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COURT OF APPEALS

STATE OF NEW YORK

GEOFFREY GELMAN,

Respondent,

-against-

No. 37

ANTONIO BUEHLER,

Appellant.

20 Eagle Street
Albany, New York 12207
February 7, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 37. And do
2 you want any rebuttal time, counselor?

3 MR. NIEHAUS: Please. Two minutes.

4 CHIEF JUDGE LIPPMAN: Two minutes. Go
5 ahead, sure.

6 MR. NIEHAUS: Thank you, Your Honor. Paul
7 Niehaus of Niehaus LLP for defendant-appellant
8 Antonio Buehler. May it please the Court.

9 This case presents the Court with two
10 distinct questions. The first is whether the
11 plaintiff in this case has alleged that the parties
12 entered into a partnership for a particular
13 undertaking, or for a definite term - - -

14 CHIEF JUDGE LIPPMAN: What's the - - - what
15 is the particular undertaking? Let's start with
16 that.

17 MR. NIEHAUS: There's none - - - none been
18 alleged here, Your Honor. What's been alleged in
19 this case is that the parties were going to form a
20 search fund of indeterminate length, identify some
21 business in some unidentified field - - -

22 CHIEF JUDGE LIPPMAN: But you know the
23 general nature, right? I mean, it's - - -

24 MR. NIEHAUS: Well - - -

25 CHIEF JUDGE LIPPMAN: - - - pretty clear.

1 MR. NIEHAUS: - - - your - - -

2 CHIEF JUDGE LIPPMAN: Let's put it this
3 way. It's pretty clear in a most general way what
4 the undertaking is. But is it a particular
5 undertaking?

6 MR. NIEHAUS: That's basically the
7 question, Your Honor.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. NIEHAUS: Yes. And that's a
10 distinction that some courts have recognized. There
11 can be a general purpose to a partnership, but that
12 doesn't qualify as a particular undertaking.

13 CHIEF JUDGE LIPPMAN: What does? What
14 does? What's a particular undertaking?

15 MR. NIEHAUS: What qualifies as a
16 particular undertaking under - - -

17 CHIEF JUDGE LIPPMAN: Again, you still have
18 this other issue of - - -

19 MR. NIEHAUS: Absolutely. Definite time.

20 CHIEF JUDGE LIPPMAN: - - - indefinite,
21 which we'll deal with. Go ahead.

22 MR. NIEHAUS: A particular undertaking,
23 Your Honor, has to identify a specific business. It
24 has to identify something that the parties can know
25 when they enter into their partnership - - -

1 JUDGE READ: That's kind of - - -

2 MR. NIEHAUS: - - - when it - - -

3 JUDGE READ: - - - antithetical to the
4 nature of a search fund, though, isn't it?

5 MR. NIEHAUS: Well, Your Honor, a search
6 fund - - - operating a search fund is something that
7 is the classic example of something of an
8 indeterminate length. It's an ongoing - - -

9 JUDGE READ: So can you ever - - -

10 MR. NIEHAUS: - - - business.

11 JUDGE READ: - - - can you ever have such a
12 partnership to undertake a search fund, or is it just
13 inherently impossible with that type of - - -

14 MR. NIEHAUS: You could - - -

15 JUDGE READ: - - - a mercurial vehicle?

16 MR. NIEHAUS: No, no. You could have a
17 search fund with a specific time frame. But that
18 would fall under the other rubric of definite time.

19 CHIEF JUDGE LIPPMAN: A time frame, or what
20 about a particular, more defined purpose?

21 MR. NIEHAUS: Well - - -

22 CHIEF JUDGE LIPPMAN: Would that do it?

23 MR. NIEHAUS: - - - if it were a particular
24 purpose - - -

25 CHIEF JUDGE LIPPMAN: Like a search - - -

1 MR. NIEHAUS: - - - yes.

2 CHIEF JUDGE LIPPMAN: - - - like that - - -

3 a search fund - - -

4 JUDGE GRAFFEO: If they said - - -

5 CHIEF JUDGE LIPPMAN: - - - for something.

6 JUDGE GRAFFEO: - - - hi-tech firms. Would

7 that be specific enough?

8 MR. NIEHAUS: I don't think that would be

9 sufficient, Your Honor.

10 JUDGE GRAFFEO: They have to name a

11 particular company that's in existence?

12 MR. NIEHAUS: In this particular instance,

13 I believe that you do. Because what you're trying to

14 do is allow the parties to know from the beginning

15 what they have to accomplish in order to conclude the

16 partnership.

17 JUDGE GRAFFEO: It's a little different,

18 though, than the real estate cases where they

19 identify a particular parcel that they're going to

20 develop. I mean - - -

21 MR. NIEHAUS: It is a little bit different.

22 JUDGE GRAFFEO: - - - here the whole

23 purpose was to investigate different types of

24 corporate opportunities - - -

25 MR. NIEHAUS: Well, but - - -

1 JUDGE GRAFFEO: - - - wasn't it?

2 MR. NIEHAUS: - - - but again, Your Honor,
3 we had that argument come in kind of at the last
4 minute, during the briefing in this case. What had
5 previously been said was, we're going to identify a
6 business and run it, and make - - - you know,
7 increase its value, and then we're going to sell it
8 some way.

9 JUDGE PIGOTT: If you were - - -

10 MR. NIEHAUS: But what you - - -

11 JUDGE PIGOTT: - - - if you were - - -
12 let's say you got together with Magic Johnson and
13 said we're going to get together and find a sports
14 team for the city of Los Angeles, that would be a
15 purpose that would fit, right?

16 MR. NIEHAUS: If you were going to say our
17 particular purpose is to find a sports team to bring
18 to the city of Los Angeles, and you could say with
19 particularity, when that particular undertaking was
20 going to be achieved, and you could stick a pin in it
21 and say we're done, then yes.

22 CHIEF JUDGE LIPPMAN: But why - - - do you
23 have - - -

24 MR. NIEHAUS: But you have to - - -

25 CHIEF JUDGE LIPPMAN: - - - do you have to

1 say when it's going to be achieved if you - - - if,
2 in answer to Judge Pigott's question, we know that's
3 the undertaking? Are they two different things? And
4 do the - - - because you're not going into that first
5 criteria. If you said we're going to buy a ball team
6 or whatever it is for Los Angeles, would that be
7 enough without saying when that's going to happen?

8 MR. NIEHAUS: Assuming that you can know
9 when that has been achieved, when that undertaking
10 has been achieved.

11 CHIEF JUDGE LIPPMAN: You mean you either
12 buy it or you don't?

13 MR. NIEHAUS: Well, but again, now you've
14 just added the other issue. And you do have to look
15 at both sides of this equation, okay? In an event
16 where - - - the reason that all of the particular
17 undertaking cases identify and have already figured
18 out what the particular parcel of land or business
19 is, is because you know that the conclusion of your
20 involvement with that business or land - - -

21 CHIEF JUDGE LIPPMAN: So if you said in
22 Judge Pigott's hypothetical - - -

23 MR. NIEHAUS: Um-hum.

24 CHIEF JUDGE LIPPMAN: - - - the undertaking
25 is to buy a baseball team for the city of Los

1 Angeles, and it doesn't say, you know, if we don't
2 get it by two years from now it's over, is it good
3 enough?

4 MR. NIEHAUS: No, it is not. It is not - -
5 -

6 CHIEF JUDGE LIPPMAN: What would you - - -

7 MR. NIEHAUS: - - - good enough in the - -
8 -

9 CHIEF JUDGE LIPPMAN: - - - what would you
10 need to say?

11 MR. NIEHAUS: What you need in that case is
12 the other side of this equation, a time limit. If
13 you say we are going to - - -

14 CHIEF JUDGE LIPPMAN: There needs to be
15 some time line to have a particular - - -

16 MR. NIEHAUS: No. No. You need to know -
17 - -

18 CHIEF JUDGE LIPPMAN: You need both?

19 MR. NIEHAUS: - - - when - - - you need one
20 or the other, definitively.

21 CHIEF JUDGE LIPPMAN: So why - - - so why
22 do you need a time line if it's a particular kind of
23 business?

24 MR. NIEHAUS: Because in this case, when
25 you say we're going to buy - - -

1 CHIEF JUDGE LIPPMAN: Particular
2 undertaking.

3 MR. NIEHAUS: - - - we're going to buy a
4 baseball team, you don't know that that event is
5 going to occur. You might not be able to buy it.

6 JUDGE SMITH: Well, how is - - - how is
7 Judge Pigott's hypothetical different from that
8 Hardin case, which I - - - the only I've - - - may be
9 the only one with a particular undertaking in the
10 history of the world. But they said we're going to
11 buy this company and sell it again. Is it - - -

12 MR. NIEHAUS: But again - - -

13 JUDGE SMITH: - - - and that was enough.

14 MR. NIEHAUS: - - - you've identified that
15 particular company. You can - - -

16 JUDGE SMITH: Okay, so if it said - - - if
17 it said we're going to buy the Atlanta Braves and
18 move them to Los Angeles, that would be a particular
19 undertaking?

20 MR. NIEHAUS: That would, in fact - - -
21 that would be a - - -

22 CHIEF JUDGE LIPPMAN: Without a - - -

23 MR. NIEHAUS: - - - particular undertaking.

24 CHIEF JUDGE LIPPMAN: - - - time frame?

25 MR. NIEHAUS: Well, again, Your Honor, if

1 you can determine that the particular undertaking has
2 occurred or has definitively failed - - - and that's
3 the issue - - - we have - - -

4 CHIEF JUDGE LIPPMAN: Well, if you want to
5 buy - - - if you want to buy the Atlantic (sic)
6 Braves, either you're going to buy them - - - Atlanta
7 Braves, you're either going to buy them or not buy
8 them, right?

9 MR. NIEHAUS: That's exactly right.

10 CHIEF JUDGE LIPPMAN: So that would be
11 good.

12 MR. NIEHAUS: That would be fair enough.

13 CHIEF JUDGE LIPPMAN: What about, though,
14 Judge Graffeo's question. If you don't know what you
15 want to buy, but you want to do some investment, is
16 that ever good enough?

17 MR. NIEHAUS: That's never good enough,
18 Your Honor. That's never good enough.

19 CHIEF JUDGE LIPPMAN: If you said we're
20 going to do some investment - - - similar to the
21 facts in this case - - - and said we're going to do
22 them by X date, that's our goal, that's the duration
23 of this, we're going to do it. The business lasts on
24 those two years, four years, okay?

25 MR. NIEHAUS: No problem. That's

1 absolutely perfect. And again, the underlying
2 purpose for both sides of this equation, either a
3 particular undertaking or the definite time, is so
4 that the parties know when they get involved what
5 they're getting involved with.

6 CHIEF JUDGE LIPPMAN: Why is it this
7 definite time? You do sort of say the duration of
8 how long this operation may - - - will last.

9 MR. NIEHAUS: It's not a definite time.
10 Because a definite time would be - - -

11 CHIEF JUDGE LIPPMAN: So what is it, when
12 it says - - -

13 MR. NIEHAUS: What is it?

14 CHIEF JUDGE LIPPMAN: - - - years?

15 MR. NIEHAUS: Well - - -

16 CHIEF JUDGE LIPPMAN: When you talk about
17 the budget for X number of years and then we might
18 solicit more. You talk about the operation - - -
19 operating, how long it might last. What is that
20 stuff? What is - - -

21 MR. NIEHAUS: It's not a - - -

22 CHIEF JUDGE LIPPMAN: - - - that's not a -
23 - -

24 MR. NIEHAUS: - - - definite time.

25 CHIEF JUDGE LIPPMAN: What is - - -

1 MR. NIEHAUS: Whatever it is, it's not a
2 definite time.

3 CHIEF JUDGE LIPPMAN: What is it in this
4 agreement?

5 MR. NIEHAUS: They - - - again, there is no
6 specific duration. He - - - the plaintiff has
7 alleged at different times and for different
8 purposes, that the partnership could have been
9 concluded in less than a year - - - may have made
10 that argument for statute of fraud purposes - - - or
11 it could last as long as nine years. But even at
12 that point, there is no specific determination of how
13 it is supposed to end. There is this claim that,
14 well, we're going to monetize it. We're going to
15 have some liquidity event. We're going to sell the
16 business. Well, you haven't said how you're going to
17 do that, haven't said for how much, haven't said how
18 you're going to split that money with the investors.
19 You haven't said that the partnership would
20 necessarily dissolve just because it came into
21 possession, for example, of some IPO shares.

22 You haven't established a specific time.
23 All that those things do is revert back to the
24 undertaking. If the particular undertaking - - - if
25 there were a particular undertaking identified here,

1 and the parties knew going in, it might take a year,
2 and it might take nine years, that's okay. That's
3 fine. Because they know from the beginning what
4 they're getting themselves into - - -

5 JUDGE READ: But isn't that, again, kind of
6 totally antithetical to the whole notion of a search
7 fund?

8 MR. NIEHAUS: I don't think it is. Because
9 again, if you're saying to yourself, I am going to
10 get involved in this search fund business, and I am
11 going to identify something, you have to know when
12 that is going to end or how that is going to end.
13 And that's just what we don't have here.

14 CHIEF JUDGE LIPPMAN: So it's - - - so it's
15 on the particular undertaking, it can't work. If you
16 have a search fund, you've got to go to a definitive
17 time. Because it can't work - - -

18 MR. NIEHAUS: Indeed, Your Honor.

19 CHIEF JUDGE LIPPMAN: - - - as a particular
20 undertaking.

21 MR. NIEHAUS: That's correct, Your Honor.

22 CHIEF JUDGE LIPPMAN: Okay.

23 MR. NIEHAUS: Thank you.

24 CHIEF JUDGE LIPPMAN: You'll have some
25 rebuttal.

1 Sir?

2 MR. GELMAN: May it please the Court, my
3 name is Geoffrey Gelman. I'm the plaintiff-
4 respondent. I'm representing myself.

5 Well, I can address a couple of these
6 points. My view is that the entire inquiry is when
7 is this going to end? Does it end at some
8 discernible time in the future, not necessarily a
9 time that you can predict exactly in advance, but
10 whether when you get to that point, do you know that
11 it's over or not? And clearly the case is here that
12 you do know when it's over; when we've created this
13 liquidity event. In other words - - -

14 CHIEF JUDGE LIPPMAN: So you're saying
15 these two issues that were talked about, one is a
16 particular undertaking, one is a definitive time,
17 you're saying that you knew that - - - or both
18 parties should have known that the general nature of
19 this undertaking, and then that it ends when there's
20 a liquidity event? And so - - -

21 MR. GELMAN: That's right.

22 CHIEF JUDGE LIPPMAN: - - - therefore that
23 meets this standard we're talking about of a definite
24 time? Is that your argument?

25 MR. GELMAN: I think it meets the standard

1 of - - -

2 CHIEF JUDGE LIPPMAN: Put it in your words.
3 I'm just trying to make it easier.

4 MR. GELMAN: Well, I think it meets the
5 standard of particular undertaking, the fact that we
6 know what it is - - - what event is going to conclude
7 the partnership.

8 JUDGE PIGOTT: But if two people get
9 together and say, you know what, we're talented
10 people, why don't we - - - why don't we work together
11 until we make a million dollars each; in your view,
12 is that a partnership that's cognizable?

13 MR. GELMAN: Well, I believe that doesn't
14 meet the definition of a valid partnership, because a
15 partnership must be two people who get together and
16 operate a business for profit.

17 JUDGE PIGOTT: What's the difference
18 between what I said and yours? You're saying
19 liquidity. You're saying we're going to work to - -
20 - we're going to work together, find something, work
21 with that something until we make money, and then
22 we're going to sell it. That's so ephemeral, I mean,
23 when do you - - - when do you know if you - - -

24 MR. GELMAN: Well - - -

25 JUDGE PIGOTT: - - - you've - - -

1 MR. GELMAN: - - - a search fund is a well-
2 known entity. There's been twenty years' worth of
3 search funds started before ours. So it is an
4 investment fund, and it does have - - -

5 JUDGE SMITH: But it's only - - - it's only
6 a search fund until you fund something. And then the
7 partnership doesn't end when you fund it. You
8 continue to run the business, right?

9 MR. GELMAN: Right. That's the unique
10 aspect of a search fund is that the investment
11 managers, once they find the business to acquire they
12 then step in as the managers of that business.

13 JUDGE SMITH: Would it be - - - to put this
14 in plain English, isn't this - - - isn't the essence
15 of the deal, we're going to look for a business to
16 invest in; we're going to find it; and we're going to
17 run it until we have a chance to cash out? Isn't
18 that the gist of it?

19 MR. GELMAN: That's the idea. We do set
20 time limitations on it, because investors have their
21 money tied up and unavailable. So we - - -

22 JUDGE SMITH: The time limitations aren't
23 hard and fast, though, are they?

24 MR. GELMAN: They were meant to guide our
25 objectives, but - - - and we would do everything

1 possible to meet them. But if we didn't create the
2 liquidity event at seven years, we would have to
3 continue and - - -

4 JUDGE GRAFFEO: Did you have a period - - -
5 did your agreement set a period of time for obtaining
6 the investments? I think you wanted, what, 600,000
7 dollars from investors?

8 MR. GELMAN: Right.

9 JUDGE GRAFFEO: Was there a period of time
10 that you had to meet that level of investment by a
11 certain date?

12 MR. GELMAN: It was meant to be a few
13 months. We didn't set a precise date. But by
14 implication, we weren't making any money ourselves,
15 so we had to either raise that money or we wouldn't
16 be able to afford our own basic living expenses.

17 JUDGE PIGOTT: What are you going to buy
18 for 600 grand? I mean, was there a plan here?

19 MR. GELMAN: Yes. The 600,000 paid for two
20 years' worth of searching. So we anticipated going
21 to trade shows, visiting different companies all over
22 the United States, talking to business brokers,
23 talking to investment bankers. There would be a long
24 period of due diligence, once we found a candidate
25 business, where we'd have to analyze it and make sure

1 the financials were okay.

2 JUDGE PIGOTT: Were you looking for a fast-
3 food restaurant or a nuclear plant or a military
4 operation? I mean, how do you - - -

5 MR. GELMAN: Well - - -

6 JUDGE PIGOTT: Because you're going to run
7 it. You've got to have some skill, I would assume.

8 MR. GELMAN: Right. We were going to focus
9 on areas where we thought our backgrounds would be
10 most applicable. My partner has a background in
11 logistics, so things involving supply chains would be
12 one good candidate. I had a background in
13 technology, so we would look at businesses where we
14 could apply technology to increase the value in
15 different ways.

16 We would look at businesses where there
17 were certain assets that weren't being fully
18 utilized. But there were different financial
19 criteria we were looking at as well. Businesses with
20 stable cash flows; businesses where the industry was
21 fairly predictable, where we weren't relying on fads
22 or seasonal - - -

23 JUDGE PIGOTT: What's an example? What'd
24 you have in your mind when you're getting into this?
25 Where did you see yourself in seven years?

1 MR. GELMAN: All right. Well, one example,
2 we talked about a janitorial services type business.
3 So, you know, we'd look at companies that - - - that
4 went in and cleaned offices, and we would see if we
5 could improve that and expand that. We - - -

6 JUDGE GRAFFEO: Was there a reason why the
7 two of you didn't put your plan in writing? Was
8 there a reason that you made this an oral agreement?

9 MR. GELMAN: Well, the agreement - - - it
10 happened over a period of time. It was - - - my
11 partner introduced me to the concept of a search
12 fund. And we were discussing how it would work for a
13 month. And at the end of the month I said okay, I
14 was in.

15 It was mostly a matter of trust. I mean, I
16 thought - - - and we thought we understood what a
17 search fund was, because there's an extensive amount
18 of literature on search funds. And both of us had
19 read through that literature and discussed that. So
20 when we said we were doing a search fund, we by
21 implication, were going to follow the template of all
22 of the search funds that had been done before us.

23 JUDGE GRAFFEO: How long were you looking
24 for investors before he told you he didn't want to
25 pursue this any longer?

1 MR. GELMAN: It was a little over four
2 months.

3 JUDGE GRAFFEO: Had there been any
4 investments up to that point in time?

5 MR. GELMAN: Yes. The way it worked is, we
6 were raising 600,000 dollars. And it's unfair for
7 any one investor to put his money in first until the
8 rest of the money is raised. So the way it worked is
9 we would secure the entire 600,000 dollars' worth of
10 commitments before we actually took money from any
11 one investor.

12 JUDGE GRAFFEO: So neither of you were
13 being paid any salary, then, for those four months?

14 MR. GELMAN: That's right. And to me,
15 that's another reason why this is a particular
16 undertaking. Because our salary and our compensation
17 - - - most of our compensation would not occur until
18 the liquidity event. And so it makes no sense that
19 we could be working without pay or without much
20 compensation in anticipation of a payoff, and have
21 someone just be able to walk out in the middle of it.

22 CHIEF JUDGE LIPPMAN: Anything else? Keep
23 going. Don't hesitate.

24 MR. GELMAN: All right. Let me see if I
25 can - - - let me - - - again, my position is that

1 this turns on the conclusion. But I want to address
2 one of the defendant's points, which is, well, we
3 didn't know at the outset what we're going to be
4 doing. And I think it's very clear that come the
5 two-year mark after the search, we would know a
6 particular business. So there would be one business.

7 If for some reason we were not able to find
8 that business, the search would be over. So there's
9 really no situation where the defendant is bound for
10 some indeterminate period of time not knowing what
11 he's going to do.

12 CHIEF JUDGE LIPPMAN: Isn't it kind of an
13 ongoing thing? This is kind of like an ongoing
14 profit-making functions of - - - like a perpetual
15 partnership that you just - - - isn't that more what
16 it's like? What is it? Does it have a beginning and
17 an end, I guess is what I'm saying.

18 MR. GELMAN: Well, one of the main
19 differences - - -

20 CHIEF JUDGE LIPPMAN: You're saying he had
21 this liquidity event.

22 MR. GELMAN: Right. And that's how it
23 differs from, say, a traditional private equity fund
24 that buys and sells multiple businesses or a venture
25 capital fund. We were in it for only one business

1 and we were going to return invested funds - - -

2 CHIEF JUDGE LIPPMAN: Well, you're in it
3 for a business that - - - to find a business, right?

4 MR. GELMAN: Right. The investment fund -
5 - -

6 CHIEF JUDGE LIPPMAN: The business of
7 finding a business.

8 MR. GELMAN: That's right. The purpose of
9 the investment fund, which was the search fund, was
10 to invest in a single other business and increase the
11 value of that business and sell it. But that would
12 be the only thing it did. And after that, the
13 partnership would wind up.

14 CHIEF JUDGE LIPPMAN: Okay. Do you have
15 anything else? Your time is just about up, but feel
16 free - - -

17 MR. GELMAN: Okay, I think that's - - -

18 CHIEF JUDGE LIPPMAN: - - - you're okay?
19 Okay.

20 MR. GELMAN: That does it. Thank you.

21 CHIEF JUDGE LIPPMAN: Okay.
22 Counselor?

23 MR. NIEHAUS: Thank you. Well - - -

24 JUDGE GRAFFEO: What precedent of the few
25 cases that are out there do you think this is closest

1 to? Because it's not really like the two real estate
2 cases - - -

3 MR. NIEHAUS: No, it's - - -

4 JUDGE GRAFFEO: Sanley or - - -

5 MR. NIEHAUS: - - - it's not - - -

6 JUDGE GRAFFEO: - - - St. Lawrence.

7 MR. NIEHAUS: - - - actually. No. Because
8 in those cases, the actual real estate had been
9 specifically identified.

10 I actually think this is closest - - - and
11 I think what this court should look to is the Girard
12 Bank case out of Pennsylvania Supreme Court, and the
13 Page v. Page case out of the California Supreme
14 Court. That's a 1961 case. And in both of those
15 cases, the courts both subtly and explicitly draw a
16 distinction between statements of general purpose
17 versus particular undertakings.

18 And what we have here is a statement of
19 general purpose. And it's very much like the
20 hypothetical posed over here which I was going to
21 raise as my own, but thank you. You can have a
22 statement of general purpose that doesn't constitute
23 a particular undertaking. So in the Girard case, you
24 had a family business that was leasing land and
25 running things and mining and logging and all sorts

1 of things like that. But they didn't have as a
2 specific purpose - - -

3 CHIEF JUDGE LIPPMAN: Why do you - - - why
4 do you think there's such a dearth of cases in New
5 York about this?

6 MR. NIEHAUS: Well, hopefully, it's because
7 people are following this court's admonition that
8 your partnership agreement should be in writing. And
9 in fact, what we have - - -

10 CHIEF JUDGE LIPPMAN: Do you think that's
11 the real problem here?

12 MR. NIEHAUS: Well, I don't think it's a
13 problem. I think that in this case, the parties were
14 actually moving towards that, because they actually
15 had, as the record shows, an LLC operating agreement.
16 And you all know that - - -

17 CHIEF JUDGE LIPPMAN: Can you have an oral
18 agreement that is a particular undertaking - - -

19 MR. NIEHAUS: Absolutely.

20 CHIEF JUDGE LIPPMAN: - - - with definite -
21 - -

22 MR. NIEHAUS: Absolutely. You absolutely
23 can. But are you going to invest any portion of
24 600,000 dollars or any portion of whatever millions
25 of dollars it was going to take to buy this

1 unidentified business on the basis of an oral
2 partnership? Of course you're not. They - - -

3 JUDGE PIGOTT: What's the downside of an
4 answer?

5 MR. NIEHAUS: I'm sorry?

6 JUDGE PIGOTT: What's the downside of
7 letting - - - of filing an answer and having some
8 discovery?

9 MR. NIEHAUS: Well, the downside, of
10 course, is that my client gets involved in all sorts
11 of actual disputes and all sorts of litigation. And
12 this is not a factual question. We're not saying
13 that there was no partnership. We're not disputing
14 that. We're saying that, just like this court has
15 said, you need to be able to identify facts. You
16 can't just plead boilerplate. You can't just say we
17 had a contract and he broke it and I'm damaged. You
18 have to plead the individual facts in order to form a
19 gatekeeping function, to identify for the defendant
20 what he's accused of doing wrong, and to identify for
21 the court what it is that they can infer was actually
22 going on between these parties; that the court can
23 infer that a particular undertaking had been agreed
24 to by the parties.

25 Without that, you just got boilerplate

1 statements of general purpose, and it's not worth the
2 court's time.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 Thank you - - -

5 MR. NIEHAUS: Thank you very much.

6 CHIEF JUDGE LIPPMAN: - - - both.

7 Appreciate it.

8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Geoffrey Gelman v. Antonio Buehler, No. 37 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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Date: February 14, 2013