SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

REVISED DECISION LIST

AUGUST 15, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Andrias, Gesmer, JJ.

4002 The People of the State of New York, Respondent, Ind. 4171/10

-against-

Nakae Thompson,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael Sonberg, J.), rendered September 4, 2013, as amended September 18, 2013, convicting defendant, after a jury trial, of murder in the second degree, gang assault in the first degree and criminal possession of a weapon in the second degree (two counts), and sentencing him, as a second violent felony offender, to an aggregate term of 30 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence, and was not against the weight of the evidence (*see People v*

Danielson, 9 NY3d 342, 348-349 [2007]). The element of homicidal intent could be inferred from defendant's act of aiming at the victim and firing a shot at very close range, striking him in the vicinity of the neck (*see e.g. People v Steele*, 93 AD3d 492 [1st Dept 2012], *lv denied* 19 NY3d 968 [2012]; *People v Mason*, 254 AD2d 109 [1st Dept 1998], *lv denied* 92 NY2d 1035 [1998]). Furthermore, the circumstances support an inference that the killing was a deliberate effort by defendant, with the assistance of one or more other persons. Neither the surveillance videotape, nor any other evidence, supports defendant's assertion that the shooting may have been reckless or negligent.

The court properly exercised its discretion in denying defendant's request to strike the testimony of an eyewitness who invoked his Fifth Amendment privilege, and was denied immunity, as to certain matters. Defendant received a full opportunity to cross-examine the witness about all matters related to the homicide he observed. Although the witness, on advice of counsel, declined to answer questions about his cooperation agreement, which pertained to unrelated criminal charges, there was no prejudice to defendant because the terms of the agreement, the underlying facts of the pending charges and the witness's expectation of a benefit for his testimony were revealed to the jury in detail, by way of a stipulation. Thus, the jury was

fully able to evaluate the effect of the expected benefit. By way of contrast, questions regarding the witness's pending charges and his other criminal or possibly criminal activity were collateral matters that only went to his general credibility. Moreover, the court instructed the jury that it could consider the witness's refusal to answer such questions in evaluating the believability and weight of his testimony (*see People v Siegel*, 87 NY2d 536, 544 [1995]). "Striking a witness's testimony is the most drastic relief available when a witness refuses further cross-examination under a claim of self-incrimination, and a court should only invoke it when there are no less drastic alternatives" (*People v Vargas*, 88 NY2d 363, 380 [1996][internal quotation marks omitted]).

The court lawfully imposed a consecutive sentence for the conviction under Penal Law § 265.03[3], because there was a completed possession, within the meaning of that statute, before the shooting occurred (*see People v Brown*, 21 NY3d 739 [2013]).

Defendant's claim that his sentence was based on a presentence report that lacked required information is unpreserved and expressly waived (*see People v Davis*, 145 AD3d 623 [1st Dept 2016], *lv denied* 28 NY3d 1183 [2017]), and we decline to review his claim in the interest of justice. As an alternative holding, we find no basis upon which to remand for

resentencing. When the court inquired whether defendant was "prepared to be sentenced" without having been interviewed by the Probation Department, defendant and his counsel each responded affirmatively. Had defendant "wished to be interviewed by the Probation Department," he could have so informed the court (*see People v Pinkston*, 138 AD3d 431, 432 [1st Dept 2016], *lv denied* 27 NY3d 1137 [2016]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 15, 2017

CLERK

Sweeny, J.P., Renwick, Andrias, Gesmer, JJ.

4025N Crabapple Corp., et al., Index 650492/15
Plaintiffs-Respondents,

-against-

Ruben Elberg,
Defendant-Appellant,

Royal One Real Estate, LLC,
et al.,
Defendants-Respondents.

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Arnold & Porter, Kaye Scholer, LLP, New York (James M. Catterson of counsel), for appellant.

Warshaw Burstein LLP, New York (Grant R. Cornehls of counsel), for Crabapple Corp., Zhu Qing, Feng Li, Mengsha Chen, Ruizhen Wang, Hong Ge, Qin Si, Yang Zhang, Zhe Fang Hongxing Liu and Xu Ning, respondents.

Johnson Liebman, LLP, New York (Charles D. Liebman of counsel), for Royal One Real Estate, LLC, Royal LIC Real Estate Management LLC, Royal Real Estate Management LLC, Royal CP Hotel Holdings LP and Royal HI Hotel Holdings LP, respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 21, 2016, which, to the extent appealled from as limited by the briefs, granted defendants-respondents' (the LLCs) motion to remove defendant Ruben Elberg (Elberg) as their co-manager and fiduciary, unanimously reversed, without costs, the motion denied, and the matter remanded to Supreme Court for further proceedings in accordance with this decision.

Elberg asserts that he is the sole managing member of the

LLCs. His sister, nonparty Tamara Pewzner (Pewzner), asserts that their father, Jacob Elberg (Jacob), deceased, was the sole owner of the LLCs and that she is the LLCs co-manager by virtue of her status as the co-executor, along with Elberg, of Jacob's estate. By virtue of that authority, Pewzner moved in the name of the LLCs to remove Ruben as a co-manager of the defendant entities, asserting, inter alia, that he had breached his fiduciary duties.

Contrary to his contention, Elberg was not removed as the sole "managing member" of the LLCs. The record demonstrates that he was a 40% minority member, not a managing member with the power to act unilaterally on the LLCs' behalf. The relevant agreements contained no provision regarding the succession of management of the LLCs in the event of the death of Jacob, the majority member. Thus, Jacob's controlling interest in the LLCs passed to his estate upon his death, and Elberg and Pewzner, the co-executors of the estate, had the authority to act as co-managers of the LLCs (Limited Liability Company Law [LLC] § 608; *see also Yew Prospect v Szulman*, 305 AD2d 588, 589 [2d Dept 2003]). LLC § 608 provides that the executor of a deceased member "may exercise *all* of the member's rights for the purpose of settling his or her estate" (emphasis added).

In view of the foregoing, Elberg's reliance on the business

judgment rule is misplaced (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]). As he was never the "sole manager" of the LLCs, the business judgment of the LLCs was never his to exercise unilaterally. However, given the conflicting submissions as to the rights of the parties vis-a-vis the LLCs and LPs, as well as whether completing the project or accepting the buyout was the best course of action, the motion court acted prematurely when it granted the motion to remove Elberg as co-manager without holding an evidentiary hearing (*see Alpert v 28 Williams St. Corp.*, 91 AD2d 530 [1st Dept 1982]; *see also Lehey v Goldburt*, 90 AD3d 410 [1st Dept 2011]). Questions of fact exist as to whether movants are entitled to the relief they seek (see *Colucci v Canastra*, 130 AD3d 1268, 1269 [3d Dept 2015] ["questions of fact preclude summary judgment on the issue of defendant's removal as a director and officer"]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 15, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4222 Heather Thomson Schindler, et al., Index 653161/15
Plaintiffs-Respondents,

-against-

Eric Rothfeld, et al.,
Defendants-Appellants,

Times Three Clothier, LLC,
Nominal Defendant.

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[And Another Action]

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Pryor Cashman LLP, New York (Donald S. Zakarin of counsel), for appellants.

Wachtel Missry LLP, New York (John H. Reichman of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 19, 2016, which, to the extent appealed from, granted plaintiffs' motion to dismiss the amended counterclaims, and denied defendants' motion to modify a September 2015 order imposing certain restraints on the parties, unanimously modified, on the law, to deny plaintiffs' motion as to the first counterclaim, and grant defendants' motion vacating the restraints imposed by the September 2015 order, and otherwise affirmed, without costs.

The first counterclaim alleges that plaintiff Heather Thomson Schindler appeared on the third season of the reality

television show The Real Housewives of New York without obtaining from defendants an exclusion from section 2.10(b) of the operating agreement governing the clothing company founded by the parties, which required her to devote her full-time services exclusively to the company. These allegations state a cause of action for breach of contract. Plaintiffs failed to demonstrate as a matter of law that defendants suffered no damages as a result of the alleged breach.

With respect to the second counterclaim, which alleges a breach of Article 8 (management) of the operating agreement, the court correctly found that plaintiffs' decision to remove defendant Eric Rothfeld as the manager of the company without a formal meeting and prior notice did not breach any applicable contractual provisions. The court had previously correctly found that this meeting requirement could be avoided, based on section 6.9 of the agreement, which provided that any action that might be taken at a meeting could be taken by informal action where, as here, a majority of the members agreed to take it, and that notice of the decision to take an informal action was not required to waive the meeting requirement. Further, while Article 8 set forth the full and exclusive authority of the manager to act on behalf of the company and provided that plaintiffs, as members, would not take any action to "bind" the

company without the manager's consent, the allegations that plaintiffs ceased complying with the instructions, requests and direction of Rothfeld as manager do not state a cause of action for breach of any specific contractual obligation imposed upon plaintiffs in Article 8.

The third and fifth counterclaims, which allege fraud and breach of fiduciary duty, were properly dismissed because they do not involve a duty separate and apart from the duty to abide by the terms of the contract (*see Verizon N.Y., Inc. v Optical Communications Group, Inc.*, 91 AD3d 176, 179-180 [1st Dept 2011]). The fourth counterclaim, which alleges breach of fiduciary duty as against Heather Thomson Schindler, is also premised upon the allegations underlying part of the breach of contract counterclaims (*see Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600 [1st Dept 2014]).

The sixth counterclaim, which seeks a permanent injunction to prevent plaintiffs from interfering with Rothfeld's managerial authority cannot stand because the substantive causes of action underlying the claims for injunctive relief have been dismissed (*Weinreb v 37 Apts. Corp,* 97 AD3d 54 [1st Dept 2012]).

The record does not support a conclusion that the parties agreed that the restraints in the September 21, 2015 order would remain in place indefinitely while this case was pending and in

the face of changed circumstances. We therefore vacate the restraints only because they were based upon the motion court's conclusion that the parties continued to consent to them. Our decision is without prejudice to plaintiff seeking such other and further restraints as may be appropriate.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 15, 2017

CLERK

CORRECTED ORDER - AUGUST 16, 2017

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4228 In re Darcel D. Clark, etc., Index 102/17
Petitioner,

-against-

George R. Villegas, etc., et al.,
Respondents.

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Darcel D. Clark, District Attorney (Matthew B. White of counsel), for petitioner.

Seymour W. James, Jr., The Legal Aid Society, New York (Lorca Morello of counsel), for Dewayne Robinson, respondent.

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Petition pursuant to CPLR article 78 to prohibit the enforcement of an order, Supreme Court, Bronx County (George R. Villegas, J.), entered on or about April 10, 2017, which ordered respondent New York State Department of Corrections and Community Supervision (DOCCS) to credit respondent Dewayne Robinson with 1,282 days of jail time, unanimously granted, without costs. Respondents are prohibited from enforcing the order.

Petitioner seeks to prohibit respondents from enforcing an order directing DOCCS to credit respondent Robinson with jail time that he never actually served. **Justice George R. Villegas has elected, pursuant to CPLR 7804(i), not to appear in this proceeding.** We conclude that this article 78 proceeding is the proper procedural vehicle for the relief sought (*see Matter of*

Pirro v Angiolillo, 89 NY2d 351, 355 [1996]; *Matter of Holtzman v Goldman*, 71 NY2d 564, 569 [1988]), and we agree with petitioner that Justice Villegas acted in excess of his authorized powers by granting Robinson's motion to reargue his motion for jail time credit on the ground of noncompliance with CPLR 460.50(5) and directing DOCCS to credit Robinson with the time. We also find that petitioner has a substantial interest in the outcome of Robinson's prosecution, and a right to pursue relief by writ of prohibition where, as here, the conviction and sentence resulted from a trial by jury rather than pursuant to a plea bargain (*see Pirro v Angiolillo*, 89 NY2d at 360). A court would be authorized to entertain Robinson's request for jail time credit for noncompliance with CPL 460.50(5) only if Robinson commenced an article 78 proceeding to compel DOCCS to grant the credit (*see e.g. Matter of Hooray v Cummings*, 89 AD2d 790 [4th Dept 1982]; *Matter of Holland v La Vallee*, 63 AD2d 989 [2d Dept 1978], *lv denied* 45 NY2d 710 [1978]). Accordingly, we do not here reach the underlying merits.

In the absence of an available remedy at law (*see* CPL 450.20), and upon a finding that substantial harm implicating the public interest would result if the order were not overturned, we grant the writ of prohibition.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 15, 2017

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Mazzarelli, Andrias, JJ.

4096 LNYC Loft, LLC, etc., Index 650969/11
Plaintiffs-Appellants,

-against-

Hudson Opportunity Fund I, LLC,
et al.,
Defendants,

Jani Development II, LLC, et al.,
Defendants-Respondents.

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Rosenfeld & Kaplan, LLP, New York (Steven M. Kaplan of counsel) for appellants.

Ganfer & Shore, LLP, New York (Steven J. Shore of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 2, 2016, reversed, on the law, without costs, the appointment of Mark Zauderer to act as Special Litigation Committee vacated, and the matter remanded for further proceedings.

Opinion by Manzanet-Daniels, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Dianne T. Renwick
Sallie Manzanet-Daniels
Angela M. Mazzarelli
Richard T. Andrias, JJ.

4096
Index 650969/11

_____x

LNYC Loft, LLC, etc.,
Plaintiff-Appellant,

-against-

Hudson Opportunity Fund I, LLC,
et al.,
Defendants,

Jani Development II, LLC, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Carol R. Edmead, J.), entered September 2, 2016, which, insofar as appealed from as limited by the briefs, granted defendants Jani Development II, LLC and One York Street Associates, LLC's motion to the extent of staying the action pending the conclusion of the investigation of the Special Litigation Committee.

Rosenfeld & Kaplan, LLP, New York (Steven M. Kaplan of counsel) for appellant.

Ganfer & Shore, LLP, New York (Steven J. Shore, Ira B. Matetsky and Justin R. Bonanno of counsel), for respondents.

MANZANET-DANIELS, J.

In *Tzolis v Wolff* (10 NY3d 100 [2008]), the Court of Appeals recognized the right of a member to sue derivatively on behalf of an LLC, leaving it to the courts to further define "[w]hat limitations on the right of LLC members to sue derivatively may exist" (*id.* at 109). This appeal concerns the propriety of the appointment of an outside attorney to serve as the sole member of a Special Litigation Committee (SLC) to determine the merits of the claims asserted in this LLC derivative suit. We recognize that the appointment of an SLC may serve an important purpose in the LLC context and endorse the practice generally, at least where explicitly contemplated by the relevant governing documents. Here, however, where the operating agreements do not explicitly provide for such an appointment, and otherwise do not evince an intent to delegate core governance functions to nonmembers, Mr. Zauderer cannot serve as the sole member of an SLC. We accordingly reverse and remand for further proceedings.

Background

This appeal concerns derivative claims asserted by plaintiff LNYC on behalf of two New York limited liability companies, HRC-NYC Development LLC (HRC) and One York Street Associates, LLC (One York). The underlying dispute concerns the parties' investment in One York, a luxury residential and commercial

condominium development located at 1 York Street, in Tribeca. The building is owned entirely by One York, an entity formed in or about 2004. One York in turn is owned by two entities: defendant Jani Development II, LLC (25%), and derivative plaintiff HRC (75%). Jani, which is controlled by defendant Stanley Perelman (not a party to this appeal), serves as One York's sole managing member.

HRC is owned by two members: plaintiff owns 44%, and defendant Hudson Opportunity Fund I, LLC (not a party to this appeal) and its affiliates (Hudson) own 56% and serve as the managing member. Plaintiff LNYC's managing member is nonparty Charles Darwish.

The One York operating agreement, dated March 3, 2004, provides that Jani cannot make a "Major Decision" without the prior written consent of HRC. Such "Major Decisions" include a decision (1) to "amend or modify this Agreement," (2) to "institute or prosecute or settle any material legal, arbitration, or administrative actions or proceedings on behalf of the LLC or any Subsidiary LLC," or (3) to confess a judgment against the LLC in any lawsuit or proceeding or settle any lawsuit or proceeding if such settlement requires payment in excess of $10,000 or an admission of liability.

HRC's operating agreement, dated July 1, 2004, similarly

provides that "no Operating Member" (i.e., Hudson and plaintiff LNYC), can undertake a "Major Decision" without the prior written consent of the other operating member. "Major Decisions" include decisions to "enter into any binding agreement or any amendment, modification, supplement or extension of any binding agreement"; to "institute and prosecute ... or settle any material legal, arbitration, or administrative actions or proceedings on behalf of the LLC"; or to "confess a judgment against the LLC in any lawsuit or proceeding or settle any lawsuit or proceeding which settlement requires a payment by the LLC or requires an admission of liability on the part of the LLC."

According to the complaint, in or about May 2010, Hudson, acting as managing member of One York, and without the consent of LNYC as required by the agreement, entered into an amendment to the One York operating agreement that modified the distributions by One York to its members. Plaintiff alleges that Perelman and Jani solicited and induced Hudson to breach the terms of the HRC operating agreement by entering into the amendment so as to benefit Jani and Perelman at HRC's and LNYC's expense, reducing HRC's share of distributions and LNYC's interest in distributions of One York's cash flow.

Plaintiff commenced this action in April 2011, initially asserting only direct claims against defendants and other

parties. For five years, the parties engaged in substantive motion practice and extensive discovery. The motion court, by decision and order dated February 9, 2016, allowed plaintiff to amend the complaint to assert five new derivative claims against certain of the defendants. Four claims were asserted on behalf of HRC and one on behalf of One York. The third amended complaint is the current operative complaint asserting derivative claims. Plaintiff alleged that demand on the managing member would have been futile because the managing members of both HRC and One York have conflicts of interest.

The managing members decided to engage an independent individual to act as a Special Litigation Committee. After plaintiff declined to select one of the individuals proposed by defendant, the managing members selected Mark C. Zauderer, Esq., to serve as SLC. Mr. Zauderer is authorized to take such action as he finds appropriate in the exercise of his independent judgment on behalf of the companies with respect to the five derivative causes asserted on behalf of HRC and One York Street. Specifically, he was granted the authority 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." No

one suggests that Mr. Zauderer is in any way biased or unqualified or that he is not independent. Plaintiff's objections go solely to the propriety of the appointment of Mr. Zauderer, an outside party, to act as SLC with authority to make recommendations as to the disposition of the derivative claims.

Defendants moved to dismiss the derivative claims on various grounds, or, in the alternative, to stay the proceedings. Plaintiff opposed, asserting that a New York LLC had no authority to appoint an SLC, and, in any event, that the proceedings ought not to be stayed.

The motion court dismissed the fourth and fifth causes of action for breach of contract as against One York. The motion court granted the motion for a stay of litigation of the derivative claims, holding that a New York LLC, like a New York corporation, may appoint an SLC to address derivative claims brought on the LLC's behalf. The motion court rejected plaintiff's argument that the language in the operating agreements concerning "Major Decisions" required the approval of LNYC to appoint an SLC. The motion court noted that such reasoning would likewise have required unanimous approval of plaintiff's commencement of the derivative litigation (which was not sought and not given). The motion court further noted that any such "Major Decision" would in any event be undertaken by the

SLC, and not one of the members.

On appeal, plaintiff maintains that defendants were not authorized to designate an SLC to handle their derivative claims. We agree and now reverse. Mr. Zauderer cannot serve as SLC in this case because he is not a manager or member of HRC or One York, and the operating agreements do not otherwise authorize his appointment.

Discussion

In *Tzolis v Wolff* (10 NY3d 100 [2008]), the Court of Appeals recognized the right of a member to sue derivatively on behalf of an LLC. The Court reasoned that the absence of a proposed article concerning derivative suits from the final legislative enactment did not mean that the legislature meant to "render derivative suits nonexistent," observing that "no legislator is known to have favored" "[such] an extreme result" (*id.* at 108-109).

In the years since *Tzolis* was decided, courts have looked to New York statutory and common law on partnerships and corporations in determining certain questions arising in the LLC context. For example, it has been held necessary for a plaintiff suing derivatively on behalf of an LLC to allege presuit demand or demand futility, by analogy to section 626© of the Business Corporation Law (*see Najjar Group, LLC v West 56th Hotel LLC*, 110

AD3d 638 [1st Dept 2013]); *Segal v Cooper*, 49 AD3d 467 [1st Dept 2008]). It has also been held that the criminal acts of a managing member may be imputed to an LLC, notwithstanding the legislature's silence, "considering the corporation-partnership hybrid nature of the LLC" (*JMM Props., Inc. v Erie Ins. Co.*, 2013 WL 149457, *6, 2013 US Dist LEXIS 5080, *17 [ND NY 2013], *affd* 548 Fed Appx 665 [2013]). In *Gottlieb v Northriver Trading Co. LLC* (58 AD3d 550 [1st Dept 2009]), we recognized an LLC's right under the common law to seek an equitable accounting, notwithstanding the defendant's argument that the plaintiff was limited to the remedies set forth in the LLC Act. We dismissed such an analysis as "inconsistent with the reasoning in *Tzolis*" (*id.* at 551).

It is true, as defendants assert, that *Tzolis* encouraged courts to fashion remedies to speak to the omissions in the LLC statute. Nonetheless, we decline to uphold the appointment of an SLC where the relevant operating agreements do not delegate managerial authority to nonmembers or nonmanagers or otherwise provide for the appointment of an outsider to serve as an SLC. It is often said that LLCs are "creatures of contract" (*Obeid v Hogan*, 2016 WL 3356851, *5, 2016 De; Ch LEXIS 86, *13 [Del Ch June 10, 2016]), and that "[o]ne attraction of the LLC form of entity is the statutory freedom granted to members to shape, by

contract, their own approach to common business relationship problems" (*id.* [internal quotation marks omitted]). Article IV of the New York LLC Act makes clear that the operating agreement of an LLC governs the relationships among members and the powers and authority of the members and manager (*see id.* at § 417).

The operating agreement for One York provides that defendant Jani is the sole manager and that defendant Perelman "controls all decision making of Jani (i.e., day-to-day and major decisions)." Article 6 of the operating agreement sets forth the "rights, duties [and] obligations" of the manager. Under section 6.3, the managing member was not empowered to undertake certain defined actions (or "Major Decisions") without the consent of HRC, including a decision to "institute or prosecute or settle any material legal, arbitration or administrative action on behalf of the LLC," or to confess a judgment against the LLC in any lawsuit or proceeding or settle any lawsuit or proceeding if such settlement requires payment in excess of $10,000 or an admission of liability.

The HRC operating agreement similarly provides that one operating member is not empowered to undertake a "major decision" without the consent of the other operating member, including decisions to "institute and prosecute ... or settle any material legal, arbitration, or administrative actions or proceedings on

behalf of the LLC"; or to "confess a judgment against the LLC in any lawsuit or proceeding or settle any lawsuit or proceeding which settlement requires a payment by the LLC or requires an admission of liability on the part of the LLC."

Neither operating agreement provides for the delegation of decision-making authority to other than a member, or to an outsider like Mr. Zauderer to serve as SLC. The agreements are explicit that while day-to-day management is vested in the manager, "major decisions" need the consent of the other members. We reject the argument that the appointment of the SLC (as opposed to the ultimate decision as to whether to proceed with the derivative litigation) was not a "Major Decision" within the meaning of the agreements. The SLC was specifically granted the authority 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 interests to pursue them."

That is not to say that the appointment of an SLC would in all cases be improper in the LLC context. Indeed, the members may so provide in the operating agreement, and such provision will be enforced in accordance with those same principles

concerning the parties' freedom to contract.[1]

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[1]As defendants note, the Revised Uniform Limited Liability Company Act, 6B Uniform Laws Ann. 367 [2008]), which has been adopted by nine states, would sanction appointment of Mr. Zauderer under these circumstances. The Uniform Act contains provisions authorizing special litigation committees and expressly addressing the situation before us, namely, who may appoint a special litigation committee:

> SECTION 805. SPECIAL LITIGATION COMMITTEE.
> (a) If a limited liability company is named as or made a party in a derivative proceeding, the company may appoint a special litigation committee to investigate the claims asserted in the proceeding and determine whether pursuing the action is in the best interests of the company. If the company appoints a special litigation committee, on motion by the committee made in the name of the company, except for good cause shown, the court shall stay discovery for the time reasonably necessary to permit the committee to make its investigation....
> (b) A special litigation committee must be composed of one or more disinterested and independent individuals, who may be members.
> (c) A special litigation committee may be appointed:
> (1) in a member-managed limited liability company:
> (A) by the affirmative vote or consent of a majority of the members not named as the parties in the proceeding; or
> (B) if all members are named as parties in the proceeding, by a majority of the members named as defendants; or
> (2) in a manager-managed limited liability company:
> (A) by a majority of the managers not named as parties in the proceeding; or
> (B) if all managers are named as parties in the proceeding, by a majority of the managers named as defendants.

In light of the above, it is unnecessary to address the parties' further contentions. We do not find defendants' waiver argument persuasive. Plaintiff is not in a similar position to parties who waive a contractual right to arbitrate disputes. The operating agreements do not provide for the delegation of authority to a nonmember or nonmanager, or for the appointment of a nonmember or nonmanager SLC, and we will not rewrite the parties' agreements to so provide.

Accordingly, the order of the Supreme Court, New York County (Carol R. Edmead, J.), entered September 2, 2016, which, insofar as appealed from as limited by the briefs, granted defendants Jani Development II, LLC and One York Street Associates, LLC's motion to the extent of staying the action pending the conclusion of the investigation of the Special Litigation Committee, should be reversed, on the law, without costs, the appointment of

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New York has not adopted the Uniform Act, though parties are free to incorporate similar provisions into their operating agreements. It should be noted that even in a state subscribing to the Uniform Act, parties can prohibit the use of SLCs by explicit provision in their operating agreement, rendering section 805 inapplicable.

Mark Zauderer to act as Special Litigation Committee vacated, and the matter remanded for further proceedings.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 15, 2017

CLERK