SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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JAMES L. MELCHER,	Index No. 604047/2003
Plaintiff,	Calendar No. 2007L-02688
-against-	IAS Part 58
APOLLO MEDICAL FUND MANAGEMENT LLC and BRANDON FRADD,	Hon. Donna Mills
Defendants.	

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PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' POST-TRIAL MOTION

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Dated: June 23, 2009

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PRELIMINARY STATEMENT

Defendants' post-trial motion dated June 12, 2009 is limited to the Third Cause of Action, for defendant Fradd's breach of fiduciary duty. Defendants' motion is without merit. In addition, it is marked by an enormous lack of candor.

In arguing that the cause of action for fiduciary duty is limited by a clause in the contract about Members being able to pursue their "own interests," or that there is no applicable fiduciary duty under Delaware law, defendants showed enormous lack of candor in failing to bring to the attention of this Court that they have already lost that argument repeatedly, including before the First Department. In arguing that the cause of action for fiduciary duty was not properly pleaded, defendants showed enormous lack of candor in failing to bring the attention of this Court that they have already lost that argument repeatedly, not just in this Court, but in the all other courts that have considered the issue.

This Court's trial rulings and jury instructions were in accord with the decisions of all prior courts that have considered the subject, and therefore cannot be erroneous.

Defendants' argument that the verdict was not supported by sufficient evidence shows a similar lack of candor. Defendants simply pretended that the mountain of uncontradicted evidence against Fradd did not exist. Nowhere did they mention the long list of admissions by defendant Fradd himself that supported the jury verdict. Nowhere did they mention that their own designated hedge fund expert, Boris Onefater, came to court, but refused to testify. Defendants' motion is without merit, was uncandid in the extreme, and should be denied.

I. THERE WAS A MOUNTAIN OF UNCONTRADICTED EVIDENCE TO SUPPORT THE JURY VERDICT FOR BREACH OF FIDUCIARY DUTY

The existence of custom and practice in the hedge fund industry was conclusively

established by the uncontradicted testimony of Michael Tannenbaum, Esq., the former president of the Hedge Fund Association. The undisputed custom and practice in the hedge fund industry is that the fees from the offshore branch of a hedge fund are shared among the owners of the onshore branch, because both are considered simply components of the same business. As Mr. Tannenbaum testified:[1]

> What you describe is a side by side hedge fund arrangement, U.S. and non-U.S. For all intents and purposes, all part of the same business, two divisions so to speak, in the same business, so that the owners of the company, if they are going to split the domestic fees in a particular way or subject to a particular formula, they would be splitting -- the custom and usage would be they are splitting the offshore funds in precisely the same manner. *T-678:21-679:5. (Emphasis added.)*
>
> I think, I can't think of a situation involving two U.S. owners where the formula for the U.S., for the U.S. management fee, performance fee split formula, is not applied precisely the same way in the offshore situation. I don't know of any time in the last 30 years that's happened. *T-680:22-681:3. (Emphasis added.)*

That testimony was literally uncontradicted: defendants designated a purported hedge fund expert, one Boris Onefater, who is currently employed in a one-man start-up litigation support firm. *Exh. D.* Mr. Onefater came to court. *Jannuzzo 6/23/09 Aff.* Mr. Onefater was unwilling to contradict Michael Tannenbaum's testimony. Mr. Onefater never testified.

Fradd admitted in testimony, and the defendants admitted in their Answer, that the "onshore" and "offshore" branch of the hedge fund held exactly the same stocks. *T-798:17-19, Exh. 100 at 6, para. 28, Exh. 101 at 4, para. 28.* Whenever a stock was bought or sold, there was simply one order to buy or sell placed with the broker, and the purchase or sale was then divided between "onshore" and "offshore." *T-798:20-25.* Fradd admitted that when he sent his quarterly written

[1] Plaintiff respectfully incorporates by reference the trial testimony that was attached as Exhibit One to the Jannuzzo Affirmation dated June 12, 2009 in support of plaintiff's motions; and respectfully incorporates by reference the Exhibits that are referred to herein that were attached to such Affirmation.

reports to the investors, he sent exactly the same report to the "onshore" and "offshore" investors. *T-808:19-809:6, 809:26-810:11.*

Fradd's quarterly reports to the investors not only made no distinction between onshore and offshore, but literally made no mention of "offshore" at all. *Exh. E.* Fradd's reports literally referred only to the onshore fund, which he co-owned with Mr. Melcher. *Id.* Each report began with the words: "Apollo Medical Partners LP was started in 1985." *Id. at 1.* Even the mailing list itself made no distinction between "onshore" and "offshore," and it had been that way for as long as the quarterly reports were sent. *T-809:3-6, 809:26-810:12.*

Fradd admitted that the "offshore" branch was even started with investors who withdrew money from "onshore" and placed it in "offshore." *T-799:8-800:19, 1037:21-1038:8.* He admitted that the "offshore" investors were "*all basically people who had been onshore or knew people that were interested in investing in offshore partners*." *T-800:23-801:-13.*

Fradd admitted, in response to questions from his own counsel, that he had sought and obtained Mr. Melcher's help and advice about running the offshore branch very shortly after it was set up. *T:1031:17-1034:13*. Fradd admitted that he was speaking with Mr. Melcher about the offshore branch "on a regular basis," and that he had conversations about setting up and running the offshore branch "*about every week or so, for a couple of months, several months.*" *T-1032:23-24 & 1034:10-13.* Fradd admitted that he had sought, obtained, and relied upon Mr. Melcher's advice in retaining the administrator of the offshore branch. *Id., T-1035:17-1036:12*.

Fradd admitted that he thereafter frequently sought and obtained Mr. Melcher's help and advice in running the offshore branch, whenever he needed help. *T-1036:13-1037:2.* He admitted that Mr. Melcher was "very helpful," and that "we were collaborative." *T-1036:25-1037:2 (Emphasis added.)*

Fradd admitted that notwithstanding his seeking and obtaining help and advice from Mr. Melcher every week or so for several months about the offshore branch, he never disclosed to Mr. Melcher that he intended to pay him nothing for it. *T-1227:4-19, 1228:3-15, 1233:12-1234:18*. Mr. Melcher testified that when he was giving his help and advice, he assumed that he would receive his share, in accordance with established industry custom and practice. *T-175:15-176:15.*

As to the defendants' much-trumpeted argument that Fradd claimed never to have poached "Mr. Melcher's investors" for the offshore branch, that testimony by Fradd is irrelevant. First, the existence of an exculpatory claim by Fradd is irrelevant to whether there was damaging evidence in the record sufficient to support the jury verdict; it merely indicates that Fradd himself introduced evidence. Second, under the jury finding that there was never any "oral modification," it makes no difference whether investors were "Mr. Melcher's investors" or not. *Exh. 19 at 1,2*. Under the written contract Mr. Melcher was entitled to half the fees on all the investors, not just the ones he personally introduced to the fund. *Exh. 24 at 18, Art. VII, Sec. 1 (net profits).*

Similarly, defendants' denunciation of Mr. Tannenbaum for "not reading the Complaint" is irrelevant to whether there is evidence in the record; it is merely a point that defendants sought to make in cross-examination, with which the jury was unimpressed, for obvious reasons. Mr. Tannenbaum was not asked to interpret the documents. Mr. Tannenbaum testified that it was not necessary to look at such documents to know what the custom and practice in the hedge fund industry is: "*I know what the custom and practice in the hedge fund industry because of 30 years experience.*" *T-693:7-16.* The validity of Mr. Tannenbaum's testimony was confirmed by defendants themselves, who never even tried to put their expert, Boris Onefater, on the witness stand. *Exh. D.* Defendants' contention that Mr. Tannenbaum was "not a Delaware lawyer" is a non-sequitur: interpretation of Delaware law is for the Court. Mr. Tannenbaum testified about custom

and practice in the industry.

Defendants' argument that Fradd said on hearsay that he had set up the offshore branch in the way he did is irrelevant for the same reason, and further, shows enormous lack of candor. Nothing about Fradd's hearsay testimony even suggested that he had been given legal advice that it was okay to cheat Mr. Melcher out of his share. The lawyer who supposedly gave Fradd the advice about the offshore branch, Jack Governale, Esq., was not only listed on defendants' witness list and never called; but further, was actually present in court and was not questioned by defendants on this subject. *Exh. F, T-1279 et seq.* Very obviously, Mr. Governale was not willing to testify in support what his client Brandon Fradd did.

Defendants' motion is without merit and should be denied.

II. THIS COURT'S RULINGS WERE IN ACCORD WITH THE RULINGS OF ALL PRIOR COURTS AND THUS CANNOT BE ERRONEOUS

Defendants argued at length that the jury instructions and jury charge: (a) did not properly state Delaware law on fiduciary duty, and (b) "did not properly state plaintiff's claim." Both arguments are contradicted by the decisions of all prior courts.

A. This Court Did Not Err As To Delaware Law

As to Delaware law, the defendants showed enormous lack of candor in failing to mention that they have already lost their argument all the way up to the First Department. Before the First Department, defendants made the same arguments they make here, about the contract clause, and about the Delaware LLC law. The First Department denied defendants' motion to dismiss, and ruled as follows:

> [T]he clause relied on by Fradd-- "a Member does not violate a duty or obligation to the Company merely because the Member's conduct furthers the Member's own interest"--appears only to allow members to act in their own interest, and does not appear to absolve members of the

> duty of loyalty inter se and of any corresponding prohibitions against diverting Company opportunities.
>
> Moreover, Delaware Code, tit. 6, § 18-1101(c) recognizes that there may be a fiduciary duty between members of a limited liability company that effectively bars clauses exculpating a member from such duty. *Exh. 5 at 5 (Emphasis added.)*

As the First Department recognized, there is simply no clause in the written contract that allows a Member to be disloyal, either to the company, or to his fellow Members. Defendants showed lack of candor in pretending to this Court that there was such a clause. There is not.

Further, as the First Department recognized, even the Delaware statute that defendants trumpeted contains an express limitation on clauses that might purport to relieve a Member of the duty of loyalty. Defendants showed lack of candor in citing the Delaware statute, without referring to the section that the First Department relied on.[2]

Moreover, the ruling by the First Department was completely in accord with Delaware law, which recognizes that a Manager or a Member of an LLC has the same fiduciary duties of loyalty as a corporate officer or director has to the shareholders. Delaware law was very recently concisely summarized in *Bay Center Apartments Owner, LLC v. Emery Bay PKI, LLC,* 2009 WL 1124451 (Del.Ch. 2009):

> But, in the absence of a contrary provision in the LLC agreement, the manager of an LLC owes the traditional fiduciary duties of loyalty and care to the members of the LLC. *Id. at 8. (Emphasis added.)*
>
> The Delaware LLC Act is silent on what fiduciary duties members of an LLC owe each other, leaving the matter to be developed by the common

[2] *Delaware Code, Title 6, § 18-1101(c)* provides: "To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager . . . , the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing. *(Emphasis added.)* The underscored section is the part referenced by the First Department's decision, above.

> law. See 6 Del. C. § 18-1104; Robert L. Symonds, Jr. & Matthew J. O'Toole, DELAWARE LIMITED LIABILITY COMPANIES § 9.04[B][3] (2007). The LLC cases have generally, in the absence of provisions in the LLC agreement explicitly disclaiming the applicability of default principles of fiduciary duty, treated LLC members as owing each other the traditional fiduciary duties that directors owe a corporation. See *Douzinas v. Am. Bureau of Shipping, Inc*., 888 A.2d 1146, 1149-50 (Del.Ch. 2006); *Metro Communication Corp. BVI v. Advanced Mobilecomm Techs. Inc*., 854 A.2d 121, 153 (Del.Ch. 2004); *VGS, Inc. v. Castiel*, 2000 WL 1277372, at 4-5 (Del.Ch. 2000), *aff'd* 781 A.2d 696 (Del. 2001).
>
> Moreover, when addressing an LLC case and lacking authority interpreting the LLC Act, this court often looks for help by analogy to the law of limited partnerships. *See, e.g., In re Seneca Investments, LLC*, 970 A.2d 259 (Del.Ch. 2008); *In re Silver Leaf, LLC*, 2005 WL 2045641 at *10 (Del.Ch. 2005). In the limited partnership context, it has been established that "[a]bsent a contrary provision in the partnership agreement, the general partner of a Delaware limited partnership owes the traditional fiduciary duties of loyalty and care to the Partnership and its partners." *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P*., 2000 WL 1476663 at *10 (Del.Ch. 2000); see also Martin I. Lubaroff & Paul M. Altman, DELAWARE LIMITED PARTNERSHIPS § 11.2.2 at 11-5 to 11-7 (2003). *Id. at fn. 33.*

In addition, defendants never mentioned that even the contract clause they trumpeted, about Members acting in their "own interest," has no counterpart in the contract regarding Managers. It is the Managers who direct the affairs of the company, not the Members. *Exh. 24 at 8, Sec. 12.*[3] The Managers of the LLC are the ones who are the functional equivalent of the officers of a corporation, not the Members. *Id.* The Members are the functional equivalent of shareholders. *Exh.24 at 15, Art. V1; and at 18, Art. VII, Sec. 1 (net profits).*

There is no clause in the Operating Agreement even purporting to allow Managers to "act in their own interest," and there is certainly no clause that allows Managers to be disloyal to either the company, or its owners.

[3] The Operating Agreement states: "12. Management of the Company. The Managers shall have the authority to conduct the day-to-day business and affairs of the Company." *Exh. at 8, Art. II, Sec 12.*

In short, the decisions of this Court were correct, were in accord with the prior judicial rulings, were in accord with the law of Delaware, and were in accord with the written contract. Defendants' motion should be denied.

B. This Court Did Not Err In The Jury Charge Or Verdict Sheet

As to defendants' arguments about the pleading of the fiduciary duty claim, defendants showed a similar lack of candor. Defendant Fradd claims he did not know he was being sued for failing to share the 20% fee with Mr. Melcher. That claim is preposterous on its face. The Complaint not only described that as the wrong in the body of the complaint, but attached to the Complaint a spreadsheet which calculated, to the penny, the total amount of the 20% fee which plaintiff then believed defendant Fradd had cheated him out of, which plaintiff then believed was $324,138.75, based on Mr. Federici's calculations. *Exh. 100 at 6-7, paras. 26-33, and two-page attachment.*

Not only this Court, but all prior courts which have ruled on the matter, have found the cause of action properly pleaded. Defendants' motion showed enormous lack of candor, for it never once mentioned any of those prior judicial decisions.

Defendants first lost on this point before Justice Cahn, when they made the same argument they make here. To remove any doubt that the Complaint was properly pled, and that it concerned both the diversion of investors and fees to defendant Fradd and away from Mr. Melcher, plaintiff moved to amend. Justice Cahn ruled that no amendment was necessary. *Exh. 3.*

> The third cause of action sounds in breach of fiduciary duty, for Fradd's allegedly diverting the 20% fee earned on Apollo Offshore from Apollo Management to another company. *Id. at 2 (Emphasis added.)*
>
> When the paragraphs at issue are read in the context of the entire complaint, the substance of the allegations in the third cause of action is clear. *Id. at 5 (Emphasis added.)*

In fact, the Complaint very clearly states in its body that the wrong by Fradd was diverting the 20% fee to a company whose profits went only to Fradd, and the attachment calculated to the penny the amount plaintiff then believed was diverted by Fradd. *Exh. 100 at 6-7, paras. 26 to 33 & two-page attachment.* Fradd was on notice from the time that Complaint was filed that he was being sued for cheating Mr. Melcher out of the 20% fee; any doubt was resolved by Justice Cahn's decision finding that no amendment was necessary, and that the substance of the allegations was clear.

The second court to consider the subject was Hon. Beverly Cohen, the JHO who supervised discovery. Justice Cohen rejected defendants' arguments in two decisions. The first clearly stated that defendant Fradd was being sued for diverting the 20% fee away from Mr. Melcher and to Fradd alone:

> Plaintiff claims that as a partner in Apollo Management, if Apollo Management were to manage Apollo Offshore, he would be entitled to share in the management fees of 20%; and he was wrongfully deprived of that share. *Exh. G at 1 (Emphasis added.)*

After that recitation, Justice Cohen ordered defendants to produce documents which they were withholding on ground of privilege. *Id.* While the privilege issues are not material here, it is undeniable that Justice Cohen's decision clearly stated what defendant Fradd was being sued for: wrongfully depriving Mr. Melcher of his share of the 20% fee from the offshore branch.

Justice Cohen's second decision rejected defendants' arguments, and ordered them to produce the quarterly reports that Fradd sent to all the investors in the offshore branch; her decision was then upheld by Justice Cahn. *Exh. H, Exh. 7 at 2 & 6.* Those reports were marked into evidence as PX-85, and they showed that Fradd himself had always treated the offshore and domestic branches of the hedge fund as one business. *Exh. E; supra at 2-3.*

Defendants lost one more time before Justice Schweitzer, when they made exactly the

same arguments they lost on before this Court. *Exh. B at 103:17 et seq.* Justice Schweitzer put to defendants' counsel the following, pointed, question:

> THE COURT: Let me ask the defendant, do you contend you're unduly prejudiced by this decision in that it's a surprise, if I were to rule that they can put in this custom and practice testimony?
>
> MS. HELLER: The expert testimony?
>
> THE COURT: Yeah. I'm not talking about that. [Not whether] it confuses the issues for the jury or any of that, I'm just talking about are you surprised that you're defending a case seeking the fees from the offshore company?
>
> MS. HELLER: Yes, because that's not what the cause of action is. The cause of action states –
>
> THE COURT: You're really telling me with a straight face up until now you never thought that that was your exposure? Any percentage of the fees of the foreign entity?
>
> MS. HELLER: Any fees made by Apollo [Management] had they not been diverted into the offshore account, that's what the allegation is absolutely, that's why we're seeking to have the expert precluded. *Exh. B at 103:17-104:14 (Emphasis added.)*

After that pithy exchange, Justice Schweitzer rejected defendants' arguments, and ruled that the hedge fund expert Michael Tannenbaum could testify, and precisely what he could testify about, which was what he did testify about at the trial, in accordance with this Court's trial ruling. *T-656:9-16 (ruling)*; *Exh. 12 at 121-123, Exh. 14 at 3.*

This Court's trial rulings were completely in accord with the rulings of all prior courts. That defendants state that there was error by this Court, and make a motion for a new trial, without even breathing a word about all the prior times they lost on these issues before all prior judges, is disgraceful.

CONCLUSION

Defendants' post-trial motion regarding the Third Cause of Action should be denied.

Dated: New York, New York
June 23, 2009

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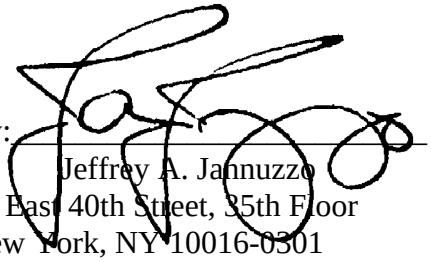
Attorney for plaintiff James Melcher

By: 
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