LNYC Loft, LLC v Hudson Opportunity Fund I
2016 NY Slip Op 31663(U)
September 1, 2016
Supreme Court, New York County
Docket Number: 650969/2011
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LNYC LOFT, LLC individually and on behalf of HRC-DEVELOPMENT LLC,

Plaintiffs,

-against-

HUDSON OPPORTUNITY FUND I, LLC, DAVID J. LOO, RICHARD ORTIZ, SANFORD HERRICK, STANLEY PERELMAN, JANI DEVELOPMENT II, LLC, and ONE YORK STREET ASSOCIATES, LLC,

Defendants.

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Index No. 650969/2011

DECISION/ORDER

Motion Seq. 012

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action arising out of a condominium development project in New York City, defendants Jani Development II, LLC ("Jani") and One York Street Associates, LLC ("One York") (collectively, "defendants") move pursuant to CPLR 3211(a)(1), (3) and (7) to dismiss the third amended complaint of the plaintiff, LNYC Loft, LLC individually ("plaintiff") and on behalf of HRC-Development LLC ("HRC-Development"). In the alternative, defendants seek to dismiss or stay plaintiff's derivative claims based on HCR-Development and One York's designation of a Special Litigation Committee to investigate plaintiff's derivative claims and to take actions plaintiff finds appropriate on behalf of HCR-Development or One York. Defendants also seek dismissal of plaintiff's fourth and fifth causes of action for breach of the One York Operating Agreement as asserted against One York.

Factual Background

After discovery and motion practice, this Court granted plaintiff leave to amend the complaint to assert certain claims (see Order dated February 9, 2016). Based on such decision,

plaintiff served the third amended complaint alleging various individual and derivative claims.

The first cause of action is by *plaintiff "LNYC"* against Hudson Opportunity Fund I, LLC ("Hudson") for breach of the HRC-Development Operating Agreement ("HRC Operating Agreement") for failing to obtain plaintiff's consent before making a certain amendment to One York's Operating Agreement. The second cause of action is by plaintiff "LNYC" against Jani and One York for tortious interference with the HRC Operating Agreement for inducing Hudson by false promises into amending the One York Operating Agreement. The sixth cause of action by plaintiff "LNYC" against Hudson is for breach of the HRC Operating Agreement for, *inter alia*, failing to supervise HRC-Development's investment in One York.

The third cause of action is brought derivatively on behalf of *HRC-Development* against Hudson, Jani and One York for a declaration that the amendment to the One York Operating Agreement is null and void. The fourth cause of action for breach of the One York Operating Agreement is brought derivatively on behalf of HRC-Development against Jani and One York, and alleges that they modified the allocation of distributions in violation of the One York Operating Agreement resulting in damages to HRC-Development. The fifth cause of action is on behalf of HRC-Development and alleges that Jani and One York breached the One York Operating Agreement by failing to pay amounts due to HRC-Development. The seventh cause of action is brought derivatively on behalf of HRC-Development against Jani (and Perelman) for an accounting of One York's books and records and for payment to One York and/or HRC-Development for funds misappropriated by Jani and Perelman, and for One York to account to HRC-Development, and upon such accounting, for Jani and Perelman to pay One York funds they misappropriated.

The eighth cause of action brought "double" derivatively "On Behalf of *One York*" against Jani based on Jani's (and it's Principal Perelman's) breach of the One York Operating Agreement. Jani, as Manager of One York, allegedly enriched himself by diverting One York's funds and assets to Jani and Perelman.

In support of dismissal of the third amended complaint, defendants argue that the newly added claims fail to state a cause of action. Further, defendants argue, plaintiff is not a proper party to represent HRC-Development's or One York's claims due to an inherent conflict of interest. Plaintiff is not qualified to take on the fiduciary responsibility of representing the interests of HRC-Development and One York given that plaintiff is suing One York in the third, fourth, fifth, and seventh causes of action, and simultaneously suing one behalf of One York in the eighth cause of action. Thus, plaintiff's divided loyalties prevent it from representing HRC-Development. Further, as plaintiff is pursuing its own personal, economic rights and personal agenda, rather than those of HRC-Development and One York, the derivative claims must be dismissed.

Defendants also contend that HRC-Development and One York retained and designated an independent, highly skilled attorney, Mark C. Zauderer, Esq., to act as the Special Litigation Committee to investigate plaintiff's derivative claims and to take such actions as appropriate on behalf of HRC-Development or One York. Where it is alleged that the board of directors or managers of a company have a conflict of interest in addressing the derivative claims, such as plaintiff's claims, the board or managers may appoint a disinterested special litigation committee to act on the company's behalf to investigate and make decisions on the claims.

Furthermore, the fourth and fifth causes of action for breach of the One York Operating

Agreement should be dismissed as against One York because One York is merely the subject of the Agreement, and not a party thereto and thus, could not have breached the Agreement.

In opposition, plaintiff argues that it is a proper party for the derivative claims, and defendants failed to demonstrate otherwise when opposing plaintiff's previous motion to amend. Further, neither the HRC Operating Agreement nor the One York Operating Agreement provided for the appointment of a committee, or allowed for the delegation of decision making authority to such a committee, much less a committee of one made up of an outside attorney chosen by Perelman. In any event, Article 6 of the HRC Operating Agreement requires plaintiff's consent for such a "Major Decision" made by Perelman and plaintiff has and continues to oppose the appointment of any special committee. And, One York may properly bring a claim for breach of the One York Operating Agreement even though it is not a signatory to such agreement. Further, One York may enforce said Agreement as a third party beneficiary of the Agreement.

In reply, defendants argue, *inter alia*, Article 6, as invoked by plaintiff, would preclude plaintiff from bringing its action since plaintiff did not obtain defendants' consent to institute this action. The Operating Agreements do not preclude the appointment of the Committee. Plaintiff's speculation that the Committee is not disinterested is insufficient and the caselaw cited by plaintiff is distinguishable.

Discussion

Pursuant to CPLR 3211 (a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual

allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 AD3d 98, 992 NYS2d 20 [1st Dept 2014]).

"Pursuant to CPLR § 3211(a)(3) a cause of action may be dismissed where a party lacks legal capacity or standing to sue" (*Kenney v. Immelt*, 41 Misc 3d 1225(A), 981 NYS2d 636 [Supreme Court, New York County 2013] *citing* CPLR 3211(a)(3). "The critical issue in determining whether a party has standing to sue is whether the party has suffered an injury in fact, which is an actual legal stake in the matter being adjudicated and ensures that the party seeking review has some concrete interest in prosecuting the action" (*Kenney, supra*).

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]).

Defendants' request to dismiss the newly added claims for failure to state a cause of action is unwarranted. For the reasons expressed in this Court's prior determination to permit plaintiff to assert the newly added claims on the ground that they were not devoid of merit, plaintiff's claims, if assumed as true, state a cause of action. Thus, dismissal on this ground is denied.

Likewise, defendants failed to establish that plaintiff's suit is sufficiently fraught with

adverse personal interest and animus so as to disqualify plaintiff from serving in its representative capacity on behalf of HRC-Development (*cf. Gilbert v Kalikow*, 272 AD2d 63, 707 NYS2d 100 [1st Dept 2000] (upholding dismissal of derivative claims where plaintiff failed to demonstrate that he will fairly and adequately represent the interests of the limited partnership, in view of "the totality of the relationship" between himself and the individual defendant, his former son-in-law and business partner; *cf. G. A. Enters. v Leisure Living Communities*, 517 F2d 24, 26 (finding sufficient animus where the first action was commenced by the individual defendant against plaintiff, which was followed by plaintiff's commencement of the action and two others against the individual defendant, thereby "strongly suggesting that the commencement of this action may have been inappropriately motivated by a desire to retaliate for the individual defendant's earlier commenced action or to obtain leverage therein)).

The caselaw cited by defendant on this issue is factually distinguishable (*cf. Steinberg v Steinberg*, 106 Misc.2d 720, 434 NYS2d 877 [Supreme Court, Special Term, New York County 1980] (while plaintiff's standing in the derivative action for corporate waste was based on her present ownership of a substantial number of company shares acquired during the course of the marriage, conflict of interest existed where she offered "to discontinue outstanding litigation on the condition that she be paid a premium of approximately one million dollars above market value for her outstanding shares" thereby "foreclosing other shareholders from pursuing the wrongs plaintiff alleges" and "on terms advantageous to her as an individual, rather than as a fiduciary," indicating "that the derivative action was deliberately instituted to obtain leverage in the matrimonial proceeding"); *Hubshman v. 1010 Tenants Corp.*, 2012 WL 4472559, 2012 NY Slip Op. 32448(U) [Supreme Court, New York County] (dismissing derivative claim by plaintiff

who was a shareholder in corporation as disqualified to bring such claim against board for waste and mismanagement, where such claims stemmed from board's previous decision to litigate issue arising from shareholder's personal roof garden)). Thus, dismissal of the derivative actions on the ground that that plaintiff's animus prevents it from representing the interests of HRC-Development, is unwarranted.

Further, dismissal of the derivative actions on the ground that conflict of interests disqualify plaintiff from representing HRC-Development is likewise unwarranted.

As to defendants' claim that plaintiff seeks to pursue its own, personal rights as opposed to those of HRC-Development, it is noted that a member of a limited liability company retains the common-law right to bring a derivative suit on behalf of the company (*Bischoff v. Boar's Head Provisions Co., Inc.*, 38 AD3d 440, 834 NYS2d 22 [1st Dept 2007] *citing Tzolis v. Wolff*, 39 AD3d 138, 829 NYS2d 488). And, in order to determine whether a claim is derivative or individual, "[t]he pertinent inquiry is whether the thrust of the plaintiff's action is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation" (*Albany-Plattsburgh United Corp. v. Bell*, 307 AD2d 416, 419, 763 NYS2d 119 [3d Dept 2003] (internal quotations omitted)).

"As a general proposition, where a corporation suffers loss because of the acts of officers, directors, or others which diminish or render valueless the shares of stock of a stockholder, the stockholder does not have a direct cause of action for such damages, but has a derivative cause of action on behalf of the corporation to recover the loss for the benefit of the corporation" (*Strain v. Seven Hills Assos.*, 75 AD2d at 371, 429 NYS2d 424 [1st Dept 1980]). A "plaintiff asserting a

derivative claim seeks to recover for injury to the business entity" (*Yudell v. Gilbert*, 99 AD3d 108, 949 NYS2d 380 [1st Dept 2012]). For example, "allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually" (*Abrams v Donati*, 66 NY2d 951, 953, 498 NYS2d 782, 489 NE2d 751 [1985]).

However, where the "thrust of [the plaintiff's] objective ... is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation" the plaintiff lacks standing to maintain a shareholder's derivative action (*see Rossi v. Kelly*, 96 AD2d 451, 465 NYS2d 1 [1983]; *DeMarco v. Clove Estates, Inc.*, 250 AD2d 724, 672 NYS2d 784 [2d Dept 1998]). While a shareholder generally cannot, as such, maintain an individual cause of action against a corporation, "exceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged" (*Abrams*, 66 NY2d at 953, 498 NYS2d 782, 489 NE2d 751; *see also Higgins v. New York Stock Exch., Inc.*, 10 Misc 3d 257, 264, 806 NYS2d 339 [Supreme Court, New York County 2005] (holding that a shareholder has standing to assert a direct claim "against a corporation where the shareholder alleges breach of a duty owed independent of any duty owed to the corporation")). Claims including the "withholding of financial information relating to [an LLC]" have been held to be individual (*see Roy v. Vayntrub*, 15 Misc 3d 1127(A), 2007 NY Slip Op. 50868(U), 2007 WL 1218356 [Supreme Court, Nassau County 2007]; *Arfa v. Zamir*, 2008 NY Slip Op. 33348(U), 2008 WL 5271648 [Supreme Court, New York County 2008]).

New York does not have a clearly articulated test, but approaches the issue on a case by case basis depending on the nature of the allegations (*Yudell v. Gilbert*, 99 AD3d 108, 949

NYS2d 380 [1st Dept 2012]). The First Department quoted and applied Delaware law, stating:

> "[a] court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation."

The Court in *Yudell* applied "this common sense approach," and held that "plaintiffs' claim for breach of fiduciary duty is derivative, because *any pecuniary loss plaintiffs suffered derives from a breach of duty and harm to the business entity*. . . ." (Emphasis added). The Court continued, "Only if and when the joint venture receives this compensation would plaintiffs then be entitled to receive their proportionate share. Thus, plaintiffs' claims are derivative" (*see also. Serino v. Lipper*, 123 AD3d 34, 994 NYS2d 64 [1st Dept 2014] *citing Yudell*, at 41). *The lost value of an investment in a corporation is quintessentially a derivative claim by a shareholder* (*id.*).

Nevertheless, although "a complaint may contain both derivative claims, brought on behalf of a corporation, and individual claims, the two claims must not be intermingled within the same causes of action, but instead must be pleaded separately" (*Greenberg v. Falco Const. Corp.*, 29 Misc 3d 1202(A), 958 NYS2d 307 [Supreme Court, Kings County 2010] *citing Abrams v. Donati*, 66 NY2d 951 [1985]; *Baliotti v. Walkes*, 134 AD2d 554, 555 [1st Dept 1987]; and *Barbour v. Knecht*, 296 AD2d 218, 227 [1st Dept 2002]).

Here, the derivative claims herein allege, *inter alia*, that HRC-Development suffered a loss by virtue of the amendment which resulted in a decrease of percentage of revenue to which it was otherwise entitled but for the improper amendment to the One York Operating Agreement. However, plaintiff also pursues separate, direct claims against Hudson, for example, for

Hudson's breach of the HRC-Development Agreement for failing to obtain plaintiff's consent to the amendment as required thereunder, a claim that does not belong to HRC-Development. Plainly, plaintiff's first, second, and sixth causes of action are brought in its individual capacity, while the remaining causes of action are brought derivatively on behalf of HRC-Development.

That plaintiff alleges both direct claims and derivative claims is not fatal to its complaint, as the respective allegations are not intertwined with each other in any single cause of action, but are stated as separate causes of action (*cf. Baker v. Andover Assoc. Mgt. Corp.*, 30 Misc 3d 1218(A), 924 NYS2d 307 [Supreme Court, Westchester County 2009] (noting that "plaintiff is an inappropriate representative for a derivative action if that plaintiff is asserting direct claims *along with* derivative claims" and granting plaintiff leave to replead derivative claims after dismissing direct claims as insufficiently stated") (emphasis added)).

As it cannot be said that the thrust of the derivative claims are personal in nature. dismissal of these claims on this ground is unwarranted.

However, as to defendants' contention that the claims should be dismissed or stayed in light of defendants' appointment of the Committee, neither forms of relief is warranted.

The "management of the business of corporations is entrusted to its board of directors and that in general, it is for the board of directors, and not for an individual stockholder, to decide in the exercise of their honest business judgment whether a particular possible lawsuit shall or shall not be prosecuted on behalf of the corporation" (*Byers v. Baxter*, 69 AD2d 343, 419 NYS2d 497 [1st Dept 1979]). An exception to this rule permits the bringing by an individual stockholder of a derivative action on behalf of the corporation where the corporation is controlled by the

wrongdoers or where the decision of the corporation not to sue is itself a breach of the directors' duty to the corporation, either because the decision is not an honest exercise of discretion or is so flagrant an abuse of that discretion as itself to constitute a wrong to the corporation." (Id.)

However, when "a corporation receives a demand by a shareholder to institute or to continue derivative litigation against its board, that board may appoint an independent litigation committee of directors who were not implicated in the wrongful conduct and who are not officers or employees of the corporation" (*Davidowitz v. Edelman*, 153 Misc 2d 853, 583 NYS2d 340 [Supreme Court, Kings County 1992]). Thus, it has been stated that, "assuming disinterestedness and honest judgment of the non-management majority of the Board of Directors . . . appointing a special litigation committee of non-management directors, advised by independent counsel who made a thorough investigation, is an appropriate way for the corporation to exercise its power to determine whether a lawsuit . . . should be pursued" (*Byers v. Baxter*, *supra*).

Plaintiff relies on Article 6 of the HRC Operating Agreement as a bar to the appointment of the Committee. Article 6 requires that any "Major Decision" be approved in writing by all "Operating Members," and the HRC Operating Agreement defined "Major Decisions" as any decision to "*institute and prosecute . . . or settle* any material legal, arbitration, or administrative *actions or proceedings on behalf of the LLC. . . .*" (¶6.3.3), or, which "*requires a payment by the LLC or requires an admission of liability on the part of the LLC.*" (¶6.3.6).[1]

Mr. Zauderer's retainer letter described his authority to:

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[1] Likewise, the One York Operating Agreement required HRC-Development's written consent to any "Major Decision" and likewise defined a major decision, as a decision to "institute or prosecute or settle any material legal, arbitration, or administrative action on behalf of the LLC (One York Operating Agreement ¶6.3.6) (One York Operating Agreement ¶6.3.11).

> Conduct such factual and legal investigation as I deem necessary and appropriate and will have the sole, full, and final responsibility, including all of the powers of the members of the Companies, to determine the positions and actions that the Companies should take with respect to the Claims, considering, among other things, whether the Claims have merit, whether they are likely to prevail, and whether it is in the Companies best interest to pursue them.

Here, the Court finds that the retention of Mr. Zauderer, in and of itself, does not rise to the level of prosecuting or settling this legal action, so as to require plaintiff's written consent. And, plaintiff's basis for instituting and prosecuting this action, without the consent of Hudson (or other related entities) may arguably apply with equal force to the appointment of the Committee. Plaintiff's interpretation of Article 6 in the context of an appointment of a Committee arguably defeats its own derivative claims.

Further, in light of the fact that plaintiff has asserted direct claims, dismissal of the action based on the appointment of the Committee to investigate derivative claims is unwarranted.

Nevertheless, defendants established their entitlement to a stay of this action. While the "mere creation" of the Committee does not alone justify a stay of a shareholder derivative action (*In re Comverse Technology, Inc.*, 56 AD3d 49, 866 NYS2d 10 [1st Dept 2008]), whether to "grant a stay of proceedings in a stockholder derivative action pending action by an SLC [Special Litigation Committee] is a matter left to the discretion of the motion court" (*Katz v. Renyi*, 282 AD2d 262, 722 NYS2d 860 [1st Dept 2001] (Given the bank's delay in appointing the SLC and the makeup of the SLC, which includes members whose impartiality is suspect, the motion court's exercise of discretion in denying the requested stay was appropriate")).

Defendants have demonstrated that their appointment of the Committee occurred soon after the third amended complaint was filed. Further, in objecting to defendants' letter request to

appoint the Committee, plaintiff "decline[d] to comment" on any of the three individuals proposed by defendants (Letter of March 10, 2016). In opposition to defendants' motion, plaintiff objects to the authority to appoint the Committee, and opines that the appointment "serve[s] only to free Mr. Perelman and his entities from the scrutiny" of plaintiff. However, plaintiff's unsupported positions are insufficient, at this juncture, to deny a stay, that has been demonstrated as warranted under the circumstances (*see Strougo on Behalf of Brazil Fund, Inc. v. Padegs*, 986 F.Supp. 812, fn2. [SDNY 1997] (finding a stay reasonable to permit the special litigation committee to complete its investigation, and noting that "[T]he independence of the litigation committee does not take on critical significance until such time as the committee moves this Court to dismiss the derivative action based on the findings of its investigation. At that point ... it becomes the function of this Court to pass on the good faith and independence of the litigation committee")).

As to the fourth and fifth causes of action as asserted against One York for breach of the One York Operating Agreement, Jani and HCR Development "made and entered into" the Operating Agreement, which is a contract whose provisions are interpreted under contract law (*see HF Lexington KY LLC v. Wildcat Synergy Manager LLC*, 35 Misc 3d 1210(A), 950 NYS2d 723 [2012]). A party alleging a breach of contract must "demonstrate the existence of a ... contract reflecting the terms and conditions of *their* ... purported agreement" (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 919 NYS2d 465 [2011] (emphasis added); *Apparelnet, Inc. v. Automated System Outsourcing Provider LLC* (one of the elements of a cause of action for breach of contract are the "formation of a contract between plaintiff and defendant" and noting that LLC, the subject of the operating agreement, "cannot breach a contract to which it is not a

party")). As it is undisputed that One York is not party to the One York Operating Agreement, dismissal of these claims is warranted as to One York, a nonsignatory to the contract.

Plaintiff's reliance on One York's status as a third party beneficiary to the One York Operating Agreement is misplaced, given that a third party beneficiary cannot be sued as a third party beneficiary unless it assumed obligations thereunder, which showing has not been made herein (*see N.F. Gozo Corp. v. Kiselman*, 38 Misc 3d 48, 51 [2d Dept 2012] ("a nonparty to a contract cannot be named as a defendant in a breach of contract action unless the nonparty assumed the obligations under the agreement"); *STS Partners Fund, LP v. Deutsche Bank Securities, Inc.*, 2016 WL 3455945, 2016 NY Slip Op. 31191(U) [Supreme Court, New York County 2016] (finding that where defendant "was not a party to the Trusts" it could not "be liable for a breach, notwithstanding that it was also a certificateholder, a Designated Entity, and an express third-party beneficiary")). Likewise, reliance on *Arfa v. Zamir* (2008 WL 2078678, 2008 NY Slip Op. 31332(U) [Supreme Court, New York County 2008]) is misplaced. Although the LLC was found to have standing to sue the managing member for breach of the operating agreements, notwithstanding that the LLC was a non-signatory to the operating agreements. This case does not stand for the proposition that an LLC itself, may be held liable for breach of an operating to which it was not a party or signatory thereto.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion pursuant to CPLR 3211(a)(1), (3) and (7) to dismiss the third amended complaint of the plaintiff, LNYC Loft, LLC individually and on

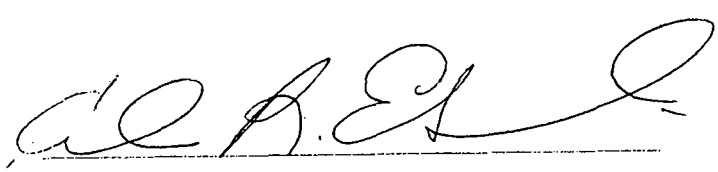
behalf of HRC-Development LLC is granted solely to the extent that the fourth and fifth causes of action are severed and dismissed as asserted against One York Street Associates, LLC with prejudice; and it is further

ORDERED that the branch of defendants' motion, in the alternative, to dismiss or stay plaintiff's derivative claims based on HRC-Development and One York's retention and designation of an independent person Mark C. Zauderer, Esq. to act as Special Litigation Committee is granted solely to the extent that this action is stayed pending the conclusion of the investigation of the Special Litigation Committee; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 1, 2016



Hon. Carol Robinson Edmead, J.S.C.