Brief of Plaintiff-Appellant

Preliminary Statement

Plaintiff-Appellant Anastasios Manitaras ("Appellant") respectfully submits this Brief in support of his appeal from the Decision and Order, and the Judgment of the Supreme Court, Westchester County (Hon. Kenneth W. Rudolph, J.S.C.), which granted Defendants-Respondents' motion for summary judgment and declared that Respondents, a bare majority of the Members of Respondent Kisco Radio Circle Associates, LLC (the "Company"), are authorized under the Company's Operating Agreement "and applicable law" to authorize the Managing Members to sell the Company's sole asset, notwithstanding the facts that: (1) the Members have no power to manage the Company, (2) the Managing Members have no power to do an act that will terminate the Company's business and existence, (3) the sale of the Company's sole asset will cause the Company's dissolution, and (4) under the Operating Agreement dissolution requires the unanimous consent of all Members.

The Court Below held that Respondents, a majority (but not all) of the Members of a manager-managed limited liability company, may vote to authorize the Managing Members to sell the Company's sole asset, even though they admit

that the Operating Agreement denies them the power to do so. Under the Operating Agreement, the only way for the Members to authorize a sale of the Company's sole asset is by unanimous consent.

When Respondents received (or solicited) an offer to purchase the Company's sole asset, Appellant - the holder of 49.89% of the Membership Interests and one of three Managing Members - objected and withheld his consent. Nevertheless, Members holding a thread-bare 50.11% of the Membership Interests purported to authorize the other Managing Members to enter into a contract to sell the Company's sole asset.

The Operating Agreement provides that the Members may only exercise such rights or powers as are granted to them by "the express terms of this Agreement." (R.48, §9.1) Respondents admit that there is no provision in the Operating Agreement which gives a majority (or less than all) of the Members the right or power to authorize the Company's sale of its sole asset. (R.31, ¶23; R. 62, 21)

The Operating Agreement also expressly provides that the Managing Members "shall have full, exclusive and complete discretion to manage and control the business and affairs of the Company...and to take all actions as they deem necessary or appropriate to accomplish the purpose of the Company as set forth

herein" (R.49, §10.1(b), emphasis added), and that they have no power to bind the Company to an act that "is not apparently for carrying on the Company's business in the ordinary course". (*Id*.) Contrary to Supreme Court's conclusion, settled New York law recognizes that the Company's sale of its sole asset is an act that terminates the Company and, thus, is not within the Managing Members' powers. (*See* pp. 17-20, *infra*.)

Respondents argued, and the Court Below apparently concluded, that the provisions of §402 of the Limited Liability Company Law (the "Act") may be relied upon as authority to disregard the Operating Agreement and confer on a majority (but less than all) of the Members a power which is denied them in the Operating Agreement.

Such a result violates the fundamental maxim that a contract should be construed in such a way as to reconcile and give effect to all of its provisions, and it violates settled law that where there is an operating agreement, its terms should be applied. Respondents' conduct, and the Judgment, are inconsistent with this maxim. If Respondents had wanted to provide that a majority (but less than all) of them could authorize a sale of the Company's sole asset, the Operating Agreement could have so provided. But it does not.

The sale of the Property causes the Company's dissolution. (R.52-53, §12.1(i)) The Operating Agreement provides that the dissolution of the Company may only be achieved with the consent of all Members. (R.53, §12.1(iii).)

The Members have no power to "authorize" the Managing Members to sell the Property. The Managing Members have no power or right to bind the Company to a sale of its sole asset, as such an act is not in furtherance of the Company's business in the ordinary course. (R.49, §10.1(b))

The Judgment should be vacated, and this Court should direct the entry of judgment declaring that Respondents have no right or power to bind the Company to a contract to sell its sole asset, without the consent of all Members.

Statement of the Questions Presented

1. Did the Court Below err in holding that a bare majority of the Members may purport to exercise a right or power which they do not have under the Operating Agreement: *to wit*, the power to authorize the Managing Members to sign a contract to sell the Company's sole asset?

The Court erred.

2. Did the Court Below err in holding that the Managing Members may sign a contract, and thus bind the Company to sell it's sole asset and terminate its

existence, without the unanimous consent of the Company's Members, as required by the Operating Agreement?

The Court erred.

3. Did the Court below err in failing to apply fundamental maxims of contract construction when it failed to give effect to all provisions of the Operating Agreement?

The Court erred.

4. Did the Court Below err in holding that §402 of the Act may be applied to confer on the Company's Members a right or power that is denied them in the Operating Agreement, which expressly provides that it constitutes their entire agreement?

The Court erred.

5. Did the Court Below err in holding that the sale of the Property - the Company's sole asset - is "an appropriate act in furtherance of the [Company's] purpose"?

The Court erred.

Statement of the Case

The Facts

The Company was formed in 2001 for the sole purpose of owning and operating one piece of real property - 40 Radio Circle, Mount Kisco, New York (the "Property") (R.41). The Property is and always has been the Company's sole asset. The Company was formed when a prior partnership among the parties was converted into a limited liability company and the Property was conveyed to the Company. (R.37-38, §1.1)

In the summer of 2007, Respondents received (or solicited) an offer for the Company to sell the Property. (R.67-69) Appellant, the holder of approximately 49.89% of the Company's Membership Interests (R.28) and far-and-away the holder of the largest share of such Membership Interests opposes the sale and has withheld his consent. (R.30)

The individual Respondents, being all of the Members of the Company other than Appellant, purportedly signed consents authorizing the Managing Members to enter into a contract to sell the Property. (*See e.g.* R.70) The Managing Members did not act on their own authority - whatever that may be - to sell the Property. Rather, as their counsel made plain in his affidavit in support of Respondents' motion for summary judgment:

> ...it is the opinion of the Company that because the majority of the Members holding the majority of the LLC Interests has approved the sale, the Managing Members thereof, who are the only persons authorized by the Operating Agreement to bind the Company, have been authorized to accept the Diamond Properties offer to purchase the Company's real property, and to execute and deliver any and all documents necessary and required to complete the sale.

(R.21)

Respondents acknowledge that nothing in the Operating Agreement confers on less than all of the Members the right or power to authorize the Managing Members to sell the Property or terminate the Company's existence. (R.19-20)

Appellant commenced this action seeking a declaration that Respondents have no authority to sell the Property without the unanimous consent of all Members - including that of Appellant. Respondents answered the Complaint (R.62-64) and simultaneously moved for summary judgment. (R.12) A few days later, Respondents signed a contract to sell the Property.[1]

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[1] The Contract of Sale was not a part of the Record in the Court Below. The Contract was provided to Appellant's counsel after that motion was submitted, and before it was decided, at the direction of the Court Below. The Contract is an exhibit to Appellant's motion for a preliminary injunction pending appeal, which motion was denied by this Court's Order dated December 20, 2007. This Court may take judicial notice of its own records. Musick v. 330 Wythe Ave. Associates, LLC, 41 A.D.3d 675, 838 N.Y.S.2d 620 (2nd Dep't 2007).

The Operating Agreement

The Operating Agreement provides that the "Purpose" of the Company is:

> To own and operate the Property and to engage in any lawful act or activity for which limited liability companies may be formed under the Act, and to engage in any and all activities necessary, advisable or incidental thereto.

(R.41, §3.1, emphasis added)

The Operating Agreement also provides that the Members have no power or role in managing the affairs of the Company. Section 9.1 of the Operating Agreement provides that:

> The Members shall have the power to exercise any and all rights or powers granted to the Members pursuant to the express terms of this Agreement.

(R.48, §9.1) The Operating Agreement, which states that it "constitutes the complete and exclusive agreement among the Members with respect to the subject matter herein" (R.58, §17.3), does not state that the Members have such and powers as may otherwise be available under the Act.

Respondents acknowledge that the Members have no power to bind the Company (R.21), and that there is no provision in the Operating Agreement which

gives them (or a majority of them) the right to vote to sell the Company's Property, its sole asset:

> The Managing Members shall be the sole Person with the power to bind the Company, except and to the extent that such power is expressly delegated to any other Person by the Managing Members.

(R.49, §10.1(b))

The Operating Agreement also provides that:

> The Managing Members shall have full, exclusive and complete discretion to manage and control the business and affairs of the Company, to make all decisions affecting the business and affairs of the Company and to take all such actions as they deem necessary or appropriate to accomplish the purpose of the Company as set forth herein.

(R.49, §10.1(b), emphasis added)

But §10.1(b) also makes clear that the Managing Members' authority is not unlimited. Rather, the Managing Members may only act to "carry[] on the Company's business in "the ordinary course":

> Unless otherwise expressly authorized by this Agreement, an act of the Managing Member that is not apparently for carrying on the Company's business in the ordinary course shall not bind the Company.

(R.49, §10.1(b), emphasis added)

The plain language of the Operating Agreement, thus, provides that the Managing Members have no power to cause the Company to do an act that is not for the purpose of "carrying on the Company's business in the ordinary course." Neither §10.2 of the Operating Agreement (which sets forth the powers of the Managing Members) (R.49-50) nor any other provision, confers on the Managing Members the power to act other than for the purpose of carrying on the Company's business in the ordinary course, or to sell the Company's sole asset, which necessarily results in the termination of the Company.

The plain language of the Operating Agreement also makes clear that the Members cannot authorize the Managing Members to do, and the Managing Members may not do, an act that is not in the ordinary course of the Company's business. Section 10.2 expressly provides that:

> The majority of the Managing Members shall have the right, power and authority, in the management of the business and affairs of the Company, to do or cause to be done any and all acts, at the expense of the Company, deemed by the Managing Members to be <u>necessary or appropriate to effectuate the business, purposes and objectives of the Company</u>.

(R.49, emphasis added) The powers then enumerated therein do not include the power to contract to sell the Company's sole asset - only the power to enter into leases. (R.49-50)

Section 10.2(iii) of the Operating Agreement, which addresses the Managing Members' power to enter into contracts on the Company's behalf, provides that their power and authority to enter into contracts is also limited to contracts which carry on the Company's business in the ordinary course. They may:

> [n]egotiate, do any act, or enter into or execute and deliver, in furtherance of any or all of the purposes of the Company, any and all agreements, contracts, documents, certifications and other instruments of any nature deemed necessary, convenient or desirable in connection with the business and affairs of the Company....

(R.49, emphasis added)

Respondents acknowledge that the Operating Agreement does not give less than all the Members any right or power to sell, or to authorize the Managing Members to sell, the Property. (R.21)

Respondents argued in the Court Below that a majority of the Members have the power to vote to sell the Company's sole asset notwithstanding the facts that: (a) the Operating Agreement allows them to exercise only the powers given to them in the Operating Agreement, and (b) the Operating Agreement gives them no

power to bind the Company to a sale of its sole asset absent unanimous consent of all Members. (R.21-22)

Pursuant to Section 12.1(I) of the Operating Agreement, the sale of the Company's Property, its sole asset, causes the Company's automatic dissolution. (R.52) Section 12.1(iii) provides that dissolution of the Company requires the "written consent of all Members." (R.53)

Because the sale of the Property results in the termination of the Company, as a matter of fact and law, such a sale is not in the ordinary course of the Company's business. Plainly, the sale of the Property is not in furtherance of the Company's Purpose, as stated in the Operating Agreement, which is to "own and operate the Property" - this one piece of property. (R.41, §3.1)

The Proceedings Below

Supreme Court granted Respondents' motion for summary judgment and dismissed the Complaint. Supreme Court held that the sale of the Property "would be an appropriate act in furtherance of the [Company's] purpose" (R.5) and implicitly adopted Respondents' argument that the Operating Agreement contains no provision which addresses the authority of the Members, or the vote required, to act to sell the Property. (R.5)

Supreme Court also implicitly held that the provisions of §402(d)(2) of the Act override the plain provisions of the Operating Agreement and allow a majority of the Members to authorize the Managing Members to sell the Company's Property. (*Id*.)

The Judgment declares that:

> ...pursuant to [the Company's] Operating Agreement and/or applicable law, the [Company's] Managing Members, authorized by the Consent of the Members holding the majority of LLC Interests, can sell the [Company's] sole asset, notwithstanding the fact that such sale will cause a dissolution of the [Company].

(R.11)

Appellant subsequently moved this Court for an order restraining Respondents from proceeding with the sale of the Property. A temporary restraining order was granted on December 4, 2007. By Order dated December 20, 2007, this Court denied Appellant's motion, and Respondents' cross-motion for a preference in calendaring the appeal. (M64051)

Argument

Point I

UNDER THE OPERATING AGREEMENT,

RESPONDENTS HAVE NO POWER TO SELL THE COMPANY'S SOLE ASSET

A. The Standard for Construing an Unambiguous Agreement

The Operating Agreement is a contract and, as such, it must be construed and enforced in accordance with its terms. The meaning of the Operating Agreement must be gleaned from a review of the whole document, and it must be construed so as to effectuate, not frustrate, the parties' purpose. *See* Bailey v. Fish & Neave, 8 N.Y.3d 523, 837 N.Y.S.2d 600 (2007) (applicable to partnership agreements).

The primary rule of construction of contracts is that "when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations'." International Marine Investors and Management Corp. v. Wirth, 245 A.D.2d 544, 666 N.Y.S.2d 503 (2nd Dep't 1997), *citing* Weisberger v. Goldstein, 242 A.D.2d 622, 662 N.Y.S.2d 544 (2nd Dep't 1997), *quoting* Slamow v. Delcol, 174 A.D.2d 725, 726, 571 N.Y.S.2d 335 (2nd Dep't 1991), *aff'd*, 79 N.Y.2d 1016, 584 N.Y.S.2d 424 (1992). In this case, Supreme Court found the Operating agreement to be unambiguous. (R.6)

As this Court recently recognized, "[a] contract should be construed, wherever possible, in such a way as to reconcile and give effect to all of its provisions," Novelty Crystal Corp. v. PSA Institutional Partners, LP, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2008 WL 141502, *1 (2nd Dep't Jan. 15, 2008), *citing* God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc., LLP, 6 N.Y.3d 371, 374, 812 N.Y.S.2d 435 (2006). A reading of the contract should not render any portion meaningless. Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 834 N.Y.S.2d 44 (2007).

Supreme Court's Order and Judgment are inconsistent with this fundamental maxim. It is inconsistent with these fundamental principles to allow Respondents to exercise a power that the Operating Agreement does not confer upon them.

B. The Operating Agreement Deprives a Majority (but not all) of the Members of the Authority to Sell the Property

Respondents acknowledge that the Operating Agreement denies the Members the power to vote to sell the Property - except by unanimous consent. (R.53, §12.1(iii)) Yet, Respondents purport to have done precisely that.

The Operating Agreement states that it "constitutes the complete and exclusive agreement among the Members with respect to the subject matter herein, and supersedes all prior agreements and understandings (written or oral) as to the subject matter herein." (R.58, §17.3)

There is no dispute that the Operating Agreement does not give Respondents - who comprise a bare majority of the Members - the power to sell the Company's sole asset. Similarly, there is no provision giving the Managing Members the authority to sell the Property. The Managing Members may not perform any act which is not in furtherance of carrying on the Company's business in the ordinary course. Section 10.1(b) states that:

> Unless otherwise expressly authorized by this Agreement, an act of the Managing Member that is not apparently for carrying on the Company's business in the ordinary course shall not bind the Company.

(R.49)

Accordingly, a majority of the Members may not exercise a power they do not have, and thereby authorize the Managing Members to do an act they have no power to do under the Operating Agreement.

1. The Sale of the Property is not in Furtherance of the Company's Purpose

Supreme Court held that the Company's sale of its sole asset is an act in furtherance of the Company's purpose. (R.5)

This conclusion is wrong as a matter of fact and law.

First, as a matter of fact, the Operating Agreement states that the "Purpose" of the Company is to own and operate but one asset - the Property. (R.41, §3.1) The Company is not a real estate company which is engaged in the buying and selling of many properties. It is a single-asset company. The sale of the Property will necessarily terminate - not continue - the Company's business; the Company cannot own and operate a piece of property it has sold. Moreover, the Operating Agreement expressly provides that the Company terminates and dissolves upon the sale of the Property. (R.53, §12.1(i))

Second, it is well-settled that the "transfer of its sole piece of real estate by a real estate corporation is not within its regular course of business, as matter of law." Edbar Corp. v. Sementilli, 2 Misc. 3d 1001(A), 784 N.Y.S.2d 920 (Sup. Ct. Bronx Co. 2004), *quoting* Vig v. Deka Realty Corp., 143 A.D.2d 185, 531 N.Y.S.2d 633 (2nd Dep't 1988); LaConti v. Urban, 309 A.D.2d 735, 765 N.Y.S.2d 634 (2nd Dep't 2003); Bouton v. Thomas Bros. Sales Corp., 179 A.D.2d 612, 578 N.Y.S.2d 232 (2nd Dep't 1992); *see* Eisen v. Post, 3 N.Y.2d 518 (1957) (Fuld, J.,

dissenting); Lindenbaum v. Albany Post Property Assoc., Inc., 297 A.D.2d 661, 747 N.Y.S.2d 118 (2nd Dep't 2002).

The test of whether or not a transfer is in the usual or regular course of the business actually conducted is whether the sale is "in furtherance of the express objects of its existence, or something outside of the normal regular course of business." Posner v. Post Road Development Equity, LLC, 253 A.D.2d 866, 678 N.Y.S.2d 350 (2nd Dep't 1998); Dukas v. Davis Aircraft Product, Inc., 131 A.D.2d 720, 516 N.Y.S.2d 781 (2nd Dep't 1987).

The Managing Members have no power or authority to bind the Company to a contract to sell the Property - even if a bare majority of the Members have purportedly authorized them to do so - because a majority of the Members (no matter how large that majority is) has no such power (R.48, §9.1), and because the Managing Members have no power to act to terminate (or to do an act that will result in the termination of) the Company without the unanimous consent of all Members. (R.49, 53) Bouton, *supra*; Vig, *supra*.

The Managing Members have no authority to act on matters that are outside their authority. TIC Holdings, LLC v. HR Software Acquisition Group, Inc., 194 Misc. 2d 106, 750 N.Y.S.2d 425 (Sup. Ct. N.Y. Co. 2002), *aff'd,* 301 A.D.2d 414, 755 N.Y.S.2d 19 (1st Dep't 2003) ("The motion court correctly determined that the

purported asset transfer by defendant Spivak in his claimed capacity as plaintiff's manager was void because the transfer of a substantial portion of plaintiff's assets was not in the ordinary course of business [citation omitted], and was therefore not authorized under plaintiff's Operating Agreement or" the Act - even under §402(d)); In re Kunin, 281 A.D. 635, 121 N.Y.S.2d 220 (1st Dep't 1953), *aff'd*, 306 N.Y. 967 (1954); Fleming v. Sarva, 5 Misc. 3d 1017(A), 798 N.Y.S.2d 709 (Sup. Ct. Nassau Co. 2004).

The sale of the Company's sole asset is an extraordinary matter, and it is, as a matter of law and under the Operating Agreement, a matter as to which the Managing Members have no voting authority. The Managing Members have no actual or apparent authority to enter into an extraordinary transaction, *id*., *citing* Hastings v. Brooklyn Life Ins. Co., 138 N.Y. 473 (1893), and where the sale or transfer causes the Company's dissolution or termination, it is by definition not in furtherance of the Company's purposes or existence. *Id.*

Because: (1) the sale of the Company's sole asset is outside the regular course of the Company's business, (2) the Operating Agreement expressly provides that such a sale will cause the dissolution of the Company and (3) dissolution can be authorized only with the consent of all Members (*id*.), neither the Managing Members, nor a majority of the Members, has the power to authorize

or bind the Company to such a sale without the consent of all of the Members - including Appellant.

Under the plain language of the Operating Agreement, neither a majority of the Members nor a majority of the Managing Members has the right or the power to authorize the sale of the Company's sole asset - which necessarily results in the Company's dissolution - without the consent of all Members. (R.52-53, §§12(1)(i), 12(1)(iii).)

2. Section 402 of the Act is Unavailing

Recognizing that the Operating Agreement does not give them the right or power to sell the Property without the unanimous consent of the Members, Respondents argued that they "gained the power, by virtue of the" Act. (R.22) Respondents are wrong.

Section 402(d)(2) of the Act provides that "[e]xcept as provided in the operating agreement,...the vote of at least a majority in interest of the members entitled to vote thereon shall be required to" approve the dissolution of the Company or the sale of its sole asset. In this case, the Operating Agreement provides otherwise.

Respondents argued that §402 is a "default" provision that is applicable in this case because there is no provision in the Operating Agreement which states, in

haec verba, that 'the unanimous consent of all Members is required to sell the Property.' Respondents are wrong for several reasons:

First, to the extent the Act is considered a "default" Act, that means only that the provisions of the Act apply in the absence of an operating agreement. §402(d). However, where, as here, there is an operating agreement, the provisions of that operating agreement govern. As the Court of Appeals recently stated in Ederer v. Gursky, ___ N.Y.3d ___, ___ N.Y.S.2d ___, 2007 WL 4438937 (Dec. 20, 2007), statutory provisions such as the Act apply in the absence of an agreement, not in the absence of a particular provision ("default requirements ...come into play in the absence of an agreement"). There is, thus, no "gap" in the Operating Agreement which would allow Respondents to "gain" a power from the Act that is denied them by their Operating Agreement, which admittedly is their entire agreement. Tzolis v. Wolff, 12 Misc. 3d 1151(A), 819 N.Y.S.2d 852 (Sup. Ct. N.Y. Co. 2006), *aff'd in part, rev'd on other grds*, 39 A.D.3d 138, 829 N.Y.S.2d 488 (1st Dep't 2007); Out of the Box Promotions, LLC v. Koschitzki, 15 Misc. 3d 1134, 841 N.Y.S.2d 821 (Sup. Ct. Kings Co. 2007) (default provisions applied in absence of operating agreement); Spires v. Casterline, 4 Misc. 3d 428, 433, 778 NY.S.2d 259 (Sup. Ct. Monroe Co. 2004) (same).

Second, Respondents ignore the fact that the Operating Agreement (which was drafted by Respondents' counsel), does provide a means by which the Company's sole asset, and the consequent termination of the Company, may be effectuated: with the unanimous consent of all Members. The Operating Agreement, which the Court found to be unambiguous, should be interpreted and enforced in accordance with all of its terms. Tzolis, *supra*, 39 A.D.3d at 145.

Third, Respondents' resort to and reliance on §402(d)(2) as authority for its position would, in fact, (a) ignore certain provisions of the Operating Agreement and (b) turn §402(d)(2) - a provision which was intended to protect against the oppression of minorities, *see* Overhoff v. Scarp, Inc., 12 Misc. 3d 350, 360, 812 N.Y.S.2d 809, 818 (Sup. Ct. Monroe Co. 2005)[2] - into a sword by which a bare majority can ignore provisions of the Operating Agreement and terminate the Company's existence without the unanimous consent required by the Operating Agreement.

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[2] Section 402, like similar provisions in New York's Partnership Law and the Business Corporation Law, is intended to impose a heightened voting and consent requirement when an entity seeks to enter into an extraordinary transaction including the sale of all or substantially all of its assets. *See* BCL §909; Partnership Law, §20(2) ("An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners"). New York law deprives an officer (or a Manager or a Member) of the power to act in extraordinary circumstances. Respondents' argument, and the Judgment would turn that law on its head. *See* Ederer, *supra*.

Indeed, application of the provisions of the Operating Agreement is not only required by well-settled rules of contract and statutory construction, but it also serves and furthers the very purpose sought to be achieved by §402.

Respondents' position and Supreme Court's apparent holding - that a simple majority of the Members can authorize a sale of the Company's sole asset (outside of the Company's ordinary business) and thereby terminate the Company - ignores the plain language of the Operating Agreement and would improperly allow Respondents to do indirectly what they are precluded from doing directly. Broadwall America, Inc. v. Bram Will-El, LLC, 32 A.D.3d 748, 821 N.Y.S.2d 190 (1st Dep't 2006); Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae, 243 A.D.2d 168, 674 N.Y.S.2d 280 (1st Dep't 1998) ("a party may not accomplish by indirection that which it is forbidden to do directly"); Alanthus Corp. v. Travelers Ins. Co., 92 A.D.2d 830, 460 N.Y.S.2d 549 (1st Dep't 1983); Redding v. Gulf Oil Corp., 38 A.D.2d 850, 330 N.Y.S.2d 158 (2nd Dep't 1972).

Respondents' counsel drafted the Operating Agreement. (R. 14) The Operating Agreement should not be interpreted in a manner that ignores certain of its provisions and confers on the Members and the Managing Members powers which the Members expressly agreed in writing they do not have.

Conclusion

The Judgment should be vacated and Supreme Court should be directed to enter judgment declaring that Respondents are not authorized to sell the Company's Property absent unanimous consent of all Members.

Dated: February 13, 2008 **BENOWICH LAW, LLP**

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