| **Ashkenazy v Gindi** |
| --- |
| 2022 NY Slip Op 32261(U) |
| July 10, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 656277/2020 |
| Judge: Andrea Masley |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

----------X

BEN ASHKENAZY, ASHKENAZY ACQUISITION CORPORATION, CROSS COUNTY MALL MANAGING MEMBER CORP., 1991 BROADWAY OWNER LLC,LULU GIGI REALTY LLC, 625 NMA AAC MEMBER LLC,DK CONNECTIONS LLC,HORACE PLAZA MANAGING MEMBER LLC, and ASHKENAZY CANADA GP CORP.,

Plaintiffs,

- v -

RAYMOND GINDI, EDDIE GINDI, ISAAC GINDI, ASG EQUITIES LLC, CCC PARTNERS, 1991 BROADWAY BLUE LLC,WEBRO 2067 LLC, IRAYMOND 2067 LLC, STAR OF DAVID 2067 LLC, RANDALL CO. 2067 LLC, 625 BLUE MEMBER LLC, BEVCON BLUE FEE LLC, GV HORACE PARTNERS, 696 STE. CATHERINE BLUE PARTNERS, ISAAC RAYMOND ASSOCIATES LLC, G-CROSS BRONX PLAZA PARTNERS, 625 MADISON BLUE LLC,GCVS FLATBUSH PARTNERS, 145 GREENE BLUE LLC, BRAVERN BLUE LLC, G III 69TH ST. PARTNERS L.P., THE ASHKENAZY FAMILY N.Y. TRUST-DATED 11/16/05, 2013 ICONIC TRUST LLC, CROSS BRONX PLAZA MANAGING MEMBER CORP., BA 625 MAD MANAGING MEMBER CORP., BA BRAVERN MANAGER LLC, 69TH STREET HOLDINGS GP LLC,SAN FRAN ICONIC MEMBER LLC, and BEN AND DEBRA FAMILY 2015 LLC,

Defendants.

----------X

**INDEX NO.** 656277/2020

**MOTION DATE** _____

**MOTION SEQ. NO.** 001 002

**DECISION + ORDER ON MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 56, 63, 64, 65, 66, 72, 131, 135

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 122, 132, 133, 136

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Motion sequence numbers 001 and 002 are consolidated for disposition.

This action arises from a business dispute between real estate investors, plaintiffs Ben Ashkenazy, and the entities he controls, and defendants Raymond Gindi, Eddie Gindi, Isaac Gindi (collectively, the Gindis) and the entities they control. Based on defendants' refusal to fund capital calls issued for the parties' jointly owned commercial properties, plaintiffs assert in the sixteen-count complaint causes of action for breach of the implied covenant of good faith and fair dealing (first, fifth, sixth, and seventh causes of action), breach of contract (second, third and fourth causes of action), and declaratory judgment (eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth causes of action.) Additionally, plaintiffs assert causes of action for defamation and defamation per se (fifteenth and sixteenth causes of action, respectively) based on the Gindis's alleged statements to others accusing Ashkenazy of mismanagement and theft.

In their answer, the Gindis assert various affirmative defenses, including failure to state a claim (first affirmative defense.) They are also joined by additional entities owned and/or controlled by the Gindis in asserting forty counterclaims.[1] These include a counterclaim alleging that plaintiffs' defamation claims are a strategic lawsuit against public participation ("SLAPP") in violation of New York's recently amended anti-SLAPP law. (Civil Rights Law §§ 70-a, 76-a.) The remainder of the counterclaims are for breach of contract, declaratory judgment, breach of fiduciary duty and aiding and abetting breach of fiduciary duty and are based on various allegations of misconduct by plaintiffs in connection with the parties' joint real estate investments.

[1] Counsels are directed to file their appearances in NYSCEF for the additional counterclaim plaintiffs and counterclaim defendants.

In motion sequence number 001, defendants now move for summary judgment dismissing the causes of action for of breach of the implied covenant of good faith and fair dealing, breach of contract and declaratory judgment (first through fourteenth causes of action.)

In motion sequence number 002, plaintiffs move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss counterclaims one, four through eight, eleven through seventeen, nineteen, twenty-two, twenty-four through twenty-nine and thirty-two through forty.

## I. Background

Ashkenazy is a well-known real estate investor, who owns and operates plaintiff Ashkenazy Acquisition Corporation ("AAC".) (NYSCEF Doc No. [NYSCEF] 1, compl., ¶ 37; NYSCEF 7, answer with counterclaims [answer], ¶ 41.) The Gindis, along with other members of their family, own and operate defendant ASG Equities LLC ("ASG"), which owns and operates a portfolio of real estate and private equity investments. (NYSCEF 1, compl., ¶ 38; NYSCEF 7, answer, ¶ 42.) For approximately a decade, Ashkenazy and the Gindis, through their various entities, invested in numerous commercial properties together. In connection with these properties, AAC, through one of its affiliates, would act as the managing member and ASG, though one of its affiliates, would act as a passive investor. (NYSCEF 1, compl., ¶ 39; NYSCEF 7, answer, ¶¶ 5, 8, 43.)

According to the complaint, seven of these properties (the "Capital Call Properties") experienced "significant financial distress as a result of the COVID-19 pandemic." (NYSCEF 1, compl., ¶ 40.) In April and June 2020, plaintiffs sent capital call letters (the "Capital Call Letters") to defendants in connection with these properties.

The letters were largely identical and explained that due to the pandemic's impact on tenants (i.e., "tenant closures, stated inability to pay rent, relief requests") and due to the uncertainty as to what, if any, "accommodations lender [would] agree to," plaintiffs were anticipating "severely constrained revenue over the next 3-6 months." (NYSCEF 39-45, Capital Call Letters.) The letters also warned that failure to fund the capital calls exposed the parties to "unimaginable risks, liabilities and threat to [their] ownership in the property," including possible "loan defaults, loan foreclosure, lapse of insurance coverages, tax liens and Landlord default under leases." (*Id.*) The letters stressed that "failing to fund th[e] capital call[s] . . . [would] result in severe consequences and cause significant damage to the partners." (*Id.*)

Defendants failed to fund the capital calls. (NYSCEF 1, compl., ¶¶ 7, 59 NYSCEF 7, answer, ¶ 11.) Plaintiffs allege that this was done to force a "buy-out at a premium." (NYSCEF 1, compl., ¶ 1.) In addition, defendants allegedly "launched a series of harassing and unfounded demands on [p]laintiffs for voluminous amounts of documents and information." (*Id.*, ¶ 8.) Plaintiffs allege that they "have provided [d]efendants with access to all the financial information to which they are [contractually] entitled" and that "the substance of the documents and information [defendants] purport to Seek had long ago been provided to them." (*Id.*)

Lastly, plaintiffs allege that, in May 2020, defendants "launched a public campaign of defamation and harassment" against plaintiffs (*id.*, ¶ 9), accusing plaintiffs of stealing millions of dollars in connection with the Capital Call Properties. (*See id.*, ¶¶ 9, 62.) In the complaint, plaintiffs point to the following incidents in support of this claim:

> "(a) Defendant Eddie Gindi accused Mr. Ashkenazy and [p]laintiffs of 'stealing' to Eddie Gindi's son-in-law, Zourie

> Dweck, as well as to Alex Adjmi, the president of A&H Acquisition Corporation and another well-known real estate investor;
>
> "(b) Defendant Isaac Gindi accused Mr. Ashkenazy and [p]laintiffs of 'stealing' to a business associate Eli Gindi (no relation to the Gindis herein) at a fundraiser, and also to Isaac Gindi's son, Sonny Gindi, who then shared the false statements with community members; and
>
> "(c) Defendant Raymond Gindi accused Mr. Ashkenazy and [p]laintiffs of 'stealing' to his business associate Eli Gindi (no relation to the Gindis herein), to Raymond Gindi's brother-in-law, Jojo Chehebar, and to Joseph Cayre, yet another well-known real estate investor."

(*Id.*, ¶ 63.)

For their part, defendants claim that, in 2018, they, for the first, time requested information regarding their investments. According to ASG's Chief Financial Officer, Michael O'Shea, "Ashkenazy agreed to provide equity schedules setting out the parties' equity contributions, ownership percentage, and distributions received for each of their investments," but he delayed doing so until 2019. (NYSCEF 76, O'Shea aff, ¶¶ 3, 6, 7.) Allegedly, upon receiving these schedules, defendants realized that "Ashkenazy had assigned himself greater ownership in the properties than the parties had agreed and/or failed to contribute amounts consistent with his stated ownership interest" and "that Ashkenazy had taken more than his *pro rata* share of distributions in some instances and had used funds from the joint companies to pay off his personal loans." (*Id.*, ¶ 7.) Defendants claim that they had no prior notice of these issues, because they had never been provided this information before. (*Id.*) Based on these discoveries, defendants allege that they made repeated requests for additional information, but that—with the exception of the federal tax returns for the years 2016 through 2018, which Ashkenazy

produced in June 2020—Ashkenazy did not provide further information. (*See id.*, ¶¶ 8-11; *See also* answer, ¶¶ 51-57.) In addition, defendants deny that they made defamatory statements about plaintiffs. They claim that Ashkenazy was the one that spread rumors about the parties' dealings. (*See* answer, ¶¶ 58-60.)

Plaintiffs commenced this action on November 13, 2020. Defendants filed their answer with counterclaims on December 18, 2020.

Details regarding the parties' business arrangements and their specific allegations of wrongdoing against each other are set forth below.

**Capital Call Properties**

**1. Cross County Mall**

In December 2007, plaintiff Cross County Mall Managing Member Corp. ("CCMMM"), an affiliate of AAC, defendant CCC Partners, an affiliate of ASG, and counterclaim defendant The Ashkenazy Family N.Y. Trust-Dated 11/16/05 ("AFT") entered into a limited liability company operating agreement ("Cross County Agreement") governing AAC Cross County Mall LLC, which operates real property commonly known as The Cross County Shopping Center, located at 750 Central Park Avenue, Yonkers, New York ("Cross County Mall".) CCMMM is the managing member. (NYSCEF 1, compl., ¶¶ 41, 42; NYSCEF 7, answer, ¶¶ 45, 46; NYSCEF 8, Cross County Agreement.)

By letter dated June 15, 2020, CCMMM, "request[ed] [CCC Partners'] consent to issue" a capital call of $1,300,000. (NYSCEF 45, Cross County Mall Capital Call Letter; *See* NYSCEF 1, compl., ¶ 58.) CCC Partners did not fund the capital call. (NYSCEF 1, compl., ¶¶ 7, 59;NYSCEF 7, answer, ¶¶ 10, 11.)

Plaintiffs allege that defendants' conduct necessitated the capital call, because Century 21, a department store that is an affiliate of CCC Partners and a tenant at the Cross County Mall, had not paid the monthly rent of approximately $245,000 since March 2020. (NYSCEF 1, compl., ¶ 60.) According to Yehuda Sheinfeld , the Chief Financial Officer of AAC, this "caused a massive shortfall of capital. " (NYSCEF 64, Sheinfeld aff, ¶ 15.) Defendants allege that the capital shortfall also caused Cross County Mall to lose Five Below as a potential tenant, because AAC Cross County Mall LLC could not fulfill its capital expenditure requirements. (*Id.*)

The Cross County Agreement provides as follows:

> "Section 2.07 Additional Capital Contributions. Each Member shall be obligated to make additional capital contributions (each an 'Additional Capital Contribution') as are called for by the Managing Member with the unanimous approval of the Members pursuant to a notice (each, an 'Additional Capital Notice') in order to meet expenses and commitments of the Company. Additional Capital Contributions shall be made by each Member in accordance with their respective Membership Interests and shall be made within ten (10) days following the date of the Additional Capital Notice."

(NYSCEF 8, Cross County Agreement, §2.07.)

**2. 1991 Broadway**

In 2013, plaintiff 1991 Broadway Owner LLC, an affiliate of AAC, and defendant 1991 Broadway Blue LLC, an affiliate of ASG, entered into a tenancy-in-common agreement ("1991 Broadway Agreement") as co-owners of four retail condominium units in the Bel Canto Condominium, located at 1991 Broadway, New York, New York ("1991 Broadway".) 1991 Broadway Owner LLC is the managing owner. (NYSCEF 1, compl., ¶¶ 43, 44(NYSCEF 7, answer, ¶¶ 47, 48; NYSCEF 9, 1991 Broadway Agreement.)

According to counterclaim plaintiffs, prior to closing on 1991 Broadway, "the parties agreed their ownership interests in 1991 Broadway would be proportionate to their payment of the purchase price." (NYSCEF 7, answer, ¶ 73.) O'Shea states that this understanding is "evidenced by an email from Mr. Ashkenazy dated October 8, 2013—two months prior to the closing—[stating] that the Gindis and Ashkenazy 'were forming a 50/50 tick [sic],' a reference to the parties' agreement that each take a 50% ownership interest in the tenancy-in-common." (NYSCEF 76, O'Shea aff, ¶ 19;NYSCEF 81, exhibit 5 to O'Shea aff, Email [Oct. 8, 2013] .) O'Shea explains that at the time, "the parties expected that each would contribute $5 million toward the total $10 million of equity toward the purchase price, and thus own 50% each." (NYSCEF 76, O'Shea aff, ¶ 20.) He annexes an email exchange between the parties, dated October 22, 2013—discussing the proposed structure for the purchase of 1991 Broadway, whereby each party would fund 50% of the cash required to close on the property—as additional evidence of this understanding. (NYSCEF 82, Email [Oct. 22, 2013].)

Pursuant to the 1991 Broadway Agreement, each owner's ownership interest in the property is stated in Exhibit A to the agreement. (NYSCEF 9, 1991 Broadway Agreement, §§ 2.2, 3.1.) Exhibit A sets 1991 Broadway Blue LLC's ownership interest at 45% and 1991 Broadway Owner LLC's at 55%. (*Id.* at 33 [exhibit A].) However, counterclaim plaintiffs allege that the parties intended for each party to fund its pro rata share towards the purchase price. (*See* NYSCEF 76, O'Shea aff, ¶ 21; NYSCEF 7, answer ¶ 73.) As such, they allege, 1991 Broadway Owner LLC was to contribute $5.5 million—consisting of $1 million of its own cash and a $4.5 million loan from counterclaim plaintiff Isaac Raymond Associates LLC, for which Ashkenazy provided

Isaac Raymond Associates LLC with a personal promissory note for $4.5 million ("1991 Broadway Note")—while 1991 Broadway Blue LLC was to contribute $4.5 million in cash. (*Id.*, ¶¶ 73, 74, 83 at 47-49; NYSCEF 10, 1991 Broadway Note.) However, 1991 Broadway Owner LLC allegedly failed to contribute its $ 1 million in cash and 1991 Broadway Blue LLC covered the shortfall to avoid default on the purchase of the property. (NYSCEF 7, answer, ¶ 75.) O'Shea states that Ashkenazy informed the Gindis of this change "right before the property's closing" and that "Ashkenazy did not explain the need for $1 million more than had been agreed or how those funds would be used." (NYSCEF 76, O'Shea aff, ¶ 22.)

Following the closing, Ashkenazy allegedly provided the Gindis with a closing statement showing $10 million in cash flowing from 1991 Broadway Blue LLC and Isaac Raymond Associates LLC and $1,281,441.53 in excess funds held in the property. (NYSCEF 7, answer, ¶ 76.) After some dispute over the matter, with Ashkenazy allegedly seeking to use the excess funds toward another property—conduct that the counterclaim plaintiffs described as "an early sign of [Ashkenazy's] negligence and recklessness." (*Id.*, ¶ 77)—Ashkenazy refunded the $1 million to 1991 Broadway Blue LLC. (*Id.*, ¶¶ 77-78.)

Counterclaim plaintiffs stated that they "presumed that 1991 Broadway Owner LLC [thereafter] paid [its] own $1 million into 1991 Broadway," bringing 1991 Broadway Owner LLC's total contribution to $5.5 million out of $10 million and making it the 55% owner of the property. (NYSCEF 76, O'Shea aff, ¶ 24.) However, on August 15, 2019, "Ashkenazy [allegedly] provided an equity schedule showing that 1991 Broadway Owner LLC paid $4.95 million of the $9 million investment in the Property (55%) and

that 1991 Broadway Blue LLC paid $4.05 million (45%)." (NYSCEF 7, answer, ¶ 80; *see* NYSCEF 76, O'Shea aff, ¶ 25; NYSCEF 83, exhibit 7 to O'Shea aff, Emails [Aug. 15, 2019], NYSCEF 84, exhibit 8 to O'Shea aff, 1991 Broadway Equity Schedule.) Counterclaim plaintiffs contend that this equity schedule has no basis in reality and that, because 1991 Broadway Owner LLC and 1991 Broadway Blue LLC each contributed $4.5 million to the purchase price, each should have an equal 50% ownership interest in 1991 Broadway. (NYSCEF 7, answer, ¶¶ 78-79.)

In March 2016, 1991 Broadway was refinanced, resulting in $6 million in proceeds. The proceeds were allegedly used as follows: (1) $394,564.49 toward refinancing fees; (2) $1 million for cash reserves in connection with a tenant lease; (3) $3.8 million paid to Isaac Raymond Associates LLC as partial payment on the 1991 Broadway Note; and (4) $805,435.51 distributed pro rata to 1991 Broadway Blue LLC and 1991 Broadway Owner LLC. (NYSCEF 7, answer, ¶¶ 85, 86.) Counterclaim plaintiffs allege that this was in contravention of sections 4.1 (a) and 4.2 of the 1991 Broadway Agreement, which provide that the sharing of income and expenses and the distribution of cash flow shall be in accordance with the owners' respective ownership interests in the property. (*See* NYSCEF 9, 1991 Broadway Agreement, §§ 4.1 [a], 4.2.)

Plaintiffs allege that as early as February 2020, defendants understood that "1991 Broadway was operating at a loss of approximately $624,000" (NYSCEF 64, Sheinfeld aff, ¶ 9.) Sheinfeld provides an email from O'Shea, dated February 7, 2020, in which O'Shea notes that 1991 Broadway is "operating at a loss (-$624k)" and asks if capital calls are anticipated. (NYSCEF 65, exhibit 1 to Sheinfeld aff, Email [Feb. 7, 2020] at 2.)

By letter dated April 2, 2020, 1991 Broadway Owner LLC "request[ed] that each partner fund its proportionate share of a total capital call of $1,600,000 in order to meet the anticipated obligations of the property." (NYSCEF 39, 1991 Broadway Capital Call Letter.) It directed 1991 Broadway Blue LLC to pay $720,000, or 45% of the total capital call, within 15 days. (*Id*. at 2.) 1991 Broadway Blue LLC did not fund the capital call. (NYSCEF 1, compl., ¶¶ 7, 59; NYSCEF 7, answer, ¶ 11.) According to Sheinfeld, "[a]s a result of 1991 Broadway Blue LLC's failure to contribute additional capital . . . numerous payment obligations have not been met" and, "[o]n October 28, 2020, the Board of Managers of Bel Canto Condominium initiated proceedings to foreclose on liens for unpaid common charges for all 4 units." (NYSCEF 64, Sheinfeld aff, ¶ 11; NYSCEF 66, complaint in the foreclosure action].)

The 1991 Broadway Agreement provides as follows:

> "5.2 Additional Contribution. In the event undistributed Available Cash, if any, in excess of Cash Reserves are inadequate to meet the Property's current operating expenses, Necessary Expenses, Emergency Expenses, or tenant improvements and allowances under approved Leases, upon written notice by the Administrative Owner to the other Owners, each Owner shall make additional contributions ('Additional Contributions') in proportion to his, her or its Ownership Interest to fund such shortfall; provided, however, that no Owner shall be required to make an Additional Contribution with respect to any item for which the unanimous consent of the Owners shall be required hereunder and shall not have been obtained. Such Additional Contributions shall be made in cash within fifteen (15) days following notice of the demand for Additional Contributions. Such notice by the Administrative Owner shall state the reason for the need for the Additional Contribution and the proposed use of such funds.
>
> "5.3 Failure to Make Additional Contribution.

> "(a) If any Owner (the 'Delinquent Owner') fails to make Additional Contributions when due, any other Owner (a 'Lending Owner') shall have the right, at its option, to lend to the Delinquent Owner (for the account of the Owner whose failure to fund its share of an Additional Contribution gave rise to the delinquency) all or any portion of the delinquent funding, provided, that such loan (a) shall bear interest at the Default Rate, (b) shall be recourse to the Delinquent Owner and (c) shall be repayable in full, with interest, no later than thirty-one (31) days following the date of the advance. . . .
>
> ***
>
> "(c) If the Delinquent Owner shall not pay any such loan described above in full by the thirty-first (31st) day following the funding of such loan, then the Lending Owner shall be entitled to exercise any and all available remedies, at law or in equity, in connection therewith."

(NYSCEF 9, 1991 Broadway Agreement, §§ 5.2, 5.3 [a], [c].) In other pertinent parts, the 1991 Broadway Agreement provides as follows:

> "3.2 Disclaimer of Partnership and Fiduciary Relationship; Tax Reporting.
>
> "(a) The Owners expressly intend that their relationship shall be that of co-owners of the Property. The provisions of this Agreement are not intended to create, nor shall they be in any way interpreted to create (i) a joint venture, partnership or other similar relationship between or among the Owners, and each of the Owners hereby expressly waives and disclaims any such joint venture, partnership or similar relationship, or (ii) any fiduciary relationship between or among the Owners, and each of the Owners hereby expressly waives and disclaims any such fiduciary relationship."
>
> ***
>
> "6. 7 Liability for Certain Acts. The Administrative Owner shall perform its duties in good faith, in a manner reasonably believed to be in the best interests of the Owners and with such care as an ordinarily prudent person in a similar position would use under similar circumstances. An Administrative Owner shall not have any liability by reason of

> being or having been an Administrative Owner and shall not be liable to any Owner for any loss or damage sustained by any Owner. Without limiting the generality of the preceding sentence, the Administrative Owner does not in any way guaranty the return of any capital to an Owner or a profit for the Owners from the operations of the Property.
>
> ***
>
> "9.2 Exculpation of Administrative Owner. The Administrative Owner shall perform its duties under this Agreement with ordinary prudence and in a manner characteristic of business people in similar circumstances, but the Administrative Owner shall not have any liability whatsoever to the Owners for loss caused by any act or by the failure to do any act if the loss suffered by the Owners arises out of a mistake in business judgment of the Administrative Owner."

(*Id.*, §§ 3.2 [a], 6.7, 9.2.)

The 1991 Broadway Agreement also contains a standard merger/integration clause. (*Id.*, § 11.2.)

**3. 2067 Broadway**

On April 11, 2014, plaintiff Lulu Gigi Realty LLC, an affiliate of AAC, and defendants Webro 2067 LLC, IRaymond 2067 LLC, Star of David 2067 LLC, and Randall Co. 2067 LLC, affiliates of ASG, entered into a tenancy-in-common agreement ("2067 Broadway Agreement") as co-owners of real property located at 2067 Broadway, New York, New York ("2067 Broadway".) Lulu Gigi Realty LLC is the administrative owner. (NYSCEF 1, compl., ¶¶ 45, 46; NYSCEF 7, answer, ¶¶ 49, 50; NYSCEF 11, 2067 Broadway Agreement.)

Plaintiffs allege that in February 2020, defendants were aware that "2067 Broadway was operating at a loss of approximately $624,000." (NYSCEF 64, Sheinfeld aff, ¶ 9.) Sheinfeld provides a copy of an email from O'Shea, dated February 7, 2020,

in which O'Shea notes that 2067 Broadway is "operating at a loss (-$624k)" and asks if capital calls are anticipated. (NYSCEF 65, exhibit 1 to O'Shea aff, Email [Feb. 7, 2020] at 2.)

By letter dated April 2, 2020, Lulu Gigi Realty LLC issued a capital call for $800,000 and requested that Webro 2067 LLC, IRaymond 2067 LLC, Star of David 2067 LLC, and Randall Co. 2067 LLC pay $544,160, their proportionate share. (*See* NYSCEF 40, 2067 Capital Call Letter.) Defendants did not fund the capital call (NYSCEF 1, compl., ¶¶ 7, 59; NYSCEF 7, answer, ¶ 11.) According to Sheinfeld, "[a]s a result of the failure of [d]efendants to contribute additional capital, [p]laintiff Lulu Gigi Realty LLC was unable to timely pay principal and interest due on the loan for the property" and was forced to "dedicate[] time and resources negotiating multiple deferrals from the parties' lender." (NYSCEF 64, Sheinfeld aff, ¶ 12.) In addition, he states that "Lulu Gigi Realty LLC was unable to pay real estate taxes for the property" and that, "[w]hile the lender advanced the parties' real estate taxes, interest is accruing on that advance, and the property is currently subject to default as a result of the failure to pay real estate taxes." (*Id.*)

The 2067 Broadway Agreement contains "Additional Contribution" and "Failure to Make Additional Contribution" provisions that are identical to those of the 1991 Broadway Agreement. (*See* NYSCEF 9, 2067 Broadway Agreement, §§ 5.1, 5.2 [a], [c].)

**4. 625 North Michigan**

On July 2, 2015, plaintiff 625 NMA AAC Member LLC, an affiliate of AAC, and defendant 625 Blue Member LLC, an affiliate of ASG, entered into an amended and

restated limited liability company operating agreement ("625 NMA Agreement") for 625 North Michigan Avenue Holdings LLC, a Delaware limited liability company that owns a retail condominium unit and office space located at 625 North Michigan Avenue, Chicago, Illinois ("625 North Michigan".) 625 NMA AAC Member LLC is the managing member. (NYSCEF 1, compl., ¶¶ 47-49; NYSCEF 7, answer, ¶¶ 51-53; NYSCEF 13, 625 NMA Agreement.)

Counterclaim plaintiffs allege that, without obtaining 625 Blue Member LLC's consent, 625 NMA AAC Member LLC used funds that should have been included in distributions to the members to prepay a mortgage on the property. (NYSCEF 7, answer, ¶ 104.) O'Shea supplies additional details in his affidavit, stating that, on September 28, 2018, "625 NMA AAC Member LLC paid off the outstanding $16,547,149.99 on [a] mortgage, which came from [non-party] Kreft 625NMA Lender, LLC." (NYSCEF 76, O'Shea aff, ¶ 34; NYSCEF 95, exhibit 19 to O'Shea aff, Emails [Mar. 18, 2019]; NYSCEF 96, exhibit 20 to O'Shea aff, Equity Schedule.)

Counterclaim plaintiffs also allege that 625 NMA AAC Member LLC permitted 625 North Michigan Avenue Holdings LLC to "suffer[] a non-monetary default on a $56,000,000 loan from CIT Bank in 2019, which led 625 North Michigan Avenue Holdings LLC to incur default interest and forced a $61,000,000 refinancing on December 30, 2019" (NYSCEF 76, O'Shea aff, ¶ 36) on unfavorable terms with another bank. (*See* NYSCEF 7, answer, ¶¶ 105, 106.) O'Shea states that "[t]he Gindis do not know what caused the non-monetary default because Ashkenazy has refused to provide that information." (NYSCEF 76, O'Shea aff, ¶ 36.)

Lastly, counterclaim plaintiffs allege that "625 NMA AAC Member LLC has deprived the Gindis' 625 Blue Member LLC of depreciation deductions it was owed in connection with . . . 625 North Michigan," by "allocate[ing] depreciation to itself that should have been allocated to 625 Blue Member LLC based on its 50.1% ownership of 625 North Michigan Avenue Holdings LLC." (NYSCEF 7, answer, ¶ 107.) O'Shea states that counterclaim plaintiffs need additional information before they can provide more detail on this claim. (NYSCEF 76, O'Shea aff, ¶ 16.)

By letter dated April 3, 2020, 625 NMA AAC Member LLC "request[ed] that each partner fund its proportionate share of a total capital call of $500,000," with 625 Blue Member LLC being called on to fund 50.1% of that, or $250,500. (NYSCEF 41, 625 North Michigan Capital Call Letter.) 625 Blue Member LLC did not fund the capital call. (NYSCEF 1, compl., ¶¶ 7, 59; NYSCEF 7, answer, ¶ 11.) According to Sheinfeld, "[a]s a result of [d]efendant 625 Blue Member LLC's failure to contribute additional capital, [the company] was forced to enter into settlement agreements . . . with certain tenants for a future abatement of rent in exchange for their agreement to pay overdue rent and to stave off foreclosure" and to "dedicate[] time and resources negotiating a three-month deferral of its principal and interest payments from its lender." (NYSCEF 64, Sheinfeld aff, ¶ 13.)

The 625 NMA Agreement provides that, if "the Managing Member determines that the Company requires additional funds," then he may elect to issue a capital call, requiring all members to "make an additional Capital Contribution to the Company. . . , pro rata based on the Members' respective Percentage Interests." (NYSCEF 13, 625 NMA Agreement, § 4.2 [a].) This requires the managing member to provide a written

notice to each member, specifying the total amount sought, each member's percentage interest, the due date for making the additional capital contribution and, "in reasonable detail, the intended use by the Company of the Additional Capital Contribution." (*Id.*)

Should there be a "Failure to Make Additional Contribution," the agreement provides that "the Contributing Member may advance to the Company all or any portion of the Non-Contributing Member's Shortfall Amount." (*Id.*, § 4.3 [b].) Any such advance is to be treated as a loan to the Non-Contributing member and is to accrue interest at, the lesser of, 18% or the maximum rate allowed by law. (*Id.*) If the Non-Contributing member does not repay the loan with interest within 180 days, "then the Contributing Member may . . . make an election (a 'Conversion Election') to have all or any portion of the unpaid amount . . ., together with all Priority Loan Interest accrued and unpaid thereon, treated as an Additional Capital Contribution to the Company by the Contributing Member," in which case "the Percentage Interest of the Contributing Member shall be increased." (*Id.*,§ 4.3 [c].) Finally, section 4.3 (d) provides that:

> "the rights, powers or remedies conferred upon the Contributing Member in Sections 4.3 (b) and (c) and Section 7.5 shall be the exclusive remedy available to the Contributing Member and the Company with respect to any failure by the Non-Contributing Member to fund its Percentage Interest of any Additional Capital Contribution."

(*Id.*, § 4.3 [d].)[2]

In other pertinent part, the 625 NMA Agreement provides that "Major Decisions . . . require the Managing Member to obtain the Required Consent prior to taking any such action." (*Id.*, § 7.1 [b].) "Major Decisions" are set forth in section 7.1 (b) and include:

[2] Section 7.5 provides for the removal of the managing member for cause.

> "(iii) unless set forth in the then applicable Approved Budget, entering into any financing or refinancing with respect to all or any portion of the Property (or any other Company asset) or all or any portion of the equity of any Subsidiary, whether by means of mortgage loans, so-called 'mezzanine' loans, unsecured loans or otherwise (including, but not limited to, executing or entering into any guaranties, promissory notes, bills of exchange or surety agreements), or terminating, modifying or restructuring the terms of, or prepaying any such financing or refinancing . . ." (*Id.*,§ 7.1 [b] [iii].)

The 625 NMA Agreement also contains the following exculpation provision:

> "11.2 Exculpation/Member Indemnification. Subject to Section 7.6 and except as provided in this Agreement and in any separate agreement executed by any Member or Affiliate of such Member, except in the case of willful misconduct, gross negligence or willful breach of the express terms of this Agreement by a Member, or as otherwise provided herein, no Member shall be liable to any other Member or the Company for (i) any act or omission performed or omitted in good faith, (ii) such Member's failure or refusal to perform any act, except those required by the terms of this Agreement or (iii) the negligence, dishonesty or bad faith of any agent, consultant or broker of the Company selected, engaged or retained in good faith." (*Id.*, §11.2.)

The agreement also contains a choice-of-law clause, which states that the agreement "shall be governed by and construed both as to validity and enforceability in accordance with the laws of the State of Delaware, without regard to the conflict of laws provisions thereof." (*Id.*, § 14.14.)

**5. The Bevcon Property**

On July 8, 2014, plaintiff DK Connections LLC, a Delaware limited liability company that is an affiliate of AAC, and defendant Bevcon Blue Fee LLC, a Delaware limited liability company with its principal place of business in New York, New York and

an ASG affiliate, entered into a tenancy-in-common agreement ("Bevcon Agreement") as co-owners of real property located at 100 North La Cienega Boulevard, Los Angeles, California (the "Bevcon Property".) DK Connections LLC is the administrative owner of the Bevcon Property. (NYSCEF 1, compl., ¶¶ 50, 51; NYSCEF 7, answer, ¶¶ 17, 54, 55; NYSCEF 14, Bevcon Agreement, §1.1.)

By letter dated April 2, 2020, DK Connections LLC issued a capital call, "requesting that each partner fund its proportionate share of a total capital call of $4,000,000 in order to meet the anticipated obligations of the property." (NYSCEF Doc No. 44.) Bevcon Blue Fee LLC's share was 50%, or $2,000,000. (*Id.*) It did not fund the capital call. (NYSCEF 1, compl., ¶¶ 7, 59; NYSCEF 7, answer, ¶ 11.)

According to Sheinfeld, "[a]s a result of [d]efendant Bevcon Blue Fee LLC's failure to contribute additional capital, Plaintiff DK Connections LLC has been unable to service its debt on the property, which is currently in default and accruing default interest." (NYSCEF 64, Sheinfeld aff, ¶ 14.) He states that, "[i]f [d]efendants continue to fail to meet their obligations, foreclosure is imminent." (*Id.*) In addition, Sheinfeld states that, due to insufficient capital, "DK Connections LLC has had to dedicate time and resources negotiating settlement agreements with tenants and provide rent abatements in exchange for tenants' agreement to pay overdue rent." (*Id.*)

For their part, counterclaim plaintiffs allege that DK Connections LLC "allocate[d] depreciation to itself that should have been allocated to Bevcon Blue Fee LLC." (NYSCEF 7, answer, ¶ 111.)

The Bevcon Agreement provides as follows:

> "5.1 Additional Contribution. In the event undistributed Available Cash, if any, is inadequate to meet the Property's

current operating expenses, Necessary Expenses, Emergency Expenses, or expenditures for tenant improvements and allowances under approved Leases, then upon written notice by any Owner to the other Owners stating the reason for the need for the Additional Contribution and the proposed use of such funds, each Owner shall make additional contributions ('Additional Contributions') in proportion to his, her or its Ownership Interest to fund such shortfall; provided, however, that such call for Additional Contributions shall be a Unanimous Consent Event. No Owner shall be required to make an Additional Contribution unless the unanimous consent of the Owners shall have been obtained for such Additional Contributions. Such Additional Contributions shall be made in cash within fifteen (15) days following notice of the demand for Additional Contributions.

***

"6.4 Approval Process. The Owners hereby acknowledge and agree that, in order to provide for the orderly management and administration of the Property and for prompt and unified decisions with respect to Unanimous Consent Events, the Owners will be bound by the decision of all of the Owners, as determined pursuant to this Agreement. . . . Whenever any approval or consent with respect to any Unanimous Consent Event is required to not be unreasonably withheld, conditioned or delayed pursuant to the terms of any Lease, any Loan Documents, the Mezzanine Loan Documents, the Property Management Agreement or any other agreement to which the Owners are parties or to which the Property is subject, each Owner agrees that it will not unreasonably withhold, condition or delay its consent or approval to such Unanimous Consent Event. Whenever an action is required to be taken pursuant to the terms of any Loan Documents (such as, for example, the purchase of insurance in amounts specified in such Loan Documents), no Owner may withhold, condition or delay consent or approval to such action. . . ."

(NYSCEF 14, Bevcon Agreement, §§ 5.1, 6.4.)

The agreement's choice-of-law clause states that it "shall be construed (both as to validity and performance) and enforced in accordance with, and governed by, the laws of the State of California applicable to contracts . . ." (*Id.*, § 11.9.)

**6. Horace Plaza**

On October 11, 2005, plaintiffs Horace Plaza Managing Member LLC ("HPMM"), an affiliate of AAC, and Ashkenazy, in his individual capacity, and defendant GV Horace Partners ("GVHP"), an affiliate of ASG, entered into a limited liability company operating agreement ("Horace Plaza Agreement") governing Horace Plaza LLC, which was formed for the purpose of acquiring and operating real property known as 99-25 to 99-41 Horace Harding Expressway a/k/a 99-40 60th Avenue, Corona, New York ("Horace Plaza".) HPMM is the managing member. (NYSCEF 1, compl., ¶¶ 52, 53; NYSCEF 7, answer, ¶¶ 56, 57, 112, 113; NYSCEF 15, Horace Plaza Agreement..)

Counterclaim plaintiffs allege that, "[i]n connection with the purchase of Horace Plaza, Horace Plaza LLC borrowed $1.5 million from [GVHP] pursuant to a promissory note (the 'Horace Plaza Note')." (NYSCEF 7, answer, ¶ 115; NYSCEF 16, Horace Plaza Note.) The Horace Plaza Note matured on October 11, 2015. (NYSCEF 7, answer ¶ 1.) Counterclaim plaintiffs allege that "Horace Plaza LLC has only made a handful of interest payments on the loan" (NYSCEF 7, answer, ¶ 116), is in default and "owes [GVHP] in excess of $8 million, which continues to accrue default interest at a rate of 16% annually." (*Id.*, ¶ 117.)

Horace Plaza LLC also allegedly received a $500,000 cash contribution from GVHP and a $4.3 million loan from M&T Real Estate Trust. Horace Plaza LLC was allegedly responsible for $3.8 million of that loan and HPMM was allegedly the

guarantor and obligor on the remaining $500,000 (the "M&T $500,000 Loan".) (*Id.*, ¶ 120.) Pursuant to section 2.01 of the Horace Plaza Agreement, HPMM and Ashkenazy assumed personal liability and agreed to pay the M&T $500,000 Loan. (NYSCEF 15, Horace Plaza Agreement, § 2.01.) Counterclaim plaintiffs allege that, without GVHP's permission and under Ashkenazy's direction, HPMM "caused Horace Plaza LLC to refinance the M&T $500,000 Loan to an amount of $626,234 on March 26, 2016." (NYSCEF 7, answer ¶ 122.) Horace Plaza LLC, rather than HPMM and Ashkenazy, is allegedly responsible for the repayment of the refinanced loan. (*Id.*, ¶ 123 at 57.)

Counterclaim plaintiffs also allege that HPMM "allocate[d] depreciation to itself that should have been allocated to [GVHP]." (*Id.*, ¶ 119 at 56.) In his affidavit, O'Shea states that "Ashkenazy has taken $67,734 in depreciation deductions between 2005 and 2018 that belonged to the Gindis: $1,070 in 2005, and $5,128 in each year from 2006 through 2018." (NYSCEF 76, O'Shea aff, ¶ 14.)

By letter dated April 2, 2020, HPMM "request[ed] that each partner fund its proportionate share of a total capital call of $100,000," with GVHP being called upon to fund 50%, or $50,000 (NYSCEF 42, Horace Plaza Capital Call Letter.) GVHP did not fund the capital call. (NYSCEF 1, compl., ¶¶ 7, 59; NYSCEF 7, answer, ¶ 11.)

The Horace Plaza Agreement's "Additional Capital Contributions" provision is identical to that of the Cross County Agreement. (*See* NYSCEF 15, Horace Plaza Agreement, §2.08.) In other pertinent part, Horace Plaza Agreement contains the following exculpation provision:

> "Section 9.01 Exculpation. No Indemnified Party shall be liable, responsible or accountable in damages or otherwise to the Company or the Members for any act or omission of the Indemnified Party on behalf of the Company, provided

> that the act or omission is not determined by a court to be due to such Indemnified Party's willful misconduct or recklessness or material breach of this Agreement."

(*Id.*, § 9.01.)

The agreement defines "Indemnified Party" as "the Managing Member and any officer, director, shareholder, partner, member, manager or agent of the Managing Member. " (*Id.*, § 1.01.)

**7. The Ste. Catherine Portfolio**

On December 11, 2007, plaintiffs Ashkenazy Canada GP Corp., an affiliate of AAC, and Ashkenazy, in his individual capacity, and defendant 696 Ste. Catherine Blue Partners ("696 Ste. Catherine Blue"), an affiliate of ASG, entered into a limited partnership agreement ("Ste. Catherine Portfolio Agreement") governing Ste. Catherine Street Portfolio Limited Partnership, for the purpose of acquiring, owning and operating real properties known as 682-684 Ste. Catherine Street, 690 Ste. Catherine Street, 692-696 Ste. Catherine Street, and 704-710 Ste. Catherine Street, Montreal, Canada (the "Ste. Catherine Portfolio".) Ashkenazy Canada GP Corp. is the general partner. (NYSCEF 1, compl., ¶¶ 54, 55; *see* answer, ¶¶ 58, 59; NYSCEF 17, Ste. Catherine Portfolio Agreement.)

Section 3.03 of the Ste. Catherine Portfolio Agreement, dealing with "Priority of Distributions," provides that "Distributions of Net Distributable Proceeds whether from operations or from Capital Events," shall be made first to "696 Ste. Catherine Blue until [it] has received the sum of $6,020,000 in the aggregate," and then "to the Partners in accordance with their Percentage Interests." (NYSCEF 17, Ste. Catherine Portfolio Agreement, § 3.03.) Further, the agreement provides that, should 696 Ste. Catherine Blue not receive that amount by December 31, 2017, Ashkenazy and his wife, Debra

Ashkenazy, shall be jointly and severally liable for "an amount equal to one-half of the shortfall." (See *id.*, § 3.04 [a].) Counterclaim plaintiffs allege that Ben and Debra Ashkenazy owed $3,010,000 as the shortfall payment, but that "[t]o date, 696 Ste. Catherine Blue . . . has only received . . . $2,666,666." (NYSCEF 7, answer, ¶ 130.) As such, they allege Ashkenazy owes $353,334 plus interest. (*See id.*)[3]

In addition, counterclaim plaintiffs allege that 696 Ste. Catherine Blue was denied priority of distributions, after the Ste. Catherine Portfolio was mortgaged for CAD 10,500,000 in January 2018. They allege that, while 696 Ste. Catherine Blue was entitled to the first $3,353,334 of those proceeds and then half of the remaining proceeds, as a pro rata distribution based on its ownership interest. (*Id.*, ¶¶ 131-133 at 59), "Ashkenazy Canada GP Corp., acting at the direction and under the control of Mr. Ashkenazy and AAC, took the entire amount for itself." (*Id.*, ¶ 132 at 59.)

According to Sheinfeld, in February 2020, defendants were aware "that there was a $1,400,000 deficit in the Ste. Catherine Portfolio budget" and that "the property was vacant and operating at a loss." (NYSCEF 64, Sheinfeld aff, ¶¶ 9,16.) Sheinfeld provides a copy of an email from O'Shea, dated February 7, 2020, in which O'Shea notes the budget deficit and inquires about "anticipated capital calls." (NYSCEF 65, Emails at 3 [Feb. 7, 2020].)

By letter dated April 2, 2020, Ashkenazy Canada GP Corp. "request[ed] that each partner fund its proportionate share of a total capital call of $600,000." (NYSCEF

[3] Counterclaim plaintiffs allege that Ashkenazy owes "$343,334 on the shortfall payment." (NYSCEF 7, answer, ¶ 130.) However, this appears to be a typographical error, as $6,020,000 minus $2,666,666 is $3,353,334 and this is the amount that appears in all other allegation. (*See id*, ¶¶ 132, 133, 333-335.)

Doc No. 43.) 696 Ste. Catherine Blue was called upon to fund 50% of that amount, or $300,000. (*Id.*) 696 Ste. Catherine Blue did not fund the capital call. (NYSCEF 1, compl., ¶¶ 7, 59; NYSCEF 7, answer, ¶ 11.) Sheinfeld states that "Ste. Catherine [Street] Portfolio Limited Partnership has been unable to lease the vacant property throughout the COVID-19 pandemic" and, as a result, "significant obligations are currently overdue, including real estate taxes and unpaid vendor invoices," placing the property "at risk of government foreclosure and the imposition of liens by vendors." (NYSCEF 64, Sheinfeld aff, ¶16.)

The Ste. Catherine Portfolio Agreement's "Additional Capital Contributions" provision is nearly identical to that of Cross County and Horace Plaza Agreements, except that it refers to "Partner(s)" and "General Partner" instead of to "Member(s)" and "Managing Member." (*See* NYSCEF 17, Ste. Catherine Portfolio Agreement, §2.08.)

The agreement also contains a choice-of-law clause that states that the agreement "and the rights of the parties [t]hereunder shall be interpreted in accordance with the laws of the Commonwealth of Delaware without regard to its conflict of law rules." (*Id.*, § 11.03.)

**B. Additional Real Estate Investments**

**1. Cross Bronx Plaza**

On October 13, 2006, counterclaim plaintiff G-Cross Bronx Plaza Partners ("GCBP"), an affiliate of ASG, and counterclaim defendants Cross Bronx Managing Member Corp. ("CBMM") and AFT, affiliates of AAC, entered a limited liability company operating agreement ("Cross Bronx Plaza Agreement") governing Cross Bronx Plaza LLC, which owns real property commonly known as New Horizons Shopping Center,

961 East 174th Street, Bronx, New York ("Cross Bronx Plaza".) CBMM is the managing member of Cross Bronx Plaza LLC. (NYSCEF 7, answer, ¶¶ 134-136; NYSCEF 18, Cross Bronx Plaza Agreement.)

As part of AFT's initial contribution to Cross Bronx Plaza LLC, Ashkenazy personally guaranteed $2,000,000 in deferred payments to the seller of Cross Bronx Plaza. (*See* NYSCEF 18, Cross Bronx Plaza Agreement, § 2.01, exhibit A.) Ashkenazy allegedly "contributed $200,000 to Cross Bronx Plaza LLC for that purpose in 2006 but never made any contribution thereafter." (NYSCEF 7, answer, ¶ 137.) "[T]he remaining $1,800,000 owed to the seller was [allegedly] paid out of the operating income of Cross Bronx Plaza." (*Id.*, ¶ 138 at 60.) GCBP alleges that such payments were improper, because, as a 50% owner of Cross Bronx Plaza LLC. (*See* NYSCEF 18, Cross Bronx Plaza Agreement, exhibit A), it was entitled to 50% of that income. It claims to "ha[ve] suffered damages of at least $900,000, plus interest." (*Id.*, ¶ 138 at 60.)

Counterclaim plaintiffs also allege that CBMM "allocate[d] depreciation to itself that should have been allocated to [GCBP]." (NYSCEF 7, answer, ¶ 139.) O'Shea provides additional detail in his affidavit, stating that:

> "Ashkenazy has . . . taken $731,893 in depreciation deductions between 2006 and 2018 that belonged to the Gindis: $49,558 in 2006, $103,158 in 2007, $81,195 in 2008, $67,292 in 2009, $65,264 in 2010, $54,763 in 2011, $45,198 in 2012, $45,097 in 2013, $45,019 in 2014, $39,299 in 2015, and $45,350 from 2016 through 2018."

(NYSCEF 76, O'Shea aff, ¶ 13.)

The Cross Bronx Plaza Agreement provides that "Net Distributable Proceeds shall be distributed among the Members in accordance with their Membership Interests on a quarterly basis after establishment of Reserves not to exceed $200,000."

(NYSCEF 18, Cross Bronx Plaza Agreement, § 3.01.) The Cross Bronx Plaza Agreement also contains an "Exculpation" provision that is identical to that of Horace Plaza Agreement. (*See id.*, § 9.01; *see also id.*, § 1.01 [defining "Indemnified Party"].)

**2. 625 Madison Avenue**

On November 5, 2013, counterclaim plaintiff 625 Madison Blue LLC, an ASG affiliate that is a New York limited liability company with its principal place of business in New York, counterclaim defendants BA 625 MAD Managing Member Corp. ("625MMMC") and 2013 Iconic Trust LLC ("Iconic"), AAC affiliates, and non-party 625 MAD MDA, LLC entered into a limited liability company agreement ("625 MAD Agreement") governing 625 MAD JV LLC, a Delaware limited liability company that is the sole member of 625 MAD Holdings LLC, which is a Delaware limited liability company and a member of 625 MAD Realty LLC, which owns real property known as 625 Madison Avenue, New York, New York ("625 Madison Avenue".) 625MMMC is the managing member of 625 MAD JV LLC. (*See* NYSCEF 7, answer, ¶¶ 22, 140, 141; *see also* NYSCEF 62, 625 MAD Agreement at 1, §§ 7, 9, 10 [a].)[4]

Counterclaim plaintiffs allege that the parties "agreed to take ownership interests in 625 MAD Realty LLC in proportion to the amount of the purchase price of the property that they paid." (NYSCEF 7, answer, ¶ 357.) O'Shea states that this agreement "is evidenced by an email from Mr. Ashkenazy on November 2, 2013" and that, "[i]n that email, Mr. Ashkenazy contemplated a $70,000,000 total equity cost for

[4] Notably, either due to error or for ease of reference, counterclaim plaintiffs simplify the parties' corporate structure and allege that the 625 MAD Agreement governs 625 MAD Realty LLC. (NYSCEF 7, answer, ¶ 141) and that "BA 625 MAD Managing Member Corp. is designated as the 'Managing Member' of 625 MAD Realty LLC." (*Id.*, ¶ 142.)

625 Madison Avenue and, thus, asked the Gindis to increase their contribution from $5 million to $7 million in order to obtain a 10% interest." (NYSCEF 76, O'Shea aff, ¶ 38; NYSCEF 100, Email [Nov. 2, 2013] [email from Ashkenazy, stating: "it looks like 70 mill in equity. You will come in for 7 mill instead of 5 mill for 10 percent"].) Counterclaim plaintiffs allege, Ashkenazy ultimately told them that the purchase price would be $50,000,000 and, thus, 625 Madison Blue LLC's contribution of $5,000,000, yielded a 10% interest in 625 MAD Realty LLC. (NYSCEF 76, O'Shea aff, ¶ 40; *see* NYSCEF 7, answer, ¶¶ 143, 358.)

According to O'Shea, on March 4, 2019, "Ashkenazy provided an equity schedule showing that only $30,100,000 was paid for the purchase of 625 Madison Avenue, rather than the $50,000,000 that the Gindis had been led to believe." (NYSCEF 76, O'Shea aff, ¶ 40; NYSCEF 101, Email from ACC [Mar. 4, 2019]; NYSCEF 102, Equity Schedule.) 625 Madison Blue LLC alleges that, as result, "[it] is either owed $1,993,010 or should have a 16.61% interest in 625 MAD Realty LLC." (NYSCEF 7, answer, ¶ 144), because Madison Blue LLC's current 10% ownership interest does not reflect the parties' intentions. (*See id.*, ¶¶ 359-361 at 91-92.)

Schedule A to the 625 MAD Agreement states each member's capital contribution and membership interest. (*See* NYSCEF 62, 625 MAD Agreement, § 12.) It shows a contribution of $99 and a membership interest of 9.99% for 625 Madison Blue LLC. (*Id.*, schedule A at 13.)

The 625 MAD Agreement also provides that it "constitutes the entire agreement of the parties" (*id.*, § 26) and contains the following exculpation provision:

"Section 19. Exculpation and Indemnification.

> "(a) To the fullest extent permitted by applicable law, neither the Members nor any Officer, Director, employee or agent of the Company nor any employee, representative, agent or Affiliate of the Members (collectively, the 'Covered Persons') shall be liable to the Company or any other Person who is bound by this Agreement for any loss, damage or claim incurred by reason of any act or omission performed or omitted by such Covered Person in good faith on behalf of the Company and in a manner reasonably believed to be within the scope of the authority conferred on such Covered Person by this Agreement, except that a Covered Person shall be liable for any such loss, damage or claim incurred by reason of such Covered Person's gross negligence or willful misconduct."

(*Id.*, § 19 [a].)

The exculpation provision also states that "[a] Covered Person shall be fully protected in relying in good faith upon the records of the Company" (*id.*, § 19 [d]) and that the parties agree that, to the extent that the provisions of the 625 MAD Agreement "restrict or eliminate the duties and liabilities of a Covered Person to the Company or its members otherwise existing at law or in equity," such provisions "replace such other duties and liabilities of such Covered Person." (*Id.*, § 19 [e].)

Lastly, the 625 MAD Agreement contains a choice-of-law clause, stating that the agreement "shall be governed by and construed under the laws of the State of Delaware (without regard to conflict of laws principles), all rights and remedies being governed by said laws." (*Id.*, § 27.)

**3. CVS Flatbush Avenue**

On August 15, 2006, counterclaim plaintiff G-CVS Flatbush Partners ("G-CVS"), an affiliate of ASG, and counterclaim defendant Ashkenazy entered into a limited liability company operating agreement (the "CVS Flatbush Agreement") governing AAC

Flatbush Retail Owner LLC ("AAC Flatbush"), which owns real property commonly known as 2460, 2464 and 2472 Flatbush Avenue, Brooklyn, New York, New York ("CVS Flatbush Avenue".) Ashkenazy is the managing member of ACC Flatbush. (*See* NYSCEF 7, answer, ¶¶ 145-147; NYSCEF 19, CVS Flatbush Agreement.)

G-CVS allegedly "contributed $575,000 for the purchase of CVS Flatbush Avenue, for which it received a 50% interest in AAC Flatbush Retail Owner LLC." (NYSCEF 7, answer, ¶ 148; *see NYSCEF 19,* CVS Flatbush Agreement, exhibit A at 22.) Pursuant to section 3.01 of the CVS Flatbush Agreement. The company's net distributable proceeds are to "be distributed . . . first entirely to G-CVS until G-CVS has received in the aggregate the sum of $575,000 without interest and thereafter to the Members in accordance with their Percentage Interests." (NYSCEF 19, CVS Flatbush Agreement at 10.) G-CVS alleges that, to date, it has received $188,500 in distributions and that Ashkenazy has neither responded to its requests for "confirm[ation] that [G-CVS] is entitled to the next $386,500 in such proceeds" nor disclosed the company's financials. (NYSCEF 7, answer, ¶ 150.)

In addition, G-CVS alleges that Ashkenazy is not entitled to management fees, "though management fees may be paid to a third-party manager." It states that it has not received notice that a third-party manager has been appointed, "and yet a 2018 income statement shows that [AAC Flatbush] paid $16,000 in management fees that year." (*Id.*, ¶ 151 at 63.) The CVS Flatbush Agreement provides as follows:

> "Section 5.03 Company Expenses. . . . The Managing Member shall be entitled to no fees in its capacity as Managing Member of the Company provided that the Managing Member shall have the right to appoint its affiliated entity as the managing agent of the Property. There shall be

> no management fee paid for so long as CVS is the tenant of the Property."

(NYSCEF 19, CVS Flatbush Agreement, § 5.03.)

**4. 145 Greene Street**

On October 10, 2013, counterclaim plaintiff 145 Greene Blue LLC ("GB"), an ASG affiliate, and counterclaim defendant Iconic and nonparty Olympic Gardens LLC ("OG") entered into a limited liability company operating agreement (the "Greene Street Agreement") governing Greene-Houston LLC, which owns real property known as 145 Greene Street a/k/a 160 Wooster Street, New York, New York 10012 ("145 Greene Street".) Iconic is the managing member of Greene-Houston LLC. (NYSCEF 7, answer, ¶¶ 152-154.)

Notably, counterclaim plaintiffs submit two versions of the Greene Street Agreement. One is executed ("Executed Greene Street Agreement") and is the one that counterclaim defendants claim as the operative agreement. However, counterclaim plaintiffs allege that Ashkenazy simply attached the signature pages to an earlier version of the parties' agreement. (*See* NYSCEF 7, answer, ¶ 157; NYSCEF 21, Executed Greene Street Agreement.) The other version that counterclaim plaintiffs submit is not executed ("Unexecuted Greene Street Agreement"), but counterclaim plaintiffs allege that it is the true agreement among the parties. (*See* NYSCEF 7, answer, ¶ 153; NYSCEF 20, Unexecuted Greene Street Agreement.)

O'Shea explains that AAC emailed its version of the Greene Street Agreement to counterclaim plaintiffs on October 10, 2013. (NYSCEF 76, O'Shea aff, ¶ 28; NYSCEF 85, Emails [Oct. 10, 2013]; NYSCEF 86, [Attachment to Email].) Counterclaim plaintiffs allegedly negotiated changes to the agreement, including to section 11, and AAC

emailed them the revised version of the agreement, which was the Unexecuted Greene Street Agreement. (NYSCEF 76, O'Shea aff, ¶ 29; NYSCEF 87, Emails [Oct. 10, 2013]; NYSCEF 88, [Attachment to Email].) O'Shea states that, based on the understanding that this was the operative agreement, counterclaim plaintiffs emailed AAC the executed signature pages. (NYSCEF 76, O'Shea aff, ¶¶ 29-33, NYSCEF 89-94].) Notably, the two versions are largely identical, except for a few provisions, such as section 11.[5]

Exhibit A to the Greene Street Agreement shows that GB contributed $1,000,000 in capital, for which it received a 16.4375% membership interest in Greene-Houston LLC. (NYSCEF 20 or 21, Greene Street Agreement, exhibit A at 15/15 or 16/16; NYSCEF 7, answer, ¶ 155.) The Greene Street Agreement provides that, "subject to the establishment of reasonable reserves" and following distributions "to Iconic for any Special Capital Calls" (Greene Street Agreement, § 11 [a]), GB is to receive 32.875% of distributions "until such time that . . . GB ha[s] . . . received a return of capital equal to $1,000,000 (the 'Initial Capital') plus 5% interest per annum (the 'Preferred Interest') on Initial Capital . . ." (*Id.*, § 11 [b].) In addition, it provides that "the Initial Capital and the Preferred Interest due to OG and GB shall be due in full, to the extent such amounts have not been repaid, on the earlier of (i) October 10, 2018 or (ii) a sale or refinance of the Property." (*Id.*, § 11.) The Unexecuted Greene Street Agreement provides further that, "if [such amounts] [are] not repaid then the Membership Interests of the Members shall be 34.25% to Iconic, 32.875% to OG and 32.875% to GB provided that upon such change in Membership Interest there shall be no further obligation to repay the Initial

[5] Citations and references to the "Greene Street Agreement" indicate that the contractual language is found in both versions of the agreement.

Capital or Preferred Interest." (NYSCEF 20, Unexecuted Greene Street Agreement, § 11.)

Counterclaim plaintiffs allege that, while "[a] 2015 equity schedule created by Mr. Ashkenazy shows that [GB] was paid $60,490 that year in compliance with Section 11 (b)," it "was paid only half that amount, $30,245, as shown on [GB's] 2015 Schedule K-1." (NYSCEF 7, answer, ¶ 158.) In addition, they allege that, to date, only $60,490 of the $1,00,000 in initial capital has been paid back. (*Id.*, ¶ 156 at 63.)

Further, counterclaim plaintiffs allege that, in 2017, Iconic made a capital call for $6,575, which GB paid. (NYSCEF 7, answer, ¶ 159.) They claim that this capital call was improper, because GB had not been repaid its $1,000,000 and, pursuant to section 9 (a) of the Greene Street Agreement, "until such time as the sums paid to. . . GB pursuant to Section 11(b) herein (i.e. 1,000,000 plus 5% per annum interest on $1,000,000) ha[s] been paid, Iconic shall make all Capital Calls (a 'Special Capital Call') . . ." (Greene Street Agreement, § 9 [a].)

Lastly, Counterclaim plaintiffs allege that "Mr. Ashkenazy, AAC and their affiliates caused [Iconic] to allocate depreciation to itself that should have been allocated to 145 Greene Blue LLC." (NYSCEF 7, answer, ¶ 160.)

The Greene Street Agreement also provides that it "constitutes the entire agreement of the parties" (Greene Street Agreement, § 19) and contains the following exculpation provision:

> "Section 14. Exculpation and Indemnification.
>
> "(a) To the fullest extent permitted by applicable law, neither the Members nor any officer, director, employee, agent or Affiliate of the foregoing (collectively, the 'Covered Persons') shall be liable to the Company or any other Person

> who is bound by this Agreement for any loss, damage or claim incurred by reason of any act or omission performed or omitted by such Covered Person in good faith on behalf of the Company and in a manner reasonably believed to be within the scope of the authority conferred on such Covered Person by this Agreement, except that a Covered Person shall be liable for any such loss, damage or claim incurred by reason of such Covered Person's gross negligence, willful misconduct, misappropriation or misuse of funds or breach of this Agreement" (*Id.*, § 14 [a].)

The exculpation provision also states that "[a] Covered Person shall be fully protected in relying in good faith upon the records of the Company" (*id.*, § 14 [d]) and that**,** to the extent that the agreement "restrict[s] or eliminate[s] the duties and liabilities of a Covered Person to the Company or its members otherwise existing at law or in equity," it shall "replace such other duties and liabilities of such Covered Person." (*Id.*, § 14 [e].)

**5. Bravern**

In September 2014, counterclaim plaintiff Bravern Blue LLC ("BB"), an affiliate of ASG, and counterclaim defendant, BA Bravern Manager LLC ("BABM"), an affiliate of AAC, along with nonparties AACMDD Group LLC and Dushey Bravern LLC, entered into a limited liability company operating agreement (the "Bravern Agreement") governing 2235 Church Avenue LLC, which is the sole member of NM Vegas FSM LLC, which formed The Shops at Bravern LLC, which owns the retail condominium unit located at 11111 NE 8th Street, Bellevue, Washington, commonly known as the Retail Unit of The Bravern ("Bravern".) BABM is the managing member 2235 Church Avenue LLC. (NYSCEF 7, answer, ¶¶ 161-163; NYSCEF 22, Bravern Agreement.)

In his affidavit, O'Shea states that, "during negotiations, Mr. Ashkenazy informed Raymond Gindi that the Gindis' investment would be pari passu both with another investor (who had contributed $3 million for a 10% interest) and Mr. Ashkenazy himself."

(NYSCEF 76, O'Shea aff, ¶ 42.) O'Shea states that "[t]his implied a total of $30 million in equity toward the purchase of the property." (*Id.*) BB allegedly "contributed $1,000,000 for the purchase of Bravern in exchange for a 3.33% interest in 2235 Church Avenue LLC." (NYSCEF 7, answer, ¶ 164) and "Dushey Braven LLC, invested $3,000,000 for a 10% interest." (*Id.*, ¶ 165 at 65.) Counterclaim plaintiffs state that both investments are "consistent with the total equity cost of Bravern, which was supposed to be $30,000,000." (*Id.*, ¶¶ 164 at 65, 165 at 65.)

On April 12, 2019, Ashkenazy allegedly emailed an equity schedule to the Gindis. (NYSCEF 76, O'Shea aff, ¶ 43; NYSCEF 104, Equity Schedule].) The "equity schedule . . . shows that only $27,407,094 was paid for the purchase of Bravern." (NYSCEF 7, answer, ¶ 166; *see* NYSCEF 104.) BB, therefore, claims that it "is either owed $87,344 or should have a 3.649% interest in 2235 Church Avenue LLC." (NYSCEF 7, answer, ¶ 166.)

Exhibit A to the Bravern Agreement lists BB's membership interest as 3.33%. It lists Dushey Bravern LLC's interest as 10%. It does not set forth the amounts the members contributed. (NYSCEF 22, Bravern Agreement, exhibit A.) The Bravern Agreement also provides that it "constitutes the entire agreement of the parties" (*id.*, § 19) and contains an "Exculpations and Indemnification" section that is identical to the one found in the Greene Street Agreement. (*See id.*, § 14.)

**6. Upper Darby**

In June 2012, counterclaim plaintiff G III 69th Street Partners, L.P. ("G III"), an ASG affiliate that is a New York limited partnership with its principal place of business in New York, allegedly entered into an amended and restated limited partnership

agreement (the "Upper Darby Agreement") for 69th Street Holdings L.P. (the "Partnership"), a Pennsylvania limited partnership, with counterclaim defendants Ashkenazy, 69th Street Holdings GP LLC ("GP") and Ben and Debra Family 2015 LLC,[6] and non-party Checo Properties Partners, L.P. The Partnership owns real property commonly known as 69th Street Retail Mall, Upper Darby, Pennsylvania ("Upper Darby".) GP is the general partner of the Partnership. (NYSCEF 7, answer, ¶¶ 26, 167-169; NYSCEF 23, Upper Darby Agreement.)

In connection with the purchase of Upper Darby, G III allegedly provided the Partnership a $2,000,000 loan. (NYSCEF 7, answer, ¶ 170.) Pursuant to a promissory note dated June 24, 2005 ("Upper Darby Note"), the Partnership promised to repay $4,000,000. (*Id.*; *see* NYSCEF 24, Upper Darby Note.)[7] Under the terms of the note, interest would begin to accrue on the outstanding principal balance on June 1, 2008 at the rate of 5% per annum. Commencing on June 1, 2010, to the extent that there was cash available from the Partnership's operations and reserves, the Partnership was required to pay $31,631.75 each month on the interest and principal of the Upper Darby Note. The entire unpaid principal and any accrued and unpaid interest were due on

[6] Notably, the entity that executed the Upper Darby Agreement is Ben and Debra Family LLC (*see* NYSCEF 23, Upper Darby Agreement at 21), whereas the answer names Ben and Debra Family 2015 LLC as a counterclaim defendant. In addition, while the agreement provides that it "is entered into . . . by and among . . . Ben Ashkenazy, an individual" (*id.* at 1), Ashkenazy is not listed among the limited partners on the signing page and does not appear to have executed the agreement in his individual capacity. Similarly, while Ben and Debra Family LLC executed the agreement as a limited partner, it is not among the parties identified in the preamble. (*See id.* at 1, 21.)

[7] Counterclaim plaintiffs do not explain why the Upper Darby Note is for twice the sum of the alleged loan, but presumably this is because the note covers the $2,000,000 loan from G III and an additional loan from Checo Properties Partners, L.P. (*see* NYSCEF 7, answer, ¶ 174; NYSCEF 24, Upper Darby Note.)

June 1, 2015. Upon default, interest would accrue at 12% per annum. (NYSCEF 7, answer, ¶¶ 171, 172; NYSCEF 24, Upper Darby Note at 6, ¶ 6.)

The Upper Darby Agreement echoes the terms of the Upper Darby Note, providing as follows:

> "Section 2.07 Loans by Members. As of the date hereof, the outstanding principal amount of the GC Loan to the Partnership (as defined in the initial Agreement of Limited Partnership) is $3,784,719.06. Interest under the GC Loan has been paid through July 31, 2011. The GC Loan shall be interest free for the first three (3) years from the Initial Closing and shall bear simple interest at the rate of 5% per annum commencing with the third (3rd) anniversary of the Initial Closing, which interest shall be paid by the Partnership from its operations prior to any distributions to the Partners pursuant to Section 3.01 hereof. Commencing with the fifth (5th) anniversary of the Initial Closing, the Note shall commence to amortize on a fifteen (15) year schedule with interest at the 5% per annum rate. The Note shall be due and payable ten (10) years from the Initial Closing, provided that any the proceeds of a sale of the Property owned by the Operating Partnership or a refinancing of any mortgage indebtedness on the Property shall be applied to the GC Loan before any distributions of such proceeds are made to the Partners pursuant to Section 3.01 hereof."

(NYSCEF 23, Upper Darby Agreement, §2.07.)

Counterclaim plaintiffs allege that "more than $1,600,000 remains outstanding on the $2,000,000 loan." (NYSCEF 7, answer, ¶ 172.) In addition, they allege that, in violation of section 2.07, "Ashkenazy caused [the Partnership] to distribute $3,887,930 to his entity, [GP], even though the Upper Darby Note" remains unpaid. (*Id.*, ¶ 173 at 67.)

Counterclaim plaintiffs also allege that Ashkenazy credited Ben and Debra Family 2015 LLC with a $4,000,000 contribution on the Partnership's equity schedule. They claim that the $4,000,000 came from loans to the Partnership, including the

$2,000,000 loan from G III in 2005, and that it was recorded as a liability in the Partnership's tax filings. (*Id.*, ¶¶ 174 at 67, 454-456 at 103.)[8] O'Shea states that "Ashkenazy sent that equity schedule to the Gindis in an email on June 7, 2019." (NYSCEF 76, O'Shea aff, ¶ 37; NYSCEF 98, Emails [June 7, 2019]; NYSCEF 99, Equity Schedule.)

The Upper Darby Agreement also contains the following exculpation provision:

> "Section 9.01 Exculpation. No Indemnified Party shall be liable, responsible or accountable in damages or otherwise to the Partnership or the Limited Partners for any act or omission of the Indemnified Party on behalf of the Partnership, provided that the act or omission is not determined by a court to be due to such Indemnified Party's willful misconduct or recklessness or material breach of this Agreement."

(NYSCEF 23, Upper Darby Agreement, §9.01.)

The agreement also contains a choice-of-law clause, stating that the agreement "and the rights of the parties [t]hereunder shall be interpreted in accordance with the laws of the Commonwealth of Pennsylvania without regard to its conflict of law rules." (*Id.*, § 11.03.)

**7. One Stockton Street**

On October 1, 2013, counterclaim plaintiff Isaac Raymond Associates LLC, an ASG affiliate and a New York limited liability company with its principal place of business in New York, New York, counterclaim defendant Iconic and nonparty PA 145 MDA, LLC entered into an amended and restated limited liability company agreement

[8] Counterclaim plaintiffs allege that that Ashkenazy credited GP with the $ 4,000,000 contribution. (NYSCEF 7, answer, ¶ 174.) However, this appears to be in error, as all other references to this occurrence mention Ben and Debra Family 2015 LLC. (*See id.*, ¶¶ 454, 455 at 103; NYSCEF 76, O'Shea aff, ¶ 37.)

("San Fran I Agreement") for San Fran Iconic Member LLC ("SFIM".)[9] SFIM is a Delaware limited liability company and Iconic is its managing member. (NYSCEF 7, answer, ¶¶ 20, 176, 178; NYSCEF 25, San Fran I Agreement.)

In June 2016, counterclaim plaintiff Isaac Raymond Associates LLC, counterclaim defendant Ben and Debra Family 2015 LLC and nonparty PA 145 MDA, LLC entered into a limited liability company agreement ("San Fran II Agreement") for San Fran Iconic Member II LLC ("SFIM II".)[10] SFIM II is a Delaware limited liability company and Ben and Debra Family 2015 LLC is its managing member. (NYSCEF 7, answer, ¶¶ 177, 178; NYSCEF 26, San Fran II Agreement.)

In June 2016, SFIM, SFIM II and nonparty Westroads-Oaks, Inc. entered into an amended and restated limited liability company agreement for One Stock Partners LLC (the "One Stockton Agreement".) One Stock Partners LLC is a Delaware limited liability company that is the sole member of One Stockton Realty LLC, a Delaware limited liability company that owns real property commonly known as One Stockton Street, San Francisco, California ("One Stockton".) SFIM is the managing member of One Stock Partners LLC. (NYSCEF 7, answer, ¶¶ 175, 179, 180; NYSCEF 27, One Stockton Agreement.)

---

[9] Counterclaim plaintiffs alleged that Ashkenazy, in his individual capacity, is a party to the San Fran I Agreement. (NYSCEF 7, answer, ¶ 176.) However, he is not listed as a member in the agreement's preamble or the signing pages. (*See* NYSCEF 25, San Fran I Agreement.)

[10] Again, counterclaim plaintiffs allege that Ashkenazy entered the San Fran II Agreement in his individual capacity. (CC, ¶ 177.) However, he is not listed as a member in the agreement's preamble or the signing pages. (*See* San Fran II Agreement.)

Counterclaim plaintiffs allege that "Isaac Raymond Associates LLC contributed $4,000,000 to the purchase of One Stockton through both [SFIM] and [SFIM II], for which it has a 4.975% combined interest in One Stock Partners LLC." (NYSCEF 7, answer, ¶ 181.) They allege that this "is consistent with the total equity cost of One Stockton, which was supposed to be $80,403,123." (*Id.*) This is the total allegedly shown on an unspecified "equity schedule created by Mr. Ashkenazy." (*Id.*, ¶ 182 at 68-69.)

O'Shea states that, on March 29, 2019, "Ashkenazy emailed the equity schedules for [SFIM] and [SFIM II]" that "showed only a $57,505,122 equity investment in One Stockton" (NYSCEF 76, O'Shea aff, ¶ 45; NYSCEF 105-107]), "$40,202,767 through [SFIM], and $17,302,355 through [SFIM II]." (NYSCEF 7, answer, ¶ 182.) As such, counterclaim plaintiffs claim that "Isaac Raymond Associates LLC is either owed $1,139,120 or should have a total 6.96% interest in One Stockton Partners [LLC]." (*Id.*)

Schedule A to the San Fran I Agreement states that Isaac Raymond Associates LLC's capital contribution was $50 and that its membership interest is 4.975%. (NYSCEF 25, San Fran I Agreement, § 12, schedule A.) Schedule A to the San Fran II Agreement also states that Isaac Raymond Associates LLC 's capital contribution was $50 and that its membership interest is 4.975%. (NYSCEF 26, San Fran II Agreement, § 12, schedule A.) Schedule I to the One Stockton Agreement states that SFIM's capital account balance is $500 and that its membership interest is 50%, while SFIM II's capital account balance is $498 and its membership interest is 49.8%. (NYSCEF 27, One Stockton Agreement, § 3.1 [c], schedule I.)

Each of the foregoing agreements provides that it "constitutes the entire agreement of the parties." (NYSCEF 25, San Fran I Agreement, § 26; NYSCEF 26, San Fran II Agreement, § 26; NYSCEF 27, One Stockton Agreement, §12.6)

The San Fran II Agreement contains an "Exculpation and Indemnification" section that is identical to that of the 625 MAD Agreement. (*See* NYSCEF 26, San Fran II Agreement, § 19.) The One Stockton Agreement's "Exculpation and Indemnification" provides as follows:

> "6.3 Exculpation and Indemnification. Notwithstanding anything to the contrary contained herein or any otherwise applicable provision of law or equity:
>
> "(a) None of the Members (including the Managing Member), their Affiliates or any officer or director of any of the foregoing (each such party, an 'Indemnified Party') shall be liable, responsible or accountable in damages or otherwise to the Company or any Member, and the Company and each Member does hereby release such Indemnified Party, for any act or omission in connection with the Company or any Subsidiary, except to the extent it is determined by an arbitrator pursuant to a binding arbitration in accordance with Section 11.7 that such act or omission (i) is a material breach of an Indemnified Party's obligations under this Agreement or (ii) resulted from such Indemnified Party's willful malfeasance or fraud or (iii) is a felony (such acts or omissions described in clauses (i), (ii) and (iii), the 'Default Actions' and each, a 'Default Action'.)[11]
>
> ***
>
> "(d) Whenever in this Agreement the Managing Member or any other Person is permitted or required to make a decision (i) in its 'discretion' or under a grant of similar authority or latitude, such Person shall be entitled to consider only such interests and factors as it desires, including its own interests, and shall, to the fullest extent permitted by applicable law, have no fiduciary or other duty

[11] The parties do not mention section 11.7, the agreement's arbitration provision, or its significance, if any, to the applicable claims.

> or obligation to give any consideration to any interest of or factors affecting the Company or the Members, or (ii) in 'good faith' or under another expressed standard, such Person shall act under such express standard and shall not be subject to any other or different standards."

(NYSCEF 27, One Stockton Agreement, § 6.3 [a], [d].)

Lastly, both the San Fran II Agreement and the One Stockton Agreement contain choice-of-law clauses, providing that the agreements are to be governed and construed under Delaware law, without regard to conflict of laws rules. (*See* NYSCEF 26, San Fran II Agreement, § 27; NYSCEF 27, One Stockton Agreement, § 12.3.)

## II. Analysis

### A. Defendants' Motion for Summary Judgment (Motion Sequence Number 001)

Once issue has been joined, a motion for summary judgment may be made upon a ground listed in CPLR 3211 (a), if such a ground appears as an affirmative defense in the answer. (*See Houston v Trans Union Credit Info. Co.*, 154 AD2d 312, 313 [1st Dept 1989]).) Where, as here, the motion for summary judgment seeks dismissal for failure to state a claim, "the complaint is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inferences." (*Johnson v Collyer*, 191 AD3d 1192, 1193 [3d Dept 2021] [internal quotation marks and citations omitted]; *see Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004].) In assessing whether a complaint fails to state a claim, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [internal citation omitted].) "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not

those of a judge . . . on a motion for summary judgment." (*Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 315 [2004] [internal quotation marks and citation omitted].)

As a preliminary matter, contrary to plaintiffs' contention, defendants' refusal to submit a Joint Statement of Undisputed Fact, does not require outright denial of the motion. Under this part's rules, "the parties are required to meet and confer, prior to filing any motion for summary judgment . . . , to attempt in good faith to reach and memorialize in a Joint Statement their agreed-upon facts," in order "to reduce duplicated and/or unnecessary submissions and to narrow the scope of the issues/facts in dispute." (Commercial Division Part 48 Rules & Procedures, Rule 9 [D].) However, as this motion is directed at the pleadings, a joint statement would not serve the intended purpose of this rule. Accordingly, the court disregards the omission. (*See* CPLR 2001.)

**1. Breach of the Implied Covenant of Good Faith and Fair Dealing**

Defendants argue that the breach of the implied covenant of good faith and fair dealing claims must be dismissed, because: (1) the agreements require defendants' consent prior to the issuance of capital calls and place no limits on defendants' right to withhold consent; (2) plaintiffs fail to allege, in nonconclusory terms, that defendants exercised their discretion in bad faith; and (3) plaintiffs fail to allege, in nonconclusory terms, that they have been deprived of the fruits of the agreements. In addition, defendants argue that, to the extent there was an implied obligation to consent to the capital calls, the obligation was not triggered, because the Capital Call Letters failed to demonstrate that the Capital Call Properties were, at that time, in need of additional capital.

Plaintiffs counter that, because the parties' agreements vest defendants with discretion, implied in those contracts is the obligation not to exercise that discretion arbitrarily, irrationally or in bad faith. Plaintiffs contend that the complaint sufficiently alleges that defendants' refusal to consent to the capital calls was made in bad faith, as part of a scheme to starve the properties of cash during the pandemic to force a buyout at a substantial premium. In addition, plaintiffs argue that the complaint does allege that defendants' actions deprived plaintiffs of the fruits of their bargain, as the purpose of the agreements was to share in the costs and benefits of owning real property and defendants' blanket refusal to consent to the capital calls endangered the parties' ownership of the properties. Lastly, plaintiffs contend that, while the agreements require notice to issue a capital call, they do not require the managing member/owner/general partner to affirmatively demonstrate that each property is in present need of additional capital.

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance," meaning that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [internal quotation marks and citations omitted].) Where a contract provides for the exercise of discretion, "this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [internal citation omitted].) Nor may a party exercise "an explicitly discretionary contract right . . . in bad faith" or "malevolently, for its own gain as part of a purposeful scheme designed to deprive plaintiffs of the benefits of the joint venture." (*Richbell Info.*

*Servs. v Jupiter Partners*, 309 AD2d 288, 302 [1st Dept 2003] [internal citations omitted]; *see Hirsch v Food Resources, Inc.*, 24 AD3d 293, 296 [1st Dept 2005] [internal citation omitted] ["(t)he exercise of an apparently unfettered discretionary contract right breaches the implied obligation of good faith and fair dealing if it frustrates the basic purpose of the agreement and deprives plaintiffs of their rights to its benefits"].) However, "no obligation can be implied that would be inconsistent with other terms of the contractual relationship." (*Dalton*, 87 NY2d at 389 [internal quotation marks and citation omitted].)

Notably, pursuant to the agreements' choice-of-law provisions, Delaware law governs the parties' rights under the Ste. Catherine Portfolio Agreement (NYSCEF 17, Ste. Catherine Portfolio Agreement, § 11.03) and California law governs the parties' rights under the Bevcon Agreement. (NYSCEF 14, Bevcon Agreement, § 11.9; *see Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006] [internal citation omitted] [stating that "(g)enerally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction"].) The laws of Delaware and California are substantially similar to New York's with regard to the implied covenant of good faith and fair dealing. (*See Oxbow Carbon & Minerals Holdings, Inc. v Crestview-Oxbow Acquisition, LLC*, 202 A3d 482, 503-504 [Del 2019]; *Steiner v Thexton*, 48 Cal 4th 411, 419-420 [Cal 2010].)

**(a) The Cross County, Horace Plaza and Ste. Catherine Portfolio Agreements (First, Sixth, and Seventh Causes of Action)**

The first, sixth and seventh causes of action state claims for breach of the implied covenant of good faith and fair dealing.

First, the Cross County, Horace Plaza and Ste. Catherine Portfolio Agreements do not confer unfettered discretion to withhold consent to a capital call. The agreements contain nearly identical "Additional Capital Contributions" provisions. Each obligates the members or partners to make additional contributions that "are called for by the Managing Member [or General Partner] with the unanimous approval of the Members [or Partners] pursuant to a notice (each, an 'Additional Capital Notice') in order to meet expenses and commitments of the Company." (NYSCEF 8, Cross County Agreement, §2.07; NYSCEF 15, Horace Plaza Agreement, § 2.08; NYSCEF 17, Ste. Catherine Portfolio Agreement, §2.08.) These provisions do not contain any language that expressly limits the members'/partners' discretion (e.g., "consent must not be unreasonably withheld".) However, and more importantly, they also lack language that confers unlimited discretion (e.g. "sole and absolute discretion".) Therefore, requiring the members to exercise their consent right in good faith does not negate express provisions of the agreements. As such, defendants were bound to exercise their discretion in good faith so as not to deprive the plaintiffs of the fruits of their bargain. (*Compare Richbell Info. Servs.*, 309 AD2d at 302-303 [finding that breach of the implied covenant of good faith and fair dealing claim did not "negate (the defendant's) explicit rights under a contract" and was viable, where the defendant allegedly used its veto power in bad faith], and *Oxbow Carbon & Minerals Holdings, Inc.*, 202 A3d at 503-504 [stating that "the vesting of a [party] with discretion does not relieve the [party] of its obligation to use that discretion consistently with the implied covenant of good faith and fair dealing"], *with Transit Funding Assoc., LLC v Capital One Equip. Fin. Corp.*, 149 AD3d 23, 29 [1st Dept 2017] [dismissing claim for breach of

the implied covenant of good faith and fair dealing, "(i)n view of the provisions of the loan agreement expressly allowing (the lender) to deny any requests for advances in its 'sole and absolute discretion,' and specifically authorizing (the lender) to deny any such requests for any reason"], *and Superior Vision Servs. v ReliaStar Life Ins. Co.*, 2006 WL 2521426, *6, 2006 Del. Ch. LEXIS 160, *24 [Del Ch, Aug. 25, 2006, No. 1668-N] [dismissing breach of implied covenant of good faith and fair dealing, based on a finding that "a reasonableness requirement was deliberately omitted," because another similar provision in the contract stated that "discretion to consent . . . (was) expressly subject to a reasonableness requirement"].)

Second, plaintiffs sufficiently allege that defendants exercised their discretion in bad faith. Plaintiffs allege that defendants unreasonably withheld their consent to the capital calls, despite knowledge that the COVID-19 pandemic had caused the Capital Call Properties to experience significant financial distress. (*See* NYSCEF 1, compl., ¶¶ 5, 6, 57-60; NYSCEF 64, Sheinfeld aff, ¶¶ 9, 15, 16; NYSCEF 65, Emails [Feb. 7, 2020] [stating that defendants knew of "a $1,400,000 deficit in the Ste. Catherine Portfolio budget" and "even anticipated and expressed the need for a capital call" and that the failure of Century 21, an affiliate of defendants, "to pay more than $1,800,000 in rent, . . . caused a massive shortfall of (Cross County Mall LLC's) capital"].) Plaintiffs also allege that defendants seek to take advantage of the properties' financial distress to force "a buy-out at a premium, to which they have no entitlement." (NYSCEF 1, compl., ¶ 1.)

Lastly, plaintiffs allege that that defendants' conduct threatens their ability to receive the fruits of these agreements. Specifically, the complaint alleges that

defendants' "misconduct threatens the very viability and survival of the properties themselves" (NYSCEF 1, compl., ¶ 3), as the Capital Call Properties "face the risk of loan defaults, loan foreclosures, lapses of insurance coverages, tax liens and landlord defaults under leases." (*Id.*, ¶ 60.) In addition, Sheinfeld states that Cross County Mall LLC has lost additional revenue when it lost a potential tenant due to its inability "to fulfill the capital expenditure requirement." (NYSCEF 64, Sheinfeld aff, ¶ 15) and that Ste. Catherine Street Portfolio Limited Partnership "is currently at risk of government foreclosure and the imposition of liens by vendors." (*Id.*, ¶ 16.) Defendants' contention, that these allegations, at best, demonstrate injury to the properties rather than injury to plaintiffs, is far from accurate, as the primary purpose of the parties' agreements was to invest in and profit from the properties. (*See* NYSCEF 1, compl., ¶¶ 41, 52, 54; *see generally* NYSCEF 8, Cross County Agreement; NYSCEF 15, Horace Plaza Agreement; NYSCEF 17, Ste. Catherine Portfolio Agreement.) Therefore, the complaint sufficiently states claims for breach of the implied covenant of good faith and fair dealing in connection with the Cross County, Horace Plaza, and Ste. Catherine Portfolio Agreements.

To the extent that defendants contend that "the supposed scheme is absurd on its face," as it would "harm the Gindis' own investments" (NYSCEF 46, defendant's brief at 13), and that plaintiffs "cannot possibly demonstrate the foundational facts on which [they] base[] [their] theory of bad faith" (*id.* at 14), these considerations necessarily raise issues of fact, which are beyond the scope of this motion. (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 213 [1st Dept 2013] [stating that "whether [the defendant] acted in good faith is not appropriately decided on a motion to dismiss"];

*Desert Equities, Inc. v Morgan Stanley Leveraged Equity Fund, II, L.P.*,, 624 A2d 1199, 1206 [Del 1993] [finding that plaintiff stated a claim by alleging that the general manager exercised its discretion unreasonably and that "[r]easonableness is a question of fact to be determined by the finder of fact"].)

Finally, contrary to defendants' contention, nothing in the agreements' "Additional Capital Contributions" provisions requires the managing member or general partner to demonstrate the existence of a present need for capital or to make any other showing before seeking approval for a capital call. Defendants point to the phrase "to meet expenses and commitments of the Company" (NYSCEF 8, Cross County Agreement, §2.07; NYSCEF 15, Horace Plaza Agreement, § 2.08; NYSCEF 17, Ste. Catherine Portfolio Agreement, §2.08) and argue that this requires the managing member/general partner to demonstrate a *present* need for capital. They maintain that, as a result, the Capital Call Letters, which anticipated "severely constrained revenue over *the next 3-6 months*" and sought additional capital "to meet the *anticipated* obligations of the propert[ies]" (Capital Call Letters [emphasis added]), failed to trigger a good faith duty to approve the capital calls.

However, this interpretation requires the court to insert "present" into the phrase "expenses and commitments of the Company." Moreover, while the agreements require an "Additional Capital Notice," they are silent as to the contents of such a notice. (*See* NYSCEF 8, Cross County Agreement, §2.07; NYSCEF 15, Horace Plaza Agreement, § 2.08; NYSCEF 17, Ste. Catherine Portfolio Agreement, §2.08.) In interpreting contracts, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the

writing." (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475, 476 [2004] [internal quotation marks and citation omitted] [declining to read into a lease a notice requirement, where "(t)here (was) neither an explicit requirement that the owner give the tenant notice . . . nor any provision allowing the tenant to terminate the lease based on the lack of such notice"]; *see Murfey v WHC Ventures, LLC*, 236 A3d 337, 355 [Del 2020] [stating that "it is axiomatic that courts cannot rewrite contracts or supply omitted provisions"].) Here, the agreements do not provide that an Additional Capital Notice must contain any specific information and the court declines to read such a requirement into the agreements.

For the foregoing reasons, to the extent that the motion for summary judgment seeks dismissal of the first, sixth, and seventh causes of action, the motion is denied.

**(b) The Bevcon Agreement (Fifth Cause of Action)**

The express language of the Bevcon Agreement requires dismissal of the fifth cause of action. The agreement provides that a "call for Additional Contributions shall be a Unanimous Consent Event" and that "[n]o Owner shall be required to make an Additional Contribution unless the unanimous consent of the Owners shall have been obtained for such Additional Contributions." (NYSCEF 14, Bevcon Agreement, § 5.1.) It then provides that "approval or consent with respect to any Unanimous Consent Event" may "not be unreasonably withheld, conditioned or delayed" when "the terms of . . . any other agreement to which the Owners are parties or to which the Property is subject" require that consent "not be unreasonably withheld, conditioned or delayed." (*Id.*, § 6.4.) The corollary to this is that, when the Unanimous Consent Event does not implicate a contract that requires otherwise, consent may be withheld for any reason

whatsoever. (*See Edwards v Arthur Andersen LLP*, 44 Cal 4th 937, 954 [Cal 2008] [internal quotation marks and citation omitted] ["when courts construe an instrument, a judge is not to insert what has been omitted, or to omit what has been inserted"].) Here, plaintiffs do not allege that any such contractual requirements were implicated in this capital call. As such, defendants were free to withhold their consent for any reason or no reason at all and the complaint fails to state a claim for breach of the implied covenant of good faith and fair dealing. (*See Wolf v Walt Disney Pictures & Tel.*, 162 Cal App 4th 1107, 1121 [Cal Ct App 2008] [internal quotations marks and citations omitted] [stating that, "if the express purpose of the contract is to grant unfettered discretion, . . . then the conduct is, by definition, within the reasonable expectation of the parties and can never violate an implied covenant of good faith and fair dealing"].)

Therefore, to the extent that the motion for summary judgment seeks dismissal of the fifth cause of action, the motion is granted.

**2. Breach of Contract**

Defendants contend that the breach of contract claims must be dismissed, because the 1991 Broadway, 2067 Broadway, and 625 NMA Agreements each contains an exclusive remedy provision, which provides that, in the event an owner fails to fund a capital call, another owner may make a short-term loan to fund the shortfall. They argue that these provisions are a condition precedent to litigation and limit any remedy to the recovery of the loan amount with interest or the dilution of the noncontributing member's interest. They also argue that the Capital Call Letters demonstrate that, at the time they were sent, none of the properties needed more capital and, thus, they never triggered any obligation to fund or consent to the capital calls. Lastly, defendants

argue that the breach of contract claims must be dismissed, because the complaint contains only conclusory allegations of damages.

Plaintiffs counter that the agreements describe a loan as an option and do not make the payment of defendants' missing capital contributions a condition precedent to a lawsuit. Plaintiffs also argue that the agreements do not require that a capital call notice contain details concerning the need for additional capital and that, in any event, the complaint and the Capital Call Letters make clear that additional capital was necessary to avoid defaults on various obligations. Lastly, they contend that the complaint and Sheinfeld's affidavit make clear that plaintiffs have, and continue to, suffer damages.

A cause of action for breach of contract requires a plaintiff to demonstrate "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010].) "[W]hen parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms." (*Vermont Teddy Bear Co.*, 1 NY3d at 475 [internal quotation marks and citation omitted].) The interpretation of an unambiguous contract is a question of law for the court (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 192 [1st Dept 1995)]), as is the determination of whether a contract is ambiguous. (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990].) In interpreting a contract, the court must consider the parties' intentions, "[t]he best evidence of [which] . . . is what they say in their writing." (*Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012] [internal quotation marks and citation omitted].) To effectuate its intended

purpose, the writing must be read as a whole, as its "meaning . . . may be distorted where undue force is given to single words or phrases." (*Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003] [internal quotation marks and citation omitted].)

Notably, pursuant to a choice-of-law clause, the 625 NMA Agreement is governed by the laws of Delaware. (NYSCEF 13, 625 NMA Agreement, § 14.14; *see Welsbach Elec. Corp*, 7 NY3d at 629.) Delaware's law regarding breach of contract and contract interpretation is substantially similar to that of New York. (*See Kuroda v SPJS Holdings, L.L.C.*, 971 A2d 872, 883 [Del Ch 2009] [stating the elements of a breach of contract claim]*; Alta Berkeley VI C.V. v Omneon, Inc.*, 41 A3d 381, 385-386 [Del 2012] [laying out the general rules of contract interpretation].)

**(a) The 1991 Broadway and 2067 Broadway Agreements (Second and Third Causes of Action)**

The second and third causes of action state claims for breach of contract.

First, the agreements' written notice requirements were satisfied. The "Additional Contribution" provisions of the 1991 Broadway Agreement and the 2067 Broadway Agreement are identical and state that, "[i]n the event undistributed Available Cash . . . [is] inadequate to meet the Property's current operating expenses, Necessary Expenses, Emergency Expenses, or tenant improvements and allowances under approved Leases," the owners must make additional contributions "upon written notice by the Administrative Owner." (*See* NYSCEF 9, 1991 Broadway Agreement, §5.2; NYSCEF 11, 2067 Broadway Agreement, §§ 5.1.) There are no requirements for the contents of the written notice and the court will not read any into the agreements. (*See Vermont Teddy Bear Co.*, 1 NY3d at 475-476.) As it is undisputed the plaintiffs sent

written notices of the need for additional capital, informing of the risk of "loan defaults, loan foreclosure, lapse of insurance coverages, tax liens and Landlord default under leases" (NYSCEF 39, 1991 Broadway Capital Call Letter; NYSCEF 40, 2067 Broadway Capital Call Letter), the agreements' written notice requirement was satisfied. To the extent that defendants contend that the properties were not in need of additional capital at the time that the Capital Call Letters were sent and that, as a result, defendants had no obligation to fund the capital calls, this raises an issue of fact for the factfinder. (*See Forrest,* 3 NY3d at 315.)

Second, the agreements' "Failure to Make Additional Contribution" provisions, which are also identical, are neither a condition precedent to this action nor a limitation on plaintiffs' available remedies. (*See* NYSCEF 9, 1991 Broadway Agreement, § 5.3; NYSCEF 11, 2067 Broadway Agreement, § 5.2.) The agreements provide that, when one owner fails to make the required additional contribution, the other owner "shall have the right, at its option," to lend to the delinquent owner all or a portion of the delinquent funding. (NYSCEF 9, 1991 Broadway Agreement, §, 5.3 [a]; NYSCEF 11, 2067 Broadway Agreement, § 5.2 [a].) If the delinquent owner fails to timely repay the loan, "then the Lending Owner shall be entitled to exercise any and all available remedies, at law or in equity, in connection therewith." (NYSCEF 9, 1991 Broadway Agreement, §, 5.3 [c]; NYSCEF 11, 2067 Broadway Agreement, § 5.2 [c].) The 1991 Broadway and 2067 Broadway Agreements' plain language is unambiguous and places no requirement on plaintiffs to first lend the delinquent funds. That plaintiffs have the option to lend the delinquent funds, without more, does not preclude them from pursuing a different remedy. Had the parties intended to create an exclusive remedy provision,

they could have done so. They did not. (*See Vermont Teddy Bear Co.*, 1 NY3d at 475; *contra Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017] [finding that "(c)ontract terms providing for a 'sole remedy' [were] sufficiently clear to establish that no other remedy was contemplated by the parties"].)

Third, plaintiffs offer more than conclusory allegations of damages. They allege that the Capital Call Properties are in "significant financial distress" as a result of the COVID-19 pandemic, which "ha[s] impaired and will impair the revenues of the Capital Call Properties, and the Capital Call Properties, consequently, face the risk of loan defaults, loan foreclosures, lapses of insurance coverages, tax liens and landlord defaults under leases." (NYSCEF 1, compl., ¶ 57.) In addition, plaintiffs supplement the complaint with Sheinfeld's affidavit, in which he states that "[a]s result of [d]efendants' failure to contribute additional capital . . . , each of the Properties has suffered, and continues to suffer, damages and other harm." (NYSCEF 64, Sheinfeld aff, ¶ 10.) As pertains to 1991 Broadway, Sheinfeld contends that, on October 28, 2020, the Board of Managers of Bel Canto Condominium initiated proceedings to foreclose on liens for unpaid common charges for all 4 units. (*Id.*, ¶ 11, NYSCEF 66, Verified Complaint in action *Board of Managers of Bel Canto Condominium v 1991 Broadway Owner LLC, et al.*.) As pertains to 2067 Broadway, Sheinfeld explains, that plaintiff Lulu Gigi Realty LLC was unable to timely pay principal and interest due on the loan for the property and that the property is also "currently subject to default as a result of the failure to pay real estate taxes." (NYSCEF 64, Sheinfeld aff, ¶ 12.)

For the foregoing reasons, the complaint sufficiently states claims for breach of the 1991 Broadway and 2067 Broadway Agreements.

Accordingly, to the extent that the motion for summary judgment seeks dismissal of the second and third causes of action, the motion is denied.

**(b) The 625 NMA Agreement (Fourth Cause of Action)**

The plain language of the 625 NMA Agreement requires dismissal of the fourth cause of action. Delaware law provides that "even if a contract specifies a remedy for breach of that contract, 'a contractual remedy cannot be read as exclusive of all other remedies [if] it lacks the requisite expression of exclusivity.'" (*Gotham Partners, L.P. v Hallwood Realty Partners, L.P.*, 817 A2d 160, 176-77 [Del 2002] [internal quotation marks and citation omitted].) Here, the unambiguous language of the "Failure to Make an Additional Capital Contribution" provision contains such an expression of exclusivity. (*See* NYSCEF 13, 625 NMA Agreement, §4.3.)

Sections 4.3 (b) provides that, in the event there is a short fall with regard to required capital contributions, "the Contributing Member may advance to the Company all or any portion of the Non-Contributing Member's Shortfall Amount," which will be treated as "a loan by the Contributing Member to the Non-Contributing Member." (*Id.*, §4.3 [b].) If the Non-Contributing Member does not repay this loan, including interest, "then the Contributing Member may . . . make [a Conversion Election]," as provided in section 4.3 [c]. The agreement then states that

> "the rights, powers or remedies conferred upon the Contributing Member in Sections 4.3 (b) and (c) . . . shall be *the exclusive remedy* available to the *Contributing Member and the Company* with respect to *any* failure by the Non-Contributing Member to fund its Percentage Interest of *any* Additional Capital Contribution."

(*Id.*, §4.3 [d] [emphasis added].)

Plaintiffs contend that the permissive "may" of sections 4.3 (b) and (c) indicates that the exclusive remedy provision of section 4.3 (d) is triggered only should a contributing member elect to proceed under sections 4.3 (b) and (c.) However, this is not a case where the agreement provides for a remedy, which plaintiffs "may" pursue, "without "preclude[ing] . . . a different remedy through a separate mechanism." (*GMG Capital Investments, LLC v Athenian Venture Partners I, L.P.*, 36 A3d 776, 782 [Del 2012] [finding that an agreement was ambiguous where the "sole remedy" provision "[did] not plainly provide that the [described mechanism] [was] the sole remedy for any breach of the Agreement" and was "triggered by a discretionary act"].) While a contributing member "may" choose not to provide a loan to fill a shortfall and, in the event it does make the loan and that loan is not repaid, it "may" choose not to exercise its Conversion Election, the agreement makes clear that these options "*shall* be *the exclusive remedy* available" to both the "Contributing Member and the Company" with respect to "*any*" failure to fund a capital call. (NYSCEF 13, 625 NMA Agreement, §4.3 [d] [emphasis added].) No ambiguity exists. Any other reading would impermissibly render section 4.3 (d) meaningless. (*See Alta Berkeley VI C.V.*, 41 A3d at 386].) Therefore, the breach of contract claim is precluded by the 625 NMA Agreement's exclusive remedy provision.

Accordingly, to the extent the motion for summary judgment seeks dismissal of the fourth cause of action, the motion is granted.

**3. Declaratory Judgment (Eighth through Fourteenth Causes of Action)**

Defendants contend, generally, that the declaratory judgment claims fail for the same reasons as the breach of contract and the breach of the implied covenant of good faith and fair dealing claims do. Plaintiffs respond that the complaint pleads justiciable controversies, because it alleges that the failure to fund or consent to the capital calls placed the Capital Call Properties at risk of default on various obligations.

"The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009] [internal quotation marks and citations omitted].) Ordinarily, "a request for a declaratory judgment is . . . premature where a future event affecting the obligations of the contracting parties is contemplated, yet uncertain of occurrence and beyond the parties' control. (*Buller v Goldberg*, 40 AD3d 333, 333[1st Dept 2007].) However, "such relief is available where the declaration will have the immediate and practical effect of influencing the parties' current conduct." (*Id.*) "A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." (*Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988] [internal citation omitted].)

Here, the declaratory judgment claims seek a declaration that defendants should either consent to and/or fund the capital calls pursuant to the agreements. (*See* NYSCEF 1, compl., ¶¶ 137, 144, 151, 158, 165, 172, 179.) As concerns the eleventh and twelfth causes of action, this court's determinations—that section 4.3 of the 625

NMA Agreement constitutes plaintiffs' exclusive remedy (*See supra* at 51-52) and that, pursuant to the terms of the Bevcon Agreement, "defendants were free to withhold their consent for any reason or no reason at all" (*supra* at 46)—fully resolve the controversies underlying those claims. As such, they are dismissed. Similarly, the remaining declaratory judgment claims will be resolved upon the final adjudication of plaintiffs' contractual claims. As the resolution of those claims "will sufficiently guide the parties on their future performance of the contract[s], thereby obviating any need for other alternative relief," the remaining declaratory judgment claims are dismissed. (*204 Columbia Hgts., LLC v Manheim*, 148 AD3d 59, 70-71 [1st Dept 2017] [internal quotation marks and citation omitted] [dismissing causes of action for declaratory judgment and injunctive relief].)

Therefore, to the extent the motion for summary judgment seeks dismissal of the eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action, the motion is granted.

**B. Counterclaim Defendants' Motion to Dismiss (Motion Sequence Number 002)**

As a preliminary matter, the court addresses a few idiosyncrasies in connection with this motion.

First, counterclaim plaintiffs attempted to voluntarily discontinue counterclaims four, eight, twenty-four and twenty-eight. (*See* NYSCEF 74, Notice of Discontinuance.) Their brief in opposition to the motion mistakenly states that these counterclaims have been withdrawn. However, because the notice of discontinuance was untimely, this court required both sides to stipulate to the discontinuance. (NYSCEF 110.) The

parties could not reach an agreement. (*See* NYSCEF 132, tr at 81-82.) Accordingly, this decision addresses these counterclaims.

Second, counterclaim plaintiffs submit proposed amended counterclaims ("PACC") with their opposition to the motion to dismiss. As the court explained during oral arguments, it will not consider the PACC, but it will accept the accompanying affidavit of O'Shea to supplement the counterclaims. (*See* tr at 104:13-16; *see also* CPLR 3025; *Leon*, 84 NY2d at 88.)

Lastly, counterclaim plaintiffs take issue with counterclaim defendants' assertion of the statute of limitations defense in their brief. While the notice of motion does not specify 3211 (a) (5) as grounds for dismissal, it does specify other CPLR 3211 (a) grounds (*see* NYSCEF 58, Notice of Motion) and counterclaim plaintiffs have had a full opportunity to respond to the statute of limitations arguments. As there is no prejudice to counterclaim plaintiffs, "the court may treat the motion as having specified the right ground and grant relief." (*Dean R. Pelton Co. v Moundsville Shopping Plaza*, 173 AD2d 201, 201 [1st Dept 1991].)

"[O]n a motion to dismiss a complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true." (*Allianz Underwriters Ins. Co.*, 13 AD3d at 174.) The court is not permitted "to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].) "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." (*Id.*)

On a motion to dismiss based on documentary evidence, dismissal is appropriate where "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] [internal citation omitted].)

On a motion to dismiss a claim pursuant to CPLR 3211 (a) (5), the defendant bears the "initial burden of establishing, prima facie, that the time in which to sue has expired." (*New York City Sch. Constr. Auth. v Ennead Architects LLP*, 148 AD3d 618, 618 [1st Dept 2017] [internal quotation marks and citation omitted].) "The burden then shifts to the plaintiff to . . . aver evidentiary facts establishing that the action was timely or. . . raise an issue of fact as to whether the action was timely." (*MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644 [1st Dept 2019] [internal quotation marks and citations omitted].)

**1. Counterclaims Relating to Real Estate Investments**

The standards for stating claims for breach of contract and declaratory judgement are set forth above. (*See supra* at 54-55, 60-61.)

To establish a breach of fiduciary duty claim, a plaintiff must allege: (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages. (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011].) To state a claim for aiding and abetting a breach of fiduciary duty, plaintiff must demonstrate "a breach of fiduciary duty, that the defendant knowingly induced or participated in the breach, and damages resulting therefrom." (*Bullmore v Ernst & Young Cayman Is.*, 45

AD3d 461, 464 [1st Dept 2007] [internal citation omitted].) Both claims must be pleaded with particularity. (*See* CPLR 3016 [b]; *see also Parker Waichman LLP v Squier, Knapp & Dunn Communications, Inc.*, 138 AD3d 570, 571 [1st Dept 2016]; *Schroeder v Pinterest Inc.*, 133 AD3d 12, 26 [1st Dept 2015].)

As several of the breach of fiduciary duty counterclaims implicate corporate governance of foreign entities, the substantive law of the state of incorporation governs those claims. (*Lerner v Prince*, 119 AD3d 122, 128 [1st Dept 2014] [stating that "issues of corporate governance. . . are governed by the law of the state in which the corporation is chartered"].) Nonetheless, because "matters of procedure are governed by the law of the forum state" (*Royal Park Invs. SA/NV v Morgan Stanley*, 165 AD3d 460, 461 [1st Dept 2018] [internal quotation marks and citation omitted]), the counterclaim must still state "the circumstances constituting the wrong . . . in detail." (CPLR 3016 [b]; *see e.g. Giuliano v Gawrylewski,* 122 AD3d 477, 478 [1st Dept 2014] [finding that breach of fiduciary duty was properly dismissed, where the allegations failed to overcome Delaware's business judgment rule and failed to satisfy the heightened pleading standards of CPLR 3016 (b)].)

**(a) 1991 Broadway**

**(i) Breach of Contract (Fourth Counterclaim)**

In the fourth counterclaim, counterclaim plaintiffs allege that: (1) counterclaim defendant 1991 Broadway Owner LLC and counterclaim plaintiff 1991 Broadway Blue LLC "agreed to take ownership interests in 1991 Broadway in proportion to the amount of the purchase price of the property that they paid"; (2) each paid $4.5 million for the purchase of the property, such that each owns 50% of 1991 Broadway; and (3) "1991

Broadway Owner LLC has breached the 1991 Broadway Agreement by taking distributions as though it owns 55% of 1991 Broadway and 1991 Broadway Blue LLC owns 45%." (NYSCEF 7, answer, ¶¶ 211-214.)

Counterclaim defendants contend that the counterclaim must be dismissed, because the 1991 Broadway Agreement provides that 1991 Broadway Blue LLC owns a 45% interest in the property, while 1991 Broadway Owner LLC owns a 55% interest. They argue that the contract is unambiguous and that parol evidence cannot be considered. They also argue that the claim is time-barred, as it accrued more than six years before the filing of the answer with counterclaims. In opposition, counterclaim plaintiffs do not address these arguments, because at the time that they filed their papers, they believed that they had withdrawn the counterclaim.

Here, documentary evidence requires dismissal of the fourth counterclaim. The 1991 Broadway Agreement provides that each owner's ownership interest in the property is set forth in Exhibit A to the agreement. (NYSCEF 9, 1991 Broadway Agreement, §§ 2.2, 3.1.) Exhibit A, in turn, states that 1991 Broadway Blue LLC owns 45% of 1991 Broadway while 1991 Broadway Owner LLC owns 55%. (*Id.*, exhibit A at 33.) Accordingly, the 1991 Broadway Agreement utterly refutes the allegations that 1991 Broadway Owner LLC breached the 1991 Broadway Agreement "by taking distributions *as though* it owns 55% of 1991 Broadway." (*Id.*, ¶ 214 [emphasis added]; *see Goshen*, 98 NY2d at 326.)

That the parties previously discussed an equal split of the property (*See* NYSCEF 76, O'Shea aff, ¶ 19; NYSCEF 81, Email [Oct. 8, 2013]) is irrelevant, as the 1991 Broadway Agreement contains a merger/integration clause. (*See* NYSCEF 9,

1991 Broadway Agreement, § 11.2.) "The merger and integration clause[] [is] explicit and therefore bar[s] the use of parol evidence of the parties' intent and of any other agreements or understandings." (*Schron v Troutman Saunders LLP*, 97 AD3d 87, 93 [1st Dept 2012], *affd sub nom. Schron v Troutman Sanders LLP*, 20 NY3d 430 [2013].)

Moreover, the claim is time-barred under the six-year statute of limitations (CPLR 213 [2].) The claim accrued at the time of the alleged breach (*see Chelsea Piers L.P. v Hudson Riv. Park Trust*, 106 AD3d 410, 412 [1st Dept 2013]) in 2013, when the parties entered the 1991 Broadway Agreement. (NYSCEF 1, compl., ¶¶ 43; 44;NYSCEF 7, answer, ¶¶ 47, 48; NYSCEF 9, 1991 Broadway Agreement.) As the answer with counterclaims was filed in December 2020, more than six year later, the counterclaim is time-barred.

Therefore, the motion to dismiss is granted to the extent of dismissing the fourth counterclaim.

**(ii) Declaratory Judgment (Fifth Counterclaim)**

The fifth counterclaim alleges that 1991 Broadway Blue LLC entered the 1991 Broadway Agreement, based on the belief that 1991 Broadway Owner LLC contributed $5.5 million to the $10 million in equity used to purchase 1991 Broadway, whereas the total equity contribution for the purchase was $9 million and 1991 Broadway Owner LLC contributed $4.5 million. (*See* NYSCEF 7, answer ¶¶ 73-81; NYSCEF 76, O'Shea aff. ¶¶ 7, 9-25.) The counterclaim seeks a "declaratory judgment that [1991 Broadway Blue LLC] is the 50% owner of 1991 Broadway." (NYSCEF 7, answer, ¶ 224.)

Counterclaim defendants contend that the fifth counterclaim should be dismissed as duplicative of the fourth counterclaim for breach of contract. In addition, they content the claim is time-barred.

Counterclaim plaintiffs respond that the court should consider parol evidence to reform the 1991 Broadway Agreement to reflect the parties' intention that their ownership interest be proportionate to their investment in the property. They argue that they have stated a claim that the agreement was executed under unilateral mistakes induced by counterclaim defendants' fraudulent misrepresentation that 1991 Broadway Owner LLC's contribution to the purchase price was proportionate to its ownership interest. In addition, they contend that the declaratory judgment claim is not duplicative of the breach of contract claim, because it seeks a rebalancing of 1991 Broadway Blue LLC's equity interest going forward rather than damages for past distributions that were too low. They also argue that the counterclaim is not time-barred under the doctrine of equitable estoppel, because Ashkenazy withheld financial information and the Gindis only began discovering the facts in 2019.

In reply, counterclaim defendant argue that counterclaim plaintiffs fail to plead the elements of unilateral mistake. In addition, they argue that there is no basis for reformation, because the 1991 Broadway Agreement accurately reflects the parties' intent. They contend that, to the extent counterclaim plaintiffs believe that 1991 Broadway Owner LLC was required to contribute an additional $1 million, they should have sued for damages. They also contend that counterclaim plaintiffs failed to make the necessary showing to benefit under the doctrine equitable estoppel.

"[A] general merger clause does not bar an action to reform a contract, which by reason of fraud and mistake does not contain the agreement of the parties." (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 86 [1970] [internal citation omitted]; *see also Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 169 [1st Dept 2015] [internal quotation marks and citation omitted] [stating that "an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made, . . . does not preclude parole evidence establishing fraudulent inducement to enter into the contract"].) To state a claim for reformation of contract based on unilateral mistake,

> "it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement. A bare, conclusory claim of unilateral mistake, which is unsupported by legally sufficient allegations of fraud, fails to state a cause of action for reformation."

(*Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [1st Dept 2007] [internal citations omitted].)

To state a claim for fraud, the plaintiff must "allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury." (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [internal citation omitted].) Each element must be alleged with specificity (CPLR 3016 [b]; *see Shea v Hambros PLC*, 244 AD2d 39, 46 [1st Dept 1998].)

Here, the parties allegedly had an expectation that 1991 Broadway Owner LLC would fund $5.5 million of the property's purchase price, whereas 1991 Broadway Blue

LLC would fund $4.5 million. (NYSCEF 7, answer, ¶¶ 73, 74.) However, "right before the closing on the property," Ashkenazy allegedly requested that the Gindis pay the $1 million that 1991 Broadway Owner LLC had formerly promised to pay from its own funds. (*Id.*, ¶ 75.) He allegedly "did not explain the need for $1 million more than had been agreed or how those funds would be used." (*Id.*) These allegations fail to allege fraud with requisite particularity.

First, it is unclear from these allegations whether, at the time that 1991 Broadway Blue LLC executed the 1991 Broadway Agreement, it was aware that 1991 Broadway Owner LLC would only pay $4.5 million toward the purchase or whether Ashkenazy made this discovery after the execution of the agreement, but before the closing on 1991 Broadway. (*See* NYSCEF 76, O'Shea aff, ¶¶ 21,22; NYSCEF 7, answer, ¶¶ 73-75.) Further, while O'Shea states that "the Gindis *presumed* that 1991 Broadway Owner LLC had paid [its] own $1 million into 1991 Broadway" (NYSCEF 76, O'Shea aff, ¶ 24 [emphasis added]), counterclaim plaintiffs do not allege that counterclaim defendants ever promised that 1991 Broadway Owner LLC would contribute the $1 million at a later time or that counterclaim defendants in any way indicated that 1991 Broadway Owner LLC ever did so. Moreover, it is not clear what basis counterclaim plaintiffs had for their belief that additional funds would be contributed to 1991 Broadway post-closing, when "[t]he closing statement . . . showed excess funds of $1,281,441.53 held in the property." (NYSCEF 7, answer, ¶ 76.) As there are no allegations of false statements made to counterclaim plaintiffs or their reasonable reliance on such statements, counterclaim plaintiffs fail to plead fraud with requisite particularity. (*See Gregor v Rossi*, 120 AD3d 447, 447 [1st Dept 2014] [internal

citations omitted] [finding that "(f)raud and fraudulent inducement (were) not pleaded with the requisite particularity under CPLR 3016 (b), because the words used by defendants and the date of the alleged false representations (were) not set forth"].)

Counterclaim plaintiffs' "inability to demonstrate fraud is fatal to [1991 Broadway Blue LLC's] claim for reformation based on unilateral mistake." (*1225 Realty Owner LLC v Mocal Enters., Inc.*, 66 AD3d 602, 602 [1st Dept 2009] [dismissing claim for reformation based on unilateral mistake, where "(b)oth sides were sophisticated business entities, represented by counsel" and the plaintiff possessed all necessary information before executing the agreement]; *see also Greater N.Y. Mut. Ins. Co.*, 36 AD3d at 443 [finding that the plaintiffs "fail(ed) to state a claim for unilateral mistake, as the complaint (did) not allege fraud with the requisite particularity"].) As the declaratory judgment claim is premised on the viability of the reformation of contract claim, the fifth counterclaim must be dismissed.

Having determined that the counterclaim fails to state a claim for reformation of contract, the court does not address the parties' statute of limitations arguments.[12]

Therefore, the motion to dismiss is granted to the extent of dismissing the fifth counterclaim.

**(iii) Breach of Contract (Seventh Counterclaim)**

The seventh counterclaim states that, pursuant to sections 4.1 (a) and 4.2 of the 1991 Broadway Agreement, the administrative owner is obligated to make all

[12] In any event, the parties' statute of limitations arguments miss the mark, as they are not addressed to the applicable statute of limitations for declaratory judgment that is premised on a claim for reformation of contract due to unilateral mistake induced by fraud. (*See infra* at B(1)(d)(i).)

distribution to "Owners in accordance with their respective Ownership Interests." (NYSCEF 7, answer, ¶¶ 234, 235.) Counterclaim plaintiffs also allege that 1991 Broadway Owner LLC breached those provisions by taking, "[i]n March 2016, . . . $4.2 million of $4.6 million in net refinancing proceeds for itself, rather than distributing those net proceeds pro rata as required by the 1991 Broadway Agreement." (*Id.*, ¶ 237 at 76.) In addition, the counterclaim states that "1991 Broadway Blue LLC is also entitled to recover as damages the amount of distributions that were incorrectly paid to 1991 Broadway Owner LLC under the false pretense that it was owed 55% of the distributions." (*Id.*, ¶ 239 at 76.)

The parties dispute whether the seventh counterclaim should be dismissed as duplicative of the fourth and fifth counterclaims.

To the extent the seventh counterclaim is premised on "the false pretense that [1991 Broadway Owner LLC] was owed 55% of the distributions" (NYSCEF 7, answer, ¶ 239), it is duplicative of the fourth counterclaim. (*See id.*, ¶¶ 211-214 at 72-73.) However, the counterclaim plaintiffs also allege that 1991 Broadway Owner LLC breached sections 4.1 and 4.2 by misapplying a portion of the $6 million in proceeds generated from the 2016 refinancing of 1991 Broadway. They also allege that 1991 Broadway Owner LLC applied $3.8 million of the proceeds to the 1991 Broadway Note, for which Ben Ashkenazy was personally liable, prior to making pro rata distributions to the owners. (*See id.*, ¶¶ 83-87, 234-238; NYSCEF 9, 1991 Broadway Note.) These allegations state a distinct claim for breach of contract.

Therefore, the motion to dismiss is granted to the extent of dismissing only that portion of the seventh counterclaim that seeks to recover past distributions to 1991 Broadway Owner LLC based on its 55% ownership of 1991 Broadway.

**(iv) Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Sixth and Eighth Counterclaims)**

The sixth counterclaim states that, as the administrative owner, 1991 Broadway Owner LLC owes 1991 Broadway Blue LLC a fiduciary duty (NYSCEF 7, answer, ¶ 227) and that it breached that duty "by misstating the total equity cost of 1991 Broadway and understating 1991 Broadway Blue LLC's ownership percentage." (*Id.*, ¶ 228.) The eighth counterclaim states that 1991 Broadway Owner LLC breached its fiduciary duty when it "improperly used and distributed a portion of the net proceeds of a refinancing to benefit Mr. Ashkenazy and his affiliates." (*Id.*, ¶ 243.) In addition, both counterclaims state that "Ashkenazy and AAC, and/or entities under their control" aided and abetted 1991 Broadway Owner LLC's breaches. (*Id.*, ¶¶ 229, 245.)

Counterclaim defendants contend that the sixth and eighth counterclaims should be dismissed, because: (1) they are duplicative of the breach of contract claims; (2) section 3.2 of 1991 Broadway Agreement disclaims the existence of a fiduciary relationship; and (3) the allegations fail to meet the heightened pleading standard of CPLR 3016 (b.) In addition, they argue that the sixth counterclaim is time-barred. Lastly, they argue that, because the predicate breach of fiduciary duty claims are not viable, the aiding and abetting portion of those claims must be dismissed. In any event, they argue, the conclusory allegations of aiding and abetting are insufficient to state a claim.

Counterclaim plaintiffs respond that the breach of fiduciary duty claims are not duplicative of the breach of contract claims, because they are based on additional or separate allegations. In addition, they argue that the agreement's disclaimer of fiduciary duty applies to the duties owed by the parties as owners and does not apply to 1991 Broadway Owner LLC in its capacity as the administrative owner. They point to sections 6.7 and 9.2 as proof, that under the 1991 Broadway Agreement, that 1991 Broadway Owner LLC owes 1991 Broadway Blue LLC fiduciary duties as the administrative owner. In addition, they argue that, because counterclaim defendants withheld records, counterclaim plaintiffs are unable to plead these claims with more detail and that counterclaim defendants are equitably estopped from asserting a statute of limitations defense.

Here, the breach of fiduciary duty claims are duplicative of the breach of contract claims and, therefore, must be dismissed. (*See William Kaufman Org. v Graham & James LLP*, 269 AD2d 171, 173 [1st Dept. 2000] ["(a) cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand"]; *see also Stefatos v Frezza*, 95 AD3d 787, 787 [1st Dept 2012] [dismissing the breach of fiduciary duty claims as duplicative of the time-barred breach of contract claim].)

While "the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself." (*37 E. 50th St. Corp. v Restaurant Group Mgt. Servs., L.L.C.*, 156 AD3d 569, 570 [1st Dept 2017] [internal quotation marks and citation omitted]), no such independent duty exists here. The 1991 Broadway Agreement "expressly waives and disclaims any such fiduciary relationship,"

clearly and unequivocally providing that the sole relationship between the "Owners . . . shall be that of co-owners of the Property" and that "[t]he provisions of this Agreement are not intended to create, nor shall they be in any way interpreted to create" any semblance of a joint venture, partnership or a fiduciary relationship. (NYSCEF 9, 1991 Broadway Agreement, § 3.2 [a].) Counterclaim plaintiffs urge this court to read this disclaimer as applying to 1991 Broadway Owner LLC in its role as "Owner," but not in its role as "Administrative Owner." However, such a reading would be contrary to the central tenets of contract interpretation: "to avoid an interpretation that would leave contractual clauses meaningless" and to aim at "a practical interpretation" of the terms to achieve the parties' "reasonable expectations." (*37 E. 50th St. Corp.*, 156 AD3d at 569 [internal quotation marks and citation omitted].) It is hard to see what possible purpose this broad waiver could serve if it is not to apply to one of the two parties to the agreement. Moreover, the "Administrative Owner" is merely a type of "Owner." (*See* NYSCEF 9, 1991 Broadway Agreement, § 1 [defining "Administrative Owner" as "1991 Broadway Owner LLC . . . or any Owner hereafter selected as Administrative Owner"]; *id.*, § 6.10 [b] [requiring the Administrative Owner to "be an Owner of an undivided interest in the Property"]) and had the parties intended to carve out an exception to this broad waiver for the Administrative Owner, they could have done so. They did not.

Contrary to counterclaim plaintiffs' contentions, nothing in sections 6.7 and 9.2 is inconsistent with the waiver of a fiduciary relationship. While section 6.7 imposes additional responsibilities on the Administrative Owner, to "perform its duties in good faith, in a manner reasonably believed to be in the best interests of the Owners and with such care as an ordinarily prudent person in a similar position would use under similar

circumstances," it goes on to clarify that the position of Administrative Owner does not open its holder to additional liability "by reason of being or having been an Administrative Owner." (NYSCEF 9, 1991 Broadway Agreement § 6.7.) Likewise, section 9.2, which exculpates the Administrative Owner for losses arising from "a mistake in business judgment of the Administrative Owner," does not demonstrate that the parties intended the disclaimer of section 3.2 to exclude the Administrative Owner. Ultimately, the 1991 Broadway Agreement unambiguously eliminates a fiduciary relationship between the parties. As such, the breach of fiduciary duty counterclaims must be dismissed. (*See CIBC Bank & Tr. Co. v Credit Lyonnais*, 270 AD2d 138, 139 [1st Dept 2000] [internal quotation marks and citation omitted] [finding the breach of fiduciary duty claim meritless where the contract provided that each party was "a sophisticated institutional investor" and "acted in the capacity of an arm's-length contractual counterparty and not as (the other's) financial advisor or fiduciary"].)

"[I]n the absence of a viable claim for breach of fiduciary duty, the related claims of aiding and abetting such a breach [are] also properly dismissed." (*Kagan v HMC-New York, Inc.*, 94 AD3d 67, 73 [1st Dept 2012].) Additionally, the counterclaims' "conclusory allegations are insufficient to sustain the aiding and abetting [claims]." (*Schroeder*, 133 AD3d at 26 [internal citations omitted].)

Therefore, the motion to dismiss is granted to the extent of dismissing the sixth and eighth counterclaims.

**(b) 145 Greene Street**

**(i) Declaratory Judgement (Twenty-Ninth Counterclaim)**

The twenty-ninth counterclaim states that, "[p]ursuant to Section 11 (c) of the [Unexecuted] Greene Street Agreement, [GB's] equity interest in Greene-Houston LLC was supposed to increase to 32.875% if its $1,000,000 contribution was not paid back by October 10, 2018" (NYSCEF 7, answer, ¶ 391), which it was not. (*See id.* ¶ 390.) Counterclaim plaintiffs allege that "Mr. Ashkenazy removed the signature pages from the [Unexecuted] Greene Street Agreement and attached them to a modified agreement that omitted that provision." (*Id.*, ¶ 391.) They now seek a declaration that "[GB] is entitled to an increase in its ownership interests in Greene-Houston LLC from 16.4375% to 32.875%." (*Id.*, ¶ 393.)

Counterclaim defendants contend that this counterclaim must be dismissed, because the Executed Greene Street Agreement contains a merger clause and should be enforced according to its terms. They point to other discrepancies between the Executed and the Unexecuted Greene Street Agreements (e.g., sections 5 [b] and 9 [b] [3]) as evidence that the executed version is the final result of negotiations between sophisticated business investors. In addition, they argue that counterclaim plaintiffs' submissions (*see* NYSCEF 76, O'Shea aff, ¶¶ 28-33; NYSCEF 85-94) show only that GB executed the agreement generally and does no prove that the version of the agreement it signed contained the provision it now seeks to enforce. Lastly, they contend that the counterclaim is time-barred, because the alleged wrongful conduct (i.e. the alleged swapping out of the agreement) occurred when the agreement was

executed on October 10, 2013, more than six years before the counterclaim was filed on December 18, 2020.

Counterclaim plaintiffs respond that, at the very least, their allegation, that Ashkenazy took the Gindis' signature page and appended it to an earlier draft of the agreement, creates an issue of fact requiring denial of the motion to dismiss. In addition, they contend that the claim is not time-barred, because it accrued at the time of breach, on October 10, 2018, when the escalation clause was purportedly triggered.

Here, the sufficiency of the declaratory judgment claim turns on which version of the Greene Street Agreement is the operative agreement. While counterclaim defendants insist that the Executed Greene Street Agreement is controlling, counterclaim plaintiffs deny that they ever executed this version of the agreement and claim that their signature page was appended to it without their knowledge. (*See* NYSCEF 7, answer, ¶ 39; NYSCEF 76, O'Shea aff, ¶¶ 28-33; NYSCEF 85-94.) Like *TIAA Global Invs., LLC v One Astoria Sq. LLC,* this court "ha[s] been presented only with allegations in [the answer with counterclaims], and some documentation which, at this stage, fails to negate any of those allegations." (127 AD3d 75, 91 [1st Dept 2015].) As such, "[t]he allegations are to be construed liberally, and assumed to be true, and [counterclaim] plaintiff[s] [are] to be afforded the benefit of every possible favorable inference." (*Id.*) Accordingly, the claim is sufficiently stated.

Nor is the claim time-barred. Counterclaim defendants mistakenly latch on to the allegation concerning the misuse of the signature page (NYSCEF 7, answer, ¶¶ 391) as the wrongful conduct triggering the running of the statute of limitations. However, this

allegation is intended to demonstrate that the Unexecuted Greene Street Agreement is the operative agreement. It does not impact the running of the statute of limitations.

"[T]he CPLR prescribes no general period of limitation for a declaratory judgment action. Courts must look to the underlying claim and the nature of the relief sought to determine the applicable period of limitation." (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 40-41 [1995] [internal quotation marks and citations omitted]; *see also Rosenthal v City of New York*, 283 AD2d 156, 157-158 [1st Dept 2001].) Here, the underlying claim is breach of the contract's escalation clause and it accrued on October 10, 2018, when the clause was purportedly triggered but not honored. (*See Chelsea Piers L.P.*, 106 AD3d at 412.) As the claim was brought well within the six-year statute of limitations (CPLR 213 [2]), it is timely.

For the foregoing reasons, to the extent the motion to dismiss seeks dismissal of the twenty-ninth counterclaim, the motion is denied.

**(ii) Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Thirty-Second Counterclaim)**

The thirty-second counterclaim states that Iconic breached the fiduciary duty it owed to GB as the managing member of Greene-Houston LLC "by allocating to itself depreciation deductions that should have been allocated to [GB]." (NYSCEF 7, answer, ¶ 412.) In addition, the counterclaim plaintiffs allege that "Ashkenazy and AAC, and/or entities under their control" aided and abetted the breach by "knowingly participat[ing] in the diversion of depreciation deductions from [GB] to [Iconic]." (*Id.*, ¶ 413.)

Counterclaim defendants contend that the claim must be dismissed, because it is based on GB's fictitious 32.875% ownership interest in Greene-Houston LLC. In addition, they argue that the Greene Street Agreement's exculpation clause expressly

limits Iconic's liability to "gross negligence, willful misconduct, misappropriation or misuse of funds or breach of this Agreement" (Greene Street Agreement, § 14 [a]), none of which is alleged. They also argue that the counterclaim's conclusory allegations are insufficient to meet the heightened pleading standard of CPLR 3016 (b). Lastly, they argue that, without a viable claim for breach of a fiduciary duty, the aiding and abetting portion of the counterclaim must also fail.

Counterclaim plaintiffs respond that, even if GB was entitled to only a 16.4375% ownership interest, it still did not receive its full depreciation deductions. In addition, they argue that the exculpation clause is limited to "Members" and not intended to apply to the "Managing Member" and, in any event, excludes willful or grossly negligent acts. They also argue that they sufficiently alleged all necessary element of the breach and that any lack of detail is due to the counterclaim defendants' failure to turn over requested information.

Here, the Greene Street Agreement's exculpation clause limits the liability of "the Members . . . any officer, director, employee, agent or Affiliate of the foregoing (collectively, the 'Covered Persons')" to instances of "gross negligence, willful misconduct, [and] misappropriation or misuse of funds . . ." (Greene Street Agreement, § 14 [a].) Contrary to counterclaim plaintiffs' contention, the managing member is necessarily included among the "Covered Persons." To exclude "Managing Member" from "Members" would be counter to "usual and commonly understood meaning" of those words (*Yaniveth R. v LTD Realty Co.*, 27 NY3d 186, 192 [2016] [internal quotation marks and citations omitted]) as well as contrary to the plain meaning of the agreement. (*See* Greene Street Agreement, § 1 [identifying "Iconic [as] the Managing Member of

the Company" in the section titled "Members"].) Moreover, limiting the liability of "Members," while excluding the "Managing Member" from the exculpation clause, makes little sense, because "[a] member who is not a manager does not owe a duty to the LLC or its members except to the extent he or it participates in the management of the LLC." (*Landes v Provident Realty Partners II, L.P.*, 2017 NY Slip Op 30196[U], **13 [Sup Ct, NY County 2017] [internal quotation marks and citation omitted].)

Notably, counterclaim plaintiffs point to the Horace Plaza Agreement to argue that when the parties wanted to disclaim a managing member's fiduciary duties, they did so expressly. (*See* NYSCEF 15, Horace Plaza Agreement § 9.01; *see also id.*, § 1.01 [defining "Indemnified Party"].) The parties' other agreements and business dealing are irrelevant. Where, as here, "the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract." (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014].)

In light of the exculpation clause, to state a viable claim for breach of fiduciary duty, counterclaim plaintiffs must allege conduct that constitutes gross negligence, willful misconduct, or misappropriation or misuse of funds. (*See Arfa v Zamir*, 21 Misc 3d 1101[A], 2008 NY Slip Op 51908[U], *3 [Sup Ct, NY County 2008], *affd* 75 AD3d 443 [1st Dept 2010] [finding breach of fiduciary duty was "allege[d] in sufficient detail" to overcome an exculpatory clause, where the factual allegations described conduct that was "grossly negligent, and/or willfully and in bad faith"].) Here, counterclaim plaintiffs merely allege that "[Iconic] has deprived the Gindis' [GB] of depreciation deductions it was owed in connection with 145 Greene Street." (NYSCEF 7, answer, ¶ 160.) It is devoid of factual details. (*See id.*, ¶ 412.) There is nothing to indicate when this

allegedly occurred, the amounts allegedly misapplied or why counterclaim plaintiffs believe the alleged conduct occurred at all. This dearth of factual allegations does not satisfy CPLR 3016 (b) (*see Parker Waichman LLP*, 138 AD3d at 571) and is insufficient to overcome the Greene Street Agreement's exculpatory clause. (*See Wietschner v Dimon*, 139 AD3d 461, 462 [1st Dept 2016] [finding that "plaintiff failed to sufficiently allege bad faith or breach of the duty of loyalty" to overcome the exculpatory clause that "insulated the directors from liability for breach of fiduciary duty"]; *see also SNS Bank v Citibank*, 7 AD3d 352, 355 [1st Dept 2004] [stating that "(e)ven on a motion to dismiss, a court need not accept as true conclusory allegations that a defendant was grossly negligent or acted willfully, in bad faith or with reckless disregard of its duties"].) Therefore, counterclaim plaintiffs fail to state a claim for breach of fiduciary duty.

Without a viable breach of fiduciary duty claim, the aiding and abetting portion of the counterclaim must also be dismissed. (*See Kagan*, 94 AD3d at 73.) In any event, conclusory allegations (*see* NYSCEF 7, answer, ¶¶ 160, 413) are insufficient to state a claim for aiding and abetting. (*See Schroeder*, 133 AD3d at 26.)

Accordingly, the motion to dismiss is granted to the extent of dismissing the thirty-second counterclaim.

**(c) Bravern**

**(i) Declaratory Judgment (Thirty-Third Counterclaim)**

The thirty-third counterclaim states that "[BB] and [BABM] agreed to take ownership interests in 2235 Church Avenue LLC in proportion to the amount of the purchase price of the Bravern property that they paid." (NYSCEF 7, answer, ¶ 418.) Counterclaim plaintiffs allege that "[BB] contributed $1,000,000 for the purchase of

Bravern" (*id.*, ¶ 419), which constituted 3.649% of the total purchase price, but received a 3.33% interest in 2235 Church Avenue LLC. (*Id.*, ¶¶ 419-423.) They, therefore, seek "a declaratory judgment that [BB] is a 3.649% owner in 2235 Church Avenue LLC or that it is owed a return of $87,344." (*Id.*, ¶ 425.)

Counterclaim defendants contend that the claim should be dismissed because the Bravern Agreement, which states the parties' respective ownership interests and contains a merger clause, should be enforced according to its terms. They also argue that the claim should be dismissed because it is duplicative of the thirty-fourth counterclaim for breach of fiduciary duty. Lastly, they argue that the claim is time-barred, because the alleged wrongful conduct (the understating BB's ownership interest) occurred when the Bravern Agreement was executed in 2014.

Counterclaim plaintiffs respond that the court should consider parol evidence to modify the Bravern Agreement, because the allegations state a claim for reformation based on a unilateral mistake induced by Ashkenazy's fraudulent misrepresentations regarding the total equity contributed toward the purchase price of the property. In addition, they contend that the claim is not time-barred because counterclaim defendants are equitably estopped from asserting that defense, having concealed their wrongdoing by withholding financial records. Lastly, they argue that Executive Order ("EO") Nos. 202.8 and 202.67 tolled their time to bring a claim.

In reply, counterclaim defendant argue that counterclaim plaintiffs fail to plead the elements of unilateral mistake. They also contend that the EOs merely suspended the statute of limitations through November 3, 2020, which does not change the counterclaim's untimeliness.

Counterclaim defendants fail to meet their burden to demonstrate that the counterclaim is time-barred. They contend that the three-year statute of limitations applies, because the declaratory judgment claim sounds in breach of fiduciary duty seeking damages. However, because the claim is premised on a reformation of contract based on unilateral mistake (*see Vigilant Ins. Co. of Am.*, 87 NY2d at 40-41 [explaining that "[c]ourts must look to the underlying claim . . . to determine the applicable period of limitation"]), the applicable statute of limitations is within "six years of the commission of the fraud, or within two years from the discovery of the fraud or from when the fraud could have been discovered with reasonable diligence." (*Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 180 [1st Dept 1998], citing CPLR 213 [8], 203 [g]; *see Rosenthal*, 283 AD2d at 157-158.) Here, the alleged fraud occurred in September 2014. (*See* NYSCEF 7, answer, ¶¶ 161-163; NYSCEF 22, Bravern Agreement.) Because the answer with counterclaims was filed on December 18, 2020, the claim is time-barred unless it benefits from the discovery rule. (*See Gutkin v Siegal*, 85 AD3d 687, 687 [1st Dept 2011].) Counterclaim plaintiffs allege that they first learned that the total equity cost for the property was $27,407,094, less than the $30 million they had believed it to be, in April 2019. (NYSCEF 76, O'Shea aff, ¶¶ 42, 43; NYSCEF 7, answer, ¶ 166.) Counterclaim defendants offer nothing to demonstrate that counterclaim plaintiffs were on inquiry notice of the alleged fraud more than two year before they asserted the counterclaim. As such, they fail to meet their burden. (*See New York City Sch. Constr. Auth*, 148 AD3d at 618; *see also Epiphany Community Nursery Sch. v Levey*, 171 AD3d 1, 7 [1st Dept 2019] [stating that, "[o]n a motion to

dismiss a fraud claim based on the two-year discovery rule, a defendant must make a prima facie case that a plaintiff was on inquiry notice of its fraud claims."].)

Moreover, the claim may benefit from the series of Executive Orders that "*tolled* time limit[s] for the commencement, filing, or service of any legal action" (*Matter of Oustatcher v Clark*, 198 AD3d 420, 421 [1st Dept 2021] [internal quotation marks and citation omitted] [emphasis added]) from March 20, 2020 through November 3, 2020 due to the COVID-19 pandemic. (*See Brash v Richards*, 195 AD3d 582, 583-584 [2d Dept 2021]; Executive Orders [Cuomo, A.] Nos. 202.8 [9 NYCRR 8.202.8], 202.67 [9 NYCRR 8.202.67], 202.72 [9 NYCRR 8.202.72]; *see also Foy v State of New York*, 71 Misc 3d 605, 607-608 [Ct Cl 2021] [internal quotations marks and citations omitted] [stating that Executive Ordered No. 202.8 "is clear in stating that any specific time limit for the commencement of any legal action is tolled," meaning that "the period of the toll is excluded from the calculation of the time in which the [claimant] can commence an action"].) However, at this time, the record is not sufficiently developed to resolve this issue.

Nonetheless, the counterclaims must be dismissed, because the allegations fail to state a claim for reformation of contract based on unilateral mistake induced by fraud. The pleading is devoid of any factual allegations to support counterclaim plaintiffs' contention that they were promised that their interest in the property would be proportionate to their investment. Indeed, as alleged, the sole basis for this belief, appears to be an *assumption* that, because the total equity cost for the property "was supposed to be $30 million," their ownership share of 3.33% was proportionate to their contribution of $1 million. (*See* NYSCEF 7, answer, ¶¶ 163, 164.) However,

counterclaim plaintiffs fail to allege what statements were made, by whom and when, to create their expectation and induce their reasonable reliance. (*See Gregor*, 120 AD3d at 447.)

The O'Shea affidavit fails to correct these deficiencies, alleging only that, during negotiations, "Mr. Ashkenazy informed Raymond Gindi that the Gindis' investment would be pari passu both with another investor (who had contributed $3 million for a 10% interest) and Mr. Ashkenazy himself" and that "[t]his *implied* a total of $30 million in equity toward the purchase of the property." (NYSCEF 76, O'Shea aff, ¶ 42 [emphasis added].) Again, absent are allegations of a promise that BB's ownership interest would be proportionate to its investment and counterclaim plaintiffs' reasonable reliance. At most, counterclaim plaintiffs allege that they were promised that ownership interest among several investors would be proportionate to their respective investments. As counterclaim plaintiffs fail to allege fraud with requisite particularity, they fail to state a claim for unilateral mistake. (*See Greater N.Y. Mut. Ins. Co.*, 36 AD3d at 443.) As the declaratory judgment claim is premised on the reformation of contract claim, the thirty-third counterclaim must be dismissed.

Therefore, the motion to dismiss is granted to the extent of dismissing the thirty-third counterclaim.

**(ii) Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Thirty-Fourth Counterclaim)**

The thirty-fourth counterclaim states that BABM breached its fiduciary duties "by misstating the total equity cost of Bravern and understating BB's ownership percentage" (NYSCEF 7, answer, ¶ 429) and that it "was aided and abetted by Mr. Ashkenazy and

AAC, and/or entities under their control, who knowingly participated" in the breach. (*Id.*, ¶ 430.)

Counterclaim defendants contend that there is no viable breach of fiduciary duty claim because the plain language of the Bravern Agreement undermines the allegations and because BABM's conduct was entirely consistent with the terms of that agreement. In addition, the parties raise nearly identical arguments as those raised in connection with the thirty-second counterclaim, regarding the impact of the agreement's exculpation clause and the sufficiency of the pleadings. They also dispute whether: (1) the thirty-fourth counterclaim is barred by the three-year statute of limitations; (2) counterclaim defendants are estopped from raising the statute of limitations; and (3) the counterclaim benefits from the EOs.

As with the thirty-third counterclaim, counterclaim defendants fail to demonstrate that the claim is time-barred. While they contend that the three-year statute of limitations applies, the applicable statute of limitations for a breach of fiduciary duty depends on the substantive relief sought. (*See Cusimano v Schnurr*, 137 AD3d 527, 529 [1st Dept 2016].) Where the claim is based on allegations of fraud, the applicable limitations period is six years (*id.*) and "[t]he discovery accrual rule also applies . . ." (*Kaufman v Cohen*, 307 AD2d 113, 122 [1st Dept 2003] [internal citations omitted].) As this counterclaim is premised on the same allegations as the thirty-third counterclaim, the same analysis applies. As with that counterclaim, counterclaim defendants fail to demonstrate that counterclaim plaintiffs were on inquiry notice of the alleged fraud more than two year before they asserted the counterclaim (*see New York City Sch. Constr. Auth*, 148 AD3d at 618; *see also Epiphany Community Nursery Sch*, 171 AD3d at 7)

and, as with that claim, it is impossible, at this time, to determine whether the counterclaim benefits from the EO Nos. 202.8, 202.67 and 202.72.

Nonetheless, the counterclaim fails to sufficiently allege breach of fiduciary duty. Here, the Bravern Agreement contains an "Exculpations and Indemnification" section that is identical to the one found in the Greene Street Agreement (NYSCEF 22, Bravern Agreement, § 14.) As with the Greene Street Agreement, the Bravern Agreement's exculpation provision necessarily applies to managing member. (*See supra* at 78; *see also* NYSCEF 22, Bravern Agreement § 1 [identifying "[BABM] [as] the Managing Member of the Company" in the section titled "Members"].) Because the provision limits liability to instances of "gross negligence, willful misconduct, [and] misappropriation or misuse of funds . . ." (*id.*, § 14 [a]), to state a claim for breach of fiduciary duty, the counterclaim must contain factual allegations of such conduct. (*See Arfa*, 21 Misc 3d 1101[A], 2008 NY Slip Op 51908[U], *3.) Here, the claim is devoid of any factual allegations of misconduct, willful or otherwise. Counterclaim plaintiffs merely allege that they expected the total equity cost to be $30 million, but that it turned out to be less. (*See* NYSCEF 7, answer, ¶¶ 164-166, NYSCEF 76, O'Shea aff, ¶¶ 42, 43.) This is insufficient to meet the specificity requirement of CPLR 3016 (b) or to allege misconduct sufficient to overcome the exculpatory clause. (*See Parker Waichman LLP*, 138 AD3d at 571; *see also Wietschner*, 139 AD3d at 462; *SNS Bank v Citibank*, 7 AD3d at 355.)

The breach of fiduciary duty counterclaim is also duplicative of the failed declaratory judgment/reformation of contract counterclaim. Both claims are premised on the allegation that that BB was not assigned its correct ownership interest based on its contribution to the purchase of Bravern (*see* NYSCEF 7, answer, ¶¶ 418-423,

428,429.) Both claims arise out of the Bravern Agreement, which sets out the parties' ownership interests. Therefore, the breach of fiduciary duty counterclaim is duplicative and cannot stand. (*See William Kaufman Org.*, 269 AD2d at 173; *see also Stefatos*, 95 AD3d at 787.)

Because the aiding and abetting portion of the counterclaim cannot survive without an underlying breach and because the allegations are conclusory, that portion of the counterclaim also fails. (*See Kagan*, 94 AD3d at 73; *Schroeder*, 133 AD3d at 26.)

Therefore, the motion to dismiss is granted to the extent of dismissing the thirty-fourth counterclaim.

**(d) 625 Madison Avenue**

**(i) Declaratory Judgment (Twenty-Fifth Counterclaim)**

The twenty-fifth counterclaim states that "625 Madison Blue LLC and [625MMMC] agreed to take ownership interests in 625 MAD Realty LLC in proportion to the amount of the purchase price of the property that they paid." (NYSCEF 7, answer, ¶ 357.) The alleged "total equity cost of 625 Madison Avenue . . . was supposed to be $50 million" (*id*, ¶ 358) and "625 Madison Blue LLC contributed $5 million for the purchase of the property, for which it received a 10% interest in 625 MAD Realty LLC." (*Id.*) Because "625 MAD Realty LLC paid only $30.1 million for the property, and only $30.1 million in initial contributions were made to 625 MAD Realty LLC" (*id.*, ¶ 359), 625 Madison Blue LLC seeks "a declaratory judgment that it is a 16.61% owner in 625 MAD Realty LLC or that it is owed a return of $1,993,010." (*Id.*, ¶ 363.)

Counterclaim defendants argue the claim should be dismissed, because the 625 MAD Agreement contains a merger clause and unambiguously states that 625 Madison

Blue LLC holds a 9.99% ownership interest. In addition, they argue the claim is time-barred under Delaware's three-year statute of limitations for declaratory judgment, because the 625 MAD Agreement was executed on November 5, 2013 and the answer with counterclaims was filed on December 18, 2020. Lastly, they argue that the claim is duplicative of the twenty-sixth counterclaim for breach of fiduciary duty, as both are premised on the alleged understating of 625 Madison Blue LL's ownership interest.

Counterclaim plaintiffs respond that the court should reform the 625 MAD Agreement based on unilateral mistake induced by Ashkenazy's fraudulent misrepresentations and that counterclaim defendants are equitably estopped from asserting the statute of limitations.

The 625 MAD Agreement provides that it "shall be governed by and construed under the laws of the State of Delaware." (NYSCEF 62, 625 MAD Agreement, § 27; *see Welsbach Elec. Corp.*, 7 NY3d at 629.) Under Delaware law, reformation based on mistake "must be applied narrowly so as to ensure to contracting parties that in only limited circumstances will the court look beyond the four corners of a negotiated contract. This is especially true . . . where the [agreement] is an integrated document." (*Interactive Corp. v Vivendi Universal, S.A.*, 2004 WL 1572932, *15, 2004 Del Ch LEXIS 90, *56 [Del Ch, June 30, 2004, No. Civ. A. 20260].) The claimant "must allege the parties reached a definite agreement that differed materially from the agreement they ultimately put into writing." (*Deluxe Entertainment Servs. Inc. v DLX Acquisition Corp.*, 2021 WL 1169905, *9, 2021 Del Ch LEXIS 58, *19 [Del Ch, Mar. 29, 2021, No. CV 2020-0618-MTZ], *affd sub nom. DSG Entertainment Servs. Inc. v DLX Acquisition Corp.*, 273 A3d 274 [Del 2022].) Where reformation is sought based on unilateral

mistake induced by fraud, the circumstance constituting the fraud must be pleaded with particularity. (*See* CPLR 3016 [b]; *see also Deluxe Entertainment Servs. Inc.*, 2021 WL 1169905, *10, 2021 Del Ch LEXIS 58, *19.)

Here, the counterclaim sufficiently pleads the existence of a definite agreement that differed materially from the executed writing. Counterclaim plaintiffs allege that the parties "agreed to take ownership interests in 625 MAD Realty LLC in proportion to the amount of the purchase price of the property that they paid" (NYSCEF 7, answer, ¶ 357), such that 625 Madison Blue LLC's $5 million contribution to the $50 million equity cost of 625 Madison Avenue, would yield a 10% interest in the company. (*Id.*, ¶ 358.) In addition, they allege that, because the total equity cost was only $30.1 million, 625 Madison Blue LLC's 10% ownership interest under the 625 MAD Agreement does not reflect the parties' intentions and requires a declaration reforming the contract. (*See id.*, ¶¶ 359-363.) O'Shea supplements these allegations, by: (1) stating that "the parties agreed that the Gindis would provide 10% of the equity cost of 625 Madison Avenue in exchange for a 10% interest in 625 MAD Realty LLC"; (2) supplying a November 2, 2013 email from Ashkenazy conveying this understanding; and (3) explaining how the Gindis only later discovered that the total equity cost for the property was significantly lower than what they were told. (*See* NYSCEF 76, O'Shea aff, ¶¶ 38-40; NYSCEF 100-102.) The allegations, as supplemented by the O'Shea affidavit, provide sufficient specificity as to the circumstance surrounding the alleged fraud that induced the mistake. (*See Valley Joist BD Holdings, LLC v EBSCO Indus., Inc.*, 269 A3d 984, 988 [Del 2021] [explaining that in pleading fraud, "the factual circumstances that must be stated with particularity refer to the time, place, and contents of the false

representations; the facts misrepresented; the identity of the person(s) making the misrepresentation; and what that person(s) gained from making the misrepresentation"].)

The 625 MAD Agreement's integration clause does not preclude the claim. Under Delaware Law,

> "[m]urky integration clauses, or standard integration clauses without explicit anti-reliance representations, will not relieve a party of its oral and extra-contractual fraudulent representations. To be effective, a contract must contain language that, when read together, can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract."

(*Prairie Capital III, L.P. v Double E Holding Corp.*, 132 A3d 35, 50-51 [Del Ch 2015] [internal quotation marks and citations omitted].)

Here, the agreement merely provides that it "constitutes the entire agreement of the parties with respect to the subject matter hereof" (NYSCEF 62, 625 MAD Agreement, § 26) and contains no anti-reliance language. As such, it is not a bar to counterclaim plaintiffs' fraud-based claim. (*See McDonald's Corp. v Easterbrook*, 2021 WL 351967, *2, 8, 2021 Del Ch. LEXIS 20, *7, 17 [Del Ch, Feb. 2, 2021, No. CV 2020-0658-JRS] [finding that a "general integration clause"—stating that the "[a]greement contain[ed] the full agreement between [parties] and completely supersedes any prior written or oral agreements or representations concerning the subject matter thereof"—"did not disclaim [the plaintiff's] reliance upon . . . extra-contractual assurances"].)

What is more, counterclaim defendants fail to demonstrate that the claim is time-barred. "Choice of law provisions typically apply to only substantive issues and statutes

of limitations are considered 'procedural.'" (*Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 416 [2010] [internal citation omitted].) "Unlike substantive law, matters of procedure are governed by the law of the forum state." (*Royal Park Invs. SA/NV*, 165 AD3d at 461 [internal quotation marks and citation omitted].) Because the 625 MAD Agreement's choice-of-law clause does not contain the "express intention . . . that Delaware's statute of limitations [is] to apply to this dispute, the choice of law provision cannot be read to encompass that limitations period." (*Portfolio Recovery Assoc., LLC*, 14 NY3d at 416.) Pursuant to CPLR 202, "where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply." (CPLR 202.) As 625 Madison Blue LLC is "limited liability company organized under the laws of the State of New York with its principal place of business in New York." (NYSCEF 7, answer, ¶ 22), New York's statute of limitations applies.

As previously explained, in determining the applicable limitations period for a declaratory judgment claim, courts look to the underlying claim. (*See Vigilant Ins. Co. of Am.*, 87 NY2d at 40-41; *see also Rosenthal*, 283 AD2d at 157-158.) Here, the underlying claim is reformation of contract due to unilateral mistake induced by fraud. Accordingly, the claim must be brought within six years of the commission of the fraud or within two years from when the fraud was or, with due diligence, could have been discovered. (*See Goldberg*, 242 AD2d at 180.) Here, the alleged fraud occurred on November 5, 2013, when the 625 Madison Agreement was executed. (NYSCEF 62, 625 Madison Agreement.) As such, it is time-barred, unless it benefits from the discovery rule. (*Gutkin*, 85 AD3d at 687.) Counterclaim defendants make no effort to demonstrate whether 625 Madison Blue LLC was on inquiry notice more than two years

before it filed its answer with counterclaims. Because they fail to meet their prima facie burden, they are not entitled to dismissal of the claim on statute of limitations grounds. (*See New York City Sch. Constr. Auth*, 148 AD3d at 618; *see also Epiphany Community Nursery Sch*, 171 AD3d at 7.)

For the foregoing reasons, to the extent the motion to dismiss seeks dismissal of the twenty-fifth counterclaim, the motion is denied.

**(ii) Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Twenty-Sixth Counterclaim)**

The twenty-sixth counterclaim states that 625MMMC, "[b]y virtue of its position as Managing Member . . . owes a fiduciary duty to 625 Madison Blue LLC (NYSCEF 7, answer, ¶ 365), which includes "assigning to each member of 625 MAD Realty LLC its correct obligation for the purchase price [for] 625 Madison Avenue and distributing to each its correct net distributable proceeds based on ownership percentage." (*Id.*, ¶ 366.) 625MMMC allegedly breached its fiduciary duty "by misstating the total equity cost of 625 Madison Avenue and understating 625 Madison Blue LLC's ownership percentage." (*Id.*, ¶ 367.) In addition, counterclaim plaintiffs allege that 625MMMC "was aided and abetted by Mr. Ashkenazy and AAC, and/or entities under their control, who knowingly participated in the misstatement of total equity cost and understatement of ownership percentage." (*Id.*, ¶ 368.)

The parties raise the same arguments for this counterclaim as they did for the twenty-fifth counterclaim. In addition, they dispute whether the claim is sufficiently pleaded and whether it is precluded by the 625 MAD Agreement's exculpation provision.

Delaware law applies to this counterclaim, which implicates corporate governance of 625 MAD JV LLC, a Delaware limited liability company. (*See* NYSCEF 62, 625 MAD Agreement at 1; *see also Lerner*, 119 AD3d at 128.)

Under Delaware law, "where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. . . . [A]ny fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous." (*Nemec v Shrader*, 991 A2d 1120, 1129 [Del 2010]; *Backer v Palisades Growth Capital II, L.P.*, 246 A3d 81, 109 [Del 2021] [internal quotation marks and citation omitted] [stating the general rule that "a plaintiff may not 'bootstrap' a breach of fiduciary duty claim into a breach of contract claim" and that "[c]ourts will dismiss the breach of fiduciary [duty] claim where the two claims overlap completely and arise from the same underlying conduct or nucleus of operative facts"].)

Here, the breach of fiduciary duty claim and the declaratory judgment/reformation of contract claim "arise from the same underlying conduct" (*Backer*, 246 A3d at 109), the alleged understatement of 625 Madison Blue LLC's ownership interest based on its equity contribution toward the purchase of 625 Madison Avenue. (*Compare* NYSCEF 7, answer, ¶ 366,367, *with id.*, ¶¶ 357-361.) The 625 Madison Agreement either correctly reflects the parties' intent as concerns their respective ownership interests in the company or it does not. That question can be fully addressed through the adjudication of the twenty-fifth counterclaim. Therefore, the breach of fiduciary duty counterclaim should be dismissed as duplicative. (*See Kagan*, 94 AD3d at 72 [applying Delaware law to dismiss breach of fiduciary duty claim as duplicative, where "the defendant managers' obligation to properly calculate and distribute monies owed to the plaintiff

[arose] out of the LLC agreements" and where the "contractual and fiduciary claims … ar[o]se from the same alleged facts and underlying conduct"]; *see also Nemec*, 991 A2d at 1129 [finding that, where "the fiduciary duty claim . . . [arose] from a dispute relating to the exercise of a *contractual* right," the claim was foreclosed].)

Without an underlying breach, the portion of the counterclaim for aiding and abetting the breach of fiduciary duty must likewise be dismissed. (*Renco Group, Inc. v MacAndrews AMG Holdings LLC*, 2015 WL 394011, *8, 2015 Del Ch LEXIS 25, *27 [Del Ch Jan. 29, 2015, No. CV 7668-VCN].)

Therefore, the motion to dismiss is granted to the extent of dismissing the twenty-sixth counterclaim.

**(e) One Stockton**

**(i) Declaratory Judgment (Thirty-Ninth Counterclaim)**

The thirty-ninth counterclaim states that counterclaim plaintiff "Isaac Raymond Associates LLC contributed $4,000,000 to the purchase of One Stockton through [SFIM] and [SFIM II]" (NYSCEF 7, answer, ¶ 464) and that its resulting combined 4.975% interest in One Stock Partners LLC "is consistent with the total equity cost [of] One Stockton, which was supposed to be $80,403,123." (*Id.*) However, counterclaim plaintiffs contend, "financial records show that only $57,505,122 was invested in One Stockton—$40,202,767 through [SFIM], but only $17,302,355 through [SFIM II]." (*Id.*, ¶ 465.) Counterclaim plaintiffs seek "a declaratory judgment that [Isaac Raymond Associates LLC] has a 11.56% interest in [SFIM II] and total 6.96% interest in One Stockton Partners LLC or is owed $1,139,120." (*Id.*, ¶ 470.)

Counterclaim defendants contend that the counterclaim should be dismissed, because Isaac Raymond Associates LLC's membership interest is unambiguously set out in the agreements, each of which contains and integrations clause, precluding extrinsic evidence. In addition, they argue that the claim is time-barred under Delaware's three-year statute of limitations, as the alleged wrongful conduct occurred when the San Fran II and One Stockton Agreements were executed in June 2016 and the answer with counterclaims was filed on December 18, 2020.

Counterclaim plaintiffs respond that parole evidence should be considered to modify or reform the contracts via declaratory judgment, because they allege that the agreements were executed under unilateral mistakes induced by Ashkenazy's fraudulent misrepresentations that the total equity toward the purchase price of One Stockton was higher than it really was. They also argue that counterclaim defendants are equitably estopped from asserting the statute of limitations.

Pursuant to their respective choice-of-law clauses, both the San Fran II Agreement and the One Stockton Agreement are to be governed by and construed under Delaware law. (NYSCEF 26, San Fran II Agreement, § 27; NYSCEF 27One Stockton Agreement, § 12.3.) However, neither of the agreements' choice-of-law clause contains the "express intention . . . that Delaware's statute of limitations [is] to apply to this dispute." (*Portfolio Recovery Assoc., LLC*, 14 NY3d at 416; *see Royal Park Invs. SA/NV*, 165 AD3d at 461; NYSCEF 26, San Fran II Agreement, § 27; NYSCEF 27, One Stockton Agreement, § 12.3.) In addition, "Isaac Raymond Associates LLC is a limited liability company organized under the laws of the State of

New York with its principal place of business in New York, New York." (NYSCEF 7, answer, ¶ 20.) Therefore, New York's statute of limitations applies. (*See* CPLR 202.)

Under New York's statute of limitations, the claim is timely. Because the underlying claim is reformation of contract due to unilateral mistake induced by fraud, the claim had to be brought within six years from commission of the fraud or within two years from discovery of the fraud. (*See Vigilant Ins. Co. of Am.*, 87 NY2d at 40-41; *see also Rosenthal*, 283 AD2d at 157-158; *Goldberg*, 242 AD2d at 180.) Here, the claim was asserted in 2020, less than six years after commission of the alleged fraud in 2016. Therefore, the counterclaim is timely.

Nor is the counterclaim barred by either agreement's integration clause. Neither the San Fran II Agreement's nor the One Stockton Agreement's integration clause (*see* NYSCEF 26, San Fran II Agreement, § 26; NYSCEF 27, One Stockton Agreement, §12.6) contains the explicit anti-reliance language necessary to "relieve a party of its oral and extra-contractual fraudulent representations." (*Prairie Capital III, L.P.*, 132 A3d at 50 [internal quotation marks and citation omitted]; *see McDonald's Corp.*, 2021 WL 351967 at *8, 2021 Del Ch. LEXIS 20 at *17.)

Nonetheless, the counterclaim must be dismissed. Even construing the allegations in a light most favorable to counterclaim plaintiffs, counterclaim plaintiffs fail to allege that "the parties reached a definite agreement that differed materially from the agreement they ultimately put into writing." (*Deluxe Entertainment Servs. Inc.*, 2021 WL 1169905 at *9, 2021 Del Ch LEXIS 58 at *19.) The sole allegation on this issue is about Isaac Raymond Associates LLC's *expectation* that its $4,000,000 contribution would yield an ownership interest in One Stock Partners LLC that was proportionate to the

total equity cost of One Stockton. Specifically, counterclaim plaintiffs allege that Isaac Raymond Associates LLC's ownership interest of 4.975% "is consistent with the total equity cost [of] One Stockton, which was supposed to be $80,403,123." (NYSCEF 7, answer, ¶¶ 181, 464.) There is no allegation that the parties reached an agreement. "While an alleged prior agreement may be informal, oral, and not constitutive of a complete contract, some form of specific prior agreement must be alleged." (*Interactive Corp.*, 2004 WL 1572932 at *16, 2004 Del Ch LEXIS 90 at *60 [dismissing unilateral mistake counterclaim, where the defendant failed to plead that a specific prior agreement existed].) This deficiency is not corrected in O'Shea's affidavit, which merely reiterates the same allegations. (*See* NYSCEF 76, O'Shea aff, ¶¶ 44-45.)

Moreover, the allegations fail to state the circumstance constituting the fraud with requisite particularity. (*See* CPLR 316 [b]; *Deluxe Entertainment Servs. Inc.*, 2021 WL 1169905, *10, 2021 Del Ch LEXIS 58, *19.) There are no allegations concerning what statements were made to induce reliance or when they were made. The sole allegation concerning counterclaim plaintiffs' basis for the belief that One Stockton was purchased for $80,403,123 is that "[a]n equity schedule created by Mr. Ashkenazy shows that $80,403,123 was paid for the purchase of One Stockton." (NYSCEF 7, answer, ¶¶ 182, 465.) However, counterclaim plaintiffs fail to supply details about when this schedule was created or how and when it was disclosed to them. As such, the circumstances of the fraud are not pleaded with the requisite particularity to state a claim for reformation of contract based on unilateral mistake induced by fraud. (*See Valley Joist BD Holdings, LLC v EBSCO Indus., Inc.*, 269 A3d at 988.)

Therefore, the motion to dismiss is granted to the extent of dismissing the thirty-ninth counterclaim.

**(ii) Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Fortieth Counterclaim)**

The fortieth counterclaim states that "[b]y virtue of its position as Managing Member of [SFIM II], Ben and Debra Family 2015 LLC owes a fiduciary duty to Isaac Raymond Associates LLC" (NYSCEF 7, answer, ¶ 472) and that, "[b]y virtue of its position as Managing Member of One Stock Partners LLC, [SFIM] owes a fiduciary duty to Isaac Raymond Associates LLC." (*Id.*, ¶ 473.) Those duties allegedly included "assigning to Isaac Raymond Associates LLC its correct obligation for the purchase price of One Stockton and distributing to Isaac Raymond Associates LLC its correct net distributable proceeds based on ownership percentage." (*Id.*, ¶ 474.) Ben and Debra Family 2015 LLC and SFIM allegedly "breached those duties by misstating the total equity cost of One Stockton and understating Isaac Raymond Associates LLC's ownership percentage in both [SFIM II] and One Stockton Partners LLC." (*Id.*, ¶ 475.) "Ashkenazy and AAC, and/or entities under their control" allegedly aided and abetted these breaches by "knowingly participat[ing] in the misstatement of total equity cost and understatement of ownership percentage." (*Id.*, ¶ 476.)

The parties repeat their arguments from the thirty-ninth counterclaim. In addition, the parties dispute whether the alleged breaches of fiduciary duty: (1) consist of any conduct beyond the explicit obligations imposed by the San Fran II Agreement and the One Stockton Agreement; (2) are precluded by the agreements' exculpation provisions; and (3) are pleaded with requisite particularity. Lastly, counterclaim defendants contend

that, without a viable underlying claim for breach of fiduciary duty, the aiding and abetting portion of the counterclaim also fails.

As this counterclaim involves agreements expressly governed by Delaware law (*see* NYSCEF 26, San Fran II Agreement, § 27; NYSCEF 27, One Stockton Agreement, § 12.3) and implicates issues of corporate governance of SFIM II and One Stock Partners LLC, both of which are Delaware limited liability companies (*see* NYSCEF 26, San Fran II Agreement; NYSCEF 27, One Stockton Agreement), Delaware law governs this counterclaim. (*See Lerner*, 119 AD3d at 128, *Welsbach Elec. Corp.*, 7 NY3d at 629.)

Here, the counterclaim must be dismissed. First, the breach of fiduciary duty counterclaim and the declaratory judgment/reformation of contract counterclaim are both premised on the alleged understatement of Isaac Raymond Associates LLC's ownership interest in SFIM II and One Stockton Partners LLC. (*See* NYSCEF 7, answer, ¶¶ 464-470, 474, 475.) Because the two claims "overlap completely and arise from the same underlying conduct" (*Backer*, 246 A3d at 109), the breach of fiduciary duty counterclaim is dismissed as duplicative. (*See Kagan*, 94 AD3d at 72; *see also Nemec*, 991 A2d at 1129.)

Second, counterclaim plaintiffs fail to allege non-exculpated conduct. The San Fran II Agreement limits liability of "Covered Persons" to "gross negligence or willful misconduct" (NYSCEF 26, San Fran II Agreement, § 19 [a].) The managing member is among the San Fran II Agreement's "Covered Persons," which includes "Members" and "any . . . agent of the Company." (*Id.*, § 19 [a].) As the managing member, Ben and Debra Family 2015 LLC is both. (*See id.*, § 5 [defining "Members"]; *id.*, § 10 (b) [stating

that "the Managing Member is an agent of the Company"].) Likewise, the One Stockton Agreement limits liability "of the Members (including the Managing Member)" to conduct constituting willful malfeasance, fraud or a felony and expressly eliminates or replaces fiduciary duties in certain circumstance. (*See* NYSCEF 27, One Stockton Agreement, § 6.3 [a]; [d].) Therefore, to sustain its breach of fiduciary duty claim, Isaac Raymond Associates LLC is required to plead, with particularity, non-exculpated conduct. (*See International Painters & Allied Trades Indus. Pension Fund v Cantor Fitzgerald, L.P.*, 41 Misc 3d 770, 777 [Sup Ct, NY County 2013], *affd sub nom. International Painters v Cantor Fitzgerald, L.P.*, 132 AD3d 470, 471 [1st Dept 2015] [applying Delaware law and dismissing breach of fiduciary duty claim that contained "no particularized pleading" of conduct that fell outside the exculpation clause]; *see also Aris Multi-Strategy Fund, L.P. v Accipiter Life Scis. Fund II (QP), L.P.*, 89 AD3d 454, 454-55 [1st Dept 2011] [applying Delaware law to find that "contractual clauses limited defendants' liability to losses caused by 'gross negligence, willful misconduct, or violation of applicable laws,' and thus served to exculpate defendants from breach of fiduciary duty claims that [did] not involve allegations of this misconduct"].) Here, as explained above, counterclaim plaintiffs fail to allege misconduct with requisite detail. Therefore, the counterclaim fails to state a claim for breach of fiduciary duty and must be dismissed.

For the foregoing reasons, the motion to dismiss is granted to the extent of dismissing the fortieth counterclaim.

**(f) 625 North Michigan**

**(i) Breach of Contract (Eleventh Counterclaim)**

In the eleventh counterclaim, counterclaim plaintiffs alleges that 625 NMA AAC Member LLC breached section 7.1 of the 625 NMA Agreement, by causing 625 North Michigan Avenue Holdings LLC to prepay the mortgage on 625 North Michigan without obtaining 625 Blue Member LLC's prior consent. (*See* NYSCEF 7, answer, ¶¶ 265-270.)

Counterclaim defendants contend that the plain language of section 7.1 requires consent for the prepayment of *new* financing and refinancing only and does not apply to the financing that was in place at the time the parties entered into the 625 NMA Agreement. They argue that the claim fails to state a breach of contract, because it does not allege that such new financing was prepaid. Moreover, they contend, the claim should be dismissed, because it fails to give notice of the claim to be proven, as it does not allege when the prepayment occurred, or which mortgage was prepaid.

Counterclaim plaintiffs respond that the agreement unambiguously requires 625 Blue Member LLC's consent for "any financing or refinancing with respect to all or any portion of the Property" and before "prepaying any such financing or refinancing." (NYSCEF 13, 625 NMA Agreement, § 7.1 [b] [iii].) In addition, they argue that the claim is sufficiently pleaded and that 625 NMA AAC Member LLC, as the managing member, is in possession of all details regarding the prepaid mortgage. They also supply additional details in O'Shea's affidavit.

The 625 NMA Agreement is governed by the laws of Delaware. (*See* NYSCEF 13, 625 NMA Agreement, § 14.14.) Under Delaware law, contract interpretation is a

question of law. (*AT&T Corp. v Lillis*, 953 A2d 241,251-252 [Del 2008].) "[W]hen interpreting a contract, the role of a court is to effectuate the parties' intent. In doing so, [the court is] constrained by a combination of the parties' words and the plain meaning of those words where no special meaning is intended." (*Id.* at 252 [internal quotation marks and citation omitted]; *see also Salamone v Gorman*, 106 A3d 354, 367-368 [Del 2014] [internal quotation marks and citation omitted] ["a contract's construction should be that which would be understood by an objective, reasonable third party"].) "When interpreting contracts, [the court should] construe them as a whole and give effect to every provision if it is reasonably possible." (*Norton v K-Sea Transportation Partners L.P.*, 67 A3d 354, 360 [Del 2013].) "When the language of a ... contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented." (*AT&T Corp.*, 953 A2d at 252 [internal quotation marks and citation omitted].)

Here, counterclaim defendant's proposed reading of the 625 NMA Agreement is contrary to its plain language. Section § 7.1 (b) (iii) requires the written approval of each member prior to

> "entering into any financing or refinancing with respect to all or any portion of the Property ( or any other Company asset) or all or any portion of the equity of any Subsidiary, whether by means of mortgage loans, so-called 'mezzanine' loans, unsecured loans or otherwise (including, but not limited to, executing or entering into any guaranties, promissory notes, bills of exchange or surety agreements), or terminating, modifying or restructuring the terms of, or prepaying any such financing or refinancing."

(NYSCEF 13, 625 NMA Agreement, § 7.1 [b] [iii].)

Counterclaim defendants argue that the phrase "entering into any financing or refinancing" refers only to new financing and does not refer to the financing that was already in place prior to the execution of the agreement. To find otherwise, they argue, would require 625 NMA AAC Member LLC to obtain consent for an event that had already occurred. They, then, argue that the word "such," in the phrase "prepaying any such financing or refinancing," necessarily refers to such new financing only and that any other reading renders the word meaningless. This reading is unpersuasive.

First, from its placement, the word "such" appears to be referencing the immediately preceding clause, which gives examples of the types of financing transactions that require prior written consent (i.e. "mortgage loans, so-called 'mezzanine' loans, unsecured loans or otherwise".) Second, there is no need to read into the section the word "new" to avoid the absurd result of requiring 625 NMA AAC Member LLC to secure members' consent to a mortgage that predated the 625 NMA Agreement. Section 7.1 (b) expressly excludes such preexisting debt from "Major Decisions" requiring consent. (*See* NYSCEF 13, 625 NMA Agreement., § 7.1 [b] [viii] [B] [requiring approval prior to "incurring any debt, other than debt that is not mortgage or mezzanine debt and is . . . (B) specifically provided for in this Agreement"]; *id.*, § 1 [defining "Refinancing Loans" to include a $56,000,000 mortgage loan made by CIT Bank June 23, 2015 and a "mezzanine loan made by [non-party] KREFT 625NMA, LLC . . . in the principal amount of $16,500,000"].) As this is the only interpretation that avoids absurdity and the insertion of new words, without rendering any words meaningless, the provision is unambiguous. (*See AT&T Corp.*, 953 A2d at 252.) Therefore, the plain language of the agreement requires the consent of members prior

to the prepayment of any mortgage, old or new, and the failure to do so constitutes a breach of contract.

In addition, counterclaim plaintiffs provide sufficient "notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved." (CPLR 3013.) Assuming, without deciding, that more detailed allegations are necessary, they are supplied in O'Shea's affidavit (*see Leon*, 84 NY2d at 88), which specifies that "NMA AAC Member LLC paid off the outstanding $16,547,149.99 on [the] mortgage, which came from [non-party] Kreft 625NMA Lender, LLC, on September 28, 2018." (NYSCEF 76, O'Shea aff, ¶ 34.)

For the foregoing reasons, to the extent the motion to dismiss seeks dismissal of the eleventh counterclaim, the motion is denied.

**(ii) Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Twelfth, Thirteenth and Fourteenth Counterclaims)**

The twelfth counterclaim states that 25 NMA AAC Member LLC breached its fiduciary duty to 625 Blue Member LLC "by prepaying the 625 North Michigan mortgage." (NYSCEF 7, answer, ¶ 273.) The thirteenth counterclaim states that 25 NMA AAC Member LLC breached its fiduciary duty "by allowing 625 North Michigan Avenue Holdings LLC to default on its loan from CIT Bank" (*id.*, ¶ 278) and that it did this "willfully, fraudulently, or due [to] its gross negligence." (*Id.*, ¶ 279.) The fourteenth counterclaim states that 25 NMA AAC Member LLC breached its fiduciary duty "by allocating to itself depreciation deductions that should have been allocated to 625 Blue Member LLC based on its 50.1% ownership of 625 North Michigan Avenue Holdings LLC." (*Id.*, ¶ 285) and that it was "aided and abetted by Mr. Ashkenazy and AAC,

and/or entities under their control, who knowingly participated in the diversion of [the] depreciation deductions." (*Id.*, ¶ 286.)

Counterclaim defendants contend that the twelfth counterclaim should be dismissed as duplicative of the eleventh counterclaim. Counterclaim plaintiffs respond that it is not duplicative, because it premised on the managing member's duty to act for the members' benefit. The parties also dispute whether all three of the counterclaims plead breach with requisite particularity and are precluded by 625 NMA Agreement's exculpation clause. Lastly, counterclaim defendants argue that the aiding and abetting portion of the fourteenth counterclaim fails without an underlying breach of fiduciary duty.

As these counterclaims involve an agreement expressly governed by Delaware law (*See* NYSCEF 13, 625 NMA Agreement, § 14.14) and implicates issues of corporate governance of 625 North Michigan Avenue Holdings LLC, a Delaware limited liability company (*see id.*), Delaware law governs these counterclaims. (*See Lerner*, 119 AD3d at 128.)

The twelfth counterclaim for breach of fiduciary duty is duplicative of the breach of contract counterclaim, because "the two claims overlap completely and arise from the same underlying conduct or nucleus of operative facts." (*Backer*, 246 A3d at 109 [internal quotation marks and citation omitted]; *see Kagan*, 94 AD3d at 72.)

Neither the thirteenth nor the fourteenth counterclaims state a claim for breach of fiduciary duty. The 625 NMA Agreement exculpates "any Member" from liability for "any act or omission performed or omitted in good faith," except for instance of "willful misconduct, gross negligence or willful breach of the express terms of this Agreement

by a Member." (NYSCEF 13, 625 NMA Agreement, § 11.2.) The plain meaning of "Member" necessarily encompasses "Managing Member" and "Non-Managing Members" alike. (*See id.*, § 1.1 [defining: "Managing Member" as "the BA Member"; "Member" as "the C21 Member and the BA Member, or any other Person admitted as a member of the Company"; and "Non-Managing Members" as "each Member other than the then Managing Member"]; *see also Salamone*, 106 A3d at 367-368; *Coventry Real Estate Advisors, L.L.C. v Developers Diversified Realty Corp.*, 84 AD3d 583, 584 [1st Dept 2011] [internal quotation marks and citation omitted] [stating that "under Delaware law, fiduciary duties are imposed "*only* on managers and those designated as controlling members of an LLC"].) In light of this exculpation clause, to state a claim for breach of fiduciary duty against 25 NMA AAC Member LLC, counterclaim plaintiffs must plead, with particularity, non-exculpated conduct. *(See International Painters & Allied Trades Indus. Pension Fund*, 41 Misc 3d at 777; *see also Aris Multi-Strategy Fund, L.P.*, 89 AD3d at 454-55.)

Here, the thirteenth counterclaim contains a single factual allegation, that 625 NMA AAC Member LLC "allowed 625 North Michigan Avenue Holdings LLC to default on a loan of more than $50,000,000 from CIT Bank." (NYSCEF 7, answer, ¶ 105; *see id.*, ¶ 278 [same].) There are no allegations concerning the circumstance of the default. Indeed, in this affidavit, O'Shea admits that "[t]he Gindis do not know what caused the non-monetary default." (NYSCEF 76, O'Shea aff, ¶ 36.) Counterclaim plaintiffs' claim, that their inability to provide detail is "because Ashkenazy has refused to provide that information" (*id.*), does not salvage the claim. Even when the defendant has exclusive knowledge of the facts, to meet CPLR 3016 (b), the plaintiff must at least plead "facts

[that] are sufficient to permit a reasonable inference of the alleged conduct." (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008].) As the counterclaim contains only a conclusory allegation that "625 NMA AAC Member LLC allowed the default to occur willfully, fraudulently, or due its gross negligence" (NYSCEF 7, answer, ¶ 105; *id.*, ¶ 279 [same]), it fails to state a claim for breach of fiduciary duty. (*See International Painters & Allied Trades Indus. Pension Fund*, 41 Misc 3d at 777]; *see also Fisk Ventures, LLC v Segal*, 2008 WL 1961156, *11, 2008 Del Ch LEXIS 158, *42 [Del Ch May 7, 2008, CIV.A. 3017-CC], *affd* 984 A2d 124 [Del 2009] [dismissing breach of fiduciary duty counterclaim, where, among other things, the defendant "failed to allege facts sufficient to support [the] claim," explaining that "the hollow invocation of 'bad faith' does not magically render a deficient complaint dismissal-proof"].)

The fourteenth counterclaim is similarly deficient. Counterclaim plaintiffs simply allege that "Mr. Ashkenazy, AAC, and their affiliates caused 625 NMA AAC Member LLC to allocate depreciation to itself that should have been allocated to 625 Blue Member LLC based on its 50.1% ownership of 625 North Michigan Avenue Holdings LLC." (NYSCEF 7, answer, ¶¶ 107, 285.) There are no factual details pleaded, nothing to indicate when this allegedly occurred or the amounts allegedly misapplied. The O'Shea affidavit fails to correct this deficiency. (*See* NYSCEF 76, O'Shea aff, ¶16.) Therefore, the fourteenth counterclaim fails to sufficiently plead a breach of fiduciary duty. (*See International Painters & Allied Trades Indus. Pension Fund*, 41 Misc 3d at 777]; *see also Fisk Ventures, LLC*, 2008 WL 1961156 at *11, 2008 Del Ch LEXIS 158 at*42.)

Without an underlying breach, the portion of the fourteenth counterclaim for aiding and abetting breach of fiduciary duty must likewise be dismissed. (*See Renco Group, Inc.*, 2015 WL 394011 at *8, 2015 Del Ch LEXIS 25 at *27.)

For the foregoing reasons, the motion to dismiss is granted to the extent of dismissing the twelfth, thirteenth, and fourteenth counterclaims.

**(g) CVS Flatbush Avenue**

**(i) Declaratory Judgment (Twenty-Seventh Counterclaim)**

Counterclaim twenty-seven, states that, pursuant to the "CVS Flatbush Agreement, [G-CVS] is entitled to all distributions from [ACC Flatbush] until the former has received back its $575,000 equity investment." (NYSCEF 7, answer, ¶ 374.) Counterclaim plaintiffs allege that, "[t]o date, G-CVS has received only $188,500 in distributions" (*id.*, ¶ 375) and that Ashkenazy "refuse[s] to confirm that [it] is entitled to the next $386,500 of net distributable proceeds." (*Id.*, ¶ 376.) G-CVS seeks a declaration that "it is entitled to the next $386,500 of net distributable proceeds from [ACC Flatbush]." (*Id.*, ¶ 378.)

Counterclaim defendants contend that the counterclaim should be dismissed because G-CVS seeks an improper advisory opinion. They contend that the counterclaim depends on the existence of net distributable proceeds, which is a future event beyond the control of the parties. Counterclaim plaintiffs insist that Ashkenazy's refusal to confirm that G-CVS is entitled to the next $386,500 of net distributable proceeds has created a justiciable controversy.

Here, it is not alleged that there are any net distributable proceeds that are in dispute. Whether AAC Flatbush generates net distributable proceeds in the future is an

event that is beyond the control of the parties and its likelihood is uncertain. Nor do counterclaim plaintiffs point to any immediate effect the sought declaration would have on the parties conduct. Therefore, counterclaim plaintiffs fail to allege the existence of a justiciable controversy and the motion to dismiss is granted to the extent of dismissing the twenty-seventh counterclaim. (*See contra Buller*, 40 AD3d at 333-334 [finding declaratory judgment regarding the validity of an option to purchase the shares to cooperative apartments, where the option was triggered by "potentially distant events beyond the parties' control," was not premature, because a declaration of the parties rights would have "a direct and present impact upon appellants' ability to dispose of their shares "]; *Realtime Data, LLC v Melone*, 104 AD3d 748, 751-752 [2d Dept 2013] [reversing dismissal of declaratory judgment claim that dealt with the parties' rights to distributions from a sale of assets, as the future event was within the control of one of the parties and likely].)

**(ii) Breach of Contract (Twenty-Eighth Counterclaim)**

In the twenty-eighth counterclaim, counterclaim plaintiffs allege that Ashkenazy breached section 5.03 of the CVS Flatbush Agreement, which permits management fees to be paid to a third-party manager once CVS is not the tenant of the property, because G-CVS has not received notice of the appointment of any third-party manager and AAC Flatbush paid $16,000 in management fees in 2018. (*See* NYSCEF 7, answer, ¶¶ 380-384; NYSCEF 19, CVS Flatbush Agreement, § 5.03.)

Counterclaim defendants contend that CVS has not been the tenant since 2018, and, as such, Ashkenazy was expressly permitted to pay management fees to a third-

party manager. In their opposition, counterclaim plaintiffs accept this position. (*See* NYSCEF 75, counterclaim plaintiffs' opposition brief at 35 n 9.)

Accordingly, the motion to dismiss is granted to the extent of dismissing the twenty-eighth counterclaim.

**(h) Upper Darby**

**(i) Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Thirty-Fifth Counterclaim)**

The thirty-fifth counterclaim states that: "as Managing Member of [the Partnership], [GP] owes a fiduciary duty to [G III]" (NYSCEF 7, answer, ¶ 433); it "breached that duty by defaulting on the Upper Darby Note, causing [the Partnership] to owe more than $1.5 million (and counting) on the loan" (*id.*, ¶ 435); and it did so as "willfully, fraudulently or due [to] its gross negligence." (*Id.*, ¶ 436.) In addition, GP was allegedly "aided and abetted by Mr. Ashkenazy and AAC, and/or entities under their control, who knowingly participated in causing [the Partnership's] failure to make timely loan payments." (*Id.*, ¶ 437.)

The parties dispute whether this counterclaim pleads breach of fiduciary duty with sufficient particularity and whether it alleges conduct outside the Upper Darby Agreement's exculpation clause. In addition, counterclaim defendants contend that the counterclaim accrued upon the Partnership's default on the Upper Darby Note on June 1, 2015, and is, thus, time-barred under Pennsylvania's two-year statute of limitations. Counterclaim plaintiffs respond that the claim is timely under the continuous-wrong doctrine, because of the Partnership's continuing default on the Upper Darby Note. Lastly, counterclaim defendants argue that, because the breach of fiduciary duty portion of the counterclaim fails, so does the aiding and abetting portion.

The Upper Darby Agreement's choice-of-law clause provides that the agreement is governed by Pennsylvania law. (NYSCEF 23, Upper Darby Agreement, § 11.03; *see Welsbach Elec. Corp.*, 7 NY3d at 629.) In addition, the Partnership is a Pennsylvania limited partnership. (*See* NYSCEF 23, Upper Darby Agreement .) "Subject to the constitution of this state, the laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners." (Partnership Law § 121-901.) Therefore, Pennsylvania's law applies to the breach of fiduciary duty claims. However, because the choice-of-law clause does not contain explicit language requiring the application of Pennsylvania's statute of limitations and because G III "is a limited partnership organized under the laws of the State of New York with its principal place of business in New York, New York" (NYSCEF 7, answer, ¶ 26), New York's statute of limitations applies to G III's counterclaims. (*See Portfolio Recovery Assoc., LLC*, 14 NY3d at 416; *see Royal Park Invs. SA/NV*, 165 AD3d at 461; *see* CPLR 202.)

"New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks." (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009] [internal citation omitted].) Where, as here, "the remedy sought is purely monetary in nature," the three-year limitations period of CPLR 214 (4) applies. (*Id.*) The claim accrues "when all elements of the tort can be truthfully alleged in a complaint," i.e. when "damages are sustained." (*Id.* at 140 [internal quotation marks and citations omitted].)

Here, the counterclaim accrued at the time of the default on June 1, 2015. (*See* NYSCEF 7, answer, ¶ 172.) As the answer with counterclaims was filed more than three years later, the counterclaim is time-barred. (*See IDT Corp.*, 12 NY3d at 140-141.)

The continuing wrong doctrine does not save the claim. The doctrine is concerned only with "a series of independent, distinct wrongs" and is inapplicable to "a single wrong that has continuing effects." (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017].) Here, the alleged wrongful act was the default and "no breach of a recurring duty" is alleged. (*Id.* at 602.) That the Partnership continues to incur default interest is merely the continuing effect of the original wrong. Therefore, the doctrine has not application here.

Having determined that the claim is time-barred, the court need not address the parties' remaining contentions.[13]

The motion to dismiss is granted to the extent of dismissing the thirty-fifth counterclaim.

**(ii) Breach of Contract (Thirty-Sixth Counterclaim)**

The thirty-sixth counterclaim states that, "[p]ursuant to Section 2.07 of the Upper Darby Agreement, the Partnership was obligated to pay off the Upper Darby Note in full before making any distributions to partners" (NYSCEF 7, answer, ¶ 442) and that GP

[13] Notably, counterclaim plaintiffs point to a waiver in the Upper Darby Note , which states that, "[i]n any action, suit or proceeding arising out of or relating to this Note, [the Partnership] hereby waives the right to interpose any defense, set-off or counterclaim of any kind or nature whatsoever." (NYSCEF 23, Upper Darby Note, ¶ 12.) As the waiver was made by the Partnership, it is unclear what possible application it has to GP's ability to raise affirmative defenses or counterclaims.

breached this provision by "caus[ing] [the Partnership] to distribute $3,887,930 to [GP], even though the Upper Darby Note still has not been paid off." (*Id.*, ¶ 443.)

Counterclaim defendants contend that the claim should be dismissed, because section 2.07 prohibits distributions of proceeds from a sale or a refinancing only and the counterclaim fails to allege that the distribution at issue involved proceeds of a sale or a refinancing. Counterclaim plaintiffs respond that the motion should be denied, because counterclaim defendants do not explain the source of such a substantial sum or otherwise demonstrate that the distribution was not in breach of section 2.07.

Here, the plain language of section 2.07 requires "the proceeds of a sale of the Property owned by the Operating Partnership or a refinancing of any mortgage indebtedness on the Property [to] be applied to the GC Loan before any distributions of such proceeds are made to the Partners." (NYSCEF 24, Upper Darby Agreement, § 2.07.) The counterclaim plaintiff allege that there has been a distribution while the loan remains outstanding. (NYSCEF 7, answer, ¶ 443.) But they do not allege that the proceeds came from the sale or the refinancing of Upper Darby. As such, they do not allege that section 2.07 has been breached. The O'Shea affidavit fails to correct this deficiency. As the counterclaim fails to allege the breach of any particular contractual provision, it fails to state a claim. (*See McShea v City of Phila.*, 606 Pa 88, 97 [2010] [dismissing breach of contract claim where "none of the necessary elements of a contract," including its breach, were alleged].)

Therefore, the motion to dismiss is granted to the extent of dismissing the thirty-sixth counterclaim.

**(iii) Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Thirty-Seventh Counterclaim)**

The thirty-seventh counterclaim states that "[b]y virtue of its position as Managing Member of [the Partnership], [GP] owes a fiduciary duty to [G III]," which "include[s] making correct distributions to its members," and that it breached this duty when it "caus[ed] the Partnership] to distribute $3,887,930 to [GP], even though the Upper Darby Note still has not been paid off." (NYSCEF 7, answer, ¶¶ 446-448.) In addition, counterclaim plaintiffs allege that "Mr. Ashkenazy and AAC, and/or entities under their control . . . knowingly participated" in the breach. (*Id.*, ¶ 449.)

The parties dispute whether the counterclaim: pleads breach of fiduciary duty with sufficient particularity; alleges conduct outside the Upper Darby Agreement's exculpation clause; and is duplicative of the breach of contract counterclaim.

Under Pennsylvania law,

> "[t]he gist of the action doctrine acts to foreclose tort claims: 1) arising solely from the contractual relationship between the parties; 2) when the alleged duties breached were grounded in the contract itself; 3) where any liability stems from the contract; and 4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim. The critical conceptual distinction between a breach of contract claim and a tort claim is that the former arises out of breaches of duties imposed by mutual consensus agreements between particular individuals, while the latter arises out of breaches of duties imposed by law as a matter of social policy."

(*Reardon v Allegheny Coll.*, 926 A2d 477, 486-487 [Pa Super Ct 2007] [internal quotation marks and citations omitted]; *see Mirizio v Joseph*, 4 A3d 1073, 1079-1080 [Pa Super Ct 2010].)

Here, the alleged breach, i.e., the making of a distribution while the Upper Darby Note remained outstanding, is grounded on the section 2.07 and the claim duplicates the breach of contract claim. (*Sompare* NYSCEF 7, answer, ¶¶ 442-444, *with id.*, ¶ 447-450.) As such, the gist of the action doctrine bars the breach of fiduciary duty claim. (*See Mahoney Realty Group, Inc. v Lamm*, 2014 WL 10987207, *10, 2014 Pa Super Unpub LEXIS 4706, *29 [Pa Super Ct, Jan. 28, 2014, No. 499 EDA 2013] [dismissing breach of fiduciary duty claim where the duties underlying the claim were defined in the parties' agreement].)

Without the underlying breach of fiduciary duty, the aiding and abetting portion of the counterclaim also fails. (*See Potok v Rebh*, 2017 WL 1372754, *4, 2017 Pa Super Unpub LEXIS 1376, *9 [Pa Super Ct, Apr. 13, 2017, No. 444 EDA 2015] [setting forth the element of an aiding and abetting claim, which include "breach of a fiduciary duty owed to another"]; *see also Kovalev v Stepansky*, 2019 WL5858070, *1, 2019 Pa Super Unpub LEXIS 4209, *2 (Pa Super Ct, Nov. 8, 2019, No. 3220 EDA 2018] [stating that the aiding and abetting claims could not survive if the primary tort claim failed].)

Therefore, the motion to dismiss is granted to the extent of dismissing the thirty-seventh counterclaim.

**(iv) Declaratory Judgment (Thirty-Eighth Counterclaim)**

The thirty-eighth counterclaim states that "[a]n equity schedule created by Mr. Ashkenazy credits his entity, Ben and Debra Family 2015 LLC, with a $4 million contribution to [the Partnership] in 2005." (NYSCEF 7, answer, ¶ 454.) Counterclaim plaintiffs allege that the $4 million was a loan from "[G III] and another member" (*id.*, ¶

455) and seek a declaration that "Ben and Debra Family 2015 LLC did not make a $4 million capital contribution to [the Partnership] in 2006." (*Id.*, ¶ 459.)

The parties dispute whether the claim is time-barred. Counterclaim defendants contend that the alleged wrongful conduct occurred in 2015, which is outside the four-year statute of limitations under Pennsylvania law. Counterclaim plaintiffs allege that the claim in not time-barred, because they only learned that Ashkenazy had falsely credited his entity with the $4,000,000 contribution when he sent them the equity schedule on June 7, 2019.

As previously explained, New York's statute of limitations applies to this counterclaim. The applicable statute of limitations for a declaratory judgment is determined by the gravamen of the claim and the nature of the relief sought. (*See Vigilant Ins. Co. of Am.*, 87 NY2d at 40-41; *see also Rosenthal*, 283 AD2d at 157-158.) If it does not appear that "a declaratory judgment action could have been commenced by an alternative proceeding for which a specific limitation period is statutorily provided," then the "six-year catchall provision" of CPLR 213 (1) applies. (*Gress v Brown*, 20 NY3d 957, 959 [2012] [internal quotation marks and citation omitted].)

Here, counterclaim defendants fail to demonstrate that the claim is time-barred. The counterclaim accrued when Ashkenazy allegedly created an equity schedule that incorrectly "credits [GP] with a $4 million contribution in 2005." (NYSCEF 7, answer, ¶¶ 174, 454.) There are no allegations to indicate when Ashkenazy created this equity schedule and counterclaim defendants point to nothing in support of their contention that the claim accrued in 2015. Moreover, in his affidavit, O'Shea clarifies that "Ashkenazy sent that equity schedule to the Gindis in an email on June 7, 2019" and

attaches the email and equity schedule. (NYSCEF 76, O'Shea aff, ¶ 37; NYSCEF 98, June 7, 2019 email; NYSCEF 99, Upper Darby Equity Schedule.) The equity schedule is dated April 30, 2019. (NYSCEF 99.) In any event, whether the claim accrued in 2015 or 2019, the answer with counterclaim was filed in 2020, within the six-year catchall provision. (*See* CPLR 231 [1].) Therefore, the counterclaim is timely and the motion to dismiss is denied as to the thirty-eighth counterclaim.

**(i) Cross Bronx Plaza**

**(i) Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Twenty-Second Counterclaim)**

The twenty-second counterclaim states that CBMM breached its fiduciary duty as the managing member of Cross Bronx Plaza LLC "by allocating to itself depreciation deductions that should have been allocated to GCBP" (NYSCEF 7, answer, ¶ 339) and that it was "aided and abetted by Mr. Ashkenazy and AAC, and/or entities under their control." (*Id.*, ¶ 340.)

The parties dispute whether the counterclaim should be dismissed for failure to plead the claim with requisite specificity and for failure to allege conduct that is outside the Cross Bronx Plaza Agreement's exculpation clause.

Here, while the breach of fiduciary duty counterclaim lacks requisite particularity, O'Shea's affidavit provides the specific amounts that counterclaim defendants allegedly misallocated in years 2007 through 2018. (*See* NYSCEF 76, O'Shea aff, ¶¶ 11,13.) Counterclaim plaintiffs, therefore, remedy the defect of their original pleading. (*See Leon*, 84 NY2d at 88.)

Nor does the Cross Bronx Plaza Agreement's exculpation clause require dismissal of the breach of fiduciary duty counterclaim. The clause provides that the

managing member is not liable "for any act or omission . . . on behalf of the Company, provided that the act or omission is not determined by a court to be due to [its] willful misconduct or recklessness or material breach of this Agreement." (NYSCEF 18, Cross Bronx Plaza Agreement, § 9.01.) Here, the alleged misconduct is the "diversion of depreciation deductions from [GCBP] to [CBMM]." (NYSCEF 7, answer, ¶ 340.) The deductions allegedly ranged from tens of thousands to hundreds of thousands of dollars and the misallocation/diversion of deductions kept occurring for over a decade. (*See* NYSCEF 76, O'Shea aff, ¶ 13.) Accepting these allegations as true and affording counterclaim plaintiffs the benefit of every favorable inference (*TIAA Global Invs., LLC*, 127 AD3d at 91), counterclaim plaintiffs sufficiently allege facts that allow an inference of willful or reckless conduct.

However, the aiding and abetting portion of the counterclaim fails to satisfy CPLR 3016 (b.) It consists entirely of conclusory allegations. (*See* NYSCEF 7, answer, ¶¶ 139, 340.) Consequently, the aiding and abetting portion of the counterclaim must be dismissed. (*See Schroeder*,133 AD3d at 26.)

Therefore, the motion to dismiss is granted to the extent of dismissing the aiding and abetting portion of the twenty-second counterclaim.

**(ii) Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Twenty-Fourth Counterclaim)**

The twenty-fourth counterclaim states that CBMM breached its fiduciary duty "by improperly reducing net distributable proceeds by paying a $1.8 million loan for which Mr. Ashkenazy was personally liable under Exhibit A to the Cross Bronx Plaza Agreement" (NYSCEF 7, answer, ¶ 351) and that it was "aided and abetted by Mr. Ashkenazy and AAC, and/or entities under their control." (*Id.*, ¶ 352.)

Counterclaim defendants contend that the twenty-fourth counterclaim should be dismissed for failure to plead with the claim particularity and because it is duplicative of the twenty-third counterclaim for breach of contract. In addition, they argue that the aiding and abetting portion of the counterclaim should be dismissed once the underlying claim is dismissed. Counterclaim plaintiffs concede that "[c]ounterclaim twenty-four concerning Cross Bronx Plaza is adequately covered by counterclaim twenty-three." (NYSCEF 75, counterclaim plaintiffs' opposition brief at 40 n 10.)

Here, the breach of fiduciary duty and the breach of contract counterclaim (*compare* NYSCEF 7, answer, ¶¶ 342-347, *with id.*, ¶¶ 348-353) are "premised upon the same facts and seek identical damages." (*Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600 [1st Dept 2014] [affirming dismissal of the breach of fiduciary duty claim as duplicative of the breach of contract claim].) Therefore, the breach of fiduciary duty counterclaim is dismissed. Having dismissed the claim for breach of fiduciary duty, the aiding and abetting portion of the claim is likewise dismissed. (*Kagan*, 94 AD3d at 73.)

Accordingly, the motion to dismiss is granted to the extent of dismissing the twenty-fourth counterclaim.

**(j) The Bevcon Property**

**(i) Breach Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Fifteenth Counterclaim)**

The fifteenth counterclaim states that, "[b]y virtue of its position as Administrative Owner of the Bevcon Property, DK Connections LLC owes a fiduciary duty to Bevcon Blue Fee LLC" (NYSCEF 7, answer, ¶ 289) and that it "breached that duty by allocating to itself depreciation deductions that should have been allocated to Bevcon Blue Fee LLC." (*Id.*, ¶ 291.) In addition, counterclaim plaintiffs allege that "DK Connections LLC

was aided and abetted by Mr. Ashkenazy and AAC, and/or entities under their control, who knowingly participated in the diversion of [the] depreciation deductions." (*Id.*, ¶ 292.)

The parties dispute whether the counterclaim should be dismissed for failure to plead breach of fiduciary duty with requisite particularity.

Notably, the Bevcon Agreement's choice-of-law clause relates only to construction and enforcement of the agreement itself. (NYSCEF 14, Bevcon Agreement, § 11.9.) The breach of the fiduciary duty counterclaim falls outside the Bevcon Agreement and therefore is subject to the traditional choice-of-law analysis. (*See Twinlab Corp. v Paulson*, 283 AD2d 570, 571 [2d Dept 2001] [finding that a choice-of-law clause, governing an agreement's "validity, interpretation, construction and performance," did not apply to the plaintiff's tort claim, which was unrelated to the defendant's duties under the contract]; *see also Gutstadt v National Fin. Partners Corp.*, 2013 NY Slip Op 32733[U] [Sup Ct, NY County 2013] [finding that "claims for breach of fiduciary duty, fraud, conversion, and unjust enrichment[,] . . . relating to the obligations of directors and controlling shareholders to minority shareholders," fell outside the scope of the choice-of-law clause, requiring that "application of New York law only to the governance and construction of the agreement"].)

Three possible jurisdictions are involved, as the tenancy-in-common involves real property in California (*see* NYSCEF 7, answer, ¶ 108) and both owners are Delaware limited liability companies (*see* NYSCEF 14, Bevcon Agreement, §1.1; NYSCEF 7, answer, ¶ 17), one of which, counterclaim plaintiff Bevcon Blue Fee LLC, has its "principal place of business in New York, New York." (NYSCEF 7, answer, ¶ 17.)

Fortunately, the court need not determined "the jurisdiction with the greatest interest in the litigation," as the outcome is the same regardless of which jurisdiction's law is applied. (*See Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 200, 201-202 [1st Dept 2013] [explaining that no choice of law analysis is required unless the court first determines there is an actual conflict of law].) The substantive law of all three jurisdiction holds that an essential element of the claim is that the defendant breached its fiduciary duty (*see Burry* 84 AD3d at 699-700; *Beard Research, Inc. v Kates*, 8 A3d 573, 601 [Del Ch 2010], *affd sub nom. ASDI, Inc. v Beard Research, Inc.*, 11 A3d 749 [Del 2010]; *Oasis W. Realty, LLC v Goldman*, 51 Cal 4th 811, 820 [Cal 2011]) and CPLR 3016 (b) requires "the circumstances constituting the wrong [to be] be stated in detail."

Here, the allegations—which do not indicate when this alleged breach of duty occurred or the amounts allegedly misapplied—are insufficient to state a claim for breach of fiduciary duty. (*See Giuliano,* 122 AD3d at 478; *see also Berardi v Berardi*, 108 AD3d 406, 406 [1st Dept 2013] [dismissing breach of fiduciary duty claim where "allegations [were] vague and conclusory, made without any specific instances of the alleged misconduct"].)

Without an underlying breach of fiduciary duty, the aiding and abetting portion of the counterclaim also fails. (*See Kagan*, 94 AD3d at 73; *see Renco Group, Inc.*, 2015 WL 394011 at *8, 2015 Del Ch LEXIS 25 at *27; *Nasrawi v Buck Consultants LLC*, 231 Cal App 4th 328, 343 [Cal Ct App 2014] [internal quotation marks and citation omitted] [stating that the sufficiency of an aiding and abetting breach of fiduciary duty claim, requires that plaintiff "first identify precisely the breach of fiduciary duty"].)

Therefore, the motion to dismiss is granted to the extent of dismissing the fifteenth counterclaim.

**(k) Horace Plaza**

**(i) Breach of Fiduciary Duty (Sixteenth Counterclaim)**

The sixteenth counterclaim states that HPMM breached its fiduciary duty as the managing member of Horace Plaza LLC by "by defaulting on the Horace Plaza Note, causing Horace Plaza LLC to owe more than $8 million (and counting) on the loan" and that it did so "willfully, fraudulently, or due [to] its gross negligence." (NYSCEF 7, answer, ¶¶ 295-298.)

The parties dispute whether the counterclaim should be dismissed for failure to plead the claim with requisite specificity and for failure to allege conduct that is outside the Horace Plaza Agreement's exculpation clause. In addition, counterclaim defendants argue that the claim is time-barred, as it was brought more than three years after the default, which occurred in October 2015. Counterclaim plaintiffs respond that the claim is not time-barred under the continuous wrong doctrine, because Horace Plaza LLC continues to be in default and is incurring default interest.

Here, the pleading is devoid of any factual allegation to support the counterclaim's conclusory allegation that the default was "willful[], fraudulent[], or due [to HPMM's] gross negligence." (NYSCEF 7, answer, ¶¶ 118, 298.) The O'Shea affidavit does not correct this deficiency. Because the allegations are insufficient to meet the specificity requirement of CPLR 3016 (b) or to allege conduct outside the exculpatory clause (*see* NYSCEF 15, Horace Plaza Agreement, § 9.01 [providing that the managing member shall not be "liable . . . for any act or omission . . . provided that the act or

omission is not determined by a court to be due to such Indemnified Party's willful misconduct or recklessness or material breach of this Agreement"]), the counterclaim fails to state a claim for breach of fiduciary duty. (*See Parker Waichman LLP*, 138 AD3d at 571; *Wietschner*, 139 AD3d at 462; *SNS Bank*, 7 AD3d at 355.)

In addition, the counterclaim is time-barred. The claim accrued at the time of the default on October 11, 2015. (NYSCEF 7, answer, ¶ 116; *see IDT Corp.*, 12 NY3d at 140) and the answer with counterclaims was filed in 2020, more than three years later. (*See IDT Corp.*, 12 NY3d at 140-141; CPLR 214 [4].) That the debt "continues to accrue default interest at a rate of 16% annually" does not save the claim (NYSCEF 7, answer, ¶ 117), because the continuing wrong doctrine is inapplicable to "a single wrong that has continuing effects." (*Henry*, 147 AD3d at 601.)

Finally, in the absence of a viable claim for breach of fiduciary duty, the aiding and abetting portion of the counterclaim is also dismissed. (*Kagan*, 94 AD3d at 73.) In any event, the counterclaims' "conclusory allegations are insufficient to sustain the aiding and abetting [claim]." (*Schroeder*, 133 AD3d at 26 [internal citations omitted].)

Accordingly, the motion to dismiss is granted to the extent of dismissing the sixteenth counterclaim.

**(ii) Breach Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty (Seventeenth Counterclaim)**

The seventeenth counterclaim states that HPMM breached its fiduciary duty "by allocating to itself depreciation deductions that should have been allocated to [GVHP]" and that it "was aided and abetted by Mr. Ashkenazy and AAC, and/or entities under their control, who knowingly participated in the diversion of [the] depreciation deductions." (NYSCEF 7, answer, ¶¶ 303, 304.)

The allegations of this counterclaim are nearly identical to that of the twenty-second counterclaim (*see id.*, ¶¶ 339,340), which deals with Cross Bronx Plaza, and the exculpatory clauses of the Cross Bronx Plaza and Horace Plaza Agreements are identical. (*See* NYSCEF 15, Horace Plaza Agreement, § 9.01; NYSCEF 18, Cross Bronx Plaza Agreement, § 9.01.) The parties also make the same arguments with respect to this counterclaim as the twenty-second counterclaim.

As with twenty-second counterclaim, O'Shea's affidavit supplies the requisite details missing from the seventeenth counterclaim (*see* NYSCEF 76, O'Shea aff, ¶ 14 [specifying amounts in depreciation deduction that were allegedly misallocated between 2005 and 2018]) and thereby remedies the defective pleading. (*See Leon*, 84 NY2d at 88.) In addition, as with the twenty-second counterclaim, accepting the allegations as true and affording counterclaim plaintiffs the benefit of every favorable inference (*TIAA Global Invs., LLC*, 127 AD3d at 91), the counterclaim sufficiently alleges facts that permit an inference of conduct that falls outside the exculpation provision.

However, the aiding and abetting portion of the counterclaim fails to satisfy CPLR 3016 (b.) It consists entirely of conclusory allegations. (*See* NYSCEF 7, answer, ¶¶ 119, 340.) As such, the aiding and abetting portion of the counterclaim must be dismissed. (*See Schroeder*,133 AD3d at 26.)

Therefore, the motion to dismiss is granted to the extent of dismissing the aiding and abetting portion of the seventeenth counterclaim.

**(iii) Declaratory Judgment (Nineteenth Counterclaim)**

The nineteenth counterclaim states that, "[u]nder Section 2.01 of the Horace Plaza Agreement, Mr. Ashkenazy and [HPMM] are solely responsible for paying the

M&T $500,000 Loan" and that, "in breach of Section 2.01, Mr. Ashkenazy and [HPMM] caused the M&T $500,000 Loan to be refinanced such that . . . Horace Plaza LLC, of which [GVHP] is a 50% owner, is responsible for the refinanced loan." (NYSCEF 7, answer, ¶¶ 315, 316.) Counterclaim plaintiffs seek "a declaratory judgment that Horace Plaza Managing Member LLC and Mr. Ashkenazy are the sole guarantors and obligors of the refinanced Horace Plaza loan." (*Id.,* ¶ 320.)

Counterclaim defendants contend that the counterclaim should be dismissed as duplicative of the eighteenth counterclaim for breach of contract, because both claims are premised on the same conduct. Counterclaim plaintiffs respond that the claim is not duplicative, because, whereas the breach of contract claim seeks damages for past injury, the declaratory judgment claim seeks to clarify the parties' rights and obligations moving forward.

Here, the eighteenth counterclaim for breach of contract is premised on the same conduct as the nineteenth counterclaim. (*Sompare* NYSCEF 7, answer, ¶¶ 306-311, *with id.,* ¶¶ 312-320.) Where, as here, "plaintiff has an adequate legal remedy for breach of contract, the cause of action for a declaratory judgment should be dismissed." (*Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 74 [1st Dept 2017]; *see also Apple Records*, 137 AD2d at 54.) This court's "determination of the breach of contract claim will 'sufficiently guide the parties on their future performance of the contract[ ], thereby obviating any need for' other alternative relief." (*204 Columbia Hgts., LLC*, 148 AD3d at 70-71, quoting *Apple Records*, 137 AD2d at 54 [dismissing causes of action for declaratory judgment and injunctive relief].)

Accordingly, the motion to dismiss is granted to the extent of dismissing the nineteenth counterclaim.

**2. Anti-SLAPP Statute (First Counterclaim)**

As a preliminary matter, the court notes that, because of the recent amendment to the anti-SLAPP law, the parties did not have the benefit of case law explaining what constitutes an "issue of public interest" and what constitutes a "purely private matter" under the statute. (*See Aristocrat Plastic Surgery, P.C. v Silva*, — AD3d —, 2022 NY Slip Op 03311, *3 [1st Dept 2022] [stating that the issue "[was] a matter of first impression before [the] Court"], quoting Civil Rights Law § 76-a [1][a][1], [d].) The parties have instead drawn on cases dealing with what constitutes a general or a limited public figure, which concerns the standard of proof necessary to succeed in a defamation action (*see generally Gottwald v Sebert*, 193 AD3d 573 [1st Dept 2021]), to guide their analysis. The court addresses the arguments as presented.

Counterclaim defendants argue that the anti-SLAPP counterclaim should be dismissed, because it fails to satisfy a statutory condition precedent. They contend that the recently amended statute requires a party to establish that the underlying action involves public participation or petition on a motion to dismiss or a motion for summary judgment (CPLR 3211 [g], 3212 [h]) prior to bringing an action for damages, which counterclaim plaintiffs have failed to do.

In addition, counterclaim defendants argue that their defamation claims do not involve public petition and participation. First, they point out that the defamatory statements were made to individuals or to small groups of people in the real estate investment community, not to the general public. Second, they argue that the

statements relate to a private controversy between the parties, not to some larger public issue. Lastly, they argue that, because the Gindis deny making the statement, they cannot invoke the protections of the anti-SLAPP statute.

Counterclaim plaintiffs respond that the statute does not require dismissal of the underlying defamation claim before a defendant can assert a counterclaim for damages under the anti-SLAPP statute. They argue that a motion pursuant to CPLR 3211 (g) or 3212 (h) is only one of several ways to recover costs and attorneys' fees under the statute. In addition, they argue that Ashkenazy's defamation claims fall within New York' expansive definition of "public interest," because: (1) Ashkenazy is a well-known real estate investor; (2) he has sought and obtained media attention in his role as a real estate investor, which is the subject of the allegedly defamatory statements; and (3) Ashkenazy publicly revealed the parties' disputes to members of the real estate community.

First, New York's anti-SLAPP law does not require a prior successful motion pursuant to CPLR 3211 (g) or 3212 (h.) Section 70-a [1] provides that "[a] defendant in an action involving public petition and participation. . . may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action." It then sets the standard for recovery of damages in such an "action, claim, cross claim or counterclaim," stating that:

> "costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to [CPLR 3211 (g) or 3212 (h)], that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported

> by a substantial argument for the extension, modification or reversal of existing law" (Civil Rights Law § 70-a [1] [a])

The statute then requires "additional demonstration[s]" in order to recover "other compensatory damages" and "punitive damage." (*Id.*, § 70-a [1] [b], [c].) The only time the statute requires an adjudication of any sort is prior to a recovery of damages. Nothing in the statute calls for an adjudication as a prerequisite to bringing a counterclaim under the statute. The anti-SLAPP law is strictly construed (*see 315 W. Enters. LLC v Robbins*, 171 AD3d 466, 467 [1st Dept 2019]) and the court will not read into the statute a requirement that is not there.

Notably, California and Nevada's anti-SLAPP statutes, on which counterclaim defendants rely as persuasive authority, contain express prerequisites of the type counterclaim defendants argue apply. (*See* Cal Civ Proc Code § 425.18 [b] [1] [defining "SLAPPback" as "any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under Section 425.16"]; Nev Rev Stat § 41.670( [1] [c] [stating that "(i)f the court grants a special motion to dismiss filed pursuant to (Nevada's Anti-SLAPP statute) . . . the person against whom the action is brought may bring a separate action to recover]".) The lack of such express language in New York's anti-SLAPP statute is precisely why counterclaim defendants' argument fails.

The court also notes counterclaim defendants' reliance on *Sackler v Am. Broadcasting Cos., Inc.* (71 Misc 3d 693 [Sup Ct, NY County 2021].) Their contention, that the court in that case expressly held that litigants must be "successful in their motions to dismiss or for summary judgment" prior to having the right to bring a claim under the amended Civil Rights Law § 70-a (*see* NYSCEF 122, counterclaim

defendant's reply at 19, quoting *Sackler*, 71 Misc 3d at 695), misconstrues the court's holding. The court in that action merely stated that "[t]he amendment to 70-a gives defendants in such actions who are successful in their motions to dismiss or for summary judgment the right to bring a claim for costs and attorney's fees." (*Sackler*, 71 Misc 3d at 695.) It did not hold that a successful CPLR 3211 (g) or 3212 (h) is a prerequisite to bringing an anti-SLAPP action. Therefore, *Sackler* does not advance counterclaim defendants' position. Moreover, it does not appear that courts take issue with the assertion of anti-SLAPP counterclaims without a prior judicial determination, although they have dismissed them on other grounds. (See *Gottwald v Sebert*, 203 AD3d 488, 488 [1st Dept 2022] [reversing grant of leave to assert a counterclaim under the anti-SLAPP law, because the amendment of the anti-SLAPP law could not "apply retroactively to pending claims such as the defamation claims asserted by plaintiffs"]; *Zuckerbrot v Lande*, 75 Misc 3d 269, 301 [Sup Ct, NY County 2022] [dismissing a counterclaim because it "[was] premised on the amended anti-SLAPP statute, which does not apply retroactively"].)

It is unclear why defendants moved for summary judgment to dismiss a number of the plaintiff's claims (under motion sequence number 001) but did not seek dismissal of the defamation claims pursuant to CPLR 3212 (h), choosing, instead, to assert a counterclaim under the anti-SLAPP statute. However, nothing in the statute requires them to do otherwise.

As such, all that remains is to determine whether defamatory statements "were made 'in connection with an issue of public interest' or, instead, relate[] to a 'purely

private matter.'" (*Aristocrat Plastic Surgery, P.C.*, 2022 NY Slip Op 03311 at *3, quoting Civil Rights Law § 76-a [1][a][1], [d].)

The statute defines an "action involving public petition and participation" as one based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" or "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest . . ." (Civil Rights Law, § 76-a [1] [a].) "Public interest" is to "be construed broadly, and shall mean any subject other than a purely private matter." (*Id.*, § 76-a [1] [d].) Generally, "[m]atters of public concern include matters of political, social, or other concern to the community, even those that do not affect the general population." (*Aristocrat Plastic Surgery,* 2022 NY Slip Op 03311 at *3, [internal quotation marks and citation omitted].) However, "[s]tatements falling 'into the realm of mere gossip and prurient interest' are not matters of public concern nor are 'publications directed only to a limited, private audience.'" (*Id.*, quoting *Huggins v Moore*, 94 NY2d 296, 302-303 [1999].)

Here, the counterclaim plaintiffs fail to demonstrate that the defamation claims involve "an issue of public interest." They argue that, because Ashkenazy is "a well-known real estate investor" (NYSCEF 1, compl., ¶ 37; NYSCEF 7, answer, ¶¶ 48, 188), who "has sought and received press and done interviews with numerous publications to attract attention to himself as a real estate investor" (*id.*, ¶ 188), he is a "public figure both generally and in particular within the real estate investing community." (*Id.*; *see* NYSCEF 75, counterclaim plaintiffs' opposition brief at 10-11.) However, the mere fact that Ashkenazy is a well-known real estate investor does not make him a public figure

generally. "[H]e is not a household name." (*Gottwald*, 193 AD3d at 577 [explaining that the plaintiff's "success in a high-profile career, without more, [did] not warrant a finding that he is a general-purpose public figure"].)

Nor is his alleged ability in attracting press to himself as a real estate investor sufficient to make him a limited public figure. (*See* NYSCEF 1, compl, ¶¶ 62, 63.) "A person is considered a limited public figure regarding a particular issue or subject when he or she voluntarily injects him or herself into a public controversy with a view toward influencing it." (*Krauss v Globe Intl.*, 251 AD2d 191, 192 [1st Dept 1998].) To be a "'public controversy . . . the subject matter must be more than simply newsworthy . . . it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.'" (*Gottwald*, 193 AD3d at 577, quoting *Krauss*, 251 AD2d at 192 [1st Dept 1998]. Nothing of the sort is alleged here. Plaintiffs' defamation claims are premised on the statements the Gindis allegedly made, accusing plaintiffs of stealing millions of dollars from defendants. (*See* NYSCEF, compl., ¶¶ ¶¶ 62, 63, 182, 191.) There is no allegation of any larger controversy that "affects the general public or some segment of it in an appreciable way." (*Gottwald*, 193 AD3d at 577 [internal quotations marks and citation omitted].) For example, in *Gottwald*, where the plaintiff sued Kesha for falsely accusing him of rape, the public controversy identified as the subject of the defamation was "the debate about sexual assault or abuse of artists in the entertainment industry." (*Gottwald*, 193 AD3d at 579.) Here, on the other hand, the basis of the defamation claim is a dissolution of a private business relationship, and much like a divorce, which "is no more than a private matter of public concern merely to

gossips, is not a public controversy requiring a limited-purpose public-figure analysis." (*Krauss*, 251 AD2d at 192-193 [internal quotation marks and citation omitted].)

In any event, the defamatory statements were shared with a limited audience. The complaint identifies three instances the Gindis allegedly made defamatory statements. Each instance involves an individual communicating information to another individual. While one of the instances was at a fundraiser, it also involved discussions among individuals. (*See* NYSCEF 1, compl., ¶ 63; *see* also NYSCEF 7, answer, ¶¶ 58-60.) "[P]ublications directed only to a limited, private audience are matters of purely private concern." (*Huggins*, 94 NY2d at 303 [internal quotation marks and citations omitted]; *see Aristocrat Plastic Surgery,* 2022 NY Slip Op 03311 at *2-3 [reviewing cases that found a matter was of public concern/interest, which cases frequently involved statements posted to public websites or published in newspapers, magazines or books].)

For the foregoing reasons, the motion to dismiss is granted to the extent of dismissing the first counterclaim.

According, it is hereby

ORDERED that defendants' motion for summary judgment (motion sequence number 001) is granted to the extent of dismissing the fourth, fifth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth causes of action, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' motion to dismiss (motion sequence number 002) is granted to the extent of dismissing:

1. the first, fourth, fifth, sixth, eighth, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, nineteenth, twenty-fourth, twenty-sixth, twenty-seventh, twenty-eighth, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-ninth, and fortieth counterclaims;
2. the aiding and abetting portions of the seventeenth and twenty-second counterclaims; and
3. that portion of the seventh counterclaim that seeks to recover past distributions to 1991 Broadway Owner LLC based on its alleged 55% ownership of the property; and it is further

ORDERED that counterclaim defendants shall reply to the counterclaims by August 5, 2022; and it is further

ORDERED that the parties shall submit by email to SFC-Part48@nycourts.gov a joint PC order or competing PC orders if they cannot agree, by August 12, 2022; and it is further

ORDERED that the parties are referred to mediation. If the parties cannot agree to a mediator, by August 5, 2022, then the court will refer the parties to the Commercial Division's ADR program.

20220710803553AMASLEYCE61709A8BEE48D0836FE95EE1C59234

7/10/2022
DATE

ANDREA MASLEY, J.S.C.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |