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

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ANGELO SLABAKIS,

Index No.: 651986/2015

Plaintiff,

**DECISION & ORDER**

-against-

WALTER SCHIK, 890 PARK REALTY CORPORATION, 890 PARK LLC, JOSEPH SCHIK, LAKE REALTY MANAGEMENT LLC, XYZ ENTITIES 1 through 10, JOHN DOES 1 through 10, and JANE ROES 1 through 10,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Walter Schik (Walter), 890 Park Realty Corporation (Park Corp), 890 Park LLC (Park LLC), Joseph Schik (Joseph), and Lake Realty Management LLC (LRM) move, pursuant to CPLR 3211, to dismiss the complaint. Plaintiff Angelo Slabakis opposes the motion. Defendants' motion is granted in part and denied in part for the reasons that follow.

*I. Factual Background & Procedural History*

As this is a motion to dismiss, the facts recited are taken from the complaint (*see* Dkt. 1) [1] and the documentary evidence submitted by the parties.[2]

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

[2] The court disregards the detailed factual affidavits submitted by defendants in support of their motion because the contents of such affidavits, as opposed to the exhibits they introduce into the record, may not be considered when deciding a motion to dismiss under CPLR 3211. *See Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 n.4 (1st Dept 2014) ("On a motion, the only possible way that documentary evidence can be submitted to the court is by way of affidavit. Thus, an affidavit ... may properly serve as the vehicle for the submission of acceptable attachments which provide evidentiary proof in admissible form, like documentary evidence. In such situations, **the affidavit itself is not considered evidence; it merely serves as a vehicle to introduce documentary evidence to the court**") (emphasis added); *see also Liberty Affordable Housing, Inc. v Maple Court Apts.*, 125 AD3d 85, 89 (4th Dept 2015) (discussing "limited purpose" of defendant's affidavit on motion to dismiss), accord

This action concerns the parties' alleged oral agreement with respect to a building located at 890 Park Avenue in Manhattan (the Building). In 1987, the Building was acquired by non-party 890 Park Associates (Park Associates), a general partnership in which Slabakis was a general partner. In 1990, Union Bank of Switzerland (UBS) issued a $3.1 million mortgage loan to Park Associates that was secured by the Building. In 1992, after Park Associates defaulted on the mortgage, UBS commenced a foreclosure action in the United States District Court for the Southern District of New York. *See* Dkt. 20 (*Union Bank of Switzerland, N.Y. Branch v 890 Park Assocs.*, No. 92-CV-1557 (SDNY)) (the Foreclosure Action). By order dated March 20, 1995, the court in the Foreclosure Action (Keenan, J.) granted UBS's summary judgment motion. *See* Dkt. 21 (*Union Bank of Switzerland, N.Y. Branch v 890 Park Assocs.*, 1995 WL 121289 (SDNY 1995)).[3] After the issuance of a foreclosure judgment and the appointment of a referee, in November 1996, UBS sold the mortgage loan to one of the defendant entities in this

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*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976). Moreover, as set forth in an order dated January 29, 2016, the parties' original briefs (Dkt. 32, 40 & 84) were stricken from the record for significantly exceeding the court's page limits. *See* Dkt. 85. The court has only considered the parties' replacement briefs. *See* Dkt. 86, 87 & 95. Further, the court notes that plaintiff's counsel in his replacement opposition brief made an argument that directly contradicted his position in his original brief regarding the parties' status as fiduciaries by virtue of their alleged friendship. *See* Dkt. 88 (letter explaining the change). No reasonable attorney should think such a tactic is permissible and future conduct of this sort may result in sanctions. That said, as discussed herein, the newly proffered argument does not alter the outcome of the instant motion.

[3] Judge Keenan's decision does not paint Slabakis in the best light. There, Judge Keenan notes that Slabakis misused the mortgage loan proceeds, breached numerous contractual requirements, and defended the foreclosure action with a meritless oral agreement claim. *See* Dkt. 21 at 5-8. Slabakis appears to be no stranger to controversies involving real estate ventures. *See, e.g., In re 60 E. 80th St. Equities, Inc.*, 218 F3d 109, 113 n.2 (2d Cir 2000) (noting that "Slabakis had at least $100,000 that he had managed to hide from his creditors"). His credibility, however, may not be considered on this motion to dismiss. The court also does not consider defendants' contention that Slabakis' is a "veritable professional litigant." *See* Dkt. 61 at 2-5 (listing other actions involving Slabakis).

action, Park Corp, for $1.5 million. Park Corp took over the foreclosure proceedings and eventually took title to the Building in December 1997 pursuant to a referee's deed. *See* Dkt. 19.

The instant action concerns Slabakis' claim that Walter, the principal of Park Corp, orally agreed to enter into a joint venture with Slabakis to develop or sell the Building. The terms of their alleged oral agreement are set forth in paragraph 17 of the complaint:

> [Slabakis and Walter] agreed that: [Walter] would advance $1,500,000 to satisfy the UBS note and mortgage in full; [Walter] would be repaid the $1,500,000 loan when revenues from development or sale would enable repayment; interest at a 12% annual rate would accrue on the $1,500,000 loan, only to be paid from the profits realized from the development of the [Building] or from its sale, and [Slabakis] would retain his equity interest in the [Building] modified only by the terms of their agreement. [Slabakis and Walter] also agreed that [Walter] would take title as a straw man in order to carry out their agreed first order of business: [Walter] would foreclose on the UBS mortgage and thereby obtain a clean record title to the [Building]. [Slabakis and Walter] also agreed that after [Walter's] loan was repaid with interest, the proceeds would next be used to satisfy expenses of each party in the interim for vacating and relocating tenants, maintaining the [Building], real estate taxes and similar usual and customary expenditures, and for development costs. Thereafter, the balance of the proceeds would be equally divided between them or the entities through which they acted, including [Park Corp and Park LLC].

Complaint ¶ 17.[4]

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[4] Throughout the complaint, Slabakis claims that the LLCs through which Walter and his son, Joseph, do business are "alter egos". *See* Complaint ¶¶ 5-7, 52, 69. This is a conclusory allegation that is not supported by any of the required factual allegations necessary to justify veil piercing. *See Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 (1st Dept 2013), accord *Morris v N.Y. State Dep't of Taxation & Finance*, 82 NY2d 135, 141 (1993). This allegation should not be repleaded absent the requisite factual support. *See TNS Holdings, Inc. v MKI Secs. Corp.*, 92 NY2d 335, 339 (1998) ("Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance"). The court does not understand Slabakis' claims that he, "through [Park Associates], had a substantial equity interest in the [Building] in excess of $6,000,000 at that time." *See* Complaint ¶ 19. Neither Slabakis nor Park Associates had any equity since they defaulted on the mortgage, and it is not alleged that a fair market value credit was sought. Whatever equity Slabakis may have is dependent on his alleged oral agreement with Walter, but the notion that any of the pre-foreclosure equity survived is difficult to reconcile with treatment of the junior lienholders, who may well have been defrauded if Slabakis' allegations are true.

Slabakis further alleges that the contemplated development would require the termination of all existing tenancies in the Building. He claims that he and Walter "agreed that [Slabakis] would undertake the effort to have the tenants vacate the [Building]" and that "[Walter] would maintain the premises, pay the taxes and assist with any issues that arose regarding the tenants." *See* Complaint ¶ 18. Slabakis claims he undertook the following efforts in support of the parties' alleged joint venture:

> [Slabakis] expended substantial time, effort and money to effect the vacation of the [Building] from approximately early 1996 to **2009**.[5] This included relocating tenants to other apartment buildings owned by [Slabakis][6] at reduced rents, payment of moving expenses or providing allowances for moving expenses, legal expenses, and other significant costs necessary to effect the vacation of the [Building]. All of these actions were taken pursuant to the parties[']agreement and with [Walter's] knowledge and agreement.

*See* Complaint ¶ 24 (emphasis added).

According to Slabakis, the parties exchanged a series of proposals regarding the Building through 2013, until the last tenant left. Slabakis alleged that since at least 2002 [*see* Complaint ¶ 28], the parties had disputes regarding Slabakis' rights in the Building. They sought to settle these disputes, for instance, by proposing that Slabakis be given tenancy of two floors, but no final agreement was ever reached. *See* Complaint ¶¶ 31-35.

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[5] In opposition to the instant motion, Slabakis claims this 2009 date was a typo and that he, in fact, did not remove the last tenant until 2013. *See* Dkt. 41 at 4-5.

[6] In reply, defendants submitted affidavits indicating that Slabakis did not actually own the buildings and that he lied to the tenants he moved, such as Ted Bulow, who claims the real building owner evicted him. *See* Dkt. 60 at 2. As noted earlier, the court cannot rely on witness affidavits to dismiss a complaint. That said, if the allegations in the complaint and his papers prove to be false, Slabakis will be subject to sanctions. At oral argument, his counsel conceded his lack of personal knowledge regarding the veracity of his client's allegations regarding the apartments. *See* Dkt. 100 (6/30/16 Tr. at 17); *see also* Dkt. 102-104, 106 (court orders appointing receiver for the buildings).

In addition to his disputes with Walter, Slabakis takes issue with Walter's son, Joseph, being put in charge of the Building's management. Slabakis alleges:

> The management of the [Building] was turned over to [LRM, which is] owned and controlled by [Joseph,] when [Walter] abruptly removed existing building management ... without consulting [Slabakis].[7] [Walter] has paid management fees to [Joseph and LRM] that bear no relation to fair, reasonable or proper charges.[8] The engagement of [Joseph and LRM] by [Walter and Park LLC] was designed and intended to create excessive and unconscionable charges related to the [Building] and thereby increase the amounts [Walter] claimed due from [Slabakis]. It also was a vehicle to provide [Joseph] with a source of income.

*See* Complaint ¶ 39. Slabakis contends this was part of Walter's plan to wipe out Slabakis' equity in their joint venture. He also claims Walter deferred developing the Building in order to allow the 12% interest on the $1.5 million loan to accrue such that the amount owed by Slabakis would exceed the value of his interest in the venture.

Slabakis commenced this action on June 5, 2015. His complaint asserts seven causes of action, numbered here as in the complaint: (1) breach of contract (i.e., the parties' alleged oral agreement), asserted against Walter and Park LLC; (2) breach of fiduciary duty, asserted against Walter and Park LLC;[9] (3) fraud, asserted against all defendants; (4) constructive trust on the

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[7] Slabakis does not explain why his consent was required.

[8] The amounts paid or what would be considered reasonable are not alleged.

[9] This claim is based on the following allegations:

> [Walter] and his alter ego entities breached the obligations by failing to provide accurate and timely financial reports to [Slabakis], failing to maintain accurate and proper books and records, making false statements regarding the costs and expenses of operating the [Building], incurring improper expenses or incurring proper expenses by improper means and for improper purposes, wrongfully asserting that certain monies were due [Walter] in an effort to dissuade [Slabakis] from pursuing the realization of his equity and investment in the [Building], and failing to consult with [Slabakis] regarding capital expenditures.

*See* Complaint ¶ 52.

Building and all sale proceeds; (5) civil conspiracy, asserted against all defendants; (6) tortious interference with prospective business relations, asserted against Joseph; and (7) specific performance of the alleged oral agreement, seeking a "judgment ordering the sale of the [Building]." On September 18, 2015, defendants filed the instant motion to dismiss. Following the submission of conforming briefs and an extensive adjournment of the oral argument date, the court reserved on the motion. *See* Dkt. 100 (6/30/16 Tr.).

*II. Discussion*

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v*

*Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

As an initial matter, the court rejects defendants' statute of frauds defense. It is well settled that an oral joint venture agreement regarding real estate is not barred by the statue of frauds. *See Retter v Zyskind*, 138 AD3d 496 (1st Dept 2016), citing *Malaty v Malaty*, 95 AD3d 961, 962 (2d Dept 2012) ("The statute of frauds does not render void oral joint venture agreements to deal in real property, as the interest of each joint venturer in a joint venture is deemed personality"), accord *Mattikow v Sudarsky*, 248 NY 404, 406 (1928). Moreover, while the sale of the Building does not appear to have been contemplated or expected within a year, that fact does not bring the parties' agreement within the ambit of the statute of frauds. Rather, since it was possible for the Building to have been sold within one year, that possibility, however remote, precludes a statute of frauds defense. *See D & N Boening, Inc. v Kirsch Beverages, Inc.*, 63 NY2d 449, 454 (1984) (statute of frauds only applicable to contracts which "have absolutely no possibility in fact and law of full performance within one year"); *Fin. Structures Ltd. v UBS AG*, 77 AD3d 417, 418 (1st Dept 2010) ("The fact that full performance within one year was unlikely or improbable does not make the agreement subject to the statute of frauds"). To the extent Slabakis can prove the existence of an enforceable oral agreement, that such agreement was oral is not fatal.

The court also rejects defendants' statute of limitations defense on Slabakis' breach of contract claim. According to Slabakis, Walter was obligated to give him half of the proceeds from an eventual sale net of expenses and minus the $1.5 million loan, which carries 12% interest. No such sale has occurred. Breach of contract claims are subject to a six-year statute of limitations and accrue when the plaintiff has the right to demand payment. *See Hahn Automotive*

*Warehouse, Inc. v Am. Zurich Ins. Co.*, 18 NY3d 765, 770 (2012). Slabakis' claim for breach of the parties' agreement cannot have accrued because the Building has not been sold, and, hence, Slabakis has no claim to monetary damages at this time.[10]

Defendants also aver that the complaint fails to plead all of the essential terms of the parties' alleged oral agreement. "The doctrine of definiteness or certainty is well established in contract law. In short, it means that a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to." *166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 (1991). "If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract." *Id.*, quoting *Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 (1989). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Express Indus. & Terminal Corp. v N.Y. State Dep't of Transp.*, 93 NY2d 584, 589 (1999), citing *Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 109 (1981).

It is true, however, that "not all terms of a contract need be fixed with absolute certainty" because "at some point virtually every agreement can be said to have a degree of indefiniteness." *Express Indus.*, 93 NY2d at 590; *see Kolchins v Evolution Markets, Inc.*, 128 AD3d 47, 61 (1st Dept 2015) ("all the terms contemplated by the agreement need not be fixed with complete and perfect certainty for a contract to have legal efficacy"). Yet, "definiteness as to material matters is of the very essence in contract law" and, thus, "[i]mpenetrable vagueness and uncertainty will not do." *Schumacher*, 52 NY2d at 109. A contract that lacks a missing essential term will only

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[10] The court will not assess the timeliness of the other causes of action since the relevant accrual dates are better assessed once they are repleaded to address the issues set forth herein. The question of whether grounds for equitable tolling exist also is better assessed with the benefit of an amended pleading.

be enforceable if there exists "an objective method for supplying the missing term." *See Basu v Alphabet Mgmt. LLC*, 127 AD3d 450 (1st Dept 2015), citing *166 Mamaroneck Ave.*, 78 NY2d at 91-92.

The court rejects defendants' contention that the parties' failure to reach a final decision about whether to sell or further develop the Building renders the agreement unenforceable. On the contrary, according to Slabakis, that was a decision the parties deferred for later determination. This makes sense. It would be odd to reach a definitive decision on what to do with a property in the future, especially given the well-known risk of real estate market fluctuations. That the parties left themselves the flexibility with respect to their handling of the Building does not defeat the enforceability of the alleged agreement. But, the complaint does not address the parties' agreement regarding how disputes would be resolved or who has final decision-making power.

There also are serious holes in plaintiffs' allegations that are exposed by defendants' submissions, which suggest Slabakis is not being truthful about myriad matters. He repeatedly refers to "his" equity in the Building when he alleges it was owned by a partnership, of which he allegedly is only one of the partners. He is careless about notions of corporate formalities by baldy asserting alter ego allegations. And, as noted, issues are raised regarding the truth of his contributions in procuring tenant removal, allegations which include his defrauding of tenants by misrepresenting his ownership of the building where they were relocated.

To be sure, such matters implicate questions of fact that cannot be resolved on this motion. Nonetheless, in light of the many holes in the complaint, Slabakis must replead with more specificity and precision. This is particularly warranted since the consideration provided by Slabakis for his interest in the alleged joint venture is difficult to discern from the complaint.

He claims to have helped procure the removal of tenants, but his actual contributions should be stated specifically, not only to ensure their accuracy and truthfulness, but also to ensure that his allegations are not inherently incredible. After all, he is claiming the right to half of a multi-million-dollar, Park Avenue building, which he did not have the means to purchase from UBS. *See Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) ("inherently incredible" factual allegations are not assumed to be true on motion to dismiss); *see also Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 (1st Dept 2016) (same, rejecting plaintiff's "incredible allegations" on motion to dismiss). Moreover, while Slabakis claims to have performed services for the parties' joint venture, he does not explain how he satisfies an essential element – the sharing of losses. *See Lerch v Ark Restoration & Design Ltd.*, 137 AD3d 637, 638 (1st Dept 2016) ("the agreement, as described by plaintiffs ... had no provision for the sharing of losses, and therefore was not one for a joint venture"), citing *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 298 (1st Dept 2003); *see also Mawere v Landau*, 130 AD3d 986, 988 (2d Dept 2015) ("The plaintiff failed to state a cause of action based on a joint venture agreement because he failed to allege a mutual promise or undertaking **to share the burden of the losses of the alleged enterprise**") (emphasis added; quotation marks omitted). Slabakis does not sufficiently plead that he agreed to share losses in a non-conclusory manner, nor does he allege what losses or liability he is jointly and severally responsible for. *See Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 565 (1988) ("As agents for each other, partners and joint venturers are jointly and severally liable to third parties for any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership") (citation and quotation marks omitted); *Ayers v Hakes*, 260 AD2d 975, 977 (3d Dept 1999) ("The imposition of joint and several liability is

appropriate where an employee is injured through the activities of employers who have entered into a joint venture").

To be clear, at this juncture and on this record, a dismissal with prejudice would be highly inappropriate. The record does indicate Slabakis' involvement with the Building, even if the specifics may not entirely accord with Slabakis' allegations. Furthermore, Walter's position is unclear as to whether Slabakis is obligated to repay the $1.5 million loan with 12% interest running from the late 1990s. Such a significant financial obligation must have been supported by corresponding significant consideration. The alleged joint venture would explain that obligation. Ergo, the court grants dismissal with leave to replead.

In light of this outcome, the court will not reach the merits of the other claims pleaded against Walter and his companies.[11] The existence and precise nature of the parties' agreement will necessarily dictate the viability of such claims. For instance, until the parameters of the parties' agreement are determined, the existence of a fiduciary relationship and the availability of specific performance cannot be assessed. Also, without understanding the parties' agreement with respect to decision-making, the court cannot evaluate Slabakis' claim that seeks to compel the sale of the Building.

That being said, the claims regarding Joseph and LRM are separately worth discussing because their alleged wrongdoing is not sufficiently pleaded. Slabakis does not explain why Walter lacked the authority to decide to change building management nor does he actually plead that Joseph, notwithstanding him being Walter's son, mismanaged the building. While the management fees paid to Joseph and LRM supposedly bore "no relation to fair, reasonable or

[11] It is not clear why Park Corp or Park LLC are named as defendants. The complaint suggests that the agreement was between Slabakis and Walter, but also suggests that their entities were either part of the agreement or were supposed to be entitled to receive the proceeds of a sale. Slabakis, as plaintiff, must allege the specific identity of the contracting parties.

proper charges," Slabakis does not allege the amount they were paid, what a reasonable fee would be, or even that they were paid more than the prior building manager. While this claim may have merit, it must be pleaded in more than a conclusory manner.

Likewise, the involvement of Joseph and LRM in an alleged conspiracy also is conclusorily pleaded. All of the conspiracy allegations, including the suggestion that many of Walter's companies, including unnamed John Doe parties, bear liability, have no basis in the complaint. A conspiracy claim requires the pleading of facts demonstrating the conspiracy. *See Sullivan v Mers, Inc.*, 139 AD3d 419, 419-20 (1st Dept 2016) ("Plaintiff ... failed to state a viable claim for conspiracy ... since his allegations that [defendants] acted as part of a common scheme or plan to defraud him of his interest in the subject property are conclusory"). Such facts are lacking here. Additionally, "New York does not recognize civil conspiracy to commit a tort as an independent cause of action." *Ferrandino & Son, Inc. v Wheaton Builders, Inc.*, 82 AD3d 1035, 1036 (2d Dept 2011). Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort. *See Alexander & Alexander of N.Y., Inc. v Fritzen*, 68 NY2d 968, 969 (1986). In repleading, plaintiff is cautioned to follow this legal precept. Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted, and the complaint is dismissed without prejudice and with leave to replead in accordance with this decision within 20 days of the entry of this order on the NYSCEF system; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on October 6, 2016, at 11:00 in the forenoon.

Dated: August 19, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C