To be Argued by:
FRED L. SEEMAN
(Time Requested: 30 Minutes)

APL 2021-00168

Court of Appeals
of the
State of New York

SAGE SYSTEMS, INC.,

Plaintiff-Respondent,

- against -

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

Defendant-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT

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Dated: January 25, 2022

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Appellate Division First Department, Case Nos.: 2020-02671 & 2020-03659
New York County Clerk's Index No.: 650745/2010

APPELLATE INNOVATIONS
(914) 948-2240

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), Plaintiff-Respondent, Sage Systems, Inc., hereby discloses that it does not have any corporate parents, subsidiaries, or affiliates except as follows: S-L Properties

RELATED LITIGATION STATEMENT

Pursuant to Court of Appeals Rule 500.13(a), there are two (2) pending actions related to this litigation. In the first related action, entitled *Sage Systems, Inc. and S-L Properties v. Michael Liss as Executor of the Estate of Robert Liss, Index No. 653523/2020*, the Plaintiffs seek to recover rent that the Estate of Robert Liss improperly received from certain subtenants/licensees. In the second related action, entitled *The Estate of Robert Liss v. Sage Systems, Inc., Index No. 107019/2010*, the Defendant, Sage Systems, Inc., has been granted partial summary judgment on its claim for specific performance.

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TABLE OF AUTHORITIES

Cases

COUNTER QUESTIONS PRESENTED

1. Whether a judicial determination that the commencement and maintenance of the Dissolution Action, without any evidentiary support, and with unclean hands, triggers the indemnification provision in the governing Partnership Agreement.

Answer: Yes. Robert Liss' commencement of the Dissolution Action, without evidentiary support, and with unclean hands, constitutes bad faith, thereby triggering the Partnership Agreement's indemnification provision.

2. Whether the Partnership Agreement's indemnification provision includes direct claims between the partners.

Answer: Yes. The broad and unrestrictive indemnification provision applies to direct claims between the partners.

3. Whether the Partnership Agreement's indemnification provision includes the recovery of legal fees.

Answer: Yes. The broad indemnification provision includes the recovery of attorneys' fees.

PRELIMINARY STATEMENT

The Plaintiff-Respondent, Sage Systems, Inc. (hereinafter "Sage") hereby submits this brief in support of the affirmance of the Decision and Order of the Honorable Barbara Jaffe dated May 8, 2020 [R. 4-14][1] and the subsequent Money Judgment filed on August 18, 2020 [R. 16-21], which were unanimously affirmed by the New York Appellate Division, First Department by Decision and Order dated April 27, 2021 [R. 137-138]. The decision below should be affirmed inasmuch as the broad indemnification provision in the governing Partnership Agreement is triggered by Robert Liss' bad faith commencement of the Dissolution Action. Indeed, it was judicially determined years ago that the Dissolution Action was commenced without any support in law or fact and with unclean hands. That determination was never appealed. Finally, the broad, unrestrictive language in the subject indemnification provision necessarily includes direct claims between the parties, and the recovery of legal fees.

COUNTER STATEMENT OF FACTS

A. S-L Properties and the Governing Partnership Agreement

In 1984, Sage and Robert Liss created the partnership, S-L Properties (hereinafter the "Partnership") by entering into a partnership agreement, dated as of February 17, 1984 (hereinafter the "Partnership Agreement"). [R. 52-75]. The

1 Refers to record on appeal.

express purpose of the Partnership was to purchase a commercial cooperative unit on the 10th floor of the building located at 246 West 38th Street, New York, New York (hereinafter the "Premises") [R. 56]. Sage and Liss each subleased a "use area" within the Premises, to be used for commercial office space. [R. 61-62].

The partners' indemnification obligations are set forth in Section 13.02(b) of the Partnership Agreement, which states, in pertinent part, that:

> (b) *The Partnership and the other Partners* shall be indemnified and held harmless *by each Partner* from and against any and all claims, demands, liabilities, costs, damage, expenses and causes of action of any nature whatsoever arising out of or incidental to any act performed by a Partner which is not performed in good faith or is not reasonably believed by such Partner to be in the best interests of the Partnership and within the scope of authority conferred upon such Partner under this Agreement, or which arises out of the fraud, *bad faith*, willful misconduct or negligence of such Partner. (emphasis added). [R. 72].

The Estate of Robert Liss (hereinafter the "Estate") is bound by this provision, pursuant to Section 13.07 of the Partnership Agreement [R. 73].

B. **The Dissolution Action**

In January, 2006, Robert Liss sued Sage, in an action entitled *Robert Liss v. Sage Systems, Inc., Index No.: 100205/2006* (hereinafter the "Dissolution Action"), seeking the judicial dissolution of the Partnership [R. 78-85]. In February, 2009, Hon. Debra A. James, J.S.C., issued an Order (hereinafter the "2009 Order"), dismissing the Dissolution Action and, in so doing, expressly held that Robert Liss

failed to present any evidence in support of his claim for judicial dissolution and that his claim was brought with "unclean hands". [R. 86-90].

C. **Procedural History and the Decisions Below**

The instant action was commenced by Summons and Complaint dated June 23, 2010 [R. 28-34]. The Complaint's sole cause of action seeks indemnification based upon Robert Liss' commencement of the Dissolution Action, in bad faith, which forced Sage to needlessly incur $80,848.04 in legal fees. [R. 49; 93-122]. Issue was joined on or about July 21, 2010. [R. 35-42]. Robert Liss subsequently died on February 2, 2011. [R. 51].

On August 29, 2019, Sage moved for summary judgment and to amend the caption to substitute "Michael Liss, as Executor of the Estate of Robert Liss" in the place of Robert Liss. [R. 43-122]. On September 20, 2019, the Estate cross-moved for summary judgment dismissing the Complaint. [R. 123-128].

By Decision and Order dated May 8, 2020, the Motion Court properly granted Sage's application, in its entirety, and denied the Estate's application. [R. 4-14]. Specifically, the Motion Court held that, based upon the determination in the 2009 Order, that Robert Liss acted with unclean hands and filed the action without evidentiary support, Robert Liss' conduct "constitutes bad faith, thereby triggering the defendant's duty to indemnify plaintiff". [R. 13]. The Motion Court also held that the indemnification provision "applies to direct claims between the partners, and

defendant raises no triable issues in opposition". [R. 12].

The Estate filed a Notice of Appeal on June 11, 2020. [R. 3]. Sage was subsequently awarded a money judgment against the Estate, in the amount of $80,608.04, on August 18, 2020 (hereinafter the "Money Judgment"). [R. 16-21]. The Estate filed a Notice of Appeal of the Money Judgment on September 3, 2020 [R. 15] and thereafter perfected the Appeals.

By Decision and Order dated April 27, 2021, the Appellate Division, First Department unanimously affirmed the Motion Court's Decision. [R. 137-138]. In doing so, the Appellate Division, First Department, expressly held that the broad language of the governing indemnification provision "encompasses the recovery of attorneys' fees" and "is not limited to third-party claims". [R. 138]. The Estate thereafter moved for leave to appeal to the Court of Appeals. The Estate's motion was granted by Order of the Court of Appeals dated October 14, 2021. [R. 136].

ARGUMENT

POINT I

ROBERT LISS' COMMENCEMENT AND MAINTENANCE OF THE DISSOLUTION ACTION, WITHOUT EVIDENTIARY SUPPORT AND WITH UNCLEAN HANDS, CONSTITUTES BAD FAITH

As set forth in the 2009 Order, Robert Liss had "unclean hands with respect to his demand for equitable relief of dissolution" and failed to present any evidence in support of his claims. [R. 89]. Caselaw is clear that unclean hands and bad faith "travel in tandem". *Erickson Beamon Ltd. V. CMG Worldwide, Inc., 2014 U.S. Dist. LEXIS 112437, 9 (S.D.N.Y. 2014)*. Moreover "an unclean hands defense requires a finding of bad faith". *Obabueki v. International Business Machines Corp., 145 F. Supp 2d 371, 401 (S.D.N.Y. 2001) aff'd 319 F3d 87 (2d Cir. 2003) cert. denied 540 U.S. 940 (2003)*. Indeed, the *Obabueki* Court held that:

> The unclean hands doctrine closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, (internal citations omitted). *Id*.

Further, by commencing the Dissolution Action, without "any reasonable basis in law or fact" and failing to submit any evidence whatsoever in support thereof, the Dissolution Action was, in essence, a frivolous lawsuit, which unequivocally constituted a bad faith act. *Smullens v. MacVean, 183 AD2d 1105, 1107 (3rd Dept. 1992) lv. app. denied 85 NY2d 995 (1995)*.

Here, the Partnership Agreement's indemnification provision is explicitly triggered by a Partner's bad faith conduct. [R. 72]. In contrast to good faith, bad faith conduct "connotes a dishonest purpose". *Kalisch-Jarcho, Inc. v. New York, 58 NY2d 377, 385 n 5 (1983)*. Thus, the commencement of the Dissolution Action, without any evidence and with unclean hands, was done solely for the dishonest purpose of dissolving the Partnership in order to unilaterally force a sale of the Premises. [R. 48, ¶28]. Based upon this conduct, the Motion Court held that Robert Liss acted in bad faith, "thereby triggering defendant's duty to indemnify plaintiff for its expenses incurred in defending itself in that action". [R. 13]. The Appellate Division, First Department, unanimously affirmed the Motion Court's Decision, reasoning that:

> The finding of the court in the dissolution action that the decedent had unclean hands in bringing that action is the equivalent of a determination that the decedent acted in bad faith…. No appeal was taken from that finding. Contrary to defendant's contention, plaintiff was damaged by having to defend itself, incurring legal costs, in that action (internal citation omitted). [R. 138].

The 2009 Order was not appealed. Indeed, the Estate did not dispute this determination before the Motion Court which, as a threshold matter, should preclude the Estate from raising the argument here. *61 West 62nd Owners Corp. v. Harkness Apartments Owners Corp., 202 AD2d 345 (1st Dept. 1994)*; *Lichtman v. Grossbard, 73 NY2d 792, 794 (1988)*.

The Estate claims that the 2009 Order, upon which the Motion Court relied, should be disregarded as *dicta*. However, since Robert Liss' unclean hands, and utter lack of evidence, were the dispositive reasons for the dismissal of the Dissolution Action [R. 89], the holding in the 2009 Order cannot be considered *dicta*. *Immuno AC v. Moor-Jankowski, 77 NY2d 235 (1991)*. In any event, since the 2009 Order presented a "carefully and thoroughly reasoned" finding of unclean hands and a lack of evidence, the 2009 Order was binding upon the Motion Court, and the Motion Court was "not free to depart from it". *Garofano Const. Co. v. City of New York, 180 Misc. 539, 540 (AT 1st Dept. 1943) aff'd 266 AD 960 (1st Dept. 1943)*.

The Estate seeks to distinguish *Garofano Const. Co. v. City of New York, 180 Misc. 539, 540 (AT 1st Dept. 1943) aff'd 266 AD 960 (1st Dept. 1943)* by arguing that the 2009 Order does not involve public policy considerations. *See, Defendant-Appellant Brief, p. 27*. However, it is respectfully submitted that the prevention of meritless lawsuits, that are commenced with unclean hands, is in the interest of public policy, and the holding in the 2009 Order should therefore be followed.

Moreover, the issue of whether the commencement of the Dissolution Action constituted unclean hands is a factual argument. *See, Chemical Bank v. Stahl, 237 AD2d 231 (1st Dept. 1997)*. Caselaw is clear that the Court:

> may review *legal arguments* which appear on the face of the record and which could not have been avoided if brought to the other party's attention. Here, however, the argument is factual, and the record is insufficient for a

> determination of this issue [internal citations omitted]. (emphasis added). *Diarrassouba v. Consolidated Edison Co. of NY Inc., 123 AD3d 525 (1st Dept. 2014)*.

The Record here, as it relates to the Dissolution Action, is comprised solely of the Summons and Complaint [R. 79-85] and the 2009 Order [R. 86-90]. The Affidavit of Michael Liss, submitted to the Motion Court, contains mere conjecture and speculation as to Robert Liss' motivation for commencing the Dissolution Action. [R. 125-128]. Accordingly, even if the Court could review the factual issue of whether Robert Liss acted with unclean hands, the Record is insufficient to permit such a review.

Accordingly, the Motion Court, as unanimously affirmed by the Appellate Division, First Department, properly held that Robert Liss' commencement of the Dissolution Action, with unclean hands, and without any evidence, constituted bad faith, thereby triggering the Partnership Agreement's indemnification provision.

POINT II

THE INDEMNIFICATION PROVISION APPLIES TO CLAIMS BETWEEN THE PARTNERS

Caselaw is clear that contractual indemnification provisions shall be deemed to include claims between the parties where:

> [t]he parties chose to use highly inclusive language in their indemnification provision, which they chose not to limit by listing the types of proceedings for which indemnification would be required. *Crossroads ABL LLC v. Canaras Capital Management, LLC, 105 AD3d 645, 646 (1st Dept. 2013)*.

Indeed, where, as here, the indemnification provision is not "limited to a specific list of items" and the parties did not "explicitly limit indemnification to third-party claims", the provision shall necessarily include claims between the parties. *Crown Wisteria, Inc. v. Cibani, 178 AD3d 524 (1st Dept. 2019)*.

The Partnership Agreement's indemnification provision is broad and inclusive and references claims "arising out of or incidental to any act performed by a Partner". [R. 72]. Indeed, the provision's lack of "an exhaustive list of actions for which indemnification is required", renders it inclusive of claims between Sage and Robert Liss. *Crossroads ABL LLC v. Canaras Capital Management, LLC, 105 AD3d 645, 646 (1st Dept. 2013)*.

The cases relied upon by the Estate are not controlling here inasmuch as they each involve narrowly tailored indemnification provisions that limited the circumstances in which they may apply. For example, in *Gotham Partners, L.P., v. High River Ltd. Partnership, 76 AD3d 203 (1st Dept. 2010), lv. app. denied 17 NY3d 713 (2011)*, the indemnification provision was limited to costs that the plaintiff incurred in connection with a specific third-party entity, "Hallwood", "as opposed to defendant's inaction with respect to its contractual duties to plaintiff". *Id* at 207. In other words, since the indemnification provision in *Gothan Partners, L.P.*, employed "the language of third party claim indemnification", thereby limiting the scope of the provision, it did not include claims between the parties. *Id* at 209.

Similarly, the indemnification provision considered in *Oscar Gruss & Son, Inc. v. Hollander, 337 F3d 186, (2d Cir. 2003)*, was limited to costs incurred "in connection with investigating, preparing to defend or defending, or providing evidence in or preparing to serve or serving as a witness…". *Id* at 199. This restrictive list, which did not include intra-party claims, prevented the indemnification provision from applying to direct claims between the parties.

Additionally, the case of *Broadhurt Investments, LP v. Bank of New York Melon, 2009 U.S. Dist. LEXIS 117590 (S.D.N.Y. 2009)*, upon which the Estate relies, in fact, favors direct indemnification between Sage and Liss. Specifically, the Court in *Broadhurt* held that, because the limited indemnification provision did not specifically identify which parties may assert indemnification claims, the provision could not include direct claims between the parties to the agreement. Here, by contrast, the Partnership Agreement's indemnification provision specifically identifies the Partners, and entitles them to:

> be indemnified and held harmless by each Partner from and against any and all claims, demands, liabilities, costs, damages, expenses and causes of action of any nature whatsoever arising out of or incidental to any act performed by a Partner. [R. 72].

Therefore, this indemnification provision includes direct claims between the parties inasmuch as it specifically references Sage's right to be indemnified by Liss for costs and expenses incurred as a result of Liss' bad faith conduct.

Finally, *Hooper Assoc. v. AGS Computers, 74 NY2d 487 (1989)* is not controlling. The indemnification provision in *Hooper Assoc.* had limited application to costs "arising out of breach of warranty claims, the performance of any service to be performed, the installation, operation and maintenance of the computer system, infringement of patents, copyrights or trademarks and the like". *Id.* at 492. Therefore, the Court held that the parties' intended to restrict the indemnification provision to third-party claims. Since the restrictions were not "exclusively or unequivocally referrable to claims between the parties themselves", the intention to include these direct claims was not "unmistakably clear". *Id.*

Recent Appellate authority demonstrates that the rule in *Hooper Assoc.* is limited to instances where parties first choose to limit an indemnification provision's applicability, and thereafter omit claims between the parties from the limited application. *See, Crown Wisteria, Inc. v. Cibani, 178 AD3d 524 (1st Dept. 2019)*; *Crossroads ABL LLC v. Canaras Capital Management, LLC, 105 AD3d 645 (1st Dept. 2013)*. Indeed, the Court in *Crossroads ABL LLC* held that:

> The parties chose to use highly inclusive language in their indemnification provision, which they chose not to limit by listing the types of proceedings for which indemnification would be required. Therefore, while the rule set forth in *Hooper Assoc. v. AGS Computers*...applies in those cases where parties intent is not evident from the plain language of the agreement, that is not the case here. *Id.* at 646.

Thus, the Motion Court, as affirmed by the Appellate Division, First Department, properly held that the Partnership Agreement's broad, unrestrictive indemnification provision demonstrates "the contracting parties' unmistakably clear intent to permit the recovery of expenses related to direct claims brought against one another". [R. 10-11].

POINT III

THE PARTNERSHIP AGREEMENT'S INDEMNIFICATION PROVISION ALLOWS FOR THE RECOVERY OF ATTORNEYS' FEES

Caselaw is clear that a broad indemnification provision should be interpreted to include attorneys' fees. *Breed Abbott & Morgan v. Hulko, 139 AD2d 71 (1st Dept. 1988) aff'd 74 NY2d 686 (1989)*. The indemnification provision in *Breed Abbott & Morgan,* broadly included indemnification "from any claims, damages, losses or expenses arising in connection herewith". *Id.* at 72. Even though this provision lacked specific reference to attorneys' fees, the Court held that "it would appear indisputably clear that the broad provisions of the indemnification agreement included the right…to recover legal expenses incurred…". *Id.* at 73.

The same finding should occur here inasmuch as the Partnership Agreement's indemnification provision includes virtually identical language, providing for indemnification from "any and all claims, demands, liabilities, costs, damage, expenses…" [R. 72]. This provision "constitutes broad language that is generally interpreted to encompass attorneys' fees". *Nigri v. Liberty Apparel Co., Inc., 76*

AD3d 842, 844 (1st Dept. 2010); Zissu v. Bear Sterns & Co., *627 F. Supp 687, 691 (S.D.N.Y. 1986), aff'd 805 F2d 75 (2nd Cir. 1986)* (even if an "indemnity provision does not expressly specify attorneys' fees, New York courts have held that broad indemnification provisions should be interpreted to extend to such fees").

The Estate, relying upon *Hooper Assoc. v. AGS Computers, 74 NY2d 487 (1989)* and *Gotham Partners, L.P., v. High River Ltd. Partnership, 76 AD3d 203 (1st Dept. 2010), lv. app. denied 17 NY3d 713 (2011)*, insists that the indemnification provision cannot apply unless it explicitly provides for "attorneys' fees". However, each of these cases are distinguishable inasmuch as the Courts in each case denied attorneys' fees because the subject indemnification provision did not permit direct claims between the parties. Specifically, the Court in *Hooper Assoc.*, denied the claim for attorneys' fees because:

> [t]he clause in this agreement does not contain language clearly permitting *plaintiff to recover from defendant* attorneys' fees incurred in a suit against the defendant. (emphasis added). *Hooper Assoc. v. AGS Computers, 74 NY2d 487, 492 (1989)*.

Similarly, the Court in *Gotham Partners, L.P.* denied the attorneys' fees claim, holding that:

> a contract provision employing the language of third party claim indemnification may not be read broadly to encompass an award of attorney's fees to the prevailing party based on the other party's breach of the contract; the provision must explicitly so state. *Gotham Partners, L.P.* at 209.

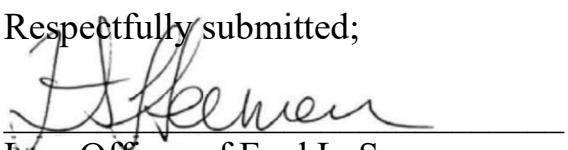
Accordingly, *Hooper Assoc., supra.* and *Gotham Partners L.P., supra.* are inapplicable here as they do not discuss whether attorneys' fees are permissible where, as here, direct claims between the parties are included in the indemnification provision. Therefore, the Motion Court, as affirmed by the Appellate Division, First Department, properly held the Estate must indemnify Sage for the legal fees that Sage incurred in the defense of the Dissolution Action.

CONCLUSION

In closing, the Decision and Order of the Appellate Division, First Department, dated April 27, 2021, which unanimously affirmed the Motion Court's Decision and Order, dated May 8, 2020, and the Money Judgment filed on August 18, 2020, should be affirmed inasmuch as the Partnership Agreement's indemnification provision requires the Estate to indemnify Sage for the costs and expenses that Sage incurred in connection with Robert Liss' bad faith commencement of the Dissolution Action.

Dated: New York, New York
January 25, 2022

Respectfully submitted;



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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Court of Appeals Rule 500.1(j) and 500.13(c)(1), that this computer-generated brief was prepared with Microsoft Word, using a proportionally spaced typeface.

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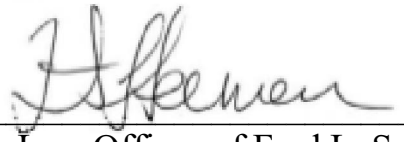
Dated: New York, New York
January 25, 2022

Respectfully submitted,



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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

Ivan Diaz, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 2160 Holland Avenue, Bronx, New York 10462.

That on the 26th day of January, 2022, deponent served the within:

BRIEF FOR PLAINTIFF-RESPONDENT

upon designated parties indicated herein at the addresses provided below, by means of Federal Express Standard Overnight Delivery, three true copies of the same at the addresses of said attorney/parties with the names of each represented party:

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Sworn to before me this
26th day of January, 2022

Notary Public

Ivan Diaz

ERIC R. LARKE
Notary Public, State of New York
No. 01LA5067236
Qualified in Westchester County
Commission Expires March 5, 2023

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