To be Argued by:
CHRISTOPHER A. RAIMONDI
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

SAGE SYSTEMS, INC.,

Plaintiff-Respondent,

– against –

MICHAEL LISS, as Executor of the Estate of Robert Liss,

Defendant-Appellant.

Appellate Case Nos.: 2020-02671 2020-03659

REPLY BRIEF FOR DEFENDANT-APPELLANT

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New York County Clerk's Index No. 650745/10

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PRELIMINARY STATEMENT

Defendant-Appellant limits its arguments herein to a rebuttal of the responsive points raised by Plaintiff-Respondent in Plaintiff-Respondent's Brief and otherwise respectfully refers this Court to Defendant-Appellant's brief as if fully set forth herein.

For the reasons set forth herein, the Estate is entitled to prevail on its appeal and the Estate asks this Court to modify the Motion Court's Order and grant Defendant-Appellant's motion in its entirety and deny Plaintiff-Respondent's motion in its entirety.

ARGUMENT

POINT I

THE PARTNERSHIP AGREEMENT DOES NOT PROVIDE FOR THE AWARD OF ATTORNEY'S FEES IN DIRECT ACTIONS BETWEEN PARTNERS

As set forth in detail in the Brief for Defendant-Appellant, the indemnification provision of Section 13.02 of the Partnership Agreement contains no reference whatsoever to attorney's fees and it is well-settled that where a contract for indemnification does not specifically reference indemnification for attorney's fees, the parties are not entitled to recover such fees. *See, e.g., Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 492, 548 N.E.2d 903, 549 N.Y.S.2d 365 (1989) ("Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.")

Sage cites two decisions for its contrary position and neither provide Sage with any support. First, Sage cites *Breed, Abbott & Morgan v. Hulko*, 139 A.D.2d 71 (1st Dept. 1988), *aff'd*, 74 N.Y.2d 686 (1989). As explained

at length in the Brief for Defendant-Appellants, the decision in *Breed, Abbott* stemmed from the fact that it involved an escrow agreement and the sole purpose of the indemnification clause was to protect the escrowee from claims made by the other parties to the agreement. *Breed, Abbott* is not a loosening of the rule in *Hooper*, as Sage seems to argue and, in fact, the Court in *Hooper* specifically distinguished the holding in *Breed, Abbott* on the basis that it was unmistakable that the provision was intended to apply to direct claims and no potential for third-party claims existed. *Hooper Assocs., Ltd.*, 74 N.Y.2d at 493-94, 549 N.Y.S.2d at 368. Sage has failed to address this point.

Second, Sage cites *Nigri v. Liberty Apparel Co., Inc.*, 76 A.D.3d 842, 844 (1st Dept. 2010) as standing for the proposition that, "as long as an indemnification provision has broad applicability, the phrase 'attorneys' fees' is not required in order to recover attorney's fees from the other." (Brief for Plaintiff-Respondent at 13.) Sage's reading of *Nigir* is astonishingly incorrect. First, the indemnification clause at issue covering third-party claims contains the words "attorney's fees." *Nigri*, 76 A.D.3d 842, 843. Second, the only direct attorney's fees claim awarded to the plaintiff in *Nigri* was recovered pursuant to a separate, standard fee-shifting

clause specifically providing for the payment of attorney's fees incurred in enforcing the agreement at issue. *Id*.

In arguing that the indemnification provision at issue covers direct claims between the parties instead of third-party claims, Sage cites the same cases previously distinguished by the Estate without directly addressing the Estate's argument. The Estate respectfully refers this Court to the Estate's prior briefing for a discussion of those cases.

In a superficial attempt to argue that three cases cited by the Estate are inapplicable (*Gotham Partners, L.P. v. High River Ltd. Partnership*, 906 N.Y.S.2d 205, 76 A.D.3d 203 (1st Dep't 2010), *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186 (2d Cir. 2003), and *Broadhurst Investments, L.P. v. Bank of New York Mellon*, No. 09 Civ. 1154 (PKC), 2009 U.S. Dist. LEXIS 117590, 2009 WL 4906096 (S.D.N.Y. Dec. 14, 2009)), Sage attempts to distinguish them by treating the conditions that trigger indemnification as limitations on the types of claims and indemnification provided. (Brief for Plaintiff-Respondent at 10.) If Sage's analysis were correct, then the indemnification provision at issue herein would, by Sage's logic, be a limited one as it only applies to acts "not performed in good faith or is not reasonably believed by such Partner to be in the best interests of the

Partnership." (R72.) The triggering events are not dispositive of the issue—the provision must meet the exacting "unmistakably clear" standard of *Hooper*. *Hooper*, 76 A.D.3d at 209.

As set forth in the Estate's prior brief, the cases upon which Sage principally relies—*Crown Wisteria, Inc. v. Cibani, 178 A.D.3d* 524 (1st Dep't 2019) and *Crossroads ABL LLC v. Canaras Cap. Mgt., LLC*, 105 A.D.3d 645 (1st Dep't 2013)—are inapposite because the provisions at issue in those cases specifically provided for payment of attorney's fees.

For these reasons, the Estate is entitled to dismissal of the indemnification claim and the Estate asks this Court to vacate the Judgment and modify the Motion Court's Order to grant Defendant-Appellant's cross-motion in its entirety and deny Plaintiff-Respondent's motion in its entirety.

POINT II

THE MOTION COURT ERRED IN FINDING BAD FAITH ON THE PART OF LISS, WITHOUT WHICH THERE CAN BE NO LIABILITY UNDER SECTION 13.02

Faced with the argument of the Estate that Sage put forth no factual evidence of bad faith on the part of Liss in support of its motion, Sage ignores both the argument and the Motion Court's decision finding that Sage's factual arguments of bad faith were unavailing. (R12-13.) Instead, Sage relies upon an interpretation of the Dissolution Order that Sage itself did not put forward (specifically that the Dissolution Order's dicta regarding unclean hands purportedly constituted a binding determination of bad faith).

Recognizing that the language in the Dissolution Order regarding unclean hands was not necessary to dispose of the case and was, therefore dictum, Sage cites *Garofano Const. Co. v. New York*, 180 Misc. 539, 540 (AT 1st Dept. 1943) *aff'd* 266 AD 960 (1st Dept. 1943) for the proposition that well-reasoned dicta is binding upon this Court. In *Garofano*, however, the court held that it was bound by the dicta in *Ewen v. Thompson-Starrett* Co., 208 N.Y. 245, 246, 101 N.E. 894, 895 (1913), a decision of the Court of Appeals, under a circumstance where the decision of the Court of Appeals involved interpretation of a statute "of such far-reaching public importance."

Id. The Dissolution Order is a decision of a lower court and the dicta contained therein does not involve public policy considerations.

Sage also cites *Diarrassouba v. Consol. Edison Co. of N.Y. Inc*., 2014 NY Slip Op 08749, ¶ 1, 123 A.D.3d 525, 525, 999 N.Y.S.2d 33, 33-34 (1st Dept. 2014) for the proposition that the Estate's failure to appeal from the Dissolution Order precludes the Estate's argument on appeal. Once again, Sage's inability to understand completely the import of the cases it cites undermines its argument.

As a threshold matter, given that the language at issue in the Dissolution Order was dicta, the Estate could not have been required to appeal from language that was not determinative of the issues when the Dissolution Order contained other grounds upon which the decision could be upheld.

Moreover, *Diarrassouba* does not stand for the cited proposition. In *Diarrassouba*, the Court, in fact, held that a factual argument not raised below in the same case could not be raised for the first time on appeal. *Id*. The *Diarrassouba* Court, however, specifically noted that it could review legal arguments, such as the legal issues raised herein, which appear on the face of the record. *Id.* Appellate courts make an exception to that general

rule when there is a sufficient record on appeal and the issue is determinative. *See Allstate Ins. Co. v. Perez*, 157 A.D.2d 521, 523, 549 N.Y.S.2d 713, 714-15 (1st Dept. 1990).

Inexplicably, Sage also cites to *Meak v. Properties Pursuit, Inc*., 186 A.D.3d 701 (2nd Dept. 2020) which is inapposite as it involves prior successive appeals that were dismissed by the appellate court.

Here, as set forth in greater detail in the Brief for Defendant-Appellant, the Dissolution Order was not "well-reasoned," the doctrine of unclean hands applies "'only where the misconduct alleged as the basis for the defense '"has immediate and necessary relation to the equity that [plaintiff] seeks in respect to the matter in litigation."'" *839 Cliffside Ave. LLC v. Deutsche Bank Ntl. Trust Co*., 2016 WL 5372804, *11 (E.D.N.Y. September 26, 2016). (internal citations omitted). Here, the dictum in the Dissolution Order stated that Liss claimed that Sage was improperly subletting space while subletting space himself.

While the reciprocal conduct was related, it does not constitute "uncleans hands." "Under New York law, to assert a defense of unclean hands, a party must have been injured by the allegedly inequitable conduct." *Id*. Sage's allegedly inequitable conduct of subletting space in fact caused

no injury to anyone, as the court held in the Dissolution Order. (R88.) Accordingly, the Liss' own subletting of space raised in dicta could not constitute "unclean hands" in the manner that Sage argues. All of this can be determined as a matter of law on the record before this Court and this Court is not bound by an erroneous legal conclusion—in dicta, no less—of a lower court.

Sage and the Motion Court have improperly conflated the conduct cited in the Dissolution Order (subletting) with the commencement of the Dissolution Proceeding. (R13; Brief for Plaintiff-Respondent at 7.) The Motion Court specifically found no independent evidence of bad faith or malicious intent on the part of Liss in commencing the Dissolution Proceeding and relied solely on a misreading of the Dissolution Order in reaching its erroneous conclusion. (R12-13.)

Sage, intending to capitalize on this, argues that "Liss' commencement of the Dissolution Action without any supporting evidence whatsoever, undeniably constitutes a bad faith act." (Brief for Plaintiff-Respondent at 8.) Such is not the case, however, absent findings to the contrary that are not present in either the Motion Court's Order or the Dissolution Order upon which it relies and, accordingly, the commencement

of the Dissolution Proceeding does not "undeniably constitute[] a bad faith act" meriting treatment analogous to sanctions. *See Di Pace v. Figueroa*, 223 A.D.2d 949, 951, 637 N.Y.S.2d 222, 224 (3rd Dept. 1996) (affirming a denial of sanctions after dismissal of a dissolution proceeding despite holding "DiPace has proffered not a shred of evidentiary material substantiating her claims; her deposition testimony, which she maintains raises factual questions, consists merely of hearsay and conclusory allegations"). Indeed, even the court in the Dissolution Proceeding did not determine that the commencement of those proceedings warranted sanctions or attorney's fees.

For these reasons, the Estate is entitled to dismissal of the indemnification claim and the Estate asks this Court to vacate the Judgment and modify the Motion Court's Order to grant Defendant-Appellant's cross-motion in its entirety and deny Plaintiff-Respondent's motion in its entirety.

CONCLUSION

For all of the foregoing reasons, the Estate respectfully requests that this Court vacate the Judgment and modify the Motion Court's Order to grant Defendant-Appellant's cross-motion in its entirety and deny Plaintiff-Respondent's motion in its entirety.

Dated: Massapequa, New York
February 11, 2021

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

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Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 1,839.

Dated: February 11, 2021