

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
EDUARD GITLIN individually, and in the right
and on the behalf of KEW APARTMENT
HOLDINGS, LLC,

Plaintiffs,

-against-

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

Defendants.
-----X

Index No. 012131/2007

**AFFIRMATION IN REPLY
TO AFFIRMATION IN
OPPOSITION BY CHIRINKIN
DEFENDANTS**

HON. STEPHEN A. BUCARIA

BARBARA LEE FORD, ESQ., an attorney duly admitted to practice before the Courts
of the State of New York, affirms the following under the penalties of perjury:

1. I am the attorney for EDUARD GITLIN (hereinafter "GITLIN") and KEW
APARTMENT HOLDINGS, LLC (hereinafter "KEW"), the Plaintiffs in this matter, and
submit this affirmation in Reply to the CHIRINKIN Defendants' Affirmation in Opposition to
the Plaintiffs' motion for summary judgment pursuant to C.P.L.R. § 3212, and in support of
Plaintiffs' motion.

PRELIMINARY ISSUES

2. As a preliminary matter, on March 1, 2011 your deponent advised all
Defendants' counsel by e-mail (Exhibit 18), that there was a typographical error in Plaintiff's
motion for summary judgment, in regard to the sale price paid by Celebrate Properties for the
Pahrump Property, which was Fifteen Million, Eight Hundred Thousand (\$15,800,000.00)

Dollars (Plaintiffs' motion for summary judgment, Affirmation of Barbara Lee Ford, Exhibit 29). Although the price was stated correctly in paragraph 32 of counsel's affirmation, an error occurred thereafter, and was carried through to the Memorandum of Law as Fifteen Million (\$15,000,000.00) Dollars. The amount of Plaintiffs' total damages claimed in connection with the "Pahrump Property" is One Million, Five Hundred and Eighty Thousand (\$1,580,000.00) Dollars which includes consequential damages.

3. As this Court is aware, there has been substantial motion practice in this case. In their arguments, the CHIRINKIN defendants attempt to reargue matters and issues that have already been decided by this Court in favor of the Plaintiffs, which have either been affirmed by the Appellate Division or were not appealed. Thus, these decisions, including the first decision on Defendants' motion to dismiss pursuant to C.P.L.R. § 3211, which was not appealed and appears herein as Exhibit 25, as well as this Court's decision dated July 6, 2009 (Exhibit 2) which was affirmed by the Second Department (Exhibit 14), are the law of the case and attempts by the CHIRINKIN Defendants to relitigate these issues must be rejected by this Court.

4. Next, the CHIRINKIN Defendants offer in support of their opposition, Exhibit 7, copies of the tax returns for KEW APARTMENT HOLDINGS, LLC, for the years, 1998, 1999, 2000, and 2001, which Mr. Feinstein alleges in his affirmation are "true and accurate copies of the Tax Returns of Kew Apartment Holdings, LLC for the years 1998, 1999, 2000, and 2001. . ." (Feinstein Affirmation, Par. 8).

5. These documents should not be considered by this court as during the deposition of Defendant ALEX CHIRINKIN, despite the fact that the tax returns were produced pursuant to the Order of this Court (exhibit 2) and the Decision of the Appellate

Division (Exhibit 14), the Defendant consistently denied that he recognized the tax returns (Exhibit 1, Deposition of ALEX CHIRINKIN, July 27, 2010, pages 178-185; Referring to Exhibits 23, 24, 25, 26, tax returns for 1998, 1999, 2000, 2001) , and based upon that position, steadfastly refused to cooperate in connection with questions posed to him regarding the documents, by alleging that he didn't recognize them and that he did not remember facts regarding the documents.

6. By example, during his deposition, when defendant ALEX CHIRINKIN was asked to review the document marked as Plaintiffs' Exhibit 23, Form 1065, U.S. Partnership Return of income 1998 (Exhibit 25 herein), and was asked "Do you recognize that document" the defendant responded, "I don't recognize this document, but I can read it" (Exhibit 1, page 178, lines 5-11).

7. His position on the tax returns for KEW and the other companies owned by him, also Defendants in this action, was that he had no recollection of them, could not identify them, could only read them, and would not confirm that they were true and accurate copies of the tax returns. In the event this matter goes to trial, these documents as well as others that the CHIRINKIN Defendants failed to produce, despite the Courts order to do so (Exhibits 2 and 14) will be the subject of a Motion in Limine prior to the trial. Notwithstanding the foregoing, should this court consider Exhibit 7 to the Affirmation of Albert Feinstein, the Plaintiffs are addressing herein the CHIRINKIN Defendants' arguments.

8. Next, the CHIRINKIN Defendants' counsel misstates the nature of this case. Mr. Feinstein's Affirmation in opposition to the Plaintiffs' motion for summary judgment alleges that "This is an action to recover membership interest Plaintiff allegedly owned in an LLC and to wind up the affairs of said LLC." (Affirmation of Albert Feinstein, paragraph 15).

This allegation is clearly not true as can be confirmed from the causes of action set forth in the Plaintiffs' Second Amended Verified Complaint (Affirmation of Albert Feinstein, Exhibit 12).

9. The causes of action include claims for unjust enrichment, common law fraud, violations of N.Y. Debtor and Creditor Laws, misappropriation of corporate assets, self dealing, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, an accounting, and breach of contract.

10. Finally, Exhibit 4 of Mr. Feinstein's Affirmation purports to be the deposition testimony of EDUARD GITLIN. The version of the deposition used for the Exhibit is a two sided document, but only one side was copied, and as a result half of the deposition is missing including references to it made in Feinstein's Memorandum of Law. Plaintiff is providing a full copy of the Deposition herein as Exhibit 19.

THE STANDARD TO DEFEAT A MOTION FOR SUMMARY JUDGMENT

11. A party shall be entitled to summary judgment, where the party establishes a prima facie case by submitting documentary evidence 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 (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]). Id., 568 N.Y.S.2d 146 at 147. 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).

12. Plaintiffs have established a prima facie case demonstrating their entitlement to summary judgment through evidentiary proof in admissible form. As shall be demonstrated herein, the CHIRINKIN defendants clearly have not met their burden and summary judgment should be granted to the Plaintiffs.

**PLAINTIFF GITLIN HAS DEMONSTRATED HIS OWNERSHIP OF KEW THROUGH
DOCUMENTARY EVIDENCE AND THE PRIOR DECISIONS OF THIS COURT**

13. The CHIRINKIN Defendants have repeatedly alleged that they dispute the Plaintiffs' Membership in KEW, yet have not produced one document in support of that position, while the Plaintiffs have repeatedly produced documents, many of which are also signed by Defendant ALEX CHIRINKIN, demonstrating GITLIN's Membership status. In his Memorandum of Law, Attorney Feinstein alleges, "Defendant Chirinkin has maintained that Plaintiff was not a member of Kew, LCC. . ." (Memorandum of Law, page 2, second paragraph). Yet, he contradicts this position when in paragraph 36 of the CHIRINKIN Defendant's Verified Second Amended Answer and Counterclaims, paragraph 36 states that Gitlin was entitled to a "33% of the anticipated profits from the sale of Kew Terrace." (Affirmation of Albert Feinstein, Exhibit 1, paragraph 36).

The Decision of This Court

14. Moreover, and dispositive on this point, this very issue was before this Court in connection with the Defendants' motion to compel production of Plaintiff GITLIN's tax returns, and the Plaintiff's opposition and cross motion to compel production and to strike the

CHIRINKIN Defendants' Answer. This court denied the Defendants' motion and granted the motion of the Plaintiffs' to compel production.¹ (Exhibit 2, Decision dated July 6, 2009).

15. In connection with the issue of GILTIN's Membership in KEW, in its decision this court stated,

More particularly, with respect to the defendants' request for the individual plaintiff's tax return and bank statements in order to possibly prove that he was not a member of Kew at the time when the subject transactions took place, the individual plaintiff has demonstrated his membership in Kew LLC on March 21, 1997, the date of the execution of the Kew LLC operating agreement. That document identifies Mr. Gitlin as having a 50% ownership interest in Kew LLC. That document imposes several obligations on the members, inter alia, a fiduciary obligation and responsibility to the LLC and its members. That document also requires some affirmative action to accomplish the withdrawal of a member and that must be accomplished "either in writing or at a meeting called for such purpose" (Article IX 9.1). The defendants have not produced any evidence of such an event, and without such ever, there is a clear presumption that such membership continues.

(Exhibit 2). For the convenience of the Court, a copy of the Operating Agreement referred to by this Court in its Decision, is attached hereto as Exhibit 3, signed by both parties, which includes "Schedule A" indicating the list of Members, EDUARD GITLIN and ALEX CHIRINKIN, each with a fifty (50%) percent ownership interest. In addition, also attached hereto are the remaining documents set forth in that motion upon which the court relied in making its Decision:

Exhibit 4- A Resolution that refers to the sole Members of Kew as ALEX CHIRINKIN and EDUARD GITLIN.

¹ It should be noted, that although the tax returns were produced, as noted earlier herein, ALEX CHIRINKIN refused to acknowledge that they were true and accurate copies, thwarting any meaningful discussion of the documents (Exhibit 1, Deposition of ALEX CHIRINKIN, July 27, 2010, pages 178-185; Exhibits 23, 24, 25, 26; nor did the CHIRINKIN Defendants produce bank statements, closing statements and other financial documents that were also demanded. As also noted herein, the Plaintiffs intend to file a Motion in Limine in connection with these issues prior to any trial of this matter.

Exhibit 5- A copy of the Membership Roster for Kew, indicating that the Members are ALEXEI CHIRINKIN "50%" and EDWARD GITLIN "50%";

Exhibit 6 -A copy of the Certificates from KEW indicating ALEXEI CHIRINKIN with a 50% interest, and EDWARD GITLIN with a 50% interest;

Exhibit 7- A copy of a contract of sale dated August 30, 2000, between KEW APARTMENTS HOLDINGS, LLC (the seller), and 78-144 Management Corp. c/o Bellmarc (the buyer), for the sale of Kew's shares of Kew Terrace Owners Inc. Each page is initialed by EDUARD GITLIN and ALEX CHIRINKIN for KEW, and the contract is signed by EDUARD GITLIN, Member, and ALEX CHIRINKIN, Member.

Exhibit 8- A lead paint disclosure document provided in connection with the sale by KEW in connection with the apartments, signed by ALEX CHIRINKIN and EDUARD GITLIN.

Exhibit 9- A Survival Letter dated November 1, 2000 provided in connection with the sale of the New York apartments by KEW, signed by EDUARD GITLIN, individually and as a Member of KEW.

Exhibit 10- A letter dated July 29, 2002 from ED GITLIN to Donna, relayed via facsimile to 1-775-727-4444, requesting information on "our" property, pertaining to the 158 acres in Pahrump (sic) Nevada. Proof of receipt included.

Exhibit 11 - A copy of an installment note in the amount of \$696,050.00 in connection with the purchase of the Nevada, Nye County property (the Pahrump property), signed by ALEXEI CHIRINKIN, Member, and EDWARD GITLIN, Member, on behalf of KEW, as **equal signors to the note without**

limitation, despite the fact that GITLIN'S interest in the Pahrump property as the result of his Membership in KEW was only ten (10%) percent, and ALEX CHIRININ's ownership interest as the result of his ownership in KEW, and ALEX CHIRINKIN ENTERPRISES, LLC, was a total of ninety (90%) percent.

Exhibit 12 - An escrow agreement in regard to the \$450,000.00 down payment for the purchase of the Nevada, Nye County property by Kew, with the Markem Escrow Agency, dated June 3, 1998, initialed by EDUARD GITLIN and ALEX CHIRINKIN, and signed by Edward Gitlin and ALEXEI CHIRINKIN.

Exhibit 13 -An addendum to the land purchase agreement of the Nevada, Nye County property initialed by ALEX CHIRINKIN and EDUARD GITLIN.

16. The Defendants appealed this Court's decision to the Second Department, which affirmed the Decision on March 9, 2010 (Exhibit 14), and thus, this Court's Decision and findings are the law of the case, and neither the Plaintiffs' status as a Member, nor his percentage of interest can be in dispute.

The law of the case doctrine is part of a larger family of kindred concepts, which includes *res judicata* (claim preclusion) and *collateral estoppels* (issue preclusion). These doctrines, broadly speaking, are designed to limit relitigation of issues. Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a "full and fair" opportunity to litigate the initial determination (see, *Arizona v. California*, 460 U.S. 605, 619, 103 S.Ct. 1382, 75 L.Ed2d 31; *People v. Guerra*, 65 N.Y.2d 60, 63, 489 N.Y.S.2d 718, 478 N.E.2d 1319; *Sales v. State Farm Fire & Cas. Co.*, 902 F.2d 933, 936 (11th Cir. 1990).

People v. the State of New York, 94 N.Y.2d 499, 502, 727 N.E.2d 1232, 1234. 706 N.Y.S.2d 678, 680 (2000). See also, Brownrigg v. New York City Housing Authority, 29 A.D.3d 721,722, 815 N.Y.S.2d 681, 683 (2nd Dept. 2006); Bonbet 366 LLC v. Tobias, 19 A.D.3d 102, 795 N.Y.S.2d 591 (1st Dept. 2005).

The Issue of the Tax Returns and Accountant Auerbach

17. A copy of the Plaintiff's personal tax return for the year 1998 (Exhibit 15), which was previously provided to the parties despite the fact that the Plaintiff was not required to do so by this Court's decision, clearly demonstrates that GILTIN was a Member of KEW. **Worthy of note is that the tax return was prepared by accountant, Arnold Auerbach, the same accountant who provided an affidavit stating that GITLIN never owned an interest in KEW.**

18. Also as noted in this Court's decision dated July 6, 2009 (Exhibit 2), Plaintiff produced two affidavits, one from Plaintiff GITLIN and the other from an individual named Dinko Grancaric, a former partner of GITLIN's (Exhibit 16). This Court noted that, "the individual plaintiff and a former partner both assert that their former accountant was terminated for incompetence, and such should be considered when his affidavit is also considered." (Exhibit 2, page 3, paragraph 1). The same consideration should hold true for the current motion should the tax returns be considered.

The Changes and Representations in KEW'S tax returns Violate the Operating Agreement and N.Y. Limited Liability Company Law

19. Arnold Auerbach's preparation of ALEX CHIRINKIN's tax returns and those of companies he was/is involved with, also come into question in regard to the alleged addition and subtraction of Members, and the various representations in the returns (Affirmation of Albert Feinstein, Exhibit 7). First, the operating agreement precludes such changes without the consent of GITLIN. Specifically, Article IX, Section 9.1 provides in relevant part,

A Member may transfer his interest in the Company to another person or entity **only with the prior unanimous consent of the other Members** either in writing or at a meeting called for such purpose. If all of the other Members do not approve of the transfer, the transferee shall have no right to participate in

the management of the business and affairs of the Company or to become a Member.

20. Next, N.Y. LLCL § 606 provides in relevant part, (a) A member may withdraw as a member of a limited liability company only at the time or upon the happening of events specified in the operating agreement and in accordance with the operating agreement. Notwithstanding anything to the contrary under applicable law, unless an operating agreement provides otherwise, a member may not withdraw from a limited liability company prior to the dissolution and winding up of the limited liability company. Notwithstanding anything to the contrary under applicable law, an operating agreement may provide that a membership interest may not be assigned prior to the dissolution and winding up of the limited liability company." Id.

21. Thus, even if the CHIRINKIN Defendant's argument that the Operating Agreement should not be considered, an argument we clearly reject as did this Court (Exhibit 2), in default of an Operating Agreement, and pursuant to New York's Limited Liability Company Law § 606, the CHIRINKIN Defendants' arguments still fail and GITLIN's position as a Member of Kew, still survives.

22. Defendant ALEX CHIRINKIN admitted during his deposition, that during the relevant time period he was the only person providing information to the accountant for his personal tax returns and that of the companies that are the subject of this litigation.

Questions to ALEX CHIRINKIN by Barbara Lee Ford:

Question:

Who provides the information to Mr. Auerbach that he puts into your tax returns, for your personal returns, for your various companies?"

Answer:

I give him bank statements and receipts.

Question:

Are you the only one in your company that does that or does your wife Nellie Chirinkin, assist you with that?

Answer:

Last four years, my wife helps me, but before that she didn't.

Question:

So there would be no other person providing information to Mr. Auerbach regarding your personal tax returns or your business tax returns other than you or possibly Nellie, is that correct?

Answer:

I don't think so.

(Exhibit 1, Deposition of ALEX CHIRINKIN, page 160, lines 21-25; page 161, lines 2-15).

23. In addition, when your deponent inquired of Defendant, ALEX CHIRINKIN as to "whether there was a tax matters partner designated for Kew Apartment Holdings, LLC ", Mr. Feinstein responded, "Objection, again. Can you say the question again Mr. Interpreter?" (Whereupon the record was read.) Mr. Feinstein, "The question is; Do you know if someone was designated." Answer: "No, I was alone. And I was filing the taxes myself since '99, since '98. And I did everything myself. I gave all the information myself."

(Exhibit 1, Deposition of ALEX CHIRINKIN, page 173, lines 11-25).

24. Finally, when asked, "At anytime did Kew Apartment Holding, LLC ever have any other members or partners other than yourself and Eduard Gitlin?" Answer, "I don't

remember, I don't remember." (Exhibit 1, Deposition of Alex Chirinkin, Page 172, lines 22-25; Page 173, line 2.

25. There is no corporate documentation indicating the GITLIN ever withdrew as a Member of KEW, or that anyone else ever became a Member of Kew. One can only assume that based upon the testimony of ALEX CHIRINKIN in regard to how information found its way to the company tax returns, and in an effort to hide the diminution of GITLINS' interest in KEW, ALEX CHIRINKIN with the cooperation of Auerbach made changes to KEW'S tax returns that did not reflect the actual Members or their actual interest pursuant to the Operating Agreement (Exhibit 3) and to the requirements of New York's Limited Liability Company Law § 606.

26. As this Court found in its decision dated July 6, 2009 (Exhibit 2), the changes to Membership as are reflected in the tax returns offered by Defendant, ALEX CHIRINKIN (Feinstein Affirmation, Exhibit 7), "requires some affirmative action to accomplish the withdrawal of a member and that must be accomplished 'either in writing or at a meeting called for such purpose' (Article IX, 9.1)." (Exhibit 2, Decision of the Court; Exhibit 3 Operating Agreement), none of which occurred here.

27. Similarly unconvincing, lacking in merit or any legal basis that offers support to their arguments, are the CHIRINKIN Defendants' claims in their Second Amended Answer that "Consistently acting as a broker, Plaintiff Gitlin did not contribute any money to the acquisition of Kew Apartments. . . . In addition, Plaintiff Gitlin convinced Defendant Alex Chirinkin that Gitlin must have signed all acquisition and disposition documents for Kew LLC

in order to receive Gitlin's 33% of the net profits from the sale of Kew Terrace². (Affirmation of Albert Feinstein, Exhibit 1, paragraphs 33-34). These arguments are absurd where ALEX CHIRINKIN himself admits that he did not contribute any cash to the acquisition of the properties (Exhibit 1, Deposition of ALEX CHIRINKIN, page 66, lines 21-25; pages 67-77; page 78, lines 2-14).

28. Although this version of events is denied by the Plaintiffs, it also ignores the fact that GITLIN, signed the documents in connection with the acquisition of the Pahrump Property, and agreed to personally sign a note along with ALEX CHIRINKIN, in the amount of \$696,050.00 in connection with the purchase, as equal signors to the note without limitation (Exhibit 11), despite the fact that GITLIN'S interest in the Pahrump property as the result of his Membership in KEW was only ten (10%) percent, and ALEX CHIRININ'S ownership interest as the result of his ownership in KEW, and his interest ALEX CHIRINKIN ENTERPRISES, LLC, was a total of ninety (90%) percent. Defendant's allegations and arguments in connection with these issues totally lack credibility.

29. Based upon the decision of this Court dated July 6, 2009 (Exhibit 2), and the documents provided by GITLIN (Exhibits 4-13), there should be no question that GITLIN was always a member of KEW, and that he owned a fifty (50%) percent interest.

That Neither Plaintiff EDUARD GITLIN or Defendant ALEX CHIRINKIN contributed cash toward the acquisition of the Nevada properties is irrelevant to the claims herein

30. Defendant ALEX CHIRINIKIN admits that he did not provide any money to acquire the Pahrump Property (hereinafter "Pahrump"), and the that \$450,000.00 total down

² The Co-op Apartments located in New York City

payment for Pahrump, was provided to ALEX CHIRINKIN ENTERPRISES, LLC (hereinafter "ACE, LLC"), which had an eighty (80%) percent interest in the Pahrump property, and is a company solely owned by ALEX CHIRINKIN, by a person named Viktor Potekhin, who it appears had a beneficial interest in ACE, LLC (Exhibit 1, Deposition of ALEX CHIRINKIN, page 66, lines 21-25; pages 67-77; page 78, lines 2-14). It should be noted that the request for proof of a transfer of funds to Viktor Potekhin during the deposition, (Exhibit 1, Deposition of ALEX CHIRINKIN page 70, lines 5-12) was never received. Thus, there is no proof that any monies were ever repaid to Viktor Potekhin, and if the \$450,000.00 was repaid, it was due from ALEX CHIRINKIN ENTERPRISES, LLC, not KEW.

31. Moreover, the above noted statements made by Defendant ALEX CHIRINKIN during his deposition (Exhibit 1, Deposition of ALEX CHIRINKIN, Page 76, lines 9-25, page 77, lines 2-13), fully support Plaintiff GITLIN's claims regarding (a) GITLIN's offer of bail for Potekhin, (b) the manner in which the property was purchased; (c) that KEW's total interest of twenty (20%) percent, was a gift from Potekhin to GITLIN and ALEX CHIRINKIN, with ten (10%) percent each for GITLIN and CHIRINKIN (Exhibit 19, Deposition of EDUARD GITLIN, June 8, 2010, pages 39-43, page 44, lines 2-3) and (d) that the monies used for the acquisition of Pahrump came from Potekhin to ALEX CHIRINKIN ENTERPRISES, LLC, in which Potekhin had a beneficial interest (Exhibit 19, page 35, lines 21-25; page 36; page 37, lines 2-24). Thus, even if monies were repaid to Potekhin, they were due from ACE, LLC, not KEW.

32. Importantly, although no monies were expended by EDUARD GITLIN or ALEX CHIRINKIN in connection with the acquisition of the Pahrump or Lucky Bucks

properties (Exhibit 19, Deposition of EDUARD GITLIN, page 119, lines 12-25; page 120, lines 2-25; page 121, line 2), there is no question that both of them signed personally on the Deed of Trust in connection with the mortgage on the Pahrump property in the amount of \$696,050.00 (Exhibit 11), both assuming considerable liability, although in the case of GITLIN, certainly not proportionate to his interest in the property through KEW, which was ten (10%) percent.

33. Finally, the fact that neither EDUARD GITLIN nor ALEX CHIRINKIN may have contributed cash toward the acquisitions by KEW is irrelevant to the arguments made in this action, other than as to a potential offset for monies that either party can demonstrate were provided toward the investment.

DEFENDANT ALEX CHIRINKIN MISCHARACTERIZES

THE ISSUE OF GITLIN'S LOANS TO HIM

34. GITLIN testified that over time, he loaned hundreds of thousands of dollars to ALEX CHIRINKIN, in connection with various businesses they were involved in, including the export of used cars, personal expenses for which ALEX CHIRINKIN borrowed money and a lawsuit (Exhibit 19, GITLIN deposition dated June 8, 2010, page 7, lines 7-25; pages 8-19; page 20, lines 20-21; pages 70-73, page 74. Line 2; page 175, lines 19-25); (Exhibit 1, Deposition of ALEX CHIRINKIN, page 22, lines 16-23).

35. On or around July 30, 2006, GITLIN wanted to have the money returned to him, and entered into an agreement with ALEX CHIRINKIN to repay Three Hundred and Fifty Thousand (\$350,000.00) dollars of it with an initial payment of Two Hundred Thousand (\$200,000.00) Dollars, and an additional payment of One Hundred and Fifty Thousand (\$150,000.00) Dollars by December 31, 2006. The parties entered into an agreement that was

signed by both GITLIN and ALEX CHIRINKIN (Exhibit 18). The agreement is clear that the monies are intended as a repayment to GITLIN, however, incorrect on the agreement, is the reference to Pahrump.

36. During his Deposition, GITLIN explained that his loans to ALEX CHIRINKIN were in cash, and as was their custom and practice, there were no writings regarding the loans. GITLIN was concerned that without the back-up documentation for the cash loans to ALEX CHIRINKIN, the repayment might be considered income instead of the repayment of a loan. As a result, during conversations with ALEX CHIRINKIN a decision was made to indicate that the monies represented the repayment of a loan concerning the Pahrump property, as the time period when GITLIN was lending money to ALEX CHIRINKIN coincided with the period when the Pahrump property investment was still active (Exhibit 19, page 101, lines 14-25; page 102-104; page 105, lines 2-12).

**PLAINTIFFS HAVE MADE A PRIMA FACIE SHOWING IN CONNECTION WITH
THEIR CLAIMS FOR COMMON LAW FRAUD
AND ALEX CHIRINKIN'S BREACH OF FIDUCIARY DUTY**

37. The CHIRINKIN Defendants claim that GITLIN has "failed to comply with CPLR 3016 (b) with regard to pleading any fraud claim." Again the CHIRINKIN defendants ignore the Decision of this Court dated November 28, 2007 (Exhibit 17), resulting from their efforts pursuant to C.P.L.R. § 3211, to have the Plaintiffs' cause of action for fraud dismissed pursuant to the pleading requirements under C.P.L.R. § 3016. In the Decision this Court held,

The plaintiff has stated factual allegations in support of each element of fraud for defendant Alex Chirinkin only. The plaintiff alleges that the defendant Alex Chirinkin represented that he would manage the day to day activities of Kew to the benefit of Kew and its member and that this statement was false. Additionally, the defendant continued to counsel the plaintiff in connection with the investment property without divulging that the Property had been transferred and sold thereby omitting a material fact and deceiving the plaintiff.

The plaintiff relied upon this misrepresentation by continuing to believe that the property had not been sold, and as a result, the plaintiff was allegedly damaged.

This Court's decision dated November 21, 2007, was never appealed and is the law of the case and the Plaintiffs' pleadings have been deemed sufficient. *See also* (Exhibit 17, page 21, lines 8-25; page 22 lines 2-20; page 32, lines 2-11). Moreover, in their motion, the Plaintiffs have demonstrated each and every element of their claim regarding the fraud perpetrated by ALEX CHIRINKIN.

38. In regard to the Plaintiffs' claim of breach of fiduciary duty, despite the fact that the heading in Mr. Feinstein's Memorandum of Law states, "Plaintiff fails to make any prima facie showing of Defendant Chirinkin's fraud or breach of fiduciary duty", nothing in his argument addresses this issue. The foregoing notwithstanding, the Decision of this Court dated July 6, 2009 (Exhibit 2), finds that as a Member of Kew, GITLIN was owed a fiduciary duty from ALEX CHIRINKIN, also a Member (That document identifies Mr. Gitlin as having a 50% ownership interest in Kew LLC. That document imposes several obligations on the members, inter alia, a fiduciary obligation and responsibility to the LLC and its members." (Exhibit 2).

39. Defendant ALEX CHIRINKIN, not only flagrantly breached the terms of the operating agreement, he betrayed his fellow Member, GITLIN, he misappropriated the assets of KEW for himself and others, and fraudulently transferred KEW's assets, rendering KEW insolvent. There can be no question that ALEX CHIRINKIN had a duty, he breached the duty, and the Plaintiffs' were damaged.

Defendants' Argument that ACE, LLC, the owner of a Majority Interest in the Pahrump Property, had the "Unrestricted Right" to Transfer KEW'S Interest in the Property to a Third Party has no basis in Law

40. The CHIRINKIN defendants attempt to make an argument that because the Pahrump property had two owners represented by two distinct entities, one with a twenty (20%) percent interest (KEW) and the other with an eighty (80%) percent interest (ACE, LLC), the majority owner had the unrestricted right to transfer the real property, (not just ACE, LLC's share) to a third party, and as an owner KEW, "could not object to or stop the transfer". These arguments are at best frivolous.

41. Two or more distinct owners of real property who cannot agree on the disposition of the property, must look to RPAPL § 901, which reads in relevant part, "[a] person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owner." Id.

42. ALEX CHIRINKIN had no right to transfer the assets of KEW, without the consent of GITLIN, pursuant to both the Operating Agreement, Exhibit 3, and N.Y. Limited Liability Company Law § 606, *supra*.

PLAINTIFFS HAVE DEMONSTRATED A PRIMA FACIE CASE FOR ENTITLEMENT TO JUDGMENT UNDER N.Y. DEBTOR AND CREDITOR LAWS

43. There can be no question that the Plaintiffs have demonstrated their entitlement to judgment as a matter of law on their claims of violations under N.Y. Debtor and Creditor Laws.

44. The CHIRINKIN Defendants' argument that GITLIN didn't produce evidence that he invested any money in KEW is a non-starter; ALEX CHIRINKIN admits that he also did not invest money in connection with the acquisition of the Pahrump property or the Lucky

Bucks property. Moreover, the fact that neither ALEX CHIRINKIN nor EDUARD GITLIN bought the property with their own money does not change either parties' rights as Members of Kew! In addition, GITLIN, who only had a ten (10%) percent interest in Pahrump through his ownership of KEW, signed jointly and severally on the Note (Exhibit 11) with ALEX CHIRINKIN, who individually and through his company ACE, LLC, owned a ninety (90%) percent interest.

45. There can also be no question that KEW was rendered insolvent by the transfers of the Lucky Bucks and Pahrump properties, as after the transfers KEW ceased doing business, and did not have sufficient assets to pay its liability to GITLIN, a fifty (50%) percent Member and Creditor (N.Y. Debtor and Creditor Law § 270).

THE CHIRINKIN DEFENDANTS' DAMAGE ANALYSIS MAKES NO SENSE

46. The CHIRINKIN Defendants attempt to demonstrate that the Plaintiffs' damages are a miniscule amount compared to the actual damages claimed them, with no supporting evidence offered to justify Defendant's arguments.

47. Despite this Court's order dated July 6, 2009 (Exhibit 2), and the Decision by the Second Department affirming the Decision regarding the CHIRINKIN Defendant's discovery obligations, there has never been a copy of any closing statements, no copies of invoices, no copies of wire transfers, no copies of tax bills or any other invoices concerning expenses incurred by ALEX CHIRINKIN in connection with the operation or sale of the Nevada properties, or any other document demonstrating that ALEX CHIRINKIN or a company that he owns and controls, or anyone else, paid anything in connection with the Pahrump and/or Lucky Bucks properties, with the exception of the checks provided by the Defendant ALEX CHIRINKIN, which are included herein as Exhibit 20.

The operation and sale of the Pahrump Property

48. Exhibit 20 consists of twenty checks in the amount of \$6,113.34 and one check in the amount of \$6,724.17, drawn on the account of ACE, LLC, an eighty (80%) percent owner of the Pahrump Property (and the company used by CHIRINKIN to make investments on behalf of Potekhin), and three checks, each in the amount of \$6,113.34 drawn on the account of VSA, a company owned by ALEX CHIRINKIN (and based upon his tax return, ARKADY PAVLOV)³, totaling \$153,444.33.

49. Each of the checks references the Pahrump Property, and based upon this information these monies are assumed to be expenses paid in connection with the Pahrump Property by ACE, LLC and VSA. There are no personal checks from either GITLIN or ALEX CHIRINKIN, all of which is consistent with GITLIN'S position that the financial benefactor of the Pahrump investment, Viktor Potekhin, who was financing the investment through ACE, LLC, in which he had a beneficial interest in the amount of eighty (80%) percent, had no expectation of a personal contribution from GITLIN, CHIRINKIN or from KEW.

50. Even if there was an expectation of a personal contribution from EDUARD GITLIN, ALEX CHIRINKIN or KEW, GITLIN'S contribution would be ten (10%) percent, or \$15,344.43, reflecting his ownership interest in KEW, and CHIRINKIN's contribution would be ninety (90%) percent or \$138,099.90.

51. Next, there is no proof that at closing or any other time, that any monies were transferred to Vicktor Potekhin by ALEX CHIRINKIN, no checks, no proof of wire transfers, no closing statements, no satisfaction of the mortgage, or any other document demonstrating

³ See, Affirmation in Response to Pavlov motion for summary judgment, Exhibit 23

the ALEX CHIRINKIN or Viktor Potekhin made any payments on behalf of KEW, nor is there any evidence through a closing statement or otherwise of the amount of the payoff for the mortgage encumbering KEW, which upon the purchase in 1998, was \$696,050.00, despite the fact that these documents were part of Plaintiffs' documents demands. If for arguments sake, which we contend would be improper here, the mortgage remained the same and KEW was expected to pay its proportionate share of the payoff based upon its interest in the property, rather than the required payment being funded by Victor Potekhin through ACE, LLC, GITLIN's share of the payoff would be \$69,605.00, as a ten (10%) percent owner of KEW, with the balance being the responsibility of ALEX CHIRINKIN (ten [10%] percent and ACE, LLC (eighty [80%] percent).

52. The only document demonstrating that an expense was paid at the Pahrump closing, is the deed and the Declaration of Value Form, Exhibit 21, which indicates that the property was sold for \$4,000,000.00, and that a transfer fee of \$15,600.00 was paid. Even if GITLIN was responsible for a portion of the closing costs, his share of the transfer tax would be \$1,560.00. Thus, even assuming that GITLIN was required to pay toward the expenses of KEW'S interest in the Pahrump investment, his total contribution based upon the documents that have been made available in this litigation totals \$86,509.43 against his Ten (10%) percent share of the purchase price of Four Million (\$4,000,000.00) Dollars, or Four Hundred Thousand (\$400,000.00) Dollars, for a net to GITLIN, of \$313,490.57. It is patently absurd, that the CHIRINKIN Defendants take the position that because Defendant PAVLOV paid \$320,000.00 to VSA, not KEW, but was given a 25% interest in the Pahrump property, that this should have any effect on GITLIN'S share through his ownership of KEW.

The Sale and Operation of the Lucky Bucks Property

53. On June 2, 1998, Kew Apartment Holdings LLC, acquired a fifty (50%) interest in a Nevada property known as APN (Assessor Parcel Number) 520-670-006, from a company known as Lucky Bucks (hereinafter the "Lucky Bucks Property"). The other owners of Lucky Bucks were Modern Way Business Enterprises, Inc., a New York State Corporation which owned a 25% interest, and Feldbyn Roman, who owned a 25% interest (Exhibit 22). The purchase price of the property was \$522,900.00

54. There is no question or any evidence to the contrary that neither GITLIN nor ALEX CHIRINKIN paid anything toward the acquisition of the Lucky Bucks property. Nor is there a question that there was a mortgage in the amount of \$352,500.00, reflecting a down payment in the amount of \$170,400.00. However, there is no record, no copy of checks, no copies of any written agreement or anything else to indicate who paid the down payment, whether or not they were repaid, and when. Nor is there any record, copy of any check, bank statement, closing statement or any other document reflecting the payment of property taxes, or any other carrying costs in connection with the Lucky Bucks property, demonstrated by the CHIRINKIN Defendants. There is also no question that ALEX CHIRINKIN was overseeing both Nevada investments.

55. There is no question that the Lucky Bucks property was fraudulently transferred and then sold to the U.S. Government for \$1,632,000.00. Before the fraudulent transfer of the Lucky Bucks property, KEW'S interest was fifty (50%) percent. Thus, KEW'S share of the sales price would be \$816,000.00, and GITLIN'S fifty (50%) percent interest in KEW would have been worth \$408,000.00. Although there is no closing statement, GITLIN'S twenty-five (25%) percent share of the mortgage would have been \$88,125.00, resulting in a net to GITLIN of \$319,875.00. Thus, based upon the information available, GITLIN is

entitled to no less than \$633,365.57 in connection with both properties, assuming that KEW had an obligation for contribution in connection with the Pahrump Property. In the absence of any obligation on the Pahrump property, GITLIN is entitled to \$719,875.00, plus interest from the time of the fraudulent transfers.

**THE ATTEMPT BY THE CHIRINKIN DEFENDANTS TO DISPARAGE THE
PLAINTIFF BASED UPON THE ACTS OF PRIOR COUNSEL WHICH ARE NOT
RELATED TO THIS MATTER, MUST BE REJECTED BY THE COURT**

56. Unable to present a credible, honest, legal argument in connection with the CHIRINKIN Defendants conduct, their counsel resorts to an attempt of character assassination, based upon the unrelated acts of GITLIN'S prior counsel. Such tactics are outrageous and should be rejected by this Court.

57. The CHIRINKIN defendant's offer not one plausible argument that could lead this court to conclude that the formation of KEW and the supporting documents prepared and authored in 1997 by Alfred Parisi, a former attorney that represented both GITLIN and ALEX CHIRINKIN, clairvoyantly anticipated a dispute between the parties ten (10) years later in 2007, and that Parisi misrepresented the facts and agreements between the Parties in 1997 to somehow benefit the interests of GITLIN, is ridiculous in the extreme.

58. Moreover, the documents that the CHIRINKIN Defendants refer to are not "newly discovered" as they allege. This litigation was commenced in 2007. When attorney Stuart Moshell was accused of wrong doing GITLIN terminated his relationship with Moshell, and brought approximately sixty (60) to seventy (70) files, most in total disarray, to your deponent. GITLIN then retained your deponent to represent him in various matters. As it took some time to go through Moshell's files, the operating agreement was not immediately

discovered, as it was in a file that was improperly labeled. As soon as it was discovered the Defendants were made aware of its existence.

59. Based upon the foregoing, the CHIRINKIN Defendants have not met their burden to defeat the Plaintiff's motion for summary Judgment.

WHEREFORE, Plaintiff demands judgment against Defendants as follows:

On the FIRST CAUSE OF ACTION FOR FRAUD against Defendant ALEX CHIRINKIN, total damages in connection with the Pahrump Property, in an amount no less than One Million, Five Hundred and Eighty-Thousand (\$1,580,000.00) Dollars plus interest, costs and punitive damages in the amount of Two Million (\$2,000,000.00) Dollars, and such other and further relief as this Court deems just and proper, and as to the Lucky Bucks Property, damages in the amount of Three Hundred, Nineteen Thousand, Eight Hundred and Seventy-Five (\$319,875.00.) Dollars, plus interest, costs and punitive damages in the amount of Four Hundred Thousand (\$400,000.00) Dollars, and such other and further relief as this Court deems just and proper.

On the SECOND CAUSE OF ACTION FOR UNJUST ENRICHMENT as to Defendants ALEX CHIRINKIN, NELLIE CHIRINKIN, and ARKADAY PAVLOV, total damages in connection with the Pahrump Property, in an amount no less than One Million, Five Hundred and Eighty-Thousand (\$1,580,000.00) Dollars plus interest, costs and punitive damages in the amount of Two Million (\$2,000,000.00) Dollars, and such other and further relief as this Court deems just and proper, and as to the Lucky Bucks Property, damages in the amount of Three Hundred, Nineteen Thousand, Eight Hundred and Seventy-Five (\$319,875.00.) Dollars, plus interest, costs and punitive damages in the amount of Four

Hundred Thousand (\$400,000.00) Dollars, and such other and further relief as this Court deems just and proper.

On the THIRD CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY, SELF DEALING AND MISAPPROPRIATION OF CORPORATE ASSETS as to Defendant ALEX CHIRINKIN, total damages in connection with the Pahrump Property, in an amount no less than One Million, Five Hundred and Eighty-Thousand (\$1,580,000.00) Dollars plus interest, costs and punitive damages in the amount of Two Million (\$2,000,000.00) Dollars, and such other and further relief as this Court deems just and proper, and as to the Lucky Bucks Property, damages in the amount of Three Hundred, Nineteen Thousand, Eight Hundred and Seventy-Five (\$319,875.00.) Dollars, plus interest, costs and punitive damages in the amount of Four Hundred Thousand (\$400,000.00) Dollars, and such other and further relief as this Court deems just and proper.

On the FOURTH CAUSE OF ACTION FOR AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY against Defendant NELLIE CHIRINKIN, total damages in connection with the Pahrump Property, in an amount no less than One Million, Five Hundred and Eighty-Thousand (\$1,580,000.00) Dollars plus interest, costs and punitive damages in the amount of Two Million (\$2,000,000.00) Dollars, and such other and further relief as this Court deems just and proper, and as to the Lucky Bucks Property, damages in the amount of Three Hundred, Nineteen Thousand, Eight Hundred and Seventy-Five (\$319,875.00.) Dollars, plus interest, costs and punitive damages in the amount of Four Hundred Thousand (\$400,000.00) Dollars, and such other and further relief as this Court deems just and proper.

On the FIFTH CAUSE OF ACTION FOR VIOLATIONS OF N.Y. DEBTOR CREDITOR LAW as to all Defendants, total damages in connection with the Pahrump

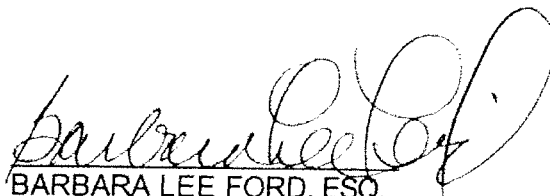
Property, in an amount no less than One Million, Five Hundred and Eighty-Thousand (\$1,580,000.00) Dollars plus interest, costs and punitive damages in the amount of Two Million (\$2,000,000.00) Dollars, and such other and further relief as this Court deems just and proper, and as to the Lucky Bucks Property, damages in the amount of Three Hundred, Nineteen Thousand, Eight Hundred and Seventy-Five (\$319,875.00.) Dollars, plus interest, costs and punitive damages in the amount of Four Hundred Thousand (\$400,000.00) Dollars, and such other and further relief as this Court deems just and proper.

On the SIXTH CAUSE OF ACTION for Breach of Contract as against Defendant ALEX CHIRINKIN, total damages in connection with the Pahrump Property, in an amount no less than One Million, Five Hundred and Eighty-Thousand (\$1,580,000.00) Dollars plus interest, costs and punitive damages in the amount of Two Million (\$2,000,000.00) Dollars, and such other and further relief as this Court deems just and proper, and as to the Lucky Bucks Property, damages in the amount of Three Hundred, Nineteen Thousand, Eight Hundred and Seventy-Five (\$319,875.00.) Dollars, plus interest, costs and punitive damages in the amount of Four Hundred Thousand (\$400,000.00) Dollars, and such other and further relief as this Court deems just and proper.

On the SEVENTH CAUSE OF ACTION for Judicial Dissolution pursuant to Limited liability Company Law § 702, 703, and § 704 , a decree dissolving Kew Apartment Holdings, Corp., an order for an accounting, and order to distribute to Plaintiff GITLIN, his rightful share of the profits of Kew, upon information and belief believed to be in connection with the Pahrump Property, an amount no less than One Million, Five Hundred and Eighty-Thousand (\$1,580,000.00) Dollars plus interest, and as to the Lucky Bucks Property, damages in the amount of Three Hundred, Nineteen Thousand, Eight Hundred and Seventy-Five

(\$319,875.00.) Dollars, plus interest, costs and such other and further relief as this Court deems just and proper.

Dated: April 26, 2011
Floral Park, New York



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