SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

BEATRICE INVESTMENTS, LLC, CORNFLOWER INVESTMENTS, LLC, GLADTIDINGS INVESTMENTS, LLC FAST MARCH INVESTMENTS LLC, SKYWARD INVESTMENTS LLC, and TRIUMPH INVESTMENTS, LLC, Individually as well as Derivatively on Behalf of 940 Realty LLC and 511 9th LLC,

Plaintiffs,

-against-

940 REALTY LLC, 511 9th LLC, 940 INVESTOR LLC, 511 MANAGER CORP., and SALIM "SOLLY" ASSA,

Defendants,

-and-

940 REALTY LLC and 511 9TH LLC,

Nominal Defendants
In the Derivative
Causes of Action

----------X

Index No.: 654052/2013

DECISION & ORDER

HON. SHIRLEY WERNER KORNREICH:

Defendants—940 Realty LLC (Eighth LLC), 511 9th LLC (Ninth LLC), 940 Investor LLC (Eighth Manager), 511 Manager Corp. (Ninth Manager), and Salim "Solly" Assa (Assa)—move to dismiss the second amended complaint (SAC) of plaintiffs—Beatrice Investments, LLC (Beatrice), Cornflower Investments, LLC (Cornflower), Gladtidings Investments, LLC (Gladtidings), Fast March Investments LLC (Fast March), Skyward Investments LLC (Skyward), and Triumph Investments, LLC (Triumph)—pursuant to CPLR 3211(a)(1) and (7). Plaintiffs oppose. For the reasons that follow, defendants' motion is denied.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the SAC (Dkt. 322)[1] and documentary evidence submitted by the parties.

This action arises from plaintiffs' membership in, and defendants' management of, Eighth LLC and Ninth LLC (the Companies). Plaintiffs Fast March, Skyward, and Triumph are members of Ninth LLC (collectively, Ninth Plaintiffs), a New York LLC that directly owns a five-sixths interest (as tenant-in-common)[2] in real property located at 511 Ninth Avenue in Manhattan (Ninth Property), condominium units. SAC ¶ 21. Non-parties Assa Realty LLC (Assa Realty), Ninemex Corp. (Ninemex), and B Mex Corp. (B Mex), also are members of Ninth LLC. SAC ¶ 26. Assa Realty is owned and controlled by defendant Assa and his brother Isaac Assa (Isaac). *Id.* Ninemax and B Mex are controlled by Assa's alleged associates, non-parties Salomon Masri and Simon Masri, respectively. *Id.* Ninth LLC is managed by defendant Ninth Manager, which, in turn, is controlled by its managing member, defendant Assa. SAC ¶¶ 14, 15. Ninth LLC's operating agreement, styled "Amended and Restated Operating Agreement" and dated June 1, 2006 (SAC ¶ 18), describes the Initial Capital Contributions and ownership interests of its Class A and Class B members (together equaling 100% of shares) in Schedule I. Dkt. 323. According to Schedule I, Triumph, a Class A member, invested $1.2 Million and owns 9.5% of all shares; Skyward, a Class A member, invested $600,000 and owns 4.75% of all shares; Fast March, a Class A member, invested $600,000 and owns 4.75% of all shares; non-party Uptempo Investments LLC, a former Class A Member, invested $600,000 and owned

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[2] FSA Real Estate Ventures, LLC owns the remaining one-sixth according to a June 1, 2006 "Tenancy In Common Agreement" between the co-tenants. Dkt. 355 (TIC Agreement) at 1.

4.75% of all shares before assigning its ownership interest to plaintiffs Triumph, Skyward and Fast March in January 2008; Ninemex, a Class A member, invested $5.075 Million and owns 40.1% of all shares; B Mex, a Class B member, invested $2.615 Million and owns 20.7% of all shares; and defendant Ninth Manager, a Class B member, invested nothing and owns .5% of all shares. *Id.* at 27; SAC ¶ 12. [3]

Plaintiffs Beatrice, Cornflower, and Gladtidings are members of defendant Eighth LLC (collectively, Eighth Plaintiffs), a Delaware LLC that, through a subsidiary, 940 8th LLC (Eighth Owner), indirectly owns real property located at 940-942 Eighth Avenue in Manhattan (Eighth Property), which includes a sizeable retail space. SAC ¶ 20. Non-party SI Partners LLC (SI Partners), which is owned and controlled by defendant Assa and his brother Isaac, also is a member of Eighth LLC. Eighth LLC is managed by defendant Eighth Manager, which, in turn, is controlled by Assa, its managing member. SAC ¶¶ 13, 15. Eighth LLC is governed by an operating agreement dated November 19, 2007 (Eighth Agreement, Dkt. 324). SAC ¶ 18. Eighth Property Owner is managed by non-party 940 Manager LLC (Eighth Property Manager), who is not a member of Eighth LLC or Eighth Property Owner.[4] Dkt. 324 at 4.

Section 5.1(b) of both the Eighth Agreement and Ninth Agreement (the Agreements) states that Eighth Manager and Ninth Manager (the Managers) "shall have the ***sole power*** to do any and all acts necessary or convenient to or for the furtherance of the purposes described herein, whether or not in the ordinary course of business," other than filing for bankruptcy. Dkt.

---

[3] Non-parties David Sutton and AD Toteh LLC, Class A members, own 4.95% and 9.5% of all shares, respectively. All Class A members total 78.3% percentage interest. Non-party 400 West 39th LLC, a Class B member, owns .5% of all shares and contributed nothing. Dkt. 323 at 27.

[4] Defendants' motion papers imply that Eighth Property Manager is affiliated with defendants. *See. e.g.*, Dkt. 351 (Defs.' Reply Br.) at 13 (using provision of Eighth Agreement authorizing payments to Eighth Property Manager's affiliates to justify brokerage fee payments to Orchedia Brokerage, an Assa-affiliated entity). The record is otherwise silent on this issue.

323 (Ninth Agreement) at 12, 25 (emphasis added); *accord* Dkt. 324 (Eighth Agreement) at 13, 15. Eighth LLC's purpose is defined broadly to include "engag[ing] in any activity that a limited liability company can engage in under the [Delaware Limited Liability Company] Act". Dkt. 324 (Eighth Agreement) at 3, 8-9. Ninth LLC's stated purposes, defined more narrowly, concern Ninth Property and the establishment of condominiums there. Dkt. 323 (Ninth Agreement) at 8.

Section 5.1(b) of both Agreements further provides: "***[n]o Member***, by reason of its status as such, shall have any right of control or management power over the business and affairs of the Company or, ***except as expressly provided herein, any Voting Rights*** with respect to any decisions to be made by the Company." Dkt. 323 at 12 (emphasis added); *accord* Dkt. 324 at 13. Additionally, the Managers have "the power and authority, on behalf of the Company, ***without the consent of any of the Members except as expressly provided herein***, to":

> (ix) ***determine the capital needs for the Property, call for Additional Capital Contributions from the Members, admit additional or substituted Members*** (whether Class A Members, Class B Members, or such ***other classes of Membership Interests*** having ***preferences, voting rights and other rights as the Manager may determine***), and ***adjust Percentage Interests,*** in each case ***in a manner consistent with*** this Agreement, including, without limitation, ***Sections 3.2 and 3.8***; ...
>
> (xi) ***retain and employ*** accountants, ***attorneys, managing agents or other experts and to enter into management***, construction, ***development***, ***brokerage***, sale, ***leasing***, vendor ***or any similar agreement relating to the Company or the Property, with third parties or Affiliates of a Member or the Manager***;
>
> (xii) ***enter into any transaction with the Manager, a Member, officer or employee, or an Affiliate of any of the foregoing, or any Person directly or indirectly controlled by or under common control with the Manager***, a Member, or an officer or employee, ***on commercially reasonable terms and conditions***[.]

Dkt. 323 at 13 (emphasis added); *accord* Dkt. 324 at 13-14.

Section 5.1(e) provides, "[u]nless otherwise agreed by the Required Members, the Manager shall not be entitled to any compensation for serving as Manager." Dkt. 323 (Ninth Agreement) at 14; *accord* Dkt. 324 (Eighth Agreement) at 15 (adding caveat "except as otherwise provided for in this Agreement"). The Agreements define "Required Members" as "Members holding, in the aggregate, not less than a majority of all of the Percentage Interests, voting together as a single class." Dkt. 323 at 7; *accord* Dkt. 324 at 7.

Section 5.6 in both Agreements provides:

> Manager's Discretion. Whenever in this Agreement the Manager is permitted or required to make a decision in [its] "discretion" or "sole discretion" or under a grant of similar authority or latitude, such Manager shall have ***no duty or obligation to consider any interest of or factors affecting some or all the Members*** so long as such Manager acts ***in good faith and in a manner which he reasonably believes is in or not opposed to the best interest of the Company.*** Each Member hereby agrees that ***any standard of care or duty imposed under the Act or any other applicable law shall be modified, waived or limited*** in each case as required to permit the Manager to act under this Agreement and to make any decision pursuant to the authority prescribed in this Section 5.6 so long as such action or decision does not constitute ***willful or wanton misconduct, gross negligence or a breach of the terms of this Agreement and is reasonably believed by the Manager to be consistent with the overall purposes and objectives of the Company.***

Dkt. 323 (Ninth Agreement) at 15 (emphasis added); *accord* Dkt. 324 (Eighth Agreement) at 16. Section 5.7 then provides "[e]xcept as may otherwise be specifically set forth in this Agreement, the personal liability of the Manager shall be limited to the fullest extent under the Act [i.e., the New York LLC Laws and the Delaware Limited Liability Company Act, as applicable] and other applicable law."). Dkt. 323 (Ninth Agreement) at 16 (emphasis added); *accord* Dkt. 324 (Eighth Agreement) at 16.[5]

[5] For as long as certain loans remained outstanding, Ninth Agreement § 10.17 requires, *inter alia*, that Ninth LLC maintain separate records and accounts, "maintain an arm's-length

As noted earlier, the Agreements originally defined two membership classes—Class A and Class B. *See* Dkt. 323 at 3-4; *accord* Dkt. 324 at 3-4. While the Agreements treat Class A members differently from Class B members for distributions ***above*** the amount of each member's unreturned capital contributions, until all members' capital contributions are returned, distributions for both classes are allocated in proportion to each member's unreturned capital contributions. Dkt. 323 at 11 (§ 4.3(a)); *accord* Dkt. 324 at 12 (§ 4.3(a)).

Sections 3.2 and 3.8 in the Agreements describe the mechanisms by which a member's percentage interest may be altered. Section 3.2 provides a process for soliciting "Additional Capital Contributions" from current members when deemed necessary by the Managers for business operations. The Managers must deliver ten days' written notice ("Additional Capital Notice") to each member indicating the aggregate amount required, the amount that can be contributed by each such member pro rata based on current percentage interests, and the date by which the contribution must be made. Should a member refuse to make the requested contribution, the manager has "the right, in his sole discretion, to cause the Company to raise all or a portion of the shortfall from any Person (including, without limitation, any Member or Affiliate of a Member) and such Person or Persons shall be admitted to the Company a[s] Class A Members or Class B Members, as the case may be." Following the contributions, the manager amends Schedule I to reflect the changes. Dkt. 323 (Ninth Agreement) at 9; *accord* Dkt. 324 (Eighth Agreement) at 10.

Under § 3.8 of the Agreements, the Companies may issue membership interests on terms ***other than*** those described in § 3.2, following ten business days' notice to the other members:

---

relationship with any affiliates," and refrain from "enter[ing] into a transaction with any of its affiliates other than on an arm's-length basis in the ordinary course of business." Dkt. 323 at 24. Plaintiffs contend that the § 10.17 obligations applied until at least 2012. SAC ¶ 41(c).

> Preemptive Rights. In the event that the Company desires to ***borrow funds from a Member or an Affiliate of a Member***, borrow funds from a third party on a participating basis, ***and/or raise capital by issuing additional Membership Interests other than pursuant to the terms and conditions of Section 3.2, each Member shall have the right to participate therein pro rata, based on Percentage Interests. The Company shall give not less than ten Business Days prior written notice of such transaction to each such Member, including the terms and conditions thereof***. The Percentage Interests of the Members shall be adjusted to reflect any Additional Capital Contributions so made by certain of the Members and/or the admission of such additional Members. ***The Manager shall make appropriate amendments to Schedule I to reflect such adjustments and admissions***, which amendments shall be binding upon the Members absent manifest error.

Dkt. 323 (Ninth Agreement) at 10 (emphasis added); *accord* Dkt. 324 (Eighth Agreement) at 11.

Paragraph 3.7 of the Agreements provides:

> Priority and Return of Capital. Except as maybe [sic] ***expressly*** otherwise provided herein, ***no Member shall have priority over any other Member, whether for the return of a Capital Contribution or for Net Profits, Net Losses or a distribution***; provided, however, that ***this Section shall not apply to any loan, guaranty, endorsement, collateral or other indebtedness (as distinguished from a Capital Contribution)*** given, made or incurred by a Member to the Company or any creditor of the Company, or to any indebtedness of the company to a Member in connection with any business transaction.

Dkt. 323 (Ninth Agreement) at 10 (emphasis added); *accord* Dkt. 324 (Eighth Agreement).

Eighth Property's retail space, for the most part, remained empty from November 2007 until October 2009, when Republic Food LLC (Republic), an entity controlled by Assa, leased it. SAC ¶ 20; *see also* Dkt. No. 204 (10/11/2016 Referee Report and Recommendation) at 41-44 (finding that Assa controlled Republic). Plaintiffs contend that Assa used Republic to funnel money to his own entities. SAC ¶¶ 20, 35-36. Specifically, plaintiffs allege that Republic paid no rent from lease inception in October 2009 until December 2011, and "little rent" thereafter. *Id.* Moreover, between 2010 and 2014, Eighth LLC allegedly paid Republic $936,215. SAC ¶ 35;

Dkt. 326 (SAC Ex. 4). Between October 2010 and February 2013, Republic allegedly transmitted $845,628 to Huey's Manhattan LLC, d/b/a, Ladino Tapas Bar and Grill (Ladino), a (now former) subtenant of Republic, owned by Assa and Isaac. SAC ¶ 36.

According to the SAC, Assa (through the Managers) orchestrated other monetary transfers from the Companies to his own entities. Specifically, between 2009 and 2012, the Companies allegedly paid a total of $260,490 to Solomon Joseph Paul and Associates (SJP), a supposed law firm located at a Brooklyn residence partially owned by Assa, a non-lawyer. SAC ¶ 37. In addition, checks issued to SJP were deposited by SI Partners—an Assa entity—"d/b/a Solomon Joseph Paul & Associates". SAC ¶ 37. Invoices supplied by defendants on SJP letterhead purport to itemize legal work performed by Richard Migliaccio (Assa's attorney) and Migliaccio's associate on behalf of the Companies. Dkt. 342 (SJP Invoices).[6] However, Migliaccio testified under oath that he was not affiliated at any point with SJP and never submitted bills for work performed by it. SAC ¶ 37.

Section 5.10, in both Agreements, requires the Companies to reimburse affiliates for amounts incurred on behalf of Eighth LLC or Ninth LLC:

> 5.10. Reimbursement of the Manager. The Company shall be responsible for and shall pay all expenses of the Company out of funds of the Company, directly to third parties ***or as reimbursement to the Manager and/or any of its Affiliates***, as the case may be, ***to the extent paid or incurred by the Manager and/or any of its Affiliates***, as the case may be, on behalf of the Company.

Dkt. 323 (Ninth Agreement) at 16; Dkt. 324 (Eighth Agreement) at 17.

[6] Upon closer examination by the court, the SJP invoices submitted by defendants (Dkt. 342) appear to reflect approximately $241,580 in billings, nearly $20,000 short of the alleged $260,490 in transfers to SJP.

The SAC further alleges that in 2009 and 2010, Eighth LLC transferred $337,771 to Orchedia Brokerage (Orchedia), located at Isaac's Brooklyn address. SAC ¶ 38. The checks for these transfers, at least $188,541 of which were brokerage fees for Republic's lease, again were deposited in the name of SI Partners, this time "d/b/a Orchedia Brokerage". SAC ¶ 38. Plaintiffs assert that no brokerage services were needed (and no fees owed) because Assa controlled Republic. SAC ¶ 38.

Eighth Agreement authorizes Eighth Owner to "retain [Eighth Property Manager] or an Affiliate thereof as the manager and leasing agent of [Eighth] Property for a fee of five percent (5%) of the gross rents for management (the "Management Fee") and for a standard leasing fee for its services as leasing agent." Dkt. 324 (Eighth Agreement) at 15. Similarly, Ninth Agreement specifies fees payable to Denver West LLC (Denver) and Gemstone 45 LLC (Gemstone), two entities owned and controlled by Assa, for services rendered to Ninth LLC. SAC ¶ 32.

Section 5.11 of Ninth Agreement sets forth the terms for payment of an "Administrative Fee" to Denver as "Administrator":

> Administrative Fee. ***During the period commencing upon February, 2006 and ending July, 2008***, the Company shall pay to the Administrator, in advance, ***a non-refundable monthly fee in the amount of $36,666, as consideration for the performance*** by the Administrator and/or its Affiliates, as the case may be, ***of administrative and related services to the Company with respect to the Property*** (the "Administrative Fee"). The unpaid Administrative Fee shall accrue in the event that all or any portion of such fee is not paid when due. In connection with this Section, the Company shall be responsible for and shall pay all administrative expenses of the Company out of funds of the Company, directly to third parties or as reimbursement to the Administrator and/or its Affiliates, as the case may be, to the extent paid or incurred by the Administrator and/or its Affiliates, as the case may be, on behalf of the Company.

Dkt. 323 (Ninth Agreement) at 5.

Section 3.1(u) of Ninth Agreement describes a "Development Fee" payable to Gemstone, the "Developer":

> "Development Fee" means ***a monthly fee in the amount of $33,333.00 payable to the Developer as consideration for its performance of development and related services to the Company with respect to the Property***, which fee shall be paid commencing ***February, 2006 and for the next succeeding twenty-nine (29) months*** shall accrue to the extent not paid in any month(s).

Id. at 16. Under § 5.1(d), the members expressly acknowledged and agreed "to the payment of the Development Fee to the Developer" and "to the payment of the Administrative Fee to the Administrator." *Id.* at 14. Ninth Agreement also acknowledges that Denver and Gemstone are affiliates of Ninth Manager. *Id.* at 2, 3.

The SAC alleges that, contrary to §§ 3.1(u) and 5.11 of Ninth Agreement, Assa continued to book payments after July 2008, overpaying Denver and Gemstone, in cash or accrued payables, by $2,245,410 and $2,468,789, respectively. SAC ¶ 32. Plaintiffs claim that Assa converted at least $2,170,000 of these payables to give Assa Realty "preferred" equity—with an 11% cumulative dividend—in Ninth LLC. *Id.* The SAC also alleges that Assa amended the Ninth Agreement in 2009—backdated to January 1, 2008—to sanction these overpayments. SAC ¶ 33. The purported amendment, signed by the Masris (on behalf of B Mex and Ninemex) and Assa (on behalf of Ninth Manager), extends the term of the monthly payments until "the later of the payment and satisfaction of the loans on the Property, or the sale or other disposition of all of the Property." Dkt. 340 (Fee Amendment to Ninth Agreement) at 2. The SAC alleges that Assa obtained the Masris' consent through a "conflicted relationship," evidenced by Assa's June 8, 2009 grant to B Mex and Ninemex of preferred equity in Ninth LLC with an 11% cumulative dividend, which has accrued $1,963,712 in dividends as of early 2014. SAC ¶ 33.

Paragraph 10.12 of both Agreements provides:

> Amendments; Consent of Members. This Agreement may be ***amended or modified only by an instrument in writing executed by the Required Members*** [i.e., members holding, in the aggregate, not less than a majority of all of the Percentage Interests, voting together as a single class[7]]. Notwithstanding the foregoing, no amendment or modification to this Agreement ... may be made ***without the approval of all of the Members*** which would: (i) modify the limited liability of the Members; (ii) ***alter the interest of a Member in profits, losses, gain or distributions in a manner inconsistent with this Agreement***; (iii) alter the provisions of Section 3.2 with respect to Additional Capital Contributions by the Members; (iv) cause the Company to be treated for income tax purposes as a corporation; or (v) reduce the requirements to approve an amendment or modification of this Agreement as provided in this Section. The Manager shall amend Schedule I of this Agreement from time to time as provided in this Agreement without the approval of any of the Members, which amendments shall be binding upon the Members absent manifest error.

Dkt. 323 at 23 (emphasis added); *accord* Dkt. 324 at 23.

The SAC alleges that Assa created new, privileged preferred interests in the Companies, granting such interests to his affiliates SI Partners and Assa Realty and to his associates' entities, Ninemex and B Mex. SAC ¶ 26. Assa purportedly granted preferred equity in Ninth LLC to Assa Realty, Ninemex, and B Mex, who consequently accrued preferred returns of $2,238,935, $1,500,338, and $463,374, respectively. SAC ¶ 27. Further, Assa allegedly granted preferred equity in Eighth LLC to SI Partners, and in 2016, paid SI Partners $1.45 million in dividends before any ordinary equity holders received distributions. SAC ¶ 27; Dkt. 348 (Quickbooks records). The SAC further contends that some of these preferred interests were granted, not in exchange for cash, but in exchange for "Alternate Acceptable Contributions", defined by amendments to the operating agreements to include "an acceptable guarantee, binding commitment, cancellation of [the LLC's] indebtedness, letter of credit, debt obligation to [the

[7] Dkt. 323 at 7 (defining "Required Members"); *accord* Dkt. 324 at 7.

LLC], surety agreement or co-signing of debt obligation from the investor or the investor's designee ...." SAC ¶ 26; *see also* Dkt. 350 at 2, 5 (amendments). The SAC claims that the preferred interest grants harmed plaintiffs by diluting their membership interests and deprioritizing the distribution rights of ordinary equity holders, such as plaintiffs, who have yet to receive any distributions from their investments. SAC ¶¶ 24, 28-29.

Plaintiffs submit copies of the amendments to Eighth Agreement and Ninth Agreement that created these preferred interests. Dkt. 350 at 2-8 (Preferred Return Amendment to Ninth Agreement dated 6/8/2009) (creating "(Special Class A and B) Preferred Return Membership Interests"); Dkt. 350 at 9-14 (Equity Amendment to Eighth Agreement dated 11/16/2007) (creating "Equity Investment Preferred Return Rights"). The Preferred Return Amendment is signed by Ninemex, B Mex, Assa Realty, and Assa (on behalf of Ninth Manager). The Equity Amendment bears only Assa's signature on behalf of SI Partners and Eighth Manager. Under these amendments, preferred interest holders are entitled to certain distributions, ahead of non-preferred members, that accrue regardless of cash flow; preferred members of Ninth LLC, moreover, are entitled to priority return of all capital. SAC ¶ 27; Dkt. 350 at 4 (Preferred Return Amendment to Ninth Agreement); *id.* at 10-11 (Equity Amendment to Eighth Agreement).[8]

Defendants contend that Assa and the Managers acted properly, given the financial difficulties facing the Companies and plaintiffs' refusal to make additional capital contributions. In support, defendants submit correspondence with plaintiffs evidencing their efforts to raise

[8] Curiously, the Equity Amendment is dated November ***16***, 2007—three days ***prior to*** the date of Eighth Agreement attached to the complaint (November ***19***, 2007)—and purports to amend an operating agreement dated November *7*, 2007, ten days ***prior to*** the date of the Eighth Agreement. *Compare* Dkt. 350 (Equity Amendment) *with* Dkt. 324 (Eighth Agreement) at 2-3.

allegedly needed capital and plaintiffs' decision not to participate in capital calls and other schemes.

As to Ninth LLC, defendants' letters dated May 14, 2009 request additional capital contributions totaling $6,750,000, divided pro rata according to membership interest percentage, pursuant to § 3.2 of Ninth Agreement. Dkt. 337 at 2-4 (5/14/2009 letters); *id.* at 6 (plaintiffs' 5/18/2009 email acknowledging receipt). Several emails from defendants to plaintiffs, also dated May 14, 2009, reference an amendment to the Ninth Agreement and invite plaintiffs to participate in a Class C membership offering. *Id.* at 7-8 (emails). Plaintiffs' June 9, 2009 response to the May 14th correspondence declines to make the requested capital contributions or to participate in the Class C offering. Dkt. 338 at 1.[9] Defendants' letter dated March 4, 2011 proposes a new loan senior to all Ninth LLC members' equity, entitling the lender to all project cash flow up to the amount of principal, at least 90% of cash flow thereafter, and a guaranteed cumulative 25% return, and requesting a response prior to March 9, 2011 should any members wish to participate. Dkt. 337 at 1 (3/4/2011 letter). Defendants' email dated December 14, 2011 references, but does not include, an unspecified "proposed Amendment" to the Ninth Agreement. Dkt. 338 at 4. Defendants also submit letters dated January 3, 2012 and October 18, 2013, calling for additional capital contributions to Ninth LLC, under Ninth Agreement § 3.2, of $1.4 million and $5 million, respectively. Dkt. 337 at 9-11.

As to Eighth LLC, defendants' email dated January 23, 2014—two months following plaintiffs' filing of this action—references a capital call. Dkt. 338 at 7. Eighth Plaintiffs' response, dated January 29, 2014, advises Assa that they would "not make additional capital

[9] While the timing of the May and June 2009 correspondence appears to correspond to the Preferred Return Amendment to Ninth Agreement, none of the submitted correspondence references the "Preferred Return" membership interests purportedly created by that amendment.

contributions to the 940 8th Avenue project, either now or at any time in the future," and complains that solicitation letters dated January 23, 2014 "reveal an alarming and unexplained diminution" in Eighth Plaintiffs' equity interests. Dkt. 338 at 6.

Plaintiffs' original complaint, filed November 22, 2013, asserts causes of action against defendants for breach of contract, breach of fiduciary duty, violation of plaintiffs' statutory inspection rights, and an accounting; and against Assa for inducement of breach of contract, inducement of breach of fiduciary duty, unjust enrichment, and conversion. Dkt. 1 (Complaint). On November 10, 2014, plaintiffs amended their complaint to assert causes of action against defendants for breach of contract, breach of the duty of good faith and fair dealing, violation of plaintiffs' statutory inspection rights, and an accounting; against Assa for inducement of breach of contract and fraudulent inducement; derivatively on behalf of Ninth LLC, against Ninth Manager and Assa for breach of fiduciary duty; and derivatively on behalf of Eighth LLC, against Eighth Manager and Assa for breach of fiduciary duty. Dkt. 65 (AC).

On February 17, 2015, defendants moved to dismiss the AC. Seq. 005. The court granted defendants' motion, dismissing the claims for an accounting and for violation of plaintiffs' inspection rights as moot in light of the court's standing order to abide by the operating agreements, and dismissing the remaining causes of action as unsupported by specific, nonconclusory facts. Dkt. 317 (Oral Arg. Tr.) at 10-12, 16-19, 21. The court granted plaintiffs leave to file a second amended complaint to replead the breach of contract and breach of fiduciary duty claims, but denied leave to assert claims against Assa that would require piercing the corporate veil of the Managers. Dkt. 317 (Oral Arg. Tr.) at 21, 22; Dkt. 316 (order).

On May 4, 2017, plaintiffs filed the SAC, asserting two causes of action: (1) breach of fiduciary duty, derivatively on behalf of Ninth LLC, against Ninth Manager and Assa; and

(2) breach of fiduciary duty, derivatively on behalf of Eighth LLC, against Eighth Manager and Assa.[10] Defendants now move to dismiss the second amended complaint. Oral argument was held February 16, 2018, and the court reserved.

II. Discussion

On a motion to dismiss a complaint, the court must accept as true the facts alleged in the pleading as well as all reasonable inferences that may be gleaned from those facts. *See Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). Breach of fiduciary duty must be pleaded with the specificity required by CPLR 3016(b). *See Peacock v Herald Square Loft Corp.*, 67 AD3d 442, 443 (1st Dept 2009); CPLR 3016(b) ("Where a cause of action ... is based upon ... breach of trust ..., the circumstances constituting the wrong shall be stated in detail.").

The court, on a motion to dismiss, is not permitted to assess the complaint's merits or factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *See Skillgames*, 1 AD3d at 250, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Deficiencies in the complaint may be remedied by affidavits submitted by the party who filed the pleading. *See Amaro*, 60 AD3d at 491; *see also Leon v Martinez*, 84 NY2d 83, 88 (1994) ("In

[10] Plaintiffs did not elect to replead a cause of action for breach of contract.

assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.").

Where dismissal is sought based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff'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 (2002), citing *Leon*, 84 NY2d at 88. "To qualify as 'documentary,' the paper's content must be 'essentially undeniable and ..., assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based." *Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 (1st Dept 2014), quoting Siegel, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR § 3211. Neither affidavits nor depositions ordinarily qualify, although correspondence such as emails may. *Id.* at 432-33.

A. Breach of Fiduciary Duty: Direct Versus Derivative

New York Law governs the duties owed to Ninth LLC. Pursuant to the "internal affairs" doctrine, Delaware law defines the duties owed by Assa and Eighth Manager to Eighth LLC. *See Culligan Soft Water Co. v Clayton Dubilier & Rice LLC*, 118 AD3d 422 (1st Dept 2014).

Under New York law, the elements of breach of fiduciary duty are "the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct." *Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014). Delaware law requires similar elements, but does not require damages. *See Beard Research, Inc. v Kates*, 8 A3d 573, 601 (Del Ch 2010) ("A claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty."), *aff'd sub nom. on alternative grounds, ASDI, Inc. v Beard Research, Inc.*, 11 A3d 749 (Del 2010). "The core of the fiduciary duty is the notion of loyalty, and a fiduciary must always act in a good faith effort to advance the interests of those to whom the duty is owed" and must not "use their

positions of trust and confidence to further their private interests." *Schroeder v Pinterest Inc.*, 133 AD3d 12, 22 (1st Dept 2015) (applying Delaware law); *accord Pokoik*, 115 AD3d at 429-31 (affirming grant of summary judgment for breach of fiduciary duty under New York law where managing member of LLC failed to act with good faith and undivided loyalty). Accordingly, under Delaware law, "[a] failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation ...." *In re Walt Disney Co. Derivative Litig.*, 906 A2d 27, 67 (Del 2006), quoting and aff'g *In re Walt Disney Co. Derivative Litig.*, 907 A2d 693, 755 (Del Ch 2005).[11]

Plaintiffs have asserted both the First and Second Causes of Action derivatively.[12] Under both New York and Delaware law,[13] the question of whether a claim is direct or derivative "must turn ***solely*** on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 (Del 2004) (emphasis in original); *accord Yudell v Gilbert*, 99 AD3d 108, 110, (1st Dept 2012) (adopting *Tooley* test). To assert a direct claim, the injury claimed must be ***independent*** of the alleged injury to the corporation. *Tooley*, 845 A2d at 1039. In the context of corporate stock—analogous to LLC membership and other equity interests—a dilutive stock issuance may warrant both direct and derivative claims, but only insofar as the individual stockholder is injured ***independently*** from the corporation, such as by diminution of

---

[11] Under New York law, bad faith may also include deliberately targeting an individual for harmful treatment. *Pokoik*, 115 AD3d at 431.

[12] Defendants do not dispute that plaintiffs have adequately pled demand futility.

[13] Under the internal affairs doctrine, whether Eighth Plaintiffs' breach of fiduciary claim is direct or derivative is governed by Delaware law because Eighth LLC is a Delaware LLC. *See Starr Found. v Am. Intel. Group, Inc.*, 76 AD3d 25, 37 (1st Dept 2010).

its voting rights. *See El Paso Pipeline GP Co., L.L.C. v Brinckerhoff*, 152 A3d 1248, 1263-64 (Del 2016), *citing Gentile v Rossette*, 906 A2d 91, 100 (Del 2006).

As to the first prong of *Tooley*, the SAC alleges that defendants' grants of preferred equity harmed plaintiffs by diluting their membership interests and deprioritizing their distribution rights. SAC ¶¶ 26-30, 42, 49.[14] These harms are direct. *See Pokoik v Pokoik*, 115 AD3d 428, 428 (1st Dept 2014) (affirming summary judgment on direct claim for breach of fiduciary duty for reduction of LLC member's capital account); *Gentile*, 906 A2d at 100 (recognizing that over-issuance of corporate shares to controlling stockholder reduces economic value and voting power of minority shareholders). While the SAC does not ***expressly*** allege harm to the LLCs, insofar as issuance of preferred equity harms a corporate entity as an overpayment to the grantees above the fair value of their capital contributions, such claims may also be stated derivatively. *See Gentile*, 906 A2d at 99. As to *Tooley*'s second prong, monetary damages[15] would accrue to the individual plaintiffs ***and*** the LLCs of which plaintiffs are members based on the degree of harm sustained by each.

Although the SAC neither asserts a direct claim for breach of fiduciary duty nor describes derivative harms stemming from the preferred equity grants, the court, below, evaluates whether the facts alleged by the SAC support both direct ***and*** derivative claims as to the preferred equity grants that are not negated by the documentary evidence.

---

[14] Specifically, the SAC alleges that Ninth Manager and Assa's grant of preferred membership interests to Assa Realty, Ninemex, and B Mex harmed Ninth LLC's non-managing members, but not Ninth LLC. Likewise, the SAC alleges that Eighth Manager and Assa's grant of preferred equity to SI Partners harmed Eighth LLC's non-managing members, but not Eighth LLC.

[15] Plaintiffs have neither requested rescission of the preferred equity grants nor joined the grantees as necessary parties. *See* CPLR 1001(a) ("Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.").

1. First Cause of Action: Breach of Fiduciary Duty Against Ninth Manager and Assa

a. Fiduciary Duties Owed by Ninth Manager and Assa to Ninth LLC and Its Members

Ninth Manager, and Assa in the disposition of Ninth LLC's affairs through Ninth Manager,[16] owed fiduciary duties to Ninth LLC and its members. *See* NY LLC Law § 409(a) ("A manager shall perform his or her duties as a manager, including his or her duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances"); *Arfa v Zamir*, 75 AD3d 443, 444 (1st Dept 2010) (individual owner and fiduciary of manager may be held liable for breach of fiduciary duty by using position to benefit manager at entity's expense); *Pokoik*, 115 AD3d at 429 (managing member of LLCs owed fiduciary duty of "undivided and undiluted loyalty" to non-managing member). But, the Ninth Agreement purports to limit Ninth Manager's liability for acts "so long as such action or decision does not constitute willful or wanton misconduct, gross negligence or a breach of the terms of this Agreement and is reasonably believed by the Manager to be consistent with the overall purposes and objectives of the Company" and relieves Ninth Manager from any "duty or obligation to consider any interest of or factors affecting some or all the Members so long as such Manager acts in good faith and in a manner which he reasonably believes is in or not opposed to the best interest of the Company." Dkt. 323 (Ninth Agreement) at 15. LLC Law § 417(a)(1), however, prohibits an operating agreement from limiting a manager's liability for bad faith, intentional misconduct, knowing violation of law, and

[16] As plaintiffs seek to hold Assa personally liable for his ***own*** alleged misconduct rather than for the acts of Eighth Manager and Ninth Manager, plaintiffs have abided by this court's directive to refrain from asserting veil-piercing claims.

receipt of personal gain to which the manager is not legally entitled.[17] Thus, as discussed below, the SAC states a claim for breach of fiduciary duty to Ninth LLC and Ninth Plaintiffs under the standards articulated by Ninth Agreement and NY LLC Law.

i. Preferred Membership Grants in Ninth LLC

Plaintiffs assert that Assa and Ninth Manager violated their fiduciary duty and the Ninth Agreement by granting preferred equity in Ninth LLC to companies owned by Assa and his associates. Defendants respond by claiming the grants were permitted under the Ninth Agreement and that they were conducted in Ninth LLC's best interest.

Section 3.7 of the Ninth Agreement states: "***Except as may be expressly otherwise provided herein, no Member shall have priority*** over any other Member, whether for the return of a Capital Contribution or for Net Profits, Net Losses or a distribution." Similarly, § 10.12 provides: "[N]o amendment or modification to this Agreement ... may be made without the approval of ***all*** of the Members which would ... (ii) alter the interest of a Member in profits,

---

[17] As noted by plaintiffs, Ninth Manager was also bound by NY LLC Law § 411, which addresses conflicts of interest by an LLC's decision makers. *See Tzolis v Wolff*, 39 AD3d 138, 145-46 (1st Dept 2007) ("Limited Liability Company Law § 411 disallows a transaction between a limited liability company and one or more of its managers, or with another business entity in which one or more of its managers has a substantial financial interest."), *aff'd*, 10 NY3d 100 (2008). While NY LLC Law § 411(a) sets forth a safe harbor for conflicted transactions when the material facts are known to those managers or members "***entitled to vote thereon***," under Ninth Agreement § 5.1(b), Ninth Manager was empowered to cause Ninth LLC to transact with Ninth Manager or its affiliate ***without*** consent of the members. NY LLC Law § 411(b), however, prohibits Ninth Manager from entering Ninth LLC into a conflicted transaction that is ***not*** fair and reasonable. *See Wilcke v Seaport Lofts, LLC*, 45 AD3d 447, 447 (1st Dept 2007) (affirming dismissal of breach of fiduciary duty claim where conflicted transaction was fair and reasonable); *see also* NY LLC Law § 411(b) ("[I]f the vote of [an] interested manager was necessary for the approval of [a] contract or transaction [where the interested manager is a manager, director, or officer of, or has a substantial financial interest in, the counterparty entity] ..., ***the limited liability company may avoid*** the contract or transaction ***unless the party or parties thereto shall establish affirmatively that the contract or transaction was fair and reasonable as to the limited liability company at the time it was approved*** ...." (emphasis added)).

losses, gain or distributions ***in a manner inconsistent with this Agreement***" (emphasis added). Finally, NY LLC Law § 417(b) states that "***except as otherwise provided in the operating agreement*** … without the written consent of each member adversely affected thereby, … no amendment of the operating agreement … shall be made that … (iii) ***alters the manner of computing the distributions*** of any member or (iv) allows the obligation of a member to make a contribution to be compromised by consent of less than all the members" (emphasis added).

Under Ninth Agreement § 5.1(b)(ix), Ninth Manager had authority, ***without*** the vote of the members, to "determine the capital needs for the Property, call for Additional Capital Contributions from the Members, ***admit*** additional or substituted Members (whether Class A Members, Class B Members, or ***such other classes of Membership Interests having preferences, voting rights and other rights as the Manager may determine***), and adjust Percentage Interests, in each case in a manner consistent with this Agreement, including, without limitation, Sections 3.2 and 3.8." Defendants, therefore, argue, so long as Ninth Manager follows the procedures outlined by §§ 3.2 and 3.8, he may, without consent of all affected members, vest ***other classes*** of members with preferences—a term denoting priority[18]—"for the return of a Capital Contribution or for Net Profits, Net Losses or a distribution" (notwithstanding § 3.7) and "alter the interest of a Member in profits, losses, gain or distributions" (notwithstanding § 10.12). Defendants contend that Ninth Manager complied with §§ 3.2 and 3.8 in giving preferred equity in Ninth LLC to Assa Realty, Ninemex, and B Mex, after plaintiffs refused to make requested capital contributions or to participate in other schemes to raise capital, and therefore acted properly. Defendants are wrong.

---

[18] *See, e.g., Goldman v Postal Tel.*, 52 F Supp 763, 767 (D Del 1943) ("The right of preferred [stockholders] to ***priority*** in distribution of assets upon liquidation is clearly a ***preferential*** right within the meaning of the Delaware statutes." (emphasis added)).

Sections 3.2, 3.8, or 5.1(b)(ix) do not insulate Assa and Ninth Manager's alleged conduct in granting preferred equity to companies belonging to Assa and his alleged associates. The SAC contends that preferred membership only was "ostensibl[y]" granted to raise capital, that "cash often was not raised at all," and that Assa contrived to "define[] contributions broadly so he and his allies might reap the benefits of 'Preferred Return Membership' without any necessary obligation to pay into the LLCs." The SAC further states that Assa converted accounts payable of Ninth LLC to grant $2 million in preferred membership interests to Assa Realty. One may reasonably infer bad faith on the part of Assa and Ninth Manager from such alleged conduct, thereby supporting the SAC's claim for breach of fiduciary duty as to the preferred equity grants in Ninth LLC to Assa Realty, Ninemex, and B Mex. The alleged conduct harmed Ninth LLC insofar as preferred members were overpaid for the value of their contributions, and it harmed Ninth Plaintiffs insofar as their percentage interest (and voting power) was diluted and their distributions deprioritized in favor of the preferred members.[19]

The documentary evidence of plaintiffs' refusal to make additional capital contributions is unavailing. Defendants' averred compliance with the advance notice requirement of § 3.8 of the Ninth Agreement does not conclusively establish the absence of bad faith.

ii. Other Breaches of Fiduciary Duty (Derivative)

The SAC alleges two acts by Ninth Manager and Assa as having breached their fiduciary duties to Ninth LLC: (1) paying Administrative Fees and Development Fees to Assa's companies after July 2008; and (2) paying Ninth LLC funds to SJP. Both of these allegations withstand defendants' motion to dismiss.

---

[19] Given the allegations of direct harm caused by the breaches of fiduciary duty, plaintiffs are granted leave, sua sponte, to file a ***final*** amended complaint to add a ***direct*** claim against Assa and Ninth Manager for breach of fiduciary duty for the grant of preferred equity in Ninth LLC.

Paragraphs 1.1 and 5.11 of the Ninth Agreement authorized Ninth Manager to pay Denver and Gemstone specific monthly amounts in Administrative and Development Fees, ***ending July 2008***. Pursuant to these terms, the SAC calculates Denver's ***total fee*** as $999,990 and Gemstone's ***total fee*** as $1,099,980; it alleges that Denver and Gemstone were collectively ***overpaid*** by more than $4.7 million. SAC ¶ 32. Defendants contend that Ninth Manager and Assa acted within the scope of their managerial authority under Ninth Agreement in extending the term of Denver and Gemstone's tenure to secure their administrative and development services. They also argue that the Fee Amendment, signed by B Mex and Ninemex, whose percentage interests together comprised the requisite majority, provides the requisite approval.

Even under the narrowed fiduciary duty standard dictated by Ninth Agreement and LLC Law § 417(a)(1), the SAC states a claim as to overpayment of Administrative and Development Fees to Denver and Gemstone—owned by Assa—that defendants fail to overcome with documentary evidence. Ninth Agreement § 5.1(b) permits Ninth Manager to perform "any and all acts necessary or convenient to or for the furtherance of" establishing condominiums at Ninth Property, including to "retain and employ ... managing agents or other experts and to entire into management, ... development, ... or any similar agreement relating to the Company or the Property, with ..' Affiliates of ... the Manager" and to "enter into any transaction with ... an affiliate of [the Manager], ... on commercially reasonable terms and conditions." Dkt. 323 (Ninth Agreement) at 12-13. Defendants argue that Assa merely continued the arrangement with identical monthly fees. But this view is contingent on ¶¶ 1.1 and 5.11 fixing a "monthly fee" ***solely*** for work undertaken prior to July 2008. However, it is ***also*** reasonable to interpret these provisions as specifying Denver and Gemstone's ***total*** compensation for all services rendered to the company: i.e., as monthly ***installments*** of "consideration for the performance of

administrative and related services" by Denver and monthly ***installments*** of "consideration for [Gemstone's] performance of development and related services".[20] Consequently, one may reasonably infer from the SAC and the documentary evidence that Assa overpaid Denver and Gemstone (i.e., himself) for work ***for which he had already been compensated***.

Further, the authorization of these increased fees by B Mex and Ninemex—a majority of the membership interests by percentage—does not warrant dismissal of this claim. While the Ninth Agreement may be amended by majority vote—with certain exceptions not applicable to the issue of fees—the SAC specifically pleads facts from which it may be reasonably inferred that Assa improperly procured B Mex and Ninemex's votes on the Denver and Gemstone fees by granting them preferred membership interests. Moreover, the SAC alleges that the Fee Amendment was executed in 2009 and ***backdated*** to 2008 to cover amounts ***already paid*** to Denver and Gemstone.[21] Thus, the SAC contends that even if B Mex and Ninemex explicitly voted for the fee arrangement, for at least some time, Assa was not authorized to increase the fees to be paid to his own companies. The uninterrupted payments past the contractual end date, the allegedly backdated Fee Amendment, and the alleged improper influence of the preferred interest grant are sufficient to plead a breach of Ninth Manager and Assa's fiduciary duty to act in good faith to advance Ninth LLC's interests rather than Assa's own.

The SAC also states a claim that the payments from Ninth LLC to SJP breached Assa and Ninth Manager's fiduciary duties. The SAC alleges that SJP improperly held ***itself*** out as a legal

---

[20] As to Gemstone (the developer designated by Ninth Agreement), given the SAC's allegation that condominium construction at Ninth Property was repeatedly delayed, it strains credulity that Gemstone could have abandoned the project in July 2008, regardless of development status, simply because it had already collected its fee.

[21] Notably, NY LLC Law § 417(a) prohibits operating agreements from retroactively eliminating personal liability for damages for breach of a manager's duty to the LLC or its members for acts or omissions committed prior to the adoption of the exculpating provision.

services provider, invoicing the Companies for work undertaken by Migliaccio, Assa's attorney. Migliaccio, however, denied affiliation with SJP, a d/b/a of SI Partners (an entity controlled by Assa and Isaac) which was located at a residential property allegedly owned in part by Assa. Further, the SAC alleges that checks to SJP were cashed by SI Partners. Defendants submit purported invoices from SJP—***not*** Migliaccio—and argue that the Agreements permit Ninth LLC to reimburse Ninth Manager's affiliates for funds outlaid on behalf of the LLC. Defendants fail to convince the court that the invoices cover disbursements for Ninth LLC's legal fees, much less ***all*** amounts allegedly disbursed.[22] The documentary evidence fails to conclusively establish a defense to the SJP allegations.[23]

2. *Breach of Fiduciary Duty Against Eighth Manager and Assa (Second Cause of Action)*

a. *Fiduciary Duties Owed by Eighth Manager and Assa to Eighth LLC and Its Members*

Delaware law, which governs Eighth LLC's internal operation, permits LLC operating agreements to restrict fiduciary duties owed by a manager of the LLC, except for acts that breach the implied covenant of good faith and fair dealing. *See* 6 *Del C* § 18-1101(c); *see also* 6 *Del C* § 18 -1101(e) (operating agreement may restrict liability for breach of fiduciary duties, but "may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing."). Absent an express provision

---

[22] As mentioned in a prior footnote, the invoices fail to account for nearly $20,000 in transfers.

[23] Defendants note that Assa has not been shown to have ***personally*** gained from the schemes alleged by plaintiff, citing *Ciavarella v Zagaglia*, 132 AD3d 608 (1st Dept 2015), for their proposition that ***personal*** gain is required to hold Assa liable for the alleged breaches of fiduciary duty. As plaintiffs note, however, *Ciavarella* concerns veil piercing—i.e., a legal theory by which an individual may be liable for damages caused by the ***wrongdoing of a corporate entity***, as opposed to his or her ***own*** wrongdoing.

limiting an LLC manager's fiduciary duties, managers owe fiduciary duties, as do persons who control such a manager. *See Feeley v NHAOCG, LLC*, 62 A3d 649, 662-63 (Del Ch 2012).

Language that merely ***limits liability*** to breaches of certain fiduciary duties does not negate ***all*** fiduciary duties, but instead ***reinforces*** the enumerated duties. *See Feeley*, 62 A3d at 664-65. Consequently, while the Eighth Agreement ***limits*** Eighth Manager's liability so long as it acts in a manner "***reasonably believed*** by the Manager to be consistent with the overall purposes and objectives of the Company" (i.e., in good faith vis-à-vis Eighth LLC), acts with "***good faith*** [vis-à-vis Eighth LLC's members] and in a manner which he reasonably believes is in or not opposed to the best interest of the Company", and abstains from "willful or wanton misconduct, gross negligence or a breach of the terms of [Eighth] Agreement," the Eighth Agreement thus ***reinforces*** Eighth Manager's fiduciary obligations to so act. Dkt. 324 (Eighth Agreement) at 16 (emphasis added). The SAC states a claim for breach of fiduciary duty as to Eighth LLC under this standard.[24]

---

[24] Defendants raise the "business judgment rule" as a defense. Delaware has three tiers of review for decision-makers—business judgment, enhanced scrutiny and entire fairness—the selection of which typically depends on whether the board member making the decision is disinterested and independent. *In re Trados Inc. Shareholder Lit.*, 73 A3d 17, 43 (Del Ch 2013). "[T]he business judgment standard … is 'a presumption that in making a business decision the directors of a corporation acted on an informed basis, in ***good faith*** and in the honest belief that the action taken was in the best interests of the company.'" *Gantler v Stephens*, 965 A2d 695, 705–06 (Del 2009) (emphasis added), quoting *Aronson v Lewis*, 473 A2d 805, 812 (Del 1984). Enhanced scrutiny applies where there is a potential conflict of interest. *Trados*, 73 A3d at 43-44. The most onerous standard—entire fairness—usually applies when there is an actual conflict of interest. *Id.* The Eighth Agreement, however, not only permits Eighth Manager to cause Eighth LLC to transact with affiliates (on commercially reasonable terms) and to enter service agreements with Eighth Manager's affiliates, but also exculpates any act that "does not constitute willful or wanton misconduct, gross negligence or a breach of the terms of this Agreement and is ***reasonably believed*** by the Manager to be consistent with the overall purposes and objectives of the Company," (Dkt. 324 at 16), relieving Eighth Manager of the requirement that a conflicted transaction be entirely, ***objectively*** fair. *See Gelfman v Weeden Inv'rs, L.P.*, 792 A2d 977, 987 (Del Ch 2001) (under partnership agreement's standard for conflicted transactions, general partner not liable for result that is not "entirely fair"). However, even if the business judgment

i. Preferred Equity Grants in Eighth LLC

The SAC states a claim as to the preferred equity grants in Eighth LLC to SI Partners, for similar reasons as do the grants in Ninth LLC, discussed above.[25] Even if Assa and Eighth Manager abided by the procedure set forth in § 3.8 of the Eighth Agreement, the SAC sufficiently alleges defendants' bad faith in granting preferred equity to SI Partners—an affiliate in which Assa had a direct financial interest as co-owner—in that the grants allegedly failed to fulfill the asserted purpose of the grants—to raise capital.[26]

ii. Other Breaches of Fiduciary Duty (Derivative)

In addition to the preferred equity grants, plaintiffs alleged that transfer of Eighth LLC funds, as to three recipients, breached Eighth Manager and Assa's fiduciary duties to Eighth LLC: (1) payments to Republic (flowing to Ladino); (2) payments to Orchedia; and (3) payments to SJP. All three allegations for breach of fiduciary duty withstand the motion to dismiss.

The SAC states a claim as to the payments to Republic. Eighth Agreement § 5.1(b)(xii) authorized Eighth Manager to transact, on behalf of Eighth LLC, with affiliates of the manger—such as Assa-controlled Republic—on "commercially reasonable terms". Here, however, as ***no*** rent was charged under Republic's lease for nearly ***two years***, ***and Eighth LLC*** disbursed cash subsidies to its tenant, one may reasonably infer that the lease was a commercially unreasonable,

---

presumption applies to Eighth Manager's conduct, because the SAC sufficiently alleges ***bad faith***, the rebutted presumption cannot be used to justify dismissal. *See Ryan v Gifford*, 918 A2d 341, 357 (Del Ch 2007) ("[T]he complaint here alleges bad faith and, therefore, a breach of the duty of loyalty sufficient to rebut the business judgment rule and survive a motion to dismiss.").

[25] Eighth Agreement §§ 3.2, 3.7, 3.8, 5.1(b)(ix), and 10.12 are virtually identical to the corresponding provisions in Ninth Agreement.

[26] As with the allegations as to Ninth LLC, given the allegations of direct harm caused by this alleged breach of fiduciary duty, plaintiffs are granted leave, sua sponte, to file a ***final*** amended complaint to add a ***direct*** claim against Assa and Eighth Manager for breach of fiduciary duty for the grant of preferred equity in Eighth LLC to SI Partners.

unauthorized giveaway to Assa's affiliate. Still more damning is the outflow of funds to Ladino—an entity which the SAC alleges was not only Assa-controlled, but also ***Assa-owned***. One may reasonably infer bad faith on these alleged facts.[27]

The SAC also states a claim as to the Orchedia payments. Defendants propound the provision of the Eighth Agreement that allowed Eighth Owner to retain Eighth Property Manager or one of its affiliates as "manager and leasing agent" for 5% of gross rents as a management fee, as well as for a standard leasing fee for leasing agent services. *See* Dkt. 324 (Eighth Agreement) at 15. Assuming, arguendo, that Orchedia is ***Eighth Property Manager's*** affiliate—a matter addressed neither by the SAC nor by defendants' papers—Eighth Agreement neither addresses nor authorizes the payment of fees to broker leases with Assa-controlled ***tenants***. Moreover, the bad faith reasonably inferred by the SAC's allegations regarding Republic's lease—under which Assa and Eighth Manager allegedly funneled money to Assa's own entity—infects the purported disbursement of fees to Orchedia in connection with that lease.[28]

Finally, the SAC states a claim as to the payment of Eighth LLC funds to SJP that is not conclusively refuted by documentary evidence for the reasons stated with respect to the SJP allegations supporting the First Cause of Action. Accordingly, it is

ORDERED that the motion to dismiss by defendants 940 Investor LLC, 511 Manager Corp., and Salim "Solly" Assa and nominal defendants 940 Realty LLC and 511 9th LLC is denied; and it is further

---

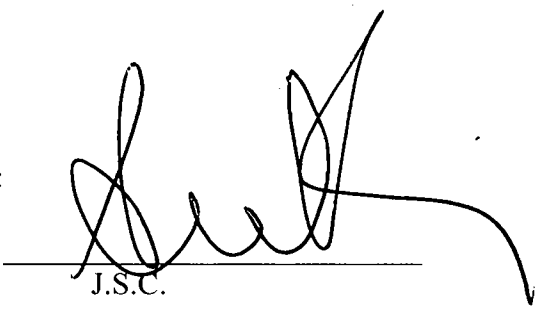
[27] Defendants point to—but fail to identify any specific provision in—Republic's lease as allegedly authorizing such subsidies. Moreover, as Eighth Manager and Assa entered Eighth LLC into Republic's lease in the first instance, the terms of that lease can hardly defend the allegations.

[28] Defendants also assert—in attorney argument—that other (non-Republic) leases account for some of Orchedia's fees. In the absence of documentary evidence substantiating these arguments, the court will not dismiss part of the Orchedia allegations.

ORDERED that the court *sua sponte* grants plaintiffs leave to amend their complaint to add direct causes of action for breach of fiduciary duty against defendants within 20 days of entry of this order on NYSCEF; and it is further

ORDERED that the parties shall call Chambers (646-386-3363) for a status teleconference on May 29, 2018 at 3:00pm to discuss to discuss the scope of and a timeline for completion of fact discovery.

Dated: May 16, 2018 ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.