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

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HARVEY RUDMAN and HAROLD KUPLESKY, on behalf of each of them individually and on behalf of Starrett City Preservation, LLC, derivatively,

Plaintiffs,

-against-

Index No.: 650159/2010

DECISION, ORDER & JUDGMENT

CAROL GRAM DEANE, THE ESTATE OF DISQUE D. DEANE by Carol G. Deane as Temporary Executrix, SALT KETTLE LLC, ST. GERVAIS LLC, STARRETT CITY PRESERVATION LLC, DD SPRING CREEK LLC, SK SPRING CREEK LLC, SPRING CREEK PLAZA LLC, DD SHOPPING CENTER LLC and SK SHOPPING CENTER LLC,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

Defendants Carol Deane (Carol), the Estate of Disque D. Deane (the Estate), St. Gervais LLC (St. Gervais), Starrett City Preservation LLC (Preservation), DD Spring Creek LLC, SK Spring Creek LLC, Spring Creek Plaza LLC, DD Shopping Center LLC and SK Shopping Center LLC, move for partial summary judgment of the second amended complaint (SAC). Plaintiffs oppose. For the reasons stated below, the motion is granted in part and denied in part.

I. Background

A. Starrett City

Starrett City is a large, affordable housing complex in eastern Brooklyn, New York. It is governed by New York's Limited-Profit Housing Companies Law, more colloquially known as the Mitchell-Lama Law (Mitchell-Lama). Title to the complex is held by Starrett City, Inc.

(SCI), a New York corporation, for the benefit of Starrett City Associates, L.P. (SCA), a New York limited partnership comprised of about 200 limited partners, a general partner and a managing general partner. Prior to 2009, the managing general partner of SCA was Disque Deane (Deane), and the general partner was defendant Salt Kettle, LLC (Salt Kettle), a New York limited liability company almost entirely owned by Deane's family through defendant St. Gervais (undisputed facts, ¶¶ 4–6). Plaintiff Harvey Rudman was hired in 1989 to serve as SCA's president (*id.* at ¶ 11). Plaintiff Harold Kuplesky was retained in 1999 and served as president of one of the managing agents for the complex (*id.* at ¶¶ 12, 12 [b]–[c]).

Starrett City received various forms of aid from the local, state and federal governments. The return on equity that could be enjoyed by the owners of Starrett City was limited by Mitchell-Lama (*see, e.g.*, Private Housing Finance Law § 28), and the rents were subject to regulation by the New York State Division of Housing and Community Renewal (DHCR) (*id.* at § 31). In exchange, the complex was granted a significant real property tax abatement (*id.* at § 33) and was eligible to receive (and did receive) mortgage loans from the New York Housing Finance Agency (HFA) (*id.* at § 22; defendants' supplemental brief, April 4, 2014, 3 [NYSCEF Doc. No. 341]; plaintiffs' supplemental brief, April 4, 2014, 1 [NYSCEF Doc. No. 340]). A further subsidy was provided by the project's participation in the interest reduction program set forth in Section 236 of the National Housing Act of 1934, as amended by the Housing and Urban Development Act of 1968 (12 USC § 1715z-1). Under this program, SCI paid only 1% interest on its HFA mortgage. The United States Department of Housing and Urban Development (HUD) paid the remainder of the loan's interest payments.

Participation under Section 236 also allowed for participation in two federal rent subsidy

programs -- the Rental Assistance Program (RAP), effectuated by means of a contract between HUD and the owners of the qualifying project (plaintiffs' supplemental brief 3–4; defendants' supplemental brief 3–4), and Section 8 assistance. Section 8 assistance was implemented pursuant to a Housing Assistance Payments (HAP) Contract between the owners and HUD; HUD paid the difference between the rent set forth in the contract and the tenant's contribution, the latter of which was generally capped at a certain percentage of the tenant's income (plaintiffs' supplemental brief 2–3; defendants' supplemental brief 4).

To encourage landlords' continued participation in the Section 8 program, Congress, in 1997, authorized HUD to implement an additional program known as "Mark-Up to Market" (the MUTM Program). Under this program, rents are allowed to rise to a supposed market rate, as determined by HUD-approved comparability studies (plaintiffs' supplemental brief 3; defendants' supplemental brief 4–5). As with the standard Section 8 program, the tenant's contribution is capped at a percentage of his income and the remainder is paid by the federal government. According to the law in place prior to 2008, Starrett City was not eligible to participate in the MUTM Program.

B. The Preservation Agreement

As managing general partner, Deane and Salt Kettle held a 1% interest in SCA (undisputed facts, ¶ 7). Originally, Deane's and Salt Kettle's interest in SCA was to increase to 9.9% in the event of a return to the partners of their capital plus 5% (*id.*). However, pursuant to a 2003 amendment to the SCA partnership agreement, the "residual interest" of Deane and Salt Kettle was increased to 19.9% and the requirement that the other partners' receive a 5% return on capital was eliminated (*id.* at ¶ 8). As a result, upon any return of capital to the SCA partners,

distribution would be 80.1% to the limited partners and 19.9% to the general and managing partners – Deane and Salt Kettle.

The value of Starrett City increased, and SCA began efforts to sell the complex or otherwise realize its equity. Preservation was created on January 1, 2006, and by Omnibus Assignments, dated January 1, 2006, Deane and Salt Kettle, as general and managing partners, each transferred, "without recourse," to Preservation

> all right, title and interest of Assignor's economic interest . . . in [SCA] . . . including all right, title and interest in any payments and distributions made or to be made to Assignor . . . (collectively, the "Economic Interest") and all of Assignor's right, title and interest in, to and under the instruments, documents, certificates, letters, records and papers relating to the Economic Interest . . . (. . . collectively referred to as the "Documents"), and all other documents executed and/or delivered in connection with the Documents, and such other instruments, documents, certificates, letters, records and papers, including without limitation, rights to condemnation awards and insurance proceeds, and all claims and choses in action related to the Documents and all of Assignor's right, title and interest in, to and under such claims and choses in action

(affirmation of Kenneth Warner, July 3, 2013 [Warner moving affirmation], exhibits 8 & 9 [Omnibus Assignments]). Excepted from the assignment were the assigning partners' interests as limited partners in SCA, their rights to reimbursement for expenses incurred as a general partner, their authority as a general partner and any rights they might have as a general partner, assignor or limited partner to indemnification or contribution (*id.*).

Preservation was organized as a New York LLC. Its initial stated purpose was

> to provide its Members with a beneficial interest in all payments payable by [SCA] or its successors to [Deane,] its managing general partner ("MGP") [,] and to [Salt Kettle] in respect of the MGP's economic interest in SCA (the "MGP Interest") and [Salt

> Kettle]'s economic interest in SCA (the "[Salt Kettle] Interest"), or all payments received by the MGP and [Salt Kettle] after the sale of the MGP Interest, in each case on the terms and conditions, and subject to the limitations, set forth herein

(affirmation of Jacqueline Veit, August 14, 2013, exhibit 17 [Preservation Agreement] § 1.3 [a]). Deane and SKI "confirm[ed] to [Preservation] that they shall not transfer any amount of [their interests as managing partners] (or any part thereof) to a transferee" (*id.* at § 1.7). The initial members of Preservation and their respective percentage interests were: St. Gervais (45.10%), Carol (11.63%), her sister Mary Clarke (2.5%), Kuplesky (11.63%), Rudman (15.01%) and Martin Fell, another officer or employee of SCA, (11.63%) (undisputed facts, ¶ 16; Preservation Agreement, exhibit A).

Preservation's operating agreement allocated profit from a capital transaction, first to the negative Capital Accounts of its members and, then, to the members in accordance with § 4.2 (iv) (a) and (b) [Preservation Agreement, § 4.1 (B)]. Section 4.2 required all "payments" received by the company from SCA's general partners to be distributed by the company, in the following order:

> (i) to the payment of all accrued expenses of [Preservation]; then
> (ii) to the payment of all debts and liabilities of [Preservation] then due . . .; then
> (iii) to the payment (or the establishment of additional reserves to fund future payment, which would be structured to keep the Members in a tax neutral position) of bonus awards to office staff for [Preservation] and affiliated entities (other than Members) up to a maximum of . . . fifteen (15%); then
> (iv) . . . to the Members, in proportion to their Sharing Ratios.

"[D]istributions" to the members were to be made "as soon as practicable but at least in the same calendar year" (Preservation Agreement, § 4.2).

While the Members' shares ("Sharing Ratios") were initially fixed by their capital contributions, the agreement allowed the shares to be reduced under certain circumstances. Thus, the Managing Member of Preservation, Carol, at her discretion, could reallocate any Member's interest:

> [a]t any time *after the Funding Event* (as hereinafter defined), . . . in whatever amounts [she] deem[s] in [her] sole discretion to be appropriate (including, without limitation, assigning a Member a Sharing Ratio of zero). *"Funding Event" shall mean the distribution to Members, in accordance with their then current Sharing Ratios . . . of at least $10,000,000 in aggregate distributions pursuant to Section 4.2(iv).* All Members acknowledge and agree that the Managing Member's reallocation power pursuant to this Section 3.3 is intended to facilitate providing a new management incentive program after *the full distribution from the proceeds of a substantial refinancing* pursuant to Section 3.02 or 3.03 of SCA's partnership agreement [italics added]

(*id.* at § 3.3).

The referenced sections of the SCA partnership agreement set forth how SCA was to disburse its cash. At least once for every fiscal year SCA's "Cash Flow"[1] was to be applied:

> first in payment of the Management Fee . . . and then [was to] be distributed in the following order of priority: (i) to the payment of principal and interest on any outstanding Operating Loans . . . (ii) to the payment of principal and interest on any outstanding Subordinated Loans . . . (iii) the remainder . . . to the Managing General Partners, . . . to the Special General Partners, and . . . to the Limited Partners

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[1] "Cash Flow" is defined there as a modified version of the partnership's "Net Profits and Losses" for federal income tax purposes. However, it is clear from the record that SCA's income for tax purposes was substantially more than the actual annual distributions it had been making, as one of the stated justifications for selling or refinancing Starrett City was to remedy "the partner 'phantom income' tax burden that [was] grow[ing] worse every year" (Warner moving affirmation, exhibit 27, *see also* Veit affirmation, exhibit 18, PwC 0225 & exhibit 20, D004208, D020361).

(Warner moving affirmation, exhibit 38, § 3.02). In addition, the partnership agreement provided that in the event of a refinancing or sale of Starrett City, the "net cash proceeds" of such transaction would be distributed and applied in the following order:

> (i) to the payment of any debts or liabilities of the Partnership or binding it or its properties . . . (ii) to the setting up of any reserve which the Managing General Partners deem reasonably necessary, or which may be required by the Regulations, to provide for any contingent or unforeseen liabilities or obligations of the Partnership . . . (iii) to the payment of principal and interest on any outstanding Operating Loans . . . (iv) to the payment of principal and interest on any outstanding Subordinated Loans . . . (v) to the payment . . . to the Managing General Partners . . . to the Special General Partners and . . . to the Limited Partners

(*id.* at § 3.03).

Additionally, Carol had the power to remove a Member from the Board "if such Member has resigned, been terminated from all or substantially all positions held with SCA and/or other enterprises owned or controlled by Disque Deane . . . or otherwise has ceased to be actively engaged on a substantially full time basis with the Deane Interests" (*id.* at § 5.5 [a]). "Notwithstanding Section 5.5(a), a Member who was removed due to termination in (a) above shall maintain his full Sharing Ration without reduction if termination occurred *after discussions began that resulted in a Funding Event*" (emphasis added) (*id.* at § 5.5 [b]). As relevant here, a Member removed during the year 2008 would lose 70% of his Sharing Ratio, and one removed during 2009 would lose 60% (*id.* at § 5.5 [a]).

C. The Refinancing and the Distributions

Cashing out of Starrett City proved complicated due to the regulatory oversight of New York City (HPD), New York State (DHCR and HFA) and the United States (HUD), all of which

were keenly interested in assuring that one of the largest affordable housing complexes in the country remained so. As a result, in 2007, a $1.3 billion bid by an entity known as Clipper Equity was rejected by the authorities as overly likely to lead to the project's exit from the various affordable housing programs (undisputed facts, ¶ 24; *see* Warner moving affirmation, exhibit 10). To achieve a sale of the property, SCA concluded it had to either remove the complex from Mitchell-Lama and the attendant governmental programs, something that SCA believed it could do as of right but felt was both economically and politically risky, or keep Starrett City as a Mitchell-Lama, in which case any sale would require the blessings of the various governmental agencies. SCA conceived of a third option. It could capture its built-up equity by refinancing the property based on its then current market value in an amount sufficient to allow an attractive distribution to the partners. The one complication was the requirement that a Mitchell-Lama project's mortgages could not exceed the "actual project cost," i.e., the original cost of development (Private Housing Finance Law § 21; *see also id.* at § 12 [6]).

SCA proceeded on two tracks. By letter to DHCR, dated August 29, 2007, Deane informed the agency of SCI's intent "to dissolve, or reconstitute as a business corporation not subject to the restrictions and limitations of the Private Housing Finance Law" (Warner moving affirmation, exhibit 12). Meantime, on October 23, 2007, it submitted to Priscilla Almodovar, the CEO of HFA, a proposal as to how Starrett City could be preserved as an affordable housing complex after a sale (Warner affirmation, exhibit 15). As an incentive for purchasers to remain in the Mitchell-Lama program, SCA proposed replacing the existing Section 236 RAP contract and the standard Section 8 HAP contract with an MUTM contract, a program for which Starrett City was not eligible, thereby not affecting tenants' payments but allowing the new owner to

collect higher rents subsidized by the federal government (*id.* at ¶ 3). For units not covered by the MUTM contract, SCA urged the government to provide so-called "enhanced" Section 8 vouchers (also known as "sticky" vouchers) which would cap the recipients' rent contribution at 30% of their income (*id.* at ¶¶ 5, 7). SCA also asked that the government "decouple" the Section 236 interest reduction payments from the existing HFA mortgage, allowing the interest payment subsidies to continue to apply to whatever new mortgage financing was put in place by the purchaser (*id.* at ¶ 4). Finally, SCA asked that the government agencies, as part of the sale, allow the removal of the non-residential parcels from the Mitchell-Lama program and the attendant government supervision.

Discussions with HUD, HFA, DHCR and HPD eventually resulted in a memorandum of understanding between those agencies, SCA and SCI (Warner moving affirmation, exhibit 17 [the MOU]). The May 12, 2008 MOU contemplated a sale of Starrett City to outside bidders, and the governmental agencies agreed[2] to expedite their review of the finalists selected by SCA and cooperate "to accomplish the desired sale"(*id.* at ¶¶ A–B). The MOU evinced the government's inclination to approve much of the subsidy framework set forth in SCA's October 2007 proposal, including: the decoupling of the Section 236 interest reduction payments from the existing HFA mortgage, which would be prepaid (MOU ¶ C.3); the replacement of the HAP and RAP contracts with an MUTM contract that would cover 60% of Starrett City's units, provided that Congress passed certain draft legislation[3] which would allow Starrett City to participate in

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[2] The term is used loosely, as the MOU stated that it "impose[d] no binding obligation on any of the parties" (MOU ¶ E).

[3] This bill was ultimately enacted as Section 1603 of the Housing and Economic Recovery Act of 2008. The statute authorizes HUD to enter into an MUTM contract with "an owner of a multifamily housing project that exceeds 5,000 units to which a contract for project-

the MUTM program (MOU ¶ C.4 [a]); the provision of "sticky" vouchers to those tenants whose units would not be covered under the MUTM contract, which would continue to be regulated by DHCR and HUD (MOU ¶ C.5 [c]); and the removal of the non-residential parcels from the Mitchell-Lama program (MOU ¶ C.6).

In June 2008, having clarified the contours of what the continued operation of Starrett City as an affordable housing complex would entail (including the level to which future rents might rise), SCA solicited bids for a "preservation transaction", in which Starrett City would be sold but would remain within Mitchell-Lama (Warner moving affirmation, exhibit 18). The deadline for final bids was December 15, 2008 (Warner moving affidavit, exhibit 23). That same day, Kuplesky's employment at Starrett City was terminated (undisputed facts, ¶ 12 [a]). Although the deadline was extended for another three days (Warner moving affirmation, exhibit 24), SCA ultimately decided that it had "not received a proposal that . . . provide[d] it with a fair return" (Warner moving affirmation, exhibit 27).[4] In a letter to the limited partners, dated February 19, 2009, the Deanes stated "that ending the formal sale process and focusing our efforts on operating [Starrett City] . . . is the best direction for [SCA] at this time. As we go forward, we will consider other options available to us, including the possibility of a refinancing" (*id.*).

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based rental assistance under section 8 of the United States Housing Act of 1937 . . . and a Rental Assistance Payment contract is subject" (Pub L 110-289, 122 US Stat 2825). Starrett City met the criteria of the new statute, which was enacted on July 30, 2008. According to a letter from Deane to the limited partners, both this statute and the state legislation discussed below "apply only to Starrett City" (Veit affirmation, exhibit 57, D007263).

[4] On February 13, 2009, in response to the final offer they had managed to receive, Curt Deane, Disque's nephew, wrote to SCA's financial advisor: "This is chutzpah. God bless them and may they be more successful in their future endeavors than the non-starter they've placed before us . . . These guys must be on drugs" (Veit affirmation, exhibit 46).

On March 3, 2009, Todd Trehubenko of Recap Advisors, SCA's financial advisor, wrote to a contact at HUD seeking confirmation of HUD's interest in allowing a "long-term preservation hold for [SCA]" as opposed to a sale (Veit affirmation, exhibit 53). Mr. Trehubenko proposed that the structure for such a deal "should track the MOU as much as possible, including the IRP decoupling, parcel division, and a MU[T]M, so that a preservation solution for the property could be achieved as soon as practical and without wiping away all of the tremendous progress that was collectively made last year" (*id.*). On March 18, 2009, Deane, on behalf of SCA, executed a retainer agreement with Wachovia Multifamily Capital Inc. pursuant to which the bank agreed to assist SCA in obtaining a suitable refinancing commitment (Warner moving affirmation, exhibit 30).

To overcome the legal hurdle imposed by the Mitchell-Lama Law on taking out a mortgage in excess of the "project cost," SCA retained the services of the law firm Wilson, Elser, Moskowitz, Edelman & Dicker LLP (Wilson Elser) as "government affairs counsel" (Warner moving affirmation, exhibit 32). On July 11, 2009, less than four months later, the New York State legislature passed a bill that became Section 22-b of the Private Housing Finance Law. The law provided a one-year window from its effective date in which DHCR could approve a mortgage "in excess of the actual project cost of a state-aided project comprising more than five thousand rental units," a description that exclusively applied to Starrett City. The Deanes, then, informed their fellow investors that they could now "proceed with [their] plan to refinance" (Warner moving affirmation, exhibit 36).

By letter dated July 30, 2009, the Deanes sent a consent solicitation to SCA's limited partners asking that they authorize Disque to enter into a refinancing subject to certain terms

(Veit affirmation, exhibit 57). As envisioned by the MOU and Mr. Trehubenko's March proposal, the consent solicitation represented that the HAP and RAP contracts would be replaced by an MUTM contract, the interest reduction payments would continue even after the HFA mortgage was replaced, and the non-residential components of Starrett City would be released from government regulation (*id.* at D007264–65). Consequently, the non-residential land would belong to SCA free of government regulation. As agreed to in the MOU, it was represented that the rents of units not subject to the MUTM contract would remain subject to HUD and DHCR restrictions and that SCA would "facilitate the delivery of governmental rental assistance for qualifying residents" (*id.* at D002764).[5] The plan was approved by the limited partners, and on December 17, 2009, SCA closed on a loan from Wells Fargo for $531,485,000 (undisputed facts, ¶ 19).

After capital was returned to the SCA partners, SCA distributed approximately $38 million to Preservation, representing 19.9% of the loan proceeds available for distribution. Preservation set aside 15% of this distribution, paying a total of $3,141,170 to Iris Sutz, Robert Poll and Curt Deane (Deane's nephew) as office staff, and retaining the balance as a reserve for future bonuses. After deducting for other expenses, Preservation distributed $31,899,544.77 to its Members. Of this amount, Rudman (who was fired in April 2009) got 15.01%, or $4,787,971.57, consistent with his interest in Preservation. Kuplesky, on the other hand, received 30% of his original 11.63% interest, or $1,113,259.21, because he had left Starrett City in 2008. By letter dated November 8, 2010, Carol reduced the interest of Rudman and Kuplesky

[5] SCI later represented to DHCR that residents of such units would be able to apply for "sticky" vouchers (Veit affirmation, exhibit 56, Recap093016).

in Preservation to zero, "effective immediately" (Warner affirmation, exhibit 39). Disque passed away that same day (undisputed facts, ¶ 9).

D. The Instant Action and Procedural Background

Plaintiffs commenced this action on March 9, 2010. An amended complaint was filed on June 4, 2010, and the SAC on October 6, 2010. The SAC claimed that, as a result of the refinancing, Preservation should have received, in addition to 19.9% of the cash proceeds of the refinancing, 1) an 18.9% partnership interest in SCA; 2) a 19.9% interest in Spring Creek Plaza LLC (Spring Creek), the entity to which SCA conveyed certain of the non-residential properties (including a shopping center) that had been released from government regulation but in which the members of SCA remained as members; 3) a share of the charitable deductions taken by SCA and Spring Creek as a result of the refinancing and donations; and 4) "the value of the [general partners'] increased equity in SCA resulting from cash reserves set aside from the cash proceeds for capital improvements and other purposes and any dividends and distributions made in respect thereof" (SAC ¶ 87). The SAC further contended that, under the Preservation Agreement, Preservation was obligated to distribute to each Member his proportionate share of the above interests.

Based on the failure to transfer and distribute the above interests, the SAC asserted the following causes of action: 1) breach of fiduciary duty by Carol and St. Gervais to Preservation and its Members; 2) aiding and abetting Carol's aforesaid breach by the other defendants; 3) and 4) breach of the assignment agreements by Deane[6] and Salt Kettle, thereby harming both

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[6] As noted, Deane passed away soon after the second amended complaint was filed. His estate has been substituted as a party in his place.

Preservation and plaintiffs; 5) breach of the Preservation Agreement by Carol, Deane and Salt Kettle; 6) conversion against all of defendants except Salt Kettle and St. Gervais; 7) and 8) tortious interference with the Preservation Agreement and the general partners' assignments; 9) a declaratory judgment that Section 3.3 of the Preservation Agreement could not be used to reduce plaintiffs' shares to zero until they receive their share of the general partners' distribution of the refinancing proceeds; and 10) a declaratory judgment that any transfers by the general partners of their interests to any entity other than Preservation are ineffective.

Defendants, in their motion, now seek a ruling that the distribution to plaintiffs' was correct and that, as of November 8, 2010, Carol was authorized to reallocate plaintiffs' interests to zero. They further ask the court to declare that Preservation was authorized to distribute the "office staff" bonuses as it did and to retain a reserve for future bonuses, and that Kuplesky's Sharing Ratio was correctly reduced by 70% because of his departure in late 2008. The motion turns on the Preservation and SCA agreements.

II. Defendants' Submissions

In support of their position that Kuplesky's shares were rightfully reduced, defendants submitted an August 30, 2007 letter to the limited partners of SCA from Deane, written soon after the government's final rejection of Clipper Equity's bid (Warner moving affirmation, exhibit 13). Deane wrote that management had been considering a number of options since the expiration of the purchase contract, including "the privatization process, reopen[ing] the bidding process, privately negotiat[ing] with a strong buyer or just wait[ing] and do[ing] nothing" (*id.*). The letter does not mention a refinancing. Also, submitted is an excerpt from Curt Deane's deposition in which he testified that, at a meeting between the various government agencies and

SCA management on September 5, 2007, "the intent was we, [SCA] . . . wanted to find a basis where we could work cooperatively with government to affect a sales process" (Warner moving affirmation, exhibit 14, 134). Defendants note that SCA's October 2007 proposal to the government opened by stating that "SCA, as its first option, desires to sell Starrett City" (Warner moving affirmation, exhibit 15); neither that document nor the May 2008 MOU mentions a refinancing option.

Moreover, defendants note that the original Recap retainer agreement, dated November 19, 2007, stated that Recap would assist SCA "in arranging and completing the successful sale of Starrett City" (Warner moving affirmation, exhibit 16). The agreement states that "Recap will *not* provide the following services in connection with this agreement: . . . g. Refinancing or resident subsidy services (interviewing prospective lenders, negotiating and closing new financing) . . . associated with a refinancing/dissolution transaction whereby the Property is not sold" (*id.* at ¶ 3). It provides for a breakup fee of $400,000 "[i]n the unlikely event, not currently contemplated, that [SCA] declines to complete an Affordability Transaction in favor of a Dissolution/Refinancing transaction" (*id.* at n 1). Also in evidence is the second amendment to the retainer agreement, dated June 11, 2009, some time after SCA had given up on the sales process (Warner moving affirmation, exhibit 35). This amendment changed the prior agreement to provide that Recap *would* offer advisory services relating to a refinancing and replaced the breakup fee provision with a simple statement that "[SCA] may elect to refinance the Property as an alternative to sale" (*id.* at ¶ 4).

The September 19, 2008 retainer agreement with the law firm Bingham McCutchen (Bingham) (Warner moving affirmation, exhibit 19) states that SCA was retaining Bingham for

representation "in connection with government regulatory matters involving [HUD] and [DHCR] as may be required by you in connection with the sale of [Starrett City] . . . and/or the exit of the Development from the Mitchell Lama program . . . including, but not limited to, reviewing submissions for government approval made by any potential purchaser" (*id.* at 1). Here, too, the agreement provides that Bingham's "representation [would] not include representation of [SCA] in connection with new financing for the Development" (*id.*).

Lastly, defendants submit a letter from SCA's attorney to Kuplesky, dated February 13, 2009 (Warner moving affirmation, exhibit 47). The letter encloses a document bearing the letterhead of "Starrett City Preservation LLC," and is entitled "Record of an Action Pursuant to Section 5.5(a)" (*id.*). The document, signed by Carol and dated "as of December 15, 2008," states that it is a record of the fact that on such date, Carol removed Kuplesky from the Preservation board "by reason of the fact that he had been terminated from all . . . positions held with [SCA] and/or other enterprises owned or controlled by Disque Deane . . . and had ceased ro be actively engaged on a substantially full time basis with the Deane Interests" (*id.*).

III. Plaintiffs' Submissions

In opposition, plaintiffs submitted a number of documents which they contend show that a refinancing option was considered well before Kuplesky's departure from SCA. The court notes two sets in particular. First, an individual named Felice Michetti was retained as an advisor to the Deanes to assist them in their attempts to realize the equity in the complex (Veit affirmation, exhibits 7 & 34). Her original retainer agreement, dated August 23, 2007, was for a term of two years and provided that she would be paid a certain percentage of the proceeds "of a sale or successful refinancing" (Veit affirmation, exhibit 34). The arrangement was renewed by

an October 22, 2009 consulting agreement (Veit affirmation, exhibits 7 & 58), which acknowledged that as part of the services she had provided hitherto (and would continue to provide until a refinancing or sale was consummated), she had negotiated with the government "to seek agreement on the terms of a Memorandum of Understanding ('MOU') which would provide the framework for a sale or refinancing transaction" (Veit affirmation, exhibit 58, CD0003683). More specifically, the agreement stated that she had worked with the government on the decoupling of the interest reduction payments, the MUTM conversion, the allocation of funds for "sticky" vouchers and the removal of the non-residential components from government oversight (*id.* at CD0003684–85).

The second set of documents are from Recap. A financial model prepared by Recap in October 2008 showed projections for a "refinancing that didn't involve the privatization of the property" (Veit affirmation, exhibit 10, 103:18–22; *see* Veit affirmation, exhibit 43). In addition, at his deposition, Mr. Trehubenko testified that a refinancing was originally excluded from the services to be provided by Recap because it had been expected that SCA would be able to handle the necessary work for a refinancing itself, without Recap's assistance (Veit affirmation, exhibit 10, 115–16). When it became apparent that Recap would have to be more involved in a non-sale transaction, Recap requested that its retainer agreement be amended (*id.*). In an email sent from Mr. Trehubenko to Curt Deane on February 14, 2008, after the sales process had finally collapsed, Mr. Trehubenko wrote that according to his recollection, "when we amended in the fall we only dealt with a potential sale (even though we anticipated we would end up refinancing) and just had a gentleman's agreement that we would redo the contract if and when we had settled on a refi" (Veit affirmation, exhibit 46).

IV. Standard

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]). A failure to make such a showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). However, if a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept. 1997]). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat summary judgment (*Zuckerman*, 49 NY2d, at 562). Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

In an action for a declaratory judgment, even if the plaintiff is not entitled to the declaration sought, the court is required to issue a declaration determining the rights of the parties rather than merely dismiss the plaintiff's claim (*Sweeney v Cannon*, 30 NY2d 633, 634

[1972]; *see also Casa de Meadows Inc. (Cayman Is.) v Zaman*, 76 AD3d 917, 922 [1st Dept 2010] citing *Daly v Becker*, 109 AD2d 651, 652 [1st Dept 1985]).

V. Discussion

A. Ninth Cause of Action

Here, as a result of the refinancing, the interests of the general and partners in SCA increased from 1% to 19.9%. SCA, which remained a Mitchell Lama housing project, conveyed the Starrett City shopping center (and other vacant parcels of land) to defendant Spring Creek, which was owned by the members of the SCA partnership, although Deane and Salt Kettle (through certain entities) held a collective 19.9% interest. Also, SCA made a charitable donation to a religious association of another parcel on the premises of the complex. In their ninth cause of action, plaintiffs seek a declaration that their shares in Preservation could not be reallocated until Preservation had received and distributed to its Members, in accordance with their respective Sharing Ratios, the additional 18.9% interest in SCA that Deane and Salt Kettle obtained as a result of the refinancing, Deane and Salt Kettle's 19.9% interest in Spring Creek, and a share of whatever charitable deductions SCA and/or Spring Creek could claim.[7]

Courts are obliged to interpret a contract so as to give meaning to all of its terms (*Corhill Corp. v S.D. Plants, Inc.*, 9 N.Y.2d 595, 599 [1961]; *Trump-Equitable Fifth Ave. Co. v H.R.H. Constr. Corp.*, 106 A.D.2d 242, 244 [1st Dept], *affd* 66 NY2d 779 [1985]). The reason is clear. A

[7] For example, Rudman claims that his shares in Preservation cannot be reduced until, *inter alia*, Preservation assigns him a 2.83% interest in SCA, that being his proportionate share (15.01%) of the general partners' newly acquired 18.9% interest in Starrett City Associates.

contract is a voluntary undertaking and should be interpreted to give effect to the parties' reasonable expectations (*Sutton v East Riv. Sav. Bank*, 55 N.Y.2d 550, 555 [1982]) *Mionis v. Bank Julius Baer & Co.*, 301 A.D.2d 104, 109 (1st Dep't 2002). Consequently, "[w]ords and phrases are given their plain meaning" (*American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *appeal denied* 77 NY2d 807 [1991]) and "should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby" *(Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013]). These tenets must be applied to the Preservation contract.

As mentioned, the Omnibus Assignments executed by Deane and Salt Kettle transferred to Preservation their "economic interest" in SCA. This economic interest included, among other things, "all right, title and interest in any *payments or distributions* made or to be made to [them] in [their] capacit[ies] as the [general partners] of [SCA]" (emphasis added). However, according to its operating agreement, it was not intended that Preservation would necessarily distribute the entirety of these "economic interests" to its Members. Rather, Preservation's purpose was to "provide its Members with a beneficial interest in all payments payable by [SCA] to [Deane] and to Salt Kettle, LLC . . . in respect of [Deane]'s economic interest in SCA . . . and [Salt Kettle]'s economic interest in SCA" (Preservation Agreement § 1.3). In keeping with that purpose, the only distribution Preservation was required to make to its Members was of the "payments received from [Deane, Salt Kettle] or any successor or transferee" (*id.* at § 4.2). These were to be applied first to the payment of Preservation's expenses and liabilities, then to office staff bonuses, with the remainder going to the Members "in proportion of their Sharing Ratios" (*id.*).

In other words, what Preservation had to distribute to its Members were the distributions it received from SCA by virtue of having been assigned the general partners' "economic interest" in that partnership, but not the economic interest itself. Section 4.2 requires the distributions to be made "at least in the same calendar year in which Payments are received by the Company" (*id.*). If its partnership interest in SCA was to be included under the economic interests to be distributed, Preservation would have been required to divest itself of all of its interest (its main or, even only, asset) in the very same year in which it was formed, a result clearly not contemplated by its LLC agreement (*see, e.g.,* Preservation Agreement § 3.3, "the Managing Member's reallocation power pursuant to this is intended to facilitate providing a new management incentive program after the full distribution"). Indeed, Deane and Salt Kettle, remained, respectively, the general partner and managing general partner of SCA, and while their economic interests as such were assigned to Preservation, their rights, duties and obligations were not.

The purpose of Preservation was to serve as a conduit, directing the distributions SCA was required to make to the general partners to the Preservation Members. The nature of such distributions was naturally determined by the SCA partnership agreement, in particular Sections 3.02 and 3.03 thereof. As noted above, the former section mandates that, at least within 60 days of the close of every fiscal year, the partnership's "Cash Flow" was to be distributed to the partners of SCA after making payments on the partnership's debt (Warner moving affirmation, exhibit 38 § 3.02 [b]). The latter section dictates that in the event of a sale or refinancing of Starrett City, the partnership was to apply the "net cash proceeds" thereof first to the payment of partnership debt, then to the establishment of a reserve for "contingent or unforeseen liabilities"

(if deemed necessary), and then to the payment of certain outstanding loans (*id.* at § 3.03). The remainder was to be distributed to the partners of SCA (*id.*). These were the distributions SCA owed to its partners, which Preservation was obligated to pass on to its Members under Section 4.2.

The reallocation power rests on this distribution scheme in the following manner: Section 3.3 of the Preservation Agreement allows the Managing Member (Carol) to reduce any Member's interest once distributions constituting a "Funding Event" have been made to the Members. A "Funding Event" is defined as "the distribution to Members . . . of at least $10,000,000 in aggregate distributions *pursuant to Section 4.2 (iv)*" (Preservation Agreement § 3.3) (emphasis supplied). Given that, as explained above, the Section 4.2 distributions were merely hand-offs of whatever "payments" Preservation received from SCA (by operation of the Omnibus Assignments), once Preservation had passed on to its Members at least $10 million of the money it received from SCA, the Managing Member would be free to reallocate the Members' shares in whatever manner she deemed appropriate. That such reallocation could not occur while Preservation was holding back a portion of the SCA payments was assured by Section 4.2's requirement that any such payments be distributed "as soon as practicable." That reallocation could not occur before SCA had distributed everything it was obliged to was clarified by the final line of Section 3.3, which states that the "reallocation power . . . is intended to facilitate providing a new management incentive program after the full distribution from the proceeds of a substantial refinancing pursuant to Section 3.02 or 3.03 of SCA's partnership agreement." Hence, in the event of a sale or refinancing, Deane (who controlled SCA) would not be able to shortchange the Preservation Members by making only a *partial* distribution to

Preservation of the SCA general partners' take of the deal's "net cash proceeds" in an amount sufficient to constitute a Funding Event, while holding on to the balance until his wife had divested certain Members of their Preservation shares, thereby depriving them of their distributions. Rather, before reallocation could occur, all distributions due the general partners under the SCA partnership agreement had to be remitted to Preservation, which, in turn, was required to disburse the allocation pursuant to Section 4.2. Section 4.2 required payment of Preservations expenses, debts and liabilities first, to be followed by a discretionary bonus fund of up to 15% and, then, distribution to Preservation's members. When the Members had received at least $10 million in the aggregate, their shares could be reallocated (Preservation Agreement, § 3.3).

In short, the reallocation power arose when $10 million dollars of the full cash distribution from SCA was transferred to Preservation's members in accordance with the waterflow set forth in Section 4.2. Assets not subject to distribution cannot be part of this scheme. Ergo, Preservation's membership in SCA, Spring Creek (which remained an asset of the SCA partners), and the charitable deduction allocated among the SCA partners for income tax purposes were not "payments" that needed to be transferred to Preservation, as they were not assets "distributed" by SCA (or Spring Creek).[8]

Plaintiffs do not dispute that Section 4.2 merely requires Preservation to pass on to its Members the distributions it received from SCA. Nor do they argue that Preservation's stake in SCA and Spring Creek and a fair allocation of SCA's charitable deductions somehow fall within the meaning of "payments" as used in Section 4.2. Rather, in opposing, plaintiffs rely on the

[8] They certainly could not be described as part of SCA's "Cash Flow" or the "net cash proceeds" of the refinancing.

final sentence of Section 3.3, which states that the "reallocation power . . . is intended to facilitate providing a new management incentive program after the full distribution from the proceeds of a substantial refinancing pursuant to Section 3.02 or 3.03 of SCA's partnership agreement." Plaintiffs maintain that according to this sentence, a full flow-through of the Section 4.2 "payments" is insufficient to trigger the reallocation power. They argue that reallocation cannot be done until Preservation has distributed all "proceeds of a substantial refinancing". Plaintiffs contend that this includes any benefit that Preservation derived from the refinancing. Plaintiffs' reading of the contract, however, is contrary to the Agreement's definition of "Funding Event", which clearly speaks to a "distribution".

Plaintiffs' interpretation rests on the assumption that the "distribution" referred to in the final line of Section 3.3 is to come from Preservation, which must divest itself of "all proceeds" – any benefit *it* received from the refinancing. However, Section 3.3 actually speaks of "the full distribution from the proceeds of a substantial refinancing *pursuant to Section 3.02 or 3.03 of SCA's partnership agreement*" (emphasis supplied). As explained above, these are the sections that govern the distributions to be made by SCA to its partners. Any distribution made "pursuant" to these sections must be made by SCA. The items sought by plaintiff were never distributed by SCA.

In sum, the court concludes that the Managing Member of Preservation may reallocate the Members' shares once (i) SCA has distributed to Preservation all distributions it was required to make to the general partners under the SCA partnership agreement, (ii) Preservation has passed those distributions on to its Members as required by Section 4.2 of the Preservation Agreement, and (iii) such distributions by Preservation aggregate to $10 million or more.

B. Bonuses

Defendants also seek a ruling that the payments Preservation made to Iris Sutz, Robert Poll and Curt Deane were authorized under Section 4.2 (iii) of the Preservation Agreement. As noted, Section 4.2 (iii) of the Preservation Agreement authorizes the Company to pay up to 15% of all payments received as "bonus awards to office staff for the Company and affiliated entities (other than Members)," or to "establish additional reserves to fund [the] future payment" of such awards.

Preservation, as plaintiffs point out, is not an operating company (plaintiffs' brief 18). It is a special purpose vehicle created to hold and distribute the economic benefits accruing to the general partners of SCA under the SCA partnership agreement, in order to reward those who assist the managing general partner in operating SCA. Preservation does not appear to have had any employees or staff of its own. Whoever was working in the SCA offices on Starrett City, regardless of which Deane entity (if any) was his or her formal employer, was "office staff" for the purposes of the Preservation Agreement.

The record submitted by defendants indicates that Sutz communicated with outside parties on behalf of SCA (Warner moving affirmation, exhibit 15 [email (Oct 23, 2007) from Iris Sutz to Priscilla Almodovar attaching SCA's "Proposal to Government Housing Agencies"]) and was included on internal correspondence concerning the deals (Warner moving affirmation, exhibits 22, 24, 30). Sutz also testified that she calculated the amount of a variety of disbursements or expenses made or incurred by Preservation (Warner moving affirmation, exhibit 41).[9] Curt testified that he began working at the SCA office in 2005 and became

[9] Plaintiffs, moreover, have alleged in their second amended complaint that Sutz was SCA's controller and prepared certain SCA and SCI financial statements (second amended

involved full-time in 2007 when the sales process commenced in earnest (Warner moving affirmation, exhibit 44, pp. 40 & 42). According to deposition testimony submitted by defendants, Curt attended meetings with the government concerning Starrett City at a fairly early stage in the process (Warner moving affirmation, exhibit 11, 79:3–4; exhibit 14). Internal correspondence relating to the deals evidence his involvement (Warner moving affirmation, exhibits 22, 24, 25, 26, 30). Finally, defendants submitted deposition testimony that Poll took over as president of SCA after Rudman left and was serving as such at the time of the refinancing (Warner moving affirmation, exhibit 45, 201:24–202:14). Defendants' moving papers, therefore, adequately set forth a *prima facie* case that these three individuals worked in the SCA offices prior to the refinancing, qualifying as "office staff" eligible to receive a bonus from Preservation under Section 4.2 (iii) of the Preservation Agreement.

In opposition, plaintiffs fail to raise a triable issue of fact. That Sutz and Curt have interests in St. Gervais, which is a Member of Preservation, does not make *them* Members of Preservation (and therefore ineligible to receive bonuses under Section 4.2 [iii]). Plaintiffs' contention that Curt was not "office staff" because he was not formally employed by any Deane entity until after the refinancing simply ignores the copious evidence in the record that Curt was working for his uncle, out of the SCA offices, on the Starrett City transactions.[10] There is no real basis for holding that the term "office staff" cannot apply to Sutz, Poll or Curt, who all worked for the Deanes on Starrett City. Plaintiffs' contention that the parties to the Preservation

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complaint, ¶ 57).

[10] On this point (in addition to defendants' submissions) see Veit affirmation exhibit 5, pp. 313–14 (Curt's testimony regarding his involvement in the bid process), as well as exhibits 36, 37, 38, 40, 42, 46, 47, 48 and 54 (emails from or to Curt involving the sales/refinancing effort).

Agreement actually intended to provide the bonuses to certain administrative employees is unavailing, as the court is "concerned with what the parties intended only to the extent that they evidenced what they intended by what they wrote" (*Akasa Holdings, LLC v Sweet*, 115 AD3d 556 [1st Dept 2014] [citation omitted]).

Nor does plaintiffs' argument that the Preservation Agreement only permits the company to set aside cash for future bonuses for current staff members fare any better. This interpretation lacks support in the text and the facts. SCA and its management still exist. SCA owns Starrett City and is managed by a managing general partner and a general partner, supported by office staff. Thus, in keeping with the Agreement, Preservation could set aside reserves of up to 15% for its office staff and those of its affiliates "to fund future payments, which would be structured to keep the Members [of Preservation] in a tax neutral position"[11] (Preservation Agreement § 4.2). Preservation, therefore, properly withheld cash for the purpose of possible future payments to the SCA office staff.

C. Kuplesky's Share

Lastly, defendants seek the dismissal of any claim that Kuplesky's Sharing Ratio was not properly reduced pursuant to Section 5.5 of the Preservation Agreement, which, as noted, allows Preservation's Managing Member to remove a Member from the company's board if that Member left employment with the Deane entities. Depending on when such removal took place, the removed Member's Sharing Ratio would be reduced by a certain amount, on condition that if

[11] *See* affirmation Kenneth Warner, August 14, 2013, exhibit 18, RUDMAN_KUPLESKY_0120190 (email from Carol to Kuplesky: "We said that the hold back for future bonuses and the bonuses for unnamed office employees was going to be 15%," to which Kuplesky responded: "You are right we will increase the 10% to 15% in the case of a refinancing where [Preservation] will have continuing responsibilities").

the Member's employment ended because of termination, such termination had to have occurred before "discussions began that resulted in a Funding Event" (Preservation Agreement, § 5.5 [b]).

Assuming as all parties do (for purposes of this motion only) that Kuplesky was *fired* in December 2008, his Sharing Ratio could not have been reduced unless the discussions that "resulted in" the refinancing had not begun before his termination. Clearly events impacting on the refinancing occurred prior to Kuplesky's firing. To prevail on the instant motion, defendants must establish that there was *no* causal relationship between the discussions held prior to Kuplesky's departure and the 2009 refinancing (*see Martin*, 235 AD2d at 196 ["In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion"]). While defendants' submissions may indicate that SCA did not actively pursue a refinancing until after Kuplesky's departure, plaintiffs' submissions suggest that Recap was analyzing a refinancing as early as October 2008, and Mr. Trehubenko testified that the only reason no commission was originally promised for refinancing work was because it was believed that SCA would not need Recap's assistance in carrying one out. Furthermore, the Deanes appear to have acknowledged the link between the pre-2009 negotiations and the ultimate refinancing in their 2009 consulting agreement with Felice Michetti, which states that her work with the government in 2007 and 2008 "would provide the framework for a sale or refinancing transaction" (Veit affirmation, exhibit 58, CD0003683).

Then too, SCA sought and obtained a commitment by the government to replace the existing subsidy structure with an MUTM and "sticky" Section 8 voucher contracts, and to continue the interest reduction payments even after the refinancing of the HFA mortgage. For an affordable housing complex these items are not coupon-clippings. Taken as a whole, they

effectively determined the cash flow and capital structure of the entire enterprise, questions that would be of paramount importance to anyone considering *any* type of investment in the property, whether as a purchaser or a lender. And while the government may not have felt that the MOU *necessarily* applied to a refinancing transaction (insofar as the document was binding at all), the fact is that SCA proposed that the refinancing "track the MOU as much as possible," the government agreed, and the final deal with Wells Fargo was based on assumptions regarding the subsidization of cash flow and interest payments according to the terms negotiated in May 2008, so much so that a special tranche of the loan was designated to be supported by the interest reduction payments which SCA had worked so hard to keep (Warner affirmation, exhibit 37, D015635). It would appear, then, that the MOU basically "wrote the script" for how Starrett City would perform as an income-producing asset in the future, and that the question of whether SCA would sell the project or refinance it was merely a question of figuring out who exactly would play the role of equity. On this record, it would be entirely reasonable for a trier of fact to conclude that without the discussions with the government prior to December 15, 2008, the refinancing transaction would not have been concluded in the way it was, if at all, in which case Kuplesky's Sharing Ratio (if he indeed was fired) should not have been reduced by any amount. A question of fact exists on this issue.

A question also remains as to when Kuplesky was removed from the board. Defendants contend that he was removed the day he was terminated, December 15, 2008, when SCA was still pursuing a sale of the property. While the Preservation Agreement provides that a Member is *subject* to removal from the board if he leaves the employ of Deane's various companies, such removal is not automatic. It is left to the discretion of the Managing Member. Removal is a

distinct event, and given the implications of the timing, it must be assumed that it is an *actual* event, with a specific, determinable time and place. Although the Preservation Agreement leaves the question of removal to the sole discretion of the Managing Member and no notice or formality appears to be required, that does not mean that a Member can be removed by the power of Carol's thoughts alone. By way of analogy, it cannot be the case that an employer can call an at-will employee into his office and inform him that as the employer had decided to fire him the previous Friday, he is owed no money for the past week. Termination (or removal) is an action or occurrence and, as such, must be proved.

Here, there is no evidence Kuplesky was told of his removal, expressly or impliedly, orally or in writing, until he received a letter from Preservation's counsel in February 2009. To be sure, that letter enclosed a document "[d]ated as of December 15, 2008" which recited that Carol had terminated Kuplesky on such date. There is no real evidence that Kuplesky was removed from the Preservation board before February 2009, a fact which both bears on the issue of whether discussions about refinancing has begun before that date and whether Kuplesky's Sharing Ratio should have only been reduced by 60% rather than 70%.

VI. Conclusion

To summarize, the court concludes that as Members of Preservation, plaintiffs were only entitled to their share of the "payments", i.e., cash distributions, that Preservation received from SCA on behalf of the partnership's managing general partner and general partner. Upon receipt of distributions of such payments in an amount sufficient to constitute a "Funding Event", plaintiffs' shares in Preservation could be reallocated down to zero. Moreover, the court concludes that Carol, as Managing Member of Preservation, had the right to withhold up to 15%

of those payments from the Members for the purpose of paying bonuses to Iris Sutz, Curt Deane and Robert Poll, or reserving money to make payments to SCA management personnel in the future. However, even taking this 15% withholding into account, whether plaintiffs' shares were validly reallocated on November 8, 2010 depends upon whether the payments made to the Members of Preservation properly constituted their entire share of the cash that SCA was supposed to pass on to Preservation according to the SCA partnership agreement and the Omnibus Assignments, an issue not explored on this motion. In addition, whether Kuplesky received everything due to him (and therefore whether his shares were properly reallocated), depends upon whether Preservation correctly reduced his Sharing Ratio by 70%, a question of fact that depends on 1) whether he was terminated or left the Deane Group of his own accord on December 15, 2008, 2) if terminated, whether he was removed from the Preservation board in 2008 or 2009, and 3) whether the discussions held with the government prior to the date of his removal "resulted in" the refinancing transaction with Wells Fargo in December 2009. Accordingly, it is

ORDERED that the motion of defendants for partial summary judgment against plaintiffs is granted in part, and the first through eighth causes of action are dismissed, to the extent they claim that the sums awarded by Preservation to Iris Sutz, Robert Poll and Curt Deane or set aside for future bonus payments were unauthorized or improper under the Preservation Agreement; and it is further

ADJUDGED AND DECLARED, on plaintiffs' ninth cause of action, that pursuant to Section 3.3 of the Preservation Agreement, the managing member of Preservation has the power to reallocate the Sharing Ratios of any member of said company once: (i) SCA or its successors

has distributed to Preservation all distributions it is required to make to its managing general partner and general partner under Sections 3.02 and 3.03 of the SCA partnership agreement; (ii) Preservation has distributed to its members, in accordance with Section 4.2 of the Preservation Agreement, any and all distributions it received from SCA; and (iii) such distributions by Preservation are $10 million or more, in the aggregate; and it is further

ORDERED that the remaining causes of action are severed and shall continue; and it is further

ORDERED that defendants' motion is otherwise denied, and that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre St., rm. 228, New York, N.Y., for a pre-trial conference on August 19 , 2014, at 12:00 noon.

Dated: July 28, 2014

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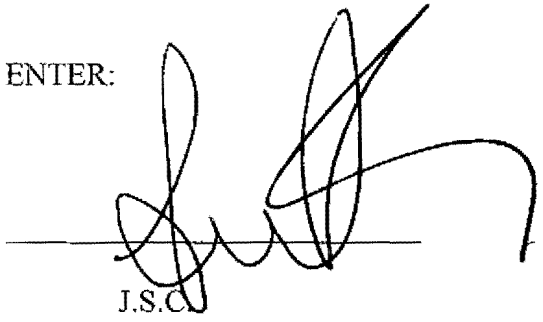

J.S.C.

County Clerk