dollars. GITLIN never had an opportunity to participate in the decision regarding the sale of the Pahrump property to BM Pahrump, due to the fraud perpetrated upon him by ALEX CHIRINKIN and PAVLOV, and based upon the foregoing, should be entitled to consequential damages in the amount of One Million, Five Hundred Thousand ($1,500,000.00) Dollars, or his ten percent (10%) share of the price paid by Celebrate Properties, LLC.

## CONCLUSION

For all of the reasons stated herein, this Court should grant the Plaintiffs the relief requested in this motion in its entirety, order Judgment against the defendants, ALEX CHIRINKIN and ARKADY PAVLOV in the amount of One Million, Nine Hundred and Eight Thousand ($1,908,000.00) Dollars, consisting of One Million, Five Hundred Thousand ($1,500,000.00) Dollars pertaining to the Pahrump Property, and Four Hundred and Eight Thousand ($408,000.00) Dollars, pertaining to the Lucky Bucks Property, impose punitive damages to be determined by the Court in connection with the fraud claims and the claims of breach of fiduciary duty, order an inquest in connection with the Plaintiff's reasonable attorney's fees, and order such other and further relief that this Court deems just and proper.

Dated: February 28, 2011

Respectfully Submitted,

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