To be Argued by:
PETER JAKAB
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

FAVOURITE LIMITED, CLAUDIO GATELLI, GRAZIANO SGHEDONI, ALBERTO BRENTEGANI, SIRIO SRL, OILE SRL and UPPER EAST SIDE SUITES LLC,

Plaintiffs-Respondents,

– against –

BENEDETTO CICO and CARLA CICO,

Defendants-Appellants,

– and –

151 EAST HOUSTON ACQUISITION LLC,

Defendant.

Appellate Case No.: 2021-02511

BRIEF FOR PLAINTIFFS-RESPONDENTS

FEIN & JAKAB
40 Fulton Street, 17th Floor
New York, New York 10038
(212) 732-9290
pjakab@earthlink.net

– and –

VALLA & ASSOCIATES, INC., P.C.
509 Madison Avenue, Suite 1510
New York, NY 10022
(212) 913-9246
antonio.valla@vallalaw..com
lisa.schachne@vallalaw..com

Attorneys for Plaintiffs-Respondents

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PRELIMINARY STATEMENT AND STATUS OF THE CASE

This is an action to recover the investment in Upper East Side Suites LLC ("UESS"). Over $4.5 million was invested. The purpose of the investment was to purchase and manage specified Manhattan real estate. The real estate was purchased and has now been sold. But not a dollar has been returned.

Defendants-Appellants the Cicos, brother and sister, were the sole co-managers of UESS. They made various representations to the court below and to the investors about the location of the invested funds, including: (1) the Cicos have them, (2) they are in a bank in Riga, Latvia, (3) they are in an escrow. R. 378-79; Dkt. 107. Discovery has shown all of these to be lies.

The Cicos' strategy has been to file motion after motion on procedural and technical grounds to delay and to avoid the merits. It is the reason the action has been pending so long. The trial court has expressed its disapproval of these tactics, and of the utter meritlessness of the Cicos' arguments (e.g., Dkt. 277 ("In keeping with their propensity to advocate clearly erroneous legal arguments, Defendants contend…")), and has ordered the Cicos to complete depositions. Dkt. 453.

This appeal is another of the Cicos' run-from-the-merits tactics. The Cicos hope to escape having to answer as fiduciaries for the disappearance of the funds invested. The trial court has become quite familiar with the Cicos' tactics. It is that kind of judicial familiarity, gained by day-to-day case management over five

years of the Cicos' dilatory maneuvers, that merits the discretion accorded trial courts. That discretion has not been abused here.

INTRODUCTION AND SUMMARY

There are two aspects to this appeal. First, Appellants challenge the trial court's exercise of its discretion to grant leave to file the Third Amended Complaint. Second, Appellants challenge the dismissal of their counterclaims. These are the only two questions presented. App. Brf. at 1 (Questions Presented).[1]

A. Leave to Amend was Appropriate

The purpose of Respondents' motion below for leave to amend was to come into compliance with the concern expressed by this Court in its March 3, 2020 decision ("Appellate Decision"). The Court's concern was directed to the corporate revival, before the Delaware Secretary of State, of Respondent UESS. The Court ruled that because the corporate revival was accomplished before, not after, the membership vote authorizing it, the revival was ineffective.

[1] Portions of Appellants' Brief may be confusing on this point. Appellants had moved in this Court to expand the Record on Appeal to include the briefing from their prior appeals. Motion #3007. Appellants had hoped to revive some arguments they had made in their previous appeals. They refer to those arguments in the first three paragraphs of their "Preliminary Statement," the last three paragraphs of their "Relevant Factual Background," and the last subsection. App. Brf. 2-3, 10, 23-24. This Court, however, denied Appellants' motion to expand the Record by Order dated October 7, 2021. Dkt. 8. Accordingly, this appeal is limited to the two questions presented.

Specifically, and as examined in detail in Part I below, the Appellate Decision "dismissed" for "lack of capacity or standing to sue," as the UESS member "obtained a certificate of revival on April 19, 2018," but "the vote to authorize prosecution of the instant action was taken between May 31 and June 30," and "the record contains no decision by more than 50% of the members to revive the Company before April 19." *Favourite Ltd. v. Cico*, 181 A.D.3d 426, 426 (1st Dept. 2020).

The Appellate Decision did not dismiss the action with prejudice, nor without leave to amend. As detailed below, a dismissal for lack of capacity or standing to sue is a dismissal without prejudice, unless expressly stated otherwise. *Wells Fargo Bank v. Ndiaye*, 146 A.D.3d 684, 686 (1st Dept. 2017) ("a dismissal premised on lack of standing is not a dismissal on the merits"); CPLR 5013 (a dismissal "before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise"). A dismissal that is not on the merits is presumed to be a dismissal without prejudice. E.g., *Maitland v. Trojan Electric & Machine Co., Inc*., 65 N.Y.2d 614, 615-16 (1985) (applying CPLR 5013). Here, the Appellate Decision simply "dismissed." It made no reference to dismissal with prejudice, nor to dismissal on the merits, nor to denial of leave to amend.

Lack of capacity or standing to sue is eminently curable. E.g., *Springwell Nav. Corp. v. Sanluis Corporacion*, S.A., 81 A.D.3d 557, 557 (1st Dept. 2011)

("lack of standing was not a final determination on the merits for res judicata purposes, [and] plaintiff is not precluded from reasserting the same claims based on newly conferred rights that cured the lack of standing").

Accordingly, Respondents set out to cure the issue[2] identified in the Appellate Decision. Respondents sought and received advice from corporate counsel in Delaware. Following that advice, UESS filed (1) a Certificate of Correction to nullify the April 2018 Certificate of Revival, and (2) a new Certificate of Revival dated in December 2020, with the Delaware Secretary of State, to revive the Company, bring it into good standing, and thereby empower it to maintain this action. The new Certificate of Revival is in compliance with the Appellate Decision, having been obtained after the July 2018 vote in which a majority of the membership executed written consents to authorize UESS to prosecute this action. R. 346-47, 352-55.

Respondents then sought leave to file the Third Amended Complaint ("TAC"). The purpose of the TAC was to set forth the corporate revival of UESS in compliance with the Appellate Decision, as stated above. In all other respects, it is identical to the Second Amended Complaint ("SAC"). R. 356-425. The trial court, in its discretion under CPLR 3025, granted the motion. R. 6-7.

[2]Plaintiffs do not believe any issue existed. Plaintiffs believe that the subsequent vote authorized the prior act via ratification, but accept the Appellate Decision as binding.

B. The Cicos' Assertions – that the Appellate Decision or the Membership Vote Precludes the Corporate Revival and Amended Complaint -- are Meritless

Appellants launch three attacks on this process and ruling. First, they assert that the Appellate Decision precludes leave to amend. For the reasons detailed in Part I below, this is mistaken. Second, they insist that the vote to authorize UESS to maintain this action against the Cicos did not authorize its corporate revival or the filing of the TAC. As explained in Part II, below, a vote to proceed with this litigation to recover the invested funds from the Cicos necessarily includes the authority to take all steps reasonably necessary to do so. A new vote need not be called to authorize each step or pleading in the litigation. Third, the Cicos take a few potshots at the votes to prosecute this action against them. As set forth in Part III, below, they are all meritless.

C. The Cicos' Counterclaims

The Cicos brought meritless counterclaims. Respondents filed motions to dismiss them, detailing numerous infirmities in each. Most of them failed to allege damages other than attorneys' fees for this action. The motions were granted.

On this appeal, the Cicos devote just a few paragraphs containing conclusory statement at the end of their Brief to challenge that ruling. Their challenge is directed only to the counterclaims for breach of contract and declaratory judgment. These points are addressed in Part IV, below.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 2017, in connection with one of Defendants' motions to dismiss the complaint, Defendants brought to the Plaintiffs' and Court's attention the notice of cancellation of UESS by the Delaware Secretary of State. Docket 43. Following the Court's February 21, 2018 rulings on the motions to dismiss (Dkts 110-113), Plaintiffs began the process of reviving the good standing of UESS with the Delaware Secretary of State. On April 19-20, 2018, the Delaware Secretary of State issued a Certificate of Revival and a Certificate of Good Standing for UESS. Dkt. 187.

On April 24, 2018, this Court issued an Order directing the Defendants to, among other things, produce a list of the UESS members and their respective equity splits. Dkt. 174. On May 10, 2018, Defendants produced the list of UESS members and their equity splits pursuant to the Court's April 24, 2018 Order. Dkt. 176.

On May 11, 2018, Plaintiffs notified the Court that they: (i) were informed and believed that more than 50% of the equity membership of UESS favored the prosecution of this action by the company against the Cicos and (2) intended to solicit written consents in a formal process under the Operating Agreement to so establish. Dkt. 181.

That process took place in June 2018 and by early July 2018, the written consents of more than 50% of the UESS equity membership had been received. Dkt. 252. On about July 19-20, 2018, Plaintiffs filed for UESS's Application for Authority with the New York Secretary of State, which was issued on July 20, 2018. Dkt. 256.

On July 23, 2018, Plaintiffs filed their Cross-Motion for leave to file Second Amended Complaint, setting forth, among all other necessary matters, the Delaware Certificate of Revival of UESS, the receipt of more than 50% of the UESS members' written consents to prosecute this action by the company against the Cicos, the New York Authority to Do Business and the proposed SAC. Dkt. 247-60.

On October 30, 2018, the Court issued an Order granting Plaintiffs leave to file the SAC, with the proviso that certain specific allegations were to be eliminated as dismissed. Dkt. 277. Plaintiffs complied and filed the SAC as directed. Dkt. 282.

After filing Answers to the SAC, the Cicos amended the Answers to add counterclaims on July 18, 2019. R. 50-72, 164-224.

The October 30, 2018 Order was appealed. Thereafter, the parties and the trial court agreed to stay proceedings below pending the appeal and pending a

mediation in which the parties agreed to engage. Dkt. 310. The mediation concluded without a resolution.

On March 3, 2020, this Court issued the Appellate Decision stating that:

> "[T]he action should be dismissed on the ground that the Company lacks capacity or standing to sue because plaintiff Sirio SRL lacked authority to obtain a certificate of revival. Initially, the Company was not dissolved pursuant to section 18-801(a) of the Act. Rather, its certificate of formation was cancelled pursuant to section 18-104(d) due to its failure to designate a new registered agent within 30 days after its old one resigned. Therefore, the Company could, in theory, be revived under section 18-1109(a). However, plaintiff Sirio SRL, which obtained the certificate of revival on April 19, 2018 as a member of the Company, lacked authority to act on behalf of the company. The Company's operating agreement states, "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." Even if the Company has become a member-managed LLC, which we are not deciding, the record contains no decision by more than 50% of the members to revive the Company before April 19, 2018. Plaintiffs rely on the vote to authorize the prosecution of the instant action but that vote was taken between May 31 and June 30, 2018."
>
> 'After [a] certificate of cancellation has been filed, suits generally may not be brought by ... an LLC' (*Matthew v Laudamiel*, 2012 WL 605589, *21, 2012 Del Ch LEXIS 38, *77-78 [Feb. 21, 2012, C.A. No. 5957-VCN]). Thus, the Company may not sue as a direct plaintiff, and the members thereof may not bring derivative claims on its behalf. Since plaintiffs lack standing or capacity, this action should be dismissed." *Favourite Ltd v. Cico*, 181 A.D.3d 426, 426 (1st Dept. 2020).

After consultation with Delaware counsel and the Delaware Secretary of State's office, UESS filed a Certificate of Correction to nullify its April 2018

Certificate of Revival, which the Appellate Decision had ruled unacceptable because it was filed prior to the membership vote. R. 346 at ¶15(a). UESS also filed a new Certificate of Revival to revive the company as of December 2020, a date subsequent to its membership vote and therefore in compliance with the First Department Decision. R. 347 at ¶15(b). The UESS Certificate of Correction and the new UESS Certificate of Revival have been accepted by the Delaware Secretary of State, which has issued certified copies of each. R. 352-55.

Accordingly, Appellants moved below for leave to file the TAC. The proposed TAC contained no substantive changes from the Second Amended Complaint as filed. The only difference between them is the recitation of the above-described Certificate of Correction and new Certificate of Revival. R. 347 at ¶17, 391-425.

At about the same time[3], Plaintiffs moved below to dismiss the Cicos' counterclaims. On June 17, 2021, the trial court granted the motions. R. 7-8. On July 1, 2021, the trial court ordered the Defendants to proceed with depositions, for which deadlines were set. Dkt. 453.

[3] The statutory time periods for response to counterclaims were extended first by the stipulated stay entered by the trial court and then by COVID-19 deadline tolling.

ARGUMENT

For leave to amend a complaint, the standard of review is abuse of discretion. *Kimso Apts. LLC v. Gandhi*, 24 N.Y.3d 403, 411 (2014) ("Applications to amend pleadings are within the sound discretion of the court …, which may be upset by us only for abuse as a matter of law"). CPLR 3025(b) provides:

> "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just…."

In the absence of prejudice to the defendants, the amendment of a pleading is to be freely granted. *Sotomayor v. Princeton Ski Outlet Corp*., 199 A.D.2d 197 (1st Dept. 1993).

I.

THE APPELLATE DECISION DOES NOT PRECLUDE LEAVE TO AMEND

The Appellate Decision stated:

> "[T]he action should be dismissed on the ground that the Company lacks capacity or standing to sue because plaintiff Sirio SRL lacked authority to obtain a certificate of revival. Initially, the Company was not dissolved pursuant to section 18-801(a) of the Act. Rather, its certificate of formation was cancelled pursuant to section 18-104(d) due to its failure to designate a new registered agent within 30 days after its old one resigned. Therefore, the Company could, in theory, be revived under section 18-1109(a). However, plaintiff Sirio SRL, which obtained the certificate of revival on April 19, 2018 as a member of the Company, lacked authority to act on behalf of the company. The Company's operating agreement states,

> "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." Even if the Company has become a member-managed LLC, which we are not deciding, the record contains no decision by more than 50% of the members to revive the Company before April 19, 2018. Plaintiffs rely on the vote to authorize the prosecution of the instant action but that vote was taken between May 31 and June 30, 2018."
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> 'After [a] certificate of cancellation has been filed, suits generally may not be brought by ... an LLC' (*Matthew v Laudamiel*, 2012 WL 605589, *21, 2012 Del Ch LEXIS 38, *77-78 [Feb. 21, 2012, C.A. No. 5957-VCN]). Thus, the Company may not sue as a direct plaintiff, and the members thereof may not bring derivative claims on its behalf. Since plaintiffs lack standing or capacity, this action should be dismissed." *Favourite Ltd v. Cic*o, 181 A.D.3d 426, 426 (1st Dept. 2020)

Thus, the Appellate Decision "dismissed" for "lack of capacity or standing to sue," as the UESS member "obtained a certificate of revival on April 19, 2018," but "the vote to authorize prosecution of the instant action was taken between May 31 and June 30," and "the record contains no decision by more than 50% of the members to revive the Company before April 19." *Favourite Ltd. v. Cico*, 181 A.D.3d 426, 426 (1st Dept. 2020).

The Appellate Decision is plainly a dismissal other than on the merits. *Tico v. Borrok*, 57 A.D.3d 302, 303 (1st Dept. 2008) ("a dismissal premised on lack of standing is not a dismissal on the merits"); *Wells Fargo Bank v. Ndiaye*, 146 A.D.3d 684, 686 (1st Dept. 2017) (same); *Pullman Group LLC v. Prudential Co.*, 297 A.D.2d 578, 579 (1st Dept. 2002) (same).

A dismissal that is not on the merits is presumed to be a dismissal without prejudice. E.g., *Maitland*, 65 N.Y.2d at 615-16; *Schwarcz v. N. German Lloyd*, 15 Misc. 2d 76, 76 (App. Term 1st Dept. 1958) ("Since the determination was not on the merits the dismissal of the complaint should have been without prejudice").

This point finds further support in CPLR 5013. CPLR 5013 governs the presumptive effect of dismissals. It provides:

> "A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise, but a judgment dismissing a cause of action after the close of the proponent's evidence is a dismissal on the merits unless it specifies otherwise."

Thus, by statute, a dismissal like the one expressed in the Appellate Decision for lack of capacity, is not a dismissal on the merits because it does not specify otherwise.

The Court of Appeals and this Court have applied this statute's principle. E.g., *Maitland*, 65 N.Y.2d at 615-16 (1985) (citing CPLR 5013 and holding that "[w]here, as here, a dismissal of a cause of action occurs prior to the close of proponent's evidence, the dismissal will not be deemed on the merits"); *Smith v. Buckley*, 152 Misc. 302 (App. Term 1st Dept. 1934) (dismissal for absence of a material witness, "presumptively the dismissal was without prejudice").

In a case of dismissal without prejudice, including for lack of standing, the plaintiff is permitted to cure the identified issue and proceed. As this Court has explained:

> "Since this Court's dismissal of the prior action for lack of standing was not a final determination on the merits for res judicata purposes, plaintiff is not precluded from reasserting the same claims based on newly conferred rights that cured the lack of standing."

Springwell, S.A., 81 A.D.3d 557, 557 (1st Dept. 2011); *Chen v. Sunshine World Travel*, 64 Misc. 3d 129(A), (App. Term 1st Dept. 2019) (same quote).

Each of these principles of common and statutory law springs from the "the strong public policy of this State is to dispose of matters on the merits." *Peters v. City of New York Health & Hosps. Corp.,* 48 A.D.3d 329, 329 (1st Dept. 2008); *Noriega v. Presbyterian Hosp. in City of New York*, 305 A.D.2d 220, 221 (1st Dept. 2003) ("strong public policy of this State that, in the absence of prejudice, a matter should be disposed of on its merits"); *W. 15th St. Assocs., L.P. v. Fares*, 31 Misc. 3d 149(A) (App. Term. 1st Dept. 2011) ("strong public policy which favors the disposition of matters on their merits"). Here, Respondents have lost their entire investments yet been put to extraordinary pains to reach the merits and finally have their day in court. The State's public policy applies to their plight with all the more force.

The request for amendment of pleadings is directed to the sound discretion of the trial court. CPLR 3025(b) provides:

> "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just…."

It is long and well settled that in the absence of prejudice to the defendant, the amendment of a pleading should be freely granted. *Sotomayor*, 199 A.D.2d 197 (1st Dept. 1993).

> "Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law. A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]. Prejudice to warrant denial of leave to amend requires some indication that the defendant has been hindered in the preparation of [their] case or has been prevented from taking some measure in support of [their] position. McGhee v Odell, 96 A.D.3d 449, 450 (1st Dept 2012) (citations and quotation marks omitted)."

Capitol Records, LLC. v. Harrison Greenwich LLC, 44 Misc.3d 202, 206, 984 N.Y.S.2d 274, 277 (N.Y. Supr. 2014).

Here, no prejudice exists because no new theories facts or claims are being asserted in the amended pleading, only a cure to the matter of capacity to sue. That is why Appellants do not claim prejudice from the amendment, nor even once mention it in their Brief.

Instead, Appellants offer a quotation to the effect that where a pleading has been dismissed, leave to amend should be denied because "there is no pleading before the court to be amended." App. Brf. at 12-13. Appellants seem to interpret

this quotation as meaning that once a motion to dismiss a pleading is granted, no amendment is permissible. After this quotation, Appellants offer, without discussion, a string cite of four cases. Id. at 13.

Appellants' interpretation of this quotation is impossibly overbroad—leave to amend is routinely permitted following granted motions to dismiss. Dismissals are commonly accompanied by leave to amend where the defect identified in the dismissal can be cured. *E.g.*, *Billig v. Schwartz*, 190 A.D.3d 547, 547 (1st Dept. 2021) (affirming dismissal of complaint "without prejudice to replead"). The cases to this effect are legion in number.

Rather, the quotation, which is seldom used, refers to those circumstances in which the pleading had been dismissed on the merits or with prejudice. To see this, we need only look at the four cases cited by Appellants. In each one, the dismissal had been on the merits, with prejudice. Once an action is dismissed on the merits with prejudice, it stands to reason there is nothing left before the court to amend.

Appellants' first cite is to *Tanner v. Stack*, 176 A.D.3d 429 (1st Dept. 2019). In that case, Justice Ramos had expressly stated in the transcript that was made part of the Order denying leave to amend: "Mr. Tanner, there is no complaint to amend right now. I dismissed this case with prejudice." *Tanner v. Stack*, N.Y. Supreme Index No. 153234/2018, Docket 80, at pg 2, lines 8-10 (N.Y. Supreme Ct. Jan. 17,

2019), *affirmed*, 176 A.D.3d 429, 429 (1st Dept. 2019). Indeed, in affirming Justice Ramos, this Court cited to *Jeffrey L. Rosenberg & Assoc. v Kadem Capital Mgt.*, 306 A.D.2d 155, 156 (1st Dept 2003) and *Wadsworth Ave. Assoc. v. Maynard*, 91 A.D.3d 452, 453, (1st Dept. 2012). *Tanner*, 176 A.D.3d at 429.

In *Rosenberg*, this Court affirmed the denial of a motion to amend where "Plaintiffs' complaint ha[d] been previously dismissed on summary judgment." *Rosenberg*, 306 A.D.2d at 156. Summary judgment of course is a determination on the merits and its dismissal is with prejudice. *Collins v. Bertram Yacht Corp*., 42 N.Y.2d 1033, 1034 (1977) ("The grant of summary judgment, the procedural equivalent of a trial, results in a final judgment on the merits"). And in *Wadsworth*, "the action was dismissed by final judgment." This Court held the plaintiff "has no right to seek leave to amend a complaint in an action that has been finally dismissed." *Wadsworth*, 91 A.D.3d at 453.

Appellants' next citation is *Panagoulopoulos v. Ortiz*, 143 A.D.3d 792 (2d Dept. 2016). That case refers to its companion decision, issued the same day, in which the Second Department explained that the complaint had been dismissed on the merits as it "alleged wrongful termination [and] failed to state a claim, since, among other reasons, the alleged employment relationship was at-will." *Panagoulopoulos v. Ortiz*, 143 A.D.3d 791 (2d Dept. 2016).

Likewise, in Appellants' next case, *Amaranth LLC v. National Australian Bank Ltd*., 40 A.D.3d 279, 279 (1st Dept. 2007), which does not mention the quotation at all, this Court, again citing Rosenberg, expressly stated that the motion for leave to amend was "made subsequent to the grant of summary judgment dismissing the complaint." Again, summary judgment is a final merits determination and thus results in a dismissal with prejudice.

In Appellants' last cited case, *Kazakhstan Inv. Fund v. Manolovici*, 2 A.D.3d 249, 250 (1st Dept. 2003), the motion for leave to amend came after the action was dismissed with prejudice "on a prior motion as time-barred," and that dismissal was affirmed. Id.[4]

By contrast, the issue involved here is standing to sue. A lack of standing to sue is not a final determination on the merits and is eminently curable. As this Court has explained, "lack of standing was not a final determination on the merits for res judicata purposes, [and] plaintiff is not precluded from reasserting the same claims based on newly conferred rights that cured the lack of standing." *Springwell*, S.A., 81 A.D.3d at 557 (1st Dept. 2011); *Chen v. Sunshine World Travel*, 64 Misc. 3d 129(A), (App. Term 1st Dept. 2019) (same quote).

[4] In a sign of these courts' recognition that the quotation, as a legal principle, lacks efficacy and is confusing in its meaning, these decisions set forth alternative grounds for their holdings. In each case, the trial court had denied the motion to amend, and the appellate court affirmed, there being no abuse of discretion. The courts also found the proposed amendments were "palpably insufficient," "patently devoid of merit," and "insufficient to state timely claims for relief." *Id*.

Appellants acknowledge this. App. Brf. at 13. But they assert that "the only relevant difference between a dismissal 'with prejudice' and a dismissal 'without prejudice' is that claims asserted in a complaint that has been dismissed 'without prejudice' can be refiled in a second action after a new index number is purchased." App. Brf. at 13. Appellants insist that a dismissal without prejudice may not be followed with an amended complaint curing the defect, but rather must be refiled in a new action using CPLR 205. App. Brf at 15. Appellants add, without citation or discussion, that "[t]here are no exceptions to this rule." App. Brf. at 14.

There is no such rule. For their "rule," Appellants cite three cases. App. Brf. at 13-14. Not one of these cases mentions, much less stands for, the Appellants' "rule." They are simply three cases in which the plaintiff chose to file a new action.[5] Appellants cite no authority and offer no further discussion because there is no such "rule." A pleading as to which a motion to dismiss is granted without prejudice does not require a new action to cure. Appellants made it up.

The actual rule is that the question of whether the cure of a dismissal without prejudice is to be done by amendment or new action is directed to the sound

[5] *Springwell Nav. Corp. v. Sanluis Corporacion, S.A.*, 81 A.D.3d 557 (1st Dept. 2011) (plaintiff chose to refile an action several years later); *Chiacchia & Feming LLP v. 14 Guerra*, 309 A.D.2d 1213, 1213-14 (4th Dept. 2003) (due to pending bankruptcy, plaintiff "stipulated" to "dismissal without prejudice" and to "recommence[ment] in a new action by the bankruptcy trustee"); *Maitland v. Trojan Elec. Mach. Co.*, 65 N.Y.2d 614 (1985) (plaintiff chose to file a new action after his claim was dismissed for failure to comply with discovery orders). App. Brf. 13-14.

discretion of the trial court.

An example is in the recent case of *Morse v. Lovelive TV US, Inc*., 69 Misc.3d 1224(A), 2020 WL 7380288 (Supr. Ct. N.Y. County Dec. 15, 2020):

> it is hereby ordered [that the] motion to dismiss the claim against Richard Cohen and Lovelive TV U.S., Inc. is granted without prejudice. It is further ordered that the plaintiff should within 30 days of today's date make all efforts to -- the Court is giving plaintiff leave to refile an amended complaint on this index number within 30 days of today's date. If that's not done within those 30 days, then the plaintiff will need to purchase a new index number"

Id. *5. Thus, Justice Reed ordered dismissal without prejudice and then in his discretion directed that if the plaintiff wished to amend to cure the identified defects, she would have 30 days to do so, otherwise she will need to do so in a new action under a new index number. As it turned out, the plaintiff in Morse filed the amended complaint, which survived a motion to dismiss, and the matter is proceeding through pre-trial under the original index number.

There are countless examples of such rulings. One good example is *Bargil Assocs., LLC v. Crites*, 173 A.D.3d 956, 957 (2nd Dept. 2019), the court reversed a refusal to grant leave to amend under identical circumstances:

> "this Court determined that the Supreme Court should have granted that branch of the plaintiff's motion which was pursuant to CPLR 3211(a) to dismiss the defendant's counterclaims "without prejudice," based on a procedural ground. Two months later, after the procedural impairment was rectified, the defendant moved for leave to amend her answer to assert the same previously dismissed counterclaims sounding in breach of contract, quantum meruit, and unjust enrichment. The Supreme Court denied the motion, and the defendant

appeals. We reverse."

To the same effect: *A.J. Temple Marble & Tile, Inc. v. Union Carbide Marble Care, Inc*., 87 N.Y.2d 574, 584–85 (1996) ("the complaint … should be dismissed. That dismissal, however, should be without prejudice to plaintiff to apply at Supreme Court, if so advised, for leave to amend"); *Art Capital Bermuda Ltd. v. Bank of N.T. Butterfield & Son Ltd*., 169 A.D.3d 426, 428 (1st Dept. 2019) ("Therefore, our dismissal is without prejudice, so that the Bank—if so advised—can make a properly supported motion for leave to amend (see CPLR 3025[b]"); *Scribani v. Buchannon*, 101 A.D.3d 1517, 1519 (3rd Dept. 2012) ("Permitting plaintiffs to seek leave to amend the complaint is especially appropriate here, as Supreme Court specifically dismissed the complaint against Skovsende without prejudice to commencement of a new action against him as permitted by CPLR 205(a)"); *Fitzsimmons v. Aley*, 174 A.D.2d 1021, 1021 (4th Dept. 1991) ("The dismissal was without prejudice and plaintiff was granted leave to amend his pleading").

In sum, it is plain from the numerous cases and from common sense that a where a court orders a dismissal without prejudice for a curable defect, the cure may be accomplished by amendment or new action. The trial court has broad discretion under CPLR 3025 to permit leave to amend after dismissal without prejudice. Leave to amend is to be freely granted in the exercise of that discretion,

absent prejudice to a defendant from the amendment.

Here, Appellants make no assertion of prejudice to them from the amendment anywhere in their Brief. That is because no prejudice exists -- the proposed amended pleading is identical in all substantive respects to the prior pleading that has guided pre-trial discovery. By contrast, the inefficiency and prejudice to Plaintiffs of having to file and serve a new action and move to consolidate is self-evident and would serve no purpose. Accordingly, the trial court's granting of leave to amend was the provident exercise of its discretion following Respondent UESS's cure of the capacity/standing to sue issue identified by this Court in the Appellate Decision.

II.

THE MEMBERSHIP VOTE AUTHORIZING THIS ACTION NECESSARILY AUTHORIZED ALL STEPS REASONABLY NECESSARY TO PROSECUTE IT

The Cicos assert that the UESS membership vote in 2018 "did not authorize Claudio Gatelli to file a Certificate of Revival or a Certificate of Correction, and it did not authorize the filing of a Third Amended Complaint or any related motions." App. Brf. at 17. The language of the written consents, never quoted in Appellants' Brief, speaks for itself:

> "WHEREAS the Member has determined that it is in the best interests of the Company and its Members that the Company file an Amended

> Complaint against Carla Cico, Benedetto Cico, and 151 east Houston Acquisition, LLC (collectively, the "Defendants"), in the Supreme Court of New York, County of New York"
>
> NOW, THEREFORE, IT IS HEREBY RESOLVED, that the Company will immediately file an Amended Complaint against the Defendants in the Supreme Court of New York, County of New York, (the "Lawsuit")
>
> FURTHER RESOLVED, that any expenses and costs borne by the Member in connection with this matter, including payment of attorney's fees in connection with the Lawsuit, shall be reimbursed by the Company from any judgment or award received by the Company through litigation upon demand by the Member at the conclusion of this matter in proportion to each Member's ownership interest in the Company." R. 470

This language contemplates and authorizes the maintenance of this "litigation" against the Cicos from the "Amended Complaint" through to "judgment or award." If any doubt lingers, a look at the language used in the letter to the entire UESS membership calling the vote quickly dispels it:

> "The purpose of the vote is whether to direct the Company to bring claims against the Defendants." R. 462
>
> * * *
>
> "This notice shall be for the purpose of holding a vote of the membership to direct the Company to bring claims against the Defendants. R. 468
>
> * * *
>
> "<u>What the present Demand asks the Company to do</u>
>
> For the reasons set forth above, the Plaintiff Members hereby reiterate their demand that the Company bring an action directly against the

> Defendants for compensatory and punitive damages, plus reasonable expenses and attorneys' fees, to compensate the Company for all the losses it suffered due to Defendants' unlawful acts.
>
> Again, if you wish to direct the Company to bring claims against the Defendants, please do the following:
>
> • Sign the written consent herewith enclosed as Exhibit A; and
>
> • Return the signed written consent" R. 469 (emph in orig.)

This language does not contemplate the absurd notion, pushed by the Cicos time and again[6], that each step in the prosecution of this action against the Cicos will require its own new written consent. Appellants' vague paragraph devoted to this point is conclusory and chooses not to cite to or quote any of this language. App. Brf. at 17. It is easy to see why.

It is settled law in both New York and Delaware, as well as common sense, that an authorization to act necessarily includes the authorization to take all measures reasonably necessary to accomplish the authorized act.

> "actual authority also includes the implied authority to take those steps reasonably necessary to accomplish the principal's expressed objectives. Restatement (Third) of Agency § 2.02 (2006); see also *Columbia Broadcasting Sys., Inc. v. Stokely-Van Camp, Inc*., 522 F.2d 369, 375-76 (2d Cir. 1975) (agent enjoys authority to engage in conduct incidental to express grant of authority or reasonably

[6] Although they keep it vague in their Brief, the Cicos have repeatedly persisted in this nonsensical assertion below. *E.g.*, R. 449 ("Resolution shows that the sole stated purpose of the resolution was to authorize the Company to file the Second Amended Complaint. And, to repeat, this resolution does not contain any references to Claudio Gatelli filing a second Certificate of Revival or related Certificate of Correction, nor the filing of a Third Amended Complaint").

necessary to accomplish it)"

Kelly v. Handy & Harman, 2010 WL 2305743, at *10 (S.D.N.Y. Feb. 11, 2010) *aff'd*, 406 F. App'x 538 (2d Cir. 2011); *Avila-Hernandez v. Timber Prod.*, 2012 WL 1409538, at *3 (Del. Super. Ct. Jan. 6, 2012) ("express grant of power to an agent includes, by implication, the power to do what is reasonably necessary to implement the grant of authority").

There is no dispute that revival of the Company was reasonably necessary for UESS to maintain this action against the Cicos, as it was directed to do by the vote. Nor is there any dispute that filing the TAC is reasonably necessary to prosecute this litigation. Thus, the Cicos' assertion that these were not authorized by the membership vote to maintain this action against them is easily rejected.

III.

THE CICOS' POTSHOTS AT THE VOTES CAST BY THREE SPECIFIED UESS MEMBERS ARE MERITLESS

In the three years since the vote was taken to prosecute this action against them, the Cicos have been filing motion after motion and pleading after pleading trying to cast doubt on various members' votes. E.g., Dkt. 261; Dkt 328; R. 67-68, 185-88, 452-53. This appeal, and the motions below from which it is taken, are among them. The trial court has each time rejected these potshots as baseless. This Court should do the same.

A. Sirio Srl/Sirio Trust Alpha

First, the Cicos reprise their bad faith assertion, repeatedly rejected below, in which they fecklessly insist that "Sirio Trust Alpha, not Sirio, Srl" is the UESS member, but Sirio Srl signed the written consent to authorize the prosecution of this action. App. Brf. 18. As the Cicos well know, Sirio S.r.l. is the trustee of Sirio Trust Alpha. In his sworn Affidavit (Dkt. 175) Benedetto Cico attached Sirio's financial statement (Dkt. 178) showing that Sirio S.r.l. is the trustee of Trust Alpha, and discusses Sirio S.r.l. as a member of UESS. Dkt 175 ¶7. Further, Sirio S.r.l. is repeatedly identified on UESS tax returns, prepared by the Cicos, as being the trustee of Trust Alpha and is issued the K-1. R. 142-63. This is also affirmatively alleged in Carla's Answer. R. 55. It is plain from document after document created by the Cicos themselves that this assertion is false. It is axiomatic that a trust can act only through its trustee. Thus, Sirio Srl as trustee executes the written consent for Trust Alpha.

B. Aiebus S.A./Scardoni

Next, the Cicos offered what their counsel purported to be a "declaration" of Giorgio Scardoni. R. 489-90. The document falls far short of the evidentiary standards for admissibility for several reasons, any one of which is sufficient to require its rejection.

The document fails to comply with CPLR 2106, which prescribes the language required of an overseas affiant. CPLR 2106 provides:

> "The statement of any person, when that person is physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:
>
> > I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law."

The document fails to comply with CPLR 3021 prescribing the language of affidavits and the administration of oaths by authorized persons, such as notaries, taking sworn statements. The document is not notarized, contains no jurat, makes no reference to penalties of perjury under the laws of the State of New York, indeed contains no oath of any kind.

The document fails to comply with CPLR 2101 providing the requirements for certified translations, including the requirement of an affidavit from a certified Italian to English translator attesting to the accuracy and correctness of the translation.

For these reasons, this document is inadmissible for any purpose in the action and was correctly rejected by the trial court. Even if it were admissible, its purported contents would at best raise a question of fact as to Mr. Scardoni's signature on the written consent, which has been on file in the docket of this action since July 2018. R. 481; Dkt 251. It is axiomatic that questions of fact may not be resolved at the pleading stage.

C. Anchor Holdings

Finally, the Cicos submitted what their counsel simply called "a printout from a UK governmental agency known as Companies House relating to Anchor International Holdings Limited." R. 458. No explanation of what this document is or means, no authentication of who printed it and when, and no explication of "UK" law is offered.

The "printout" states that a company called Anchor Holdings International Limited has a status of "dissolved" by "compulsory strike-off." R. 491. But no statement of the legal or other effect of such a status appears in either the document, the Kemp Affirmation, or anywhere else.

There is no evidence of what "Companies House" is, or what legal effect it has, if any. There is no evidence whether the entity referenced in the document, which is stated to be headquartered in London, is even the same one as the UESS member, which has been sworn by Mr. Cico to be headquartered in Rome. Dkt

176. The unexplained, unauthenticated, foreign law document offered by the Cicos' counsel without expert testimony of the operation of that law, is of no evidentiary effect, even if the entity referenced were the member in question.[7]

IV.

THE CICOS' COUNTERCLAIMS WERE PROPERLY DISMISSED

It is difficult to tell what Appellants' arguments are as to their dismissed counterclaims. Apart from citing general legal standards, Appellants spend just one paragraph on ten counterclaims they characterize as "breach of contract" (App. Brf. at 22) and a one paragraph on five more they characterize as "declaratory judgment." *Id*. at 23. They fail to mention, much less refute, any of the arguments for dismissal. They fail to mention or refute the trial court's reasons for dismissal. Appellants offer nothing but a few conclusory proclamations of merit. *Id*. 22-23.

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[7] The Court should note that even if the Scardoni and Anchor International membership votes were subtracted from the written consents to prosecute this action, a majority of the unconflicted members, 39.47% of 75%, would nonetheless have carried the vote. R 487-88. The Cicos claim to own over 25% of UESS by virtue of having been its managers. R. 125. As the trial court ruled back in June 2019:

> "The Cicos would be disabled from voting on the propriety of this action (see Beam v. Stewart, 845 A2d 1040, 1049 [Del 2004]). Under Delaware law, where persons holding voting rights are conflicted, action should only be taken by a vote of an unconflicted majority to ensure that the presumptions of the business judgment rule are not rendered inapplicable (*In re Morton's Rest. Grp., Inc. Shareholders Lit.,* 74 A3d 656,663 [Del Ch. 2013]; see *Corwin v. KKR Fin. Holdings, LLC*, 125 A3d 304, 313 n.28 [Del 2015]). Thus, a vote by 50% of all membership interests may not be required (e.g., if only 75% are unconflicted, a vote of 37.5% should suffice." R. 126

For the sake of bringing order and light to this portion of the appeal, Respondents will address the trial court's dismissal counterclaim by counterclaim, for each of Benedetto and Carla, in the subsections that follow.

Carla Counterclaim #1 and Benedetto Counterclaim #2.

In these counterclaims, Carla and Benedetto say that during the period they were the sole co-managers of UESS, they failed to pay themselves management fees and expense reimbursements.[8] R. 61-62, 196-97. They allege that this was a breach of the Operating Agreement by UESS. Id.

As to management fees, the trial court correctly found that the Operating Agreement conditions the payment of management fees on the existence of "net income" for UESS (R. 90), and that the Cicos neither alleged, nor submit any evidence of, the existence of net income for UESS in any year. R. 7. The trial Court also correctly found that the tax returns, created and filed by the Cicos themselves, reflected that UESS had no "net income." R. 7, 130-140.

As to expenses, the trial court correctly found that the Cicos failed to allege, or submit evidence of, expenses incurred for which they sought reimbursement. R.

[8] As its sole co-managers, Carla and Benedetto were obligated, and the only ones authorized, to take actions for UESS to fulfill its obligations. This includes paying its debts, like any expense reimbursement or management fees due. The fact that they did not do so speaks mightily to the fact that these debts either never existed.

7. In response to document demands seeking all documents concerning the debts of UESS, neither Cico produced any expense reports nor reimbursement requests, much less unpaid ones with back-up. R. 14, 108-120. This is because none exist. The counterclaims themselves fail to allege that any specified expenses were even incurred, or that any specified expenses were the subject of an expense report, much less one submitted with appropriate back-up. These missing allegations are fatal to the counterclaims because as the trial court correctly held, UESS has no obligation to pay for expenses not incurred, nor any not scheduled on an expense report with appropriate back up. The Cicos made no showing to the contrary below (R. 250-51, 275-77).

Carla Counterclaim #2, Benedetto Counterclaims #1, 4, 6, and 8

These are for breach of the Operating Agreement. All the allegations are directed to the steps Respondents have taken to prosecute this action against the Cicos, such as the corporate revival, the retention of counsel, and the filing of pleadings. R. 195-96 ("Thus by filing the complaint and the second amended complaint as well as by virtue of all acts taken thereafter by the company, the company breached the operating agreement…"); R. 199-200 (same); R. 212 ("Without the foregoing actions … the Company's claims would have been dismissed and Benedetto would not have been required to defend himself"); R. 214

("Because [of] Favourite's [actions], Benedetto has been required to continue defending the claim asserted against him by the Company"); R. 64 ("Individual plaintiffs breached the Operating Agreement by…improperly retaining counsel to prosecute this action.").[9]

It follows that the alleged damages are simply the attorneys' fees and expenses the Cicos incurred in defending this action. R. 196 ("As a proximate result of the Company's breaches of the Operating Agreement, Benedetto Cico has been forced to defend himself in the New York Action, which was illegally filed by the Original Plaintiffs on its behalf. As such, he has suffered, and will continue to suffer, damages for which the Company is liable."). The trial court recognized this as failing to meet the element of damages for a breach of contract claim. R. 7-8 ("The Cicos do not allege damages separate and apart from their legal fees in this action, which are not recoverable under the American Rule. *CW Capital Invs LLC v. CW Capital Cobalt VR Ltd.*, 182 AD3d 448 [1st Dept 2020]; see *Congel v. Malfitano*, 31 NY3d 272, 291 [2018]").

[9] The two other allegations were "failing to appoint a new manager" and "failing to amend the Operating Agreement." R. 64. As pointed out below (R. 227), there is no affirmative obligation to amend the Operating Agreement, nor one to appoint a new manager. Absent and obligation, there can be no breach. *Deutsche Bank Nat'l Tr. Co. v. Flagstar Cap. Mkts. Corp.,* 32 N.Y.3d 139, 149 (2018) ("no obligation … no breach").

Carla Counterclaims #3 and 5, Benedetto Counterclaims #5, 7, and 9

These are each framed as claims for declaratory judgment based on the identical allegations made in the breach of contract claims discussed in the previous subsection. The trial court correctly found them to be duplicative (R. 8) and therefore subject to dismissal for the same reasons.

Carla Counterclaim #6, Benedetto Counterclaim #12

These are for "attorneys' fees" incurred in this action. R. 69, 221-22. The sole ground alleged is the prevailing party attorneys' fees clause of the parties' Operating Agreement. Id. The trial court properly held that these were premature, as there is no prevailing party yet: "To the extent the Cicos claim entitlement to prevailing-party fees under § 11.12 of the operating agreement, of course, it is premature to decide that now and, whoever prevails, can seek reimbursement of fees based on the contract. *Cf. Pier Studios LP v. Chelsea Piers LP*, 27 AD3d 217 [1st Dept 2006]." R. 8.

Carla Counterclaim #7

In the seventh counterclaim, Carla seeks indemnity from the Company for the very claims being brought against her by the Company. That is not how the Section 5.10(a) of the Operating Agreement indemnity provision works. The

indemnity provision applies to claims by third parties, not a dispute between the indemnitor and the indemnitee. The latter scenario is governed by Section 5.10(b), which exculpates a manager or member for liability to one another or to the company for specified kinds of conduct or inaction, not relevant here. R. 90-91. Any other reading would render 5.10(a) absurd, the company having to repay to the wrongdoer the very damages it is awarded.

In any event, Section 5.10(a) provides for indemnity if, and only if, the challenged conduct is "within the scope of the authority conferred on the Managers or Members by this Agreement," "does not constitute a violation of any provision of this Agreement" and "does not arise from the failure to exercise reasonable business judgment in good faith, gross negligence, willful misconduct, or fraud." R. 90. There are no claims against the Cicos that fit this definition of indemnifiable conduct. Each affirmative action alleged is a willful violation of a provision of the OA and/or of a fiduciary duty and each failure to act was a violation of the duties expressly referenced in the OA owed to the Members and UESS. R. 356-89. Thus, Carla is not eligible for indemnity for any of the claims in this action. For these reasons, the seventh counterclaim was properly dismissed.

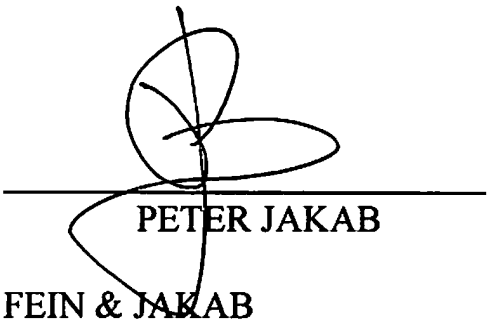
Carla Counterclaims # 4 and 8, Benedetto Counterclaims # 3, 10, and 11

These are not included among the list of counterclaims whose dismissals the Cicos are appealing. App. Brf. 22 ("Appellant Carla Cicos First, Second, Sixth and Seventh Counterclaims as well as Appellant Benedetto Cicos First, Second, Fourth, Sixth, Eighth, and Twelfth Counterclaims"), 23 ("Appellant Carla Cico's Third and Fifth Counterclaims and Appellant Benedetto Cico's Fifth, Seventh, and Ninth Counterclaims"). Failure to address dismissal of certain causes of action on an appeal that addresses the dismissal of others results in the abandonment on appeal of the issues not addressed. *E.g.*, *Furlender v Sichenzia Ross Friedman Ference LLP*, 79 A.D.3d 470, 470 (1st Dept 2010); *McHale v. Anthony*, 41 A.D.3d 265, 266-67 (1st Dept 2007).

CONCLUSION

For all the reasons stated above, the ruling of trial court should be affirmed in its entirety.

Dated: New York, New York
November 3, 2021



PETER JAKAB

FEIN & JAKAB
40 Fulton Street · 17th Floor
New York, New York 10038
(212) 732-9290

VALLA & ASSOCIATES, INC., PC
Antonio Valla, Esq.
509 Madison Avenue · Suite 1510
New York, New York 10022

Attorneys for Plaintiffs
Favourite Ltd., Claudio Gatelli, Graziano Sghedoni, Alberto Brentegani, Sirio SRL, Oile Srl, Upper East Side Suites LLC

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Respectfully,

VALLA & ASSOCIATES, INC., PC
509 Madison Avenue · Suite 1510
New York, New York 10022
(212) 913-9246

FEIN & JAKAB
40 Fulton Street · 17th Floor
New York, New York 10038
(212) 732-9290