

To Be Argued By:  
SEAN M. KEMP  
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# New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

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FAVOURITE LIMITED, CLAUDIO GATELLI, GRAZIANO SGHEDONI,  
ALBERTO BRENTEGANI, SIRIO SRL, OILE SRL, UPPER EAST SIDE SUITES LLC,  
*Plaintiffs-Respondents,*  
—against—

CASE NO.  
**2021-02511**

BENEDETTO CICO, CARLA CICO,  
*Defendants-Appellants,*  
151 EAST HOUSTON ACQUISITION LLC,  
*Defendant.*

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## REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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Defendants-Appellants Carla Cico and Benedetto Cico (hereinafter sometimes collectively referred to as “Appellants”) submit this Reply Memorandum of Law in further support of their appeal.<sup>1</sup>

### **PRELIMINARY STATEMENT**

When this Court dismissed Respondents’ action it did not grant Respondents leave to file an amended complaint. It simply dismissed their claims in their entirety. Therefore, when Respondents moved the Trial Court for leave to file an amended complaint there was no longer a pleading pending before that court that could be amended. Respondents’ opposition fails to offer any authority that a motion for leave to amend is proper under these circumstances. However, even if Respondents’ motion for leave to file an amended complaint was procedurally proper, which it was not, the proposed amended pleading was devoid of merit since the Company did not properly authorize the filing of the Corrective Certificates or the amended pleading.

Likewise, Respondents do not set forth any legitimate reason to support the Trial Court’s complete disregard of New York’s liberal pleading standard and its dismissal of Appellants’ counterclaims. Instead, Respondents go beyond the four corners of Appellants’ respective pleadings to argue the merits of their

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<sup>1</sup> All capitalized terms not defined herein have the meanings set forth in Appellants’ moving papers.

counterclaims which is improper. Appellants set forth legally cognizable claims supported by meritorious allegations that easily satisfy the requirements of CPLR 3211(a)(7).

For all the reasons set forth below and in Appellants' opening brief, the Trial Court's Decision and Order should be reversed, Appellants' counterclaims should be reinstated, and Respondents' action should be dismissed.

## **ARGUMENT**

### **POINT I: THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED RESPONDENTS LEAVE TO FILE A THIRD AMENDED COMPLAINT**

#### **A. RESPONDENTS SHOULD NOT HAVE BEEN GRANTED LEAVE TO FILE AN AMENDED COMPLAINT BECAUSE THERE WAS NO PLEADING PENDING BEFORE THE COURT THAT COULD BE AMENDED**

This Court's Decision and Order dismissing Respondents' action was not a decision on the "merits" or "with prejudice". Thus, Respondents are entitled to commence a new action and refile their claims assuming that act is properly authorized by the Company, and the claims are not barred by the applicable statute of limitations<sup>2</sup>. This Court did not, however, grant Respondents leave to file an amended complaint so once this action was dismissed there was no longer a pleading pending before the court that could be amended and Respondents should

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<sup>2</sup> As set forth in Appellants opening brief at p.15-16, a new action would likely be time barred by the applicable statute of limitations.

have attempted to commence a new action. See generally, Wells Fargo Bank, N.A. v. Ndiaye, 146 A.D.3d 684 (1st Dep't 2017) (a dismissal for lack of standing is without prejudice and does not prevent commencement of subsequent action); Wiki Chen v. Sunshine World Travel, 64 Misc.3d 129(A) (N.Y. App. Term 2019) (dismissal based on lack of standing did not preclude filing of subsequent action); Pullman Group, LLC v. Prudential Insurance Company of America, 297 A.D.2d 578 (1st Dep't 2002) (dismissal for lack of standing did not bar filing a new action based on same claims after the lack of capacity is cured). Accordingly, Respondents' motion for leave to file a third amended complaint was procedurally defective and the Trial Court should have denied their motion.

**B. RESPONDENTS SHOULD NOT HAVE BEEN GRANTED LEAVE TO FILE AN AMENDED COMPLAINT BECAUSE THE AMENDED COMPLAINT FAILED TO CORRECT THE PLEADING'S DEFICIENCIES**

Respondents' claim that they properly cured their issues relating to standing and/or capacity to sue is without merit. The Second Amended Complaint Resolution did not authorize Claudio Gatelli to file the Corrective Certificates and it did not authorize the filing of the Third Amended Complaint.

First, neither of these acts could be authorized by the members of the Company because, as more fully set forth in Appellants' prior appeal under Appellate Division Case No.: 2019-5580, the Company is a manager-managed Company, not

a member-managed Company, and Respondents have failed to appoint a manager<sup>3</sup>. Appellants raised this issue in their opening brief in connection with this appeal so it is properly before this Court and any attempts by Respondents to limit the scope of this appeal in that regard should be denied.

This is a fundamental threshold issue that goes to the heart of this case. The Trial Court's transformation of the Company from a manager-managed company to a member-managed company was in violation of the Company's Operating Agreement as well as Delaware limited liability company law and has permitted Respondents to hijack the Company and prosecute this action without any legal authority to do so.

The express terms of the Company's Operating Agreement state that the Company is a manager-managed company. It is well settled that the scope,

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<sup>3</sup> By Notice of Motion dated September 3, 2021, Appellant requested leave to enlarge the record on this appeal to include briefs filed with this Court in connection with prior appeals in the above-entitled action, under Appellate Division Case Nos. 2018-5365 and 2019-5580 (the "Prior Appeals"), so that issues fully briefed but not previously determined on those appeals can be addressed in this appeal. See, Motion #3007. Respondents did not oppose that motion. Nonetheless, by Decision and Order dated October 7, 2021, this Court denied Appellant's motion for leave to enlarge the record.

Appellant subsequently moved by Notice of Motion dated October 21, 2021, pursuant to CPLR 2221(e) for leave to renew its prior appeal (Appellate division Case No. 2019-5580) based on the Trial Court's ruling that Respondents cured their standing/capacity to sue issues so that certain fundamental threshold issues that were raised in Appellants' prior appeal, but not determined, could be addressed. The most important issue being the Trial Court's unilateral transformation of the Company from a manager-managed limited liability company to a member-managed limited liability company in derogation of the Company's Operating Agreement and Delaware limited liability company law. That motion is fully submitted and currently pending before this Court.

structure and operation of a limited liability company is defined by its operating agreement and that both New York and Delaware courts rarely interfere with the terms of an operating agreement. Estate of Calderwood v. ACE Group, Intl. LLC, 157 A.D.3d 190 (1st Dep't 2017); Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 291 (Del. 1999). Accordingly, the Operating Agreement, not the Trial Court's erroneous holding, should control and Respondents' failure to duly appoint a manager prevents them from curing any issues relating to the Company's standing or capacity to sue.

Second, even if it is assumed that the Company is now a member-managed company, which it is not, a majority in interest did not vote in favor of the Second Amended Complaint Resolution and, more importantly, that resolution did not authorize the filing of the Corrective Certificates or the Third Amended Complaint. Respondents' assertion that the Second Amended Complaint Resolution essentially gave any member the authority to take any action on behalf of the Company with respect to this litigation defies logic, is not authorized by the Company's Operating Agreement and is contradicted by this Court's prior Decision and Order.

As this Court recognized in its March 3, 2020, Decision and Order, the Company's Operating Agreement states that, "**No Member as a Member shall have the right to bind the Company in dealings with third parties. No Member is an agent of the Company solely by virtue of being a member and**



**no Member has authority to act for the Company solely”** (R. 94 emphasis added and R.293-294) This Court relied on this language to conclude that the Second Amended Complaint Resolution did not properly authorize Sirio Srl to obtain a certificate of revival and it rejected Respondents’ argument that it somehow ratified Sirio Srl’s unauthorized filing. Therefore, there is no reason why that resolution can now be relied upon by Respondents to support Mr. Gatelli’s unauthorized filing of the Corrective Certificates or the Company’s filing of the Third Amended Complaint.

Based on the foregoing, the Company failed to cure its lack of standing or capacity to sue which renders the Third Amended Complaint palpably insufficient and devoid of merit. Accordingly, the Trial Court erred when it granted Respondents’ motion for leave to file an amended complaint.

**POINT II: THE TRIAL COURT ERRED WHEN IT DISREGARDED NEW YORK’S LIBERAL PLEADING STANDARD AND DISMISSED APPELLANTS’ COUNTERCLAIMS IN THEIR ENTIRETY**

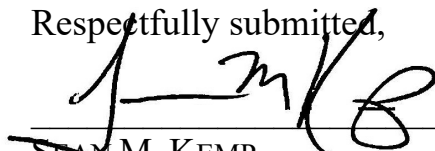
As set forth in Appellants’ opening brief, the only issue on a motion to dismiss under CPLR 3211(a)(7) is “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail”. Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). Here, Appellants easily satisfy this standard and set forth legally cognizable counterclaims for breach of

contract and declaratory relief. Respondents and the Trial Court go beyond the four corners of the pleading to attack Appellants' counterclaims, which is improper especially since discovery is not complete in this matter. Accordingly, the Decision and Order should be reversed, and Appellants' counterclaims should be reinstated

### CONCLUSION

The Trial Court erred when it granted Respondents leave to file a Third Amended Complaint and dismissed Appellants' Counterclaims. The terms of the Company's Operating Agreement should not be disregarded. The Company is a manager-managed limited liability company and Respondents' failure to operate the Company in a manner consistent with its Operating Agreement is fatal to their action. For all the reasons set forth above and in their opening brief, Appellants respectfully request that this Court reverse the Trial Court's Decision and Order.

Respectfully submitted,



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