To Be Argued By:
DAVID J. KATZ, ESQ.
Time Requested: 15 Minutes

Court of Appeals

STATE OF NEW YORK

RONI LLC, ESHEL PROPERTIES, LLC, GILI HOLDINGS, LLC, and KRR INVESTMENTS, LLC, Assignees, and A.G. DOR INVESTMENTS, LLC, BANAGA LLC, MORDECHAI GOLDENBERG, ELORY LLC, ELUNGER, INC., HOD INTERNATIONAL EQUITES LLC, JOSSIFOFF LLC, KALINA & SONS LLC, KARSH N. DYAZ LLC, LYDGAT, LLC, MAZELDIK LLC, RISING STAR, LLC, ROKCOM LLC, S.I. DAR LLC, SBGR LLC, SINTRA REAL-ESTATE LLC, TAMR LLC, TATIVA FINANCE LTD., WASTED DREAMS, LLC, YALI, LLC, YORAM BAUMANN, LLC, ELI UNGER, JEOSHUA DOR, EREZ ZENOV, NIR KRIEL, EYAL SCHIFF, OVED SASON, AZARIA JOSSIFOFF, URI KALINA, ZVI KARSH, RON BAHAT, YEHUDA KEREN, JACOB PERRY, SHALOM PAPIR, RAFI RACHMAN, AMOS LASKER, ELI MOR, YORAM DAR, SHLOMO MASHAIACH, EYTAN STIBBE, RON GUTTMAN, PNINA GOLDBERG, SHUKI WEISS, ILAN CALIC, and YORAM BAUMANN, as Assignors,

Plaintiffs-Respondents,

-against-

RACHEL L. ARFA, ALEXANDER SHPIGEL, AMERICAN ELITE PROPERTIES, INC., and LAWRENCE A. MANDELKER, in his Official capacity as Court-Appointed Temporary Receiver, pursuant to CPLR Art. 64 of HARLEM HOLDINGS, LLC,

Defendants-Appellants,

GADI ZAMIR, HARLEM ACQUISITION LLC, MINTZ LEVIN COHN FERRIS GLOVSKY & POPEO, P.C., JEFFREY A. MOERDLER, EDWARD LUKASHOK, AUBREY REALTY CO., AUBREY REALTY, LLC, 42ND STREET REALTY, LLC, TAMMAZ REALTY, LLC, and ELUL ACQUISITION, LLC,

Defendants.

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Defendants-Appellants Rachel L. Arfa, Alexander Shpigel, and American Elite Properties, Inc. ("AEP") (collectively, "Appellants") submit this reply brief in further support of their appeal from the order of the Appellate Division, First Department, which affirmed on the law the order of the Supreme Court, New York County, to the extent it denied Appellants' motion to dismiss on the pleadings the breach of fiduciary duty, accounting, and constructive fraud claims, and granted in part and denied in part Appellants' motion to dismiss on the pleadings the affirmative fraud cause of action in Plaintiffs-Respondents' Amended Complaint.

PRELIMINARY STATEMENT

In their opening brief, Appellants demonstrated that the Appellate Division's decision is unprecedented in holding, as a matter of law, that someone who prepares and files a limited liability company's articles of organization and who then solicits people to invest in that limited liability company is a fiduciary to anyone he or she solicits to invest. Moreover, the Appellate Division reached this remarkable conclusion notwithstanding its express finding that the factual allegations in Respondents' Amended Complaint failed, as a matter of law, to plead the traditional fiduciary badges of trust and confidence or superior skill and expertise, which this Court has held for decades are the touch stones of the existence of a fiduciary duty.

Instead of defending the Appellate Division's unprecedented decision, Respondents mischaracterize that decision in a way that finds no support in either the decision or the Record. Specifically, notwithstanding the Appellate Division's holding that that Appellants were fiduciaries, as a matter of law, solely because they organized the Property LLCs and solicited investments in those LLCs from prospective investors, Respondents argue that the Appellate Division concluded that Appellants were fiduciaries because they exercised complete discretion and control over what to do with Respondents' funds after those funds were invested in the Property LLCs. As discussed below and in Appellants' opening brief, nothing could be further from the truth. It is undisputed that, at the time Appellants were soliciting Respondents' investments, Appellants had already executed a contract of sale to purchase a specific parcel of real property at a specifically disclosed price, both of which were disclosed to Respondents in the written offering materials they received from Appellants. Thus, the undisputed time line established by factual allegations and documentary evidence contained in the Record could not be clearer that Appellants had absolutely no discretion with respect to how Respondents' funds were to be spent. Indeed, as discussed below, the Appellate Division dismissed for lack of standing breach of fiduciary duty claims asserted in a related action previously filed by the Property LLCs against the same individuals and entities that are Appellants in this action, on the ground that Appellants could not

have owed a fiduciary duty to LLCs that did not even exist at the time the brokerage commissions and property contracts of sale that are the subject of this action were executed.

Finally, signaling the weakness of their arguments that the Appellate Division properly found , as a matter of law, that Appellants were fiduciaries based solely on their status as organizers of the Property LLCs, Respondents alternatively urge this Court to affirm on a basis expressly rejected by the Appellate Division, i.e., that Respondents have sufficiently pleaded the elements of trust and confidence and superior skill and knowledge that this Court requires to establish the existence of a fiduciary duty. But as discussed below, this Court has no jurisdiction to consider this argument in an appeal from a certified question presented by the Appellate Division, and the argument is nevertheless completely lacking in merit as evidenced by, *inter alia*, factual allegations in the original complaint that was filed in this action and that were conspicuously dropped from the Amended Complaint undoubtedly because they made clear that trust and confidence and superior skill and knowledge could not possibly be pled in good faith by Respondents. Accordingly, for the reasons set forth below, the decision and order of the Appellate Division must be reversed and all claims alleged against Appellants dismissed on the pleadings.

ARGUMENT

I. THE DECISION BELOW SHOULD BE REVERSED BECAUSE, AS A MATTER OF LAW, NO FIDUCIARY DUTY WAS ALLEGED TO EXIST BETWEEN APPELLANTS AND RESPONDENTS BASED SOLELY ON THEIR STATUS AS ORGANIZERS OF THE PROPERTY LLCS

In their opening brief, Appellants demonstrated that the Appellate Division erred when it held, as a matter of law, that Respondents' "allegation that [Appellants'] planned the business venture, organized the LLCs, and solicited [Respondents] to invest in them are sufficient to establish a fiduciary relationship." (R. 7) Specifically, Appellants established that: (i) the law in New York has never been that promoters of business corporations always owe a fiduciary duty, as a matter of law, to the prospective investors they solicit to invest in the corporation; (ii) even if this was a correct expression of New York law in the late nineteenth and early twentieth centuries, it is no longer the law in New York given a long line of decisions from this Court holding that the touchstones of a fiduciary duty are trust and confidence and superior skill and expertise (none of which was sufficiently pled here); and (iii) even if this was still a correct expression of New York law with respect to promoters of business corporations, sound public policy reasons counseled against reflexively applying this inflexible rule to limited liabilities companies. In their brief, Respondents present several arguments in their

attempt to prop up the holding and reasoning of the Appellate Division, none of which withstands scrutiny.

First, throughout their brief, Respondents try to defend the Appellate Division's decision by rewriting both the record and the Appellate Division's decision as relating to fiduciary duties to LLC organizers who allegedly "seek funds from investors to be applied to a business to be organized, *controlled and managed* by the promoter[s] [*sic.*]." (Resp. Br. at 21) (emphasis added); *see also id.* at 2 (restating first question presented as "[w]hether a promoter who solicits funds from investors to use in an enterprise to be organized, *managed, and controlled by* the promoter owes the investors a fiduciary duty" (emphasis added)); *id.* at 26 ("Promoters who solicit and control funds for their use in organizing and managing the enterprise undertake a fiduciary's relation and duties"). But the allegations pled in both Respondents' Amended Complaint and documentary evidence submitted by Appellants make clear that Appellants had absolutely no discretion over how to use the funds they solicited from Respondents.

Specifically, the record is clear that, by the time Appellants solicited Respondents to invest in each of the Property LLCs, Appellants had already contracted to purchase a specific piece of real estate at a specific price and were soliciting Respondents to invest in a Property LLC to which Appellants would assign the already negotiated purchase contract. (R. 64 (setting forth timeline))

For example, the documentary evidence submitted by Respondents and Appellants below showed that the contract of sale to purchase the property that was eventually assigned to the 100-102 East 124th Street Package LLC was signed on September 8, 2004 (R. 325), while written "set up" materials provided to the Respondents who were solicited to invest in that Property LLC were dated October 10, 2004, and specifically describe the real property to be acquired by that Property LLC and the purchase price at which it was to be acquired (R. 148-67). Indeed, in dismissing on the pleadings for lack of standing claims requiring the existence of a fiduciary duty that were filed in a prior action by the Property LLCs against defendants who are the Appellants in this action (and who were represented by the same counsel that is representing Respondents in this action), the Appellate Division held that, because "the objectionable [brokerage commission] agreements were entered into *before* the formation of the [Property] LLCs . . . [,] the promoters could not have then owed the non-existent entities [i.e., the Property LLCs] any fiduciary obligations." *546-552 W. 146th St. v. Arfa*, 54 A.D.3d 543, 545, 863 N.Y.S.2d 412, 415 (1st Dep't 2008) (emphasis added), *lv. denied*, 12 N.Y.3d 840, 881 N.Y.S.2d 13 (2009). Thus, Appellants, the Property LLCs, and their counsel have repeatedly taken the position that the contracts of sale and "secret" brokerage commission agreements were signed *before* the Property LLCs were organized, that the real property parcels and their purchase prices were disclosed to

Respondents *before* they decided to invest, and that Appellants had absolutely no discretion to decide how to use the funds Respondents invested once Respondents parted with those funds; the funds had to be used to purchase specifically identified real properties at specifically disclosed prices.[1]

Thus, it is a non-sequitur that, according to Respondents (Resp. Br. at 14, R. 258), they "were not solicited to take interest in completed transactions, but were solicited to pool their funds with the Appellants under Appellants' expertise and control," where Appellants had no control over how these funds were to be used. Instead, the appropriate paradigm to contrast to the facts pled here would be an equity fund where investors capitalize an LLC with their funds, the LLC becomes an investment vehicle through which the members make real estate investments based on the discretionary decisions of the LLC's Managers and former organizers, and *after* the investors become members in the LLC, those who promoted and manage the LLC decide in which deals to invest the LLCs funds that were earlier provided to investors. In that situation—where the organizers and Managers of the LLC have complete discretion over how to invest the members' funds—a fiduciary relationship would likely be pled, in contrast to the facts alleged here, where no such discretion was given by Respondents to Appellants over how to use the funds

[1] In any event, because Respondents—who beneficially own a majority of the membership interests in the Property LLCs (R. 58)—are in privity with the Property LLCs, Respondents are collaterally estopped from relitigating this timeline in this proceeding. *See Ryan v. N.Y. Tele. Co.*, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 826 (1984).

Respondents invested in the Property LLCs. Accordingly, Respondents should not be permitted to prop up the Appellate Division's decision that organizers of LLCs always owe fiduciary duties, as a matter of law, to those they solicit to invest in the LLCs by recasting the record and Appellate Division's decision as applying only to facts that are nowhere pled by Respondents and that are flatly contradicted by the Record.

Second, Respondents argue (Resp. Br. at 21-22) that "[t]he law is well established . . . that promoters of business ventures—those who seek funds from investors to be applied to a business to be organized, controlled and managed by the promoter—owe a fiduciary's duty of full disclosure to those investors." As an initial matter, as discussed above, this legal proposition is based on a factual predicate that is not present in the Appellate Division's decision or the Record, i.e., that Respondents' funds were to be controlled and managed by Appellants. In any event, as discussed in our opening brief, this Court's decision in *Brewster v. Hatch*, 122 N.Y. 349, 25 N.E. 505 (1890)—upon which the Appellate Division relied, did not establish a *per se* rule that promoters of business corporation's always owe a fiduciary duty to those they solicit to invest. Instead, this Court held that "the relation between these litigants . . . *was* . . . *one of trust and confidence* . . . [because *defendants] were to control and direct such proceedings* as should be taken anterior to the formation of the corporation, as well as after." 122 N.Y. at

359, 361, 25 N.E. at 507, 508 (emphasis added). Nothing could be further from adopting a *per se* fiduciary status.

The remaining cases cited by Respondents fare no better for them. For example, two of the cases that Respondents rely on are dated lower court decisions that cited *Brewster* and held that promoters in those cases owed fiduciary duties to corporations or their prospective shareholders *based on the facts alleged in those cases*. *See Hutchinson v. Simpson*, 92 A.D. 382, 87 N.Y.S. 369 (1st Dep't 1904); *Hifler v. Calmac Oil & Gas Corp.*, 10 N.Y.S.2d 531 (Sup. Ct. Steuben Co.) (most recent New York case to cite *Brewster*), *aff'd mem.*, 258 A.D. 781, 16 N.Y.S.2d 104 (4th Dep't 1939).

Three other cases mischaracterized by Respondents below are this Court's decisions in *Northridge Cooperative Section No. 1. v. 32nd Ave. Construction. Corp.*, 2 N.Y.2d 514,161 N.Y.S.2d 404 (1956), and *Gramercy Equities Corp. v. Dumont,* 72 N.Y.2d 560, 534 N.Y.S.2d 908 (1988), and the Second Department's decision in *Shore Terrace Co-op., Inc. v. Roche*, 25 A.D.2d 666, 268 N.Y.S.2d 278 (2d Dep't 1966). *Northridge* opined in *dicta* that the promoters of a corporation owed a fiduciary duty to the corporation (as opposed to the prospective shareholders of the corporation) for self-interested transactions between the promoter and the corporation. Indeed, in *546-552 West 146th Street LLC,* discussed above, the First Department characterized this statement from

Northridge as *dicta*, declined to follow *Shore Terrace Co-op* (which reached the same result as *Northridge* in a case involving a business corporation) and dismissed for lack of standing claims asserted in that action against the defendants (including the Appellants in this appeal) brought by the Property LLCs and in which those LLCs had argued that the Appellants in this appeal owed fiduciary duties to these LLCs, as a matter of law, based on the latter's status as promoters of the LLCs.[2] And *Gramercy Equities Corp.* merely held that partnership law principles should be applied to resolve a dispute about whether one joint venturer should have to indemnify the other joint venturer for activities undertaken after the joint venture was formed. Indeed, the word "fiduciary" never even appears in this Court's opinion in that case.

The last case mischaracterized by Respondents below is *Huang v. Sy*, 2008 N.Y. Slip Op. 50391(U), 2008 WL 553646, at *6 (Sup. Ct. Queens Co. Feb. 28, 2008), *aff'd*, 62 A.D.3d 660, 878 N.Y.S.2d 398 (2d Dep't 2009). There, the trial court held, after a bench trial, that the managing partner of a partnership breached his fiduciary duties to his fellow partners *in connection with mismanaging the partnership after it was formed.* Indeed, this is how the Second Department

[2] Respondents' reliance (Resp. Br. at 23) on a 1978 annotation from the American Law Reports, *see* Hebert B. Chermiside, Jr., *Corporation's Measure of Recovery Against Promoter Who Has Made Secret Profit in Sale of Property to Corporation*, 84 A.L.R.3d 162 (1978), is likewise misplaced given that this annotation deals with fiduciary duties owed by a promoter of a business corporation *to the corporation for transactions entered into with the corporation* and that the broad legal principals expressed in this annotation relating to other scenarios were expressly rejected in *546-552 West 146th St. LLC* as not being an accurate description of New York law.

described the facts of the case in affirming the trial court's findings of fact and conclusions of law:

> The trial court's verdict in favor of the plaintiffs on their causes of action to recover damages for fraud and breach of fiduciary duty was warranted by the facts adduced at trial, including evidence demonstrating that the defendant . . . made payments to himself, and to [his co-defendants], entities under his sole control, from funds belonging to the partnerships of which the plaintiffs were members, without authorization from the other partners and in contravention of the relevant partnership agreements.

62 A.D.3d at 661, 878 N.Y.S.2d at 400. In passing, the trial court stated in *dicta* that, during the preliminary negotiations of a partnership agreement, prospective partners owed fiduciary duties towards one another, but the trial court was never asked to decide whether such a duty was always owed as a matter of law, nor did the trial court cite to any New York authorities that had expressly held as such.[3]

Thus, with the exception of *dicta* from one recent trial court decision involving a general partnership, Respondents cite to no recent cases holding that a promoter of any entity owes a fiduciary duty, as a matter of law, to its prospective

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[3] The three cases cited by the trial court in support of its *dicta* are: (i) this Court's decision in *Dubbs v. Stribling & Assocs.*, 96 N.Y.2d 337, 728 N.Y.S.2d 413 (2001), which merely reaffirmed the black letter law that a real estate broker owes a fiduciary duty to its client; (ii) the First Department's decision in *Global Minerals & Metals Corp. v. Holme*, 35 A.D.3d 93, 824 N.Y.S.2d 210 (1st Dep't 2006), which merely held that one who is a shareholder, officer, and director of a closely held corporation owes a fiduciary duty to his fellow shareholders after the closely held corporation has been formed and his fellow shareholders become shareholders; and (iii) *Tobias v. First City National Bank & Trust Co.*, 709 F. Supp. 1266 (S.D.N.Y. 1989), which merely held that, in certain circumstances, a general partner of a limited partnership *may* owe a fiduciary duty to his prospective limited partners if they sufficiently pled the traditional indicia of a fiduciary duty (*i.e.,* trust and confidence or superior skill or knowledge).

investors.[4] Nor do they explain how the ancient cases they and the Appellate Division relied on below involving business corporations can be squared with the long line of recent cases from this Court cited in Appellants' opening brief holding that trust and confidence and superior knowledge—which were not sufficiently pled here—must be pled to establish the existence of a fiduciary duty.

Third, Respondents argue (Resp. Br. at 22-23) that courts in other jurisdictions have held in certain contexts that promoters of corporations and general and limited partnerships owe fiduciary duties to either the entity they helped form or the prospective investors in those entities.[5] Once again, none of these jurisdictions has held that—or discussed whether—an organizer of a limited liability company owes a fiduciary duty to the prospective investors in that LLC before they invest. And none of them provides a rationale for this Court to jettison the yardstick of trust and confidence and superior skill and knowledge that it has traditionally applied to assessing whether a fiduciary duty has been sufficiently pled and that the Appellate Division found Respondents' Amended Complaint

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[4] Respondents also cite to *Dymm v. Cahill*, 730 F. Supp. 1245, 1264 (S.D.N.Y. 1990). But, while that case contains a stray reference to promoter status in *dicta*, it actually held that a general partner owes a fiduciary duty to the limited partners in a limited partnership that already exists for actions taken in managing the limited partnership.

[5] *See, e.g., Weiss v. Lehman*, 713 F. Supp. 489, 501 (D.D.C. 1989); *In re Der*, 113 B.R. 218, 230 (Bankr. D. Md. 1989); *Eisenbaum v. W. Energy Resources, Inc.*, 267 Cal. Rptr. 5, 9 (Ct. App. 4th Dist. 1990); *Topanga v. Corp. v. Gentile*, 58 Cal. Rptr. 713, 717 (Ct. App. 2d Dist. 1967); *Nerbonne, N.V. v. Lake Bryan Int'l Props.*, 689 So. 2d 322, 325 (Fla. 5th Dist. Ct. App. 1997); *Smith v. Bitter*, 319 N.W.2d 196, 200 (Iowa 1982); *Koppitz-Melchers, Inc. v. Koppitz*, 24 N.W.2d 220, 225 (Mich. 1946); *Golden v. Oahe Enters., Inc.*, 295 N.W.2d 160, 164 (S.D. 1980).

failed to measure up to. Indeed, courts from other jurisdictions have held that no affirmative disclosure duty exists prior to formation of a partnership relationship. *See, e.g., Jordan v. McDonald*, 803 F. Supp. 493 (D. Mass. 1992) (no duty to person purchasing a partnership interest); *Lagen v. Balcor Co.*, 274 653 N.E.2d 968 (Ill. Ct. App. 1995) (no pre-partnership fiduciary duty to disclose where plaintiff reposed no special trust or confidence in defendant); *Waite ex rel. Bretton Woods Acquisition Co. v. Sylvester*, 560 A.2d 619, 624-26 (N.H. 1989) (UPA Section 21 does not impose fiduciary duty among prospective partners dealing at arm's length during formation negotiations).

Fourth, Respondents argue (Resp. Br. at 24) that common-law duties imposed on "promoters" of business corporations are consistent with the statutory duties of disclosure imposed by federal and state securities statutes, such as the Securities Act of 1933 and New York's Martin Act. But this argument turns history on its head, because the reason these statutes were enacted was precisely because there were no clear, bright-line, common-law fiduciary duties of disclosure imposed on corporate promoters. *See* Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems,* 62 Univ. of Chicago L. Rev. 1047 (1995). Indeed, the reason why there have been so few lawsuits filed against corporate promoters in the last fifty years alleging common-law causes of action sounding in breach of fiduciary duty is no doubt because this area of law has been

preempted by federal and state securities statutes and regulations. Thus, the bright line disclosure rules articulated in this federal and state regulatory scheme actually support Appellants' argument that their activities do not give rise to status-based, common-law fiduciary duties but instead are governed by common-law rules governing fiduciaries that require a plaintiff to establish the traditional fiduciary badges of trust and confidence and superior skill and knowledge.

Fifth, Respondents argue (Resp. Br. at 25) that fiduciary duties of those who organize closely held business entities, solicit investors for funds, and control or manage the enterprise once it is organized should be "premised upon a clear rule rather than on case-by-case or investor-by-investor factual analysis, just as this Court has promulgated and applied clear rules of fiduciary or disclosure duties to govern other relations involving advice, trust, or control." But, once again, this argument is premised on the faulty factual predicate involving control and management of the funds invested by Respondents' that is nowhere found in the Appellate Division's decision or the record. Indeed, the cases cited by Respondents actually support Appellants' position because they memorialize the distinction between cases where the defendants were found to owe fiduciary duties because they allegedly exercised the requisite degree of discretionary control and superior skill and knowledge, *see EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 799 N.Y.S.2d 170 (2005) (IPO underwriters that advise issuers are fiduciaries);

Dubbs v. Stribling & Assocs., 96 N.Y.2d 337, 728 N.Y.S.2d 413 (2001) (real estate brokers who advise, negotiate, and represent clients), and cases where fiduciary duties were not sufficiently pled because such allegations were lacking, *see Northeast Gen. Corp. v. Wellington Adver., Inc.*, 82 N.Y.2d 158, 604 N.Y.S.2d 1 (1993) (finders who introduce business opportunities with no discretion over their clients funds are not fiduciaries). Thus, at bottom, this Court's fiduciary duty jurisprudence has always been based on the facts and circumstances pled by a plaintiff and not about imposing status based rules. As this Court recently explained in *People ex rel. Cuomo v. Coventry First LLC*, 13 N.Y.3d 108, 115, 886 N.Y.S.2d 671 (2009), "[o]ur question is whether the *facts* concerning life settlement brokers, *as alleged by the Attorney General*, fit within the legal theory of fiduciary duty." (emphasis added).

Fifth, Respondents argue (Resp. Br. at 26-29) that, assuming that promoters of business corporations have always owed a fiduciary duty, as a matter of law, to those they solicit, this Court should reflexively extend the law of corporate promoters to govern the duties of LLC organizers because this Court commonly looks to the law developed for corporations or partnerships, particularly as to common-law duties, for extension by analogy to limited liability companies. But this argument both proves too little and too much. It proves too little because Appellants are not arguing that legal principles applied to corporations or

partnerships should *never* be applied to LLCs. Instead, they are arguing that legal principles that may have been applied to corporations over 100 years ago and that have not been applied to corporations for more than half a century should not be reflexively applied to LLCs, which are creatures of contract and statute, in the absence of statutory or contractual authorization from them. Indeed, as discussed in Appellants' opening brief, fiduciary duties that long ago may have been imposed on promoters of corporations should not be imposed, as a matter of law, on organizers of LLCs, especially given that LLC organizers (generally) and Appellants (specifically) did not engage in the kinds of activities traditionally performed by organizers of business corporations, a point echoed by Professor Larry Ribstein, the nation's foremost expert on limited liabilities and closely held entities, whose views on this issue are quoted extensively in Appellants' opening brief.[6] *See also In re 1545 Ocean Avenue, LLC,* 72 A.D.3d 121, 126-27, 893 N.Y.S.2d 590, 594-95 (2d Dep't 2010) (declining to apply to LLCs the statutory

[6] Instead of addressing the substance of Professor Ribstein's compelling arguments on the merits, Respondents stoop (Resp. Br. at 26 n.24) to attacking Professor Ribstein's reputation and attempting to belittle his views by quoting out of context from snippets of his scholarly writings in an effort to portray him as some sort of kook. Professor Ribstein's treatises on LLCs and partnerships—*Ribstein & Keatinge on Limited Liability Companies* and *Bromberg & Ribstein on Partnerships*—have been cited in more than 240 cases, including by the highest courts in more than half the states, eight federal appeals courts, and the United States Supreme Court. *Bromberg & Ribstein* has been cited three times by this Court, *see Eurycleia Partners, LP v. Seward & Kissel, LLP,* 12 N.Y.3d 553, 883 N.Y.S.2d 147 (2009); *Dawson v. White & Case,* 88 N.Y.2d 666, 649 N.Y.S.2d 364 (1996); *People v. Zinke,* 76 N.Y.2d 8, 556 N.Y.S.2d 11 (1990). In *Tzolis v. Wolff,* 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008), three members of this Court referred to Professor Ribstein as "[t]he co-author of the major treatise on limited liability companies." That Respondents have stooped to engaging in character assassination of someone with Professor Ribstein's credentials and reputation speaks volumes about the merits of their arguments.

standard for dissolving a close corporation because "it would be inappropriate . . . to import dissolution grounds from the Business Corporation Law or partnership Law to the [Limited Liability Company Law] and "Limited liability companies . . . fall within the ambit of neither the Business Corporation Law nor the Partnership Law").

Respondents' argument also proves too much. Specifically, Respondents rely on this Court's recent decision in *In re Hausman*, 13 N.Y.3d 408, 412, 893 N.Y.S.2d 499, 501 (2009), to buttress their argument that principles of corporate law are often applied to LLCs. There, this Court held that the *de facto* incorporation doctrine that had long applied to corporations should also apply to LLCs, especially given that both the parties and the Third Department were in agreement on this point. *See id.* Indeed, the Delaware Chancery Court recently held that a creditor of an insolvent Delaware limited liability company lacks standing to bring a derivative claim on behalf of that LLC, even though Delaware's courts have previously held that a creditor of an insolvent Delaware business corporation could bring such an action. As the Chancery Court explained: "[b]ecause the conceptual underpinnings of the corporation law and Delaware's [alternative entity] law are different, courts should be wary of uncritically importing requirements from the DGCL into the [alternative entity] context."

CML V, LLC v. Bax, 6 A.D.3d 238, 249 (Del. Ch. Ct. 2010) (internal quotation marks omitted).

Accordingly, for all the reasons set forth above, this Court should reverse the decision below on the ground that, as a matter of law, no fiduciary duty was pled based solely on Appellants' status as organizers of the Property LLCs.

II. THIS COURT HAS NO JURISDICTION TO CONSIDER RESPONDENTS' ALTERNATIVE ARGUMENT, WHICH IS NEVERTHELESS MERITLESS, THAT THE APPELLATE DIVISION'S DECISION TO SUSTAIN RESPONDENTS' CLAIMS BASED ON THE EXISTENCE OF A FIDUCIARY DUTY SHOULD BE AFFIRMED BECAUSE THAT COURT INCORRECTLY DECIDED THAT RESPONDENTS HAD FAILED, AS A MATTER OF LAW, TO PLEAD TRUST AND CONFIDENCE AND SUPERIOR SKILL AND KNOWLEDGE

No doubt recognizing the thin reed on which the Appellate Division's decision rests regarding Appellants' status as fiduciaries based solely on their status as the organizers of the Property LLCs, Appellants argue in the alternative (Resp. Br. at 31-35) that their claims based on the existence of a fiduciary duty should nevertheless be sustained on the pleadings because the Appellate Division erred in concluding, as a matter of law, that Respondents had failed to plead the traditional indicia of a fiduciary duty *(i.e.*, trust and confidence or superior skill and knowledge). The argument must be rejected both procedurally and on the merits.

As a matter of procedure, this Court has no jurisdiction to consider this argument in an appeal brought up by a certified question from the Appellate Division. As this Court explained in *Parochial Bus Systems., Inc. v. Board. of Education of City of N.Y.,* 60 N.Y.2d 539, 545, 470 N.Y.S.2d 564, 566 (1983), this Court lacks jurisdiction to consider arguments raised in an appeal by a respondent where the respondent "has obtained the full relief sought . . . even where that party disagrees with the particular findings, rationale or the opinion supporting the judgment or order below in his favor, or where he failed to prevail on all the issues that had been raised." (citations omitted). Here, Respondents have obtained all the relief they sought, i.e., a denial of Appellants' motion to dismiss directed at their Amended Complaint. Thus, they are not permitted in this appeal to challenge a rationale of the Appellate Division upon which they disagree and failed to prevail.[7]

Turning to the merits of Respondents' argument, the Appellate Division correctly decided that Respondents have failed, as matter of law, to plead trust and confidence and superior skill or knowledge. As the Appellate Division correctly explained (R. 6), merely alleging that Respondents "had little or limited knowledge

[7] Appellants acknowledge that this Court has recognized a limited exception that permits a "successful nonaggrieved party, [who is] barred from bringing an appeal or cross appeal, [to] nonetheless seek review of an adverse holding rendered below, on the appeal from the *final* judgment or order brought by the losing party." *Parochial Bus Sys., Inc.*, 60 N.Y.2d at 545, 470 N.Y.S.2d at 566-67 (emphasis added). Here, however, this appeal is not from a final judgment but from an order of the Appellate Division certifying questions for appeal. Thus, this limited exception does not apply.

of New York real estate or United States laws, customs or business practices with respect to real estate or investments" and that Appellants "held themselves out as experienced experts in these areas," is of no moment given the lack of any allegations in the Amended Complaint that Appellants "misled [Respondents] about how particular real estate and investing practices in New York and the United States would affect the transactions in question." And the Appellate Division correctly reasoned (R. 7) that Respondents' allegations that Appellants "play[ed] upon the cultural identities and friendship" of Respondents is also of no consequence because "personal connections of that sort alone between parties to a business transaction do not establish a fiduciary relationship." (citing *Johnston v. DeHaan*, 37 A.D.2d 1028, 1029, 325 N.Y.S.2d 762, 765 (3d Dep't 1971); *see also Henneberry v. Sumitomo Corp. of Am.*, 532 F. Supp. 2d 523, 550 (S.D.N.Y. 2007) ("parties dealing at arms length in a commercial transaction lack the requisite level of trust or confidence between them necessary to give rise to a fiduciary obligation"); *RNK Capital LLC v. Natsource LLC*, 76 A.D.3d 840, 841-42, 907 N.Y.S.2d 476, 478 (1st Dep't 2010) ("plaintiffs' own 'subjective claims of reliance on defendants' expertise [do not] suffice to establish a fiduciary relationship'" (quoting *Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Bros. Int'l*, 251 A.D.2d 137, 137, 674 N.Y.S.2d 648, 649 (1st Dep't 1998), *lv. denied*, 95 N.Y.2d 762, 715 N.Y.S.2d 215 (2000)).

Moreover, the allegation of trust and confidence in the Amended Complaint cannot be squared with the judicial admission contained in Paragraph 23(iv) of the original Complaint, which was conveniently dropped from the Amended Complaint, that "[m]any investors had little or no contact directly with Shpigel, but were introduced to the investments by [Plaintiffs,] investors Eli Mor, Jacob Perry or Ilan Calic." (R. 105) Put bluntly, how could Appellants have assumed positions of trust and confidence with Respondents if they had little or no direct contact with them? Thus, the Appellate Division properly found that the Motion Court erred in holding that a fiduciary duty based on trust and confidence had been sufficiently pled in the Amended Complaint in the face of documentary evidence in the form of the original Complaint conclusively establishing that no such relationship of trust and confidence existed.

Indeed, the First Department reached a similar result in *Morgenthau & Latham v. Bank of New York*, 305 A.D.2d 74, 760 N.Y.S.2d 438 (1st Dep't 2003). In that case, the Appellate Division held that the shareholders of a Russian bank, who claimed that an American correspondent bank had committed fraud by stating that the Russian bank was in sound condition and by concealing that the Russian bank's senior management was actively engaged in unlawful and criminal activities, causing shareholders to withdraw a demand that their shares be redeemed, could not have reasonably relied on that misrepresentation, where, in a

related earlier federal lawsuit, the complaint alleged that the bank never intended to honor its dividend payment and redemption obligations regarding shares and that the bank was under control of Russian gangsters. As the Appellate Division explained, "plaintiffs' claim of justifiable reliance is flatly contradicted by [the] allegations in the Federal action [complaint] and that this contradiction requires dismissal of their fraud claim pursuant to CPLR 3211(a)(1)" 305 A.D.2d at 82, 760 N.Y.S.2d at 444.

Furthermore, the Appellate Division's conclusion that a fiduciary duty was not properly pled based on Appellants' alleged superior knowledge of the New York real estate market is also supported by that court's decision in *Stuart Silver Assocs., Inc. v. Baco Development Corp.*, 245 A.D.2d 96, 96, 665 N.Y.S.2d 415, 416 (1st Dep't 1997), a case that is on all fours with this one. There, limited partnerships were organized "for the purpose of rehabilitating and developing two real estate properties in Harlem and converting them into condominiums." When soliciting investments from the limited partners, the general partners allegedly told the limited partners that "they would double their investment and receive a guaranteed 8% return, and that there were no substantial risks associated with the project." *Stuart Silver Assocs.*, 245 A.D.2d at 97, 665 N.Y.S.2d at 416. The general partners also provided the prospective limited partners with offering materials, but before investing, the limited partners never "visited the project sites,

investigated the [general partners'] investment history, requested supporting documentation for the financial projections in the project summary, or otherwise conducted further inquiries into the nature of the project and the reliability of the promoter[s]." *Id.*

The limited partners subsequently invested and later sued the general partners for, *inter alia,* fraud and breach of fiduciary duty in connection with misrepresentations and omissions allegedly made in connection with the solicitation of their limited partnership interests. *Stuart Silver Assocs.*, 245 A.D.2d at 98, 665 N.Y.S.2d at 417. The Appellate Division found that the fraud and breach of fiduciary duty claims should have been dismissed as a matter of law.

The court began its analysis with the observation that "[t]o claim that a business transaction gave rise to a fiduciary relationship, plaintiff must show that defendant had superior expertise or knowledge about some subject and misled plaintiff by false representations concerning that subject." *Stuart Silver Assocs.*, 245 A.D.2d at 99, 665 N.Y.S.2d at 418. The court then concluded that, as a matter of law, no fiduciary duty was owed to the limited partners by the general partners:

> [P]laintiffs could easily have obtained background information about the anticipated state of the Harlem real estate market by consulting the legal and financial advisors who had guided their previous investment decisions. Plaintiffs could also have requested supporting documentation for the project summaries, investigated the project site and its existing leases, reviewed the construction contract and asked for more information about the terms and success rate of [the general partners'] other real estate

> development ventures. While this documentation may have been largely possessed by [the general partners] initially, plaintiffs were not too inexperienced to know what type of information to request. The difference in business expertise between plaintiffs and [the general partners] was not so great as to give [the general partners] a fiduciary duty to suggest that they perform due diligence before investing.

Stuart Silver Assocs., 245 A.D.2d at 99-100, 665 N.Y.S.2d at 418. Here, all the Respondents represented and warranted that they were accredited investors (R. 204-05, 209-10, 214-15, 219-20, 223-24), and were capable of obtaining the same information from the Sellers or others that had been obtained by Appellants. Moreover, documentary evidence in the form of the written offering materials referenced in the Amended Complaint make crystal clear that Respondents were expected to exercise their own due diligence. (R. 134-93)

As in *Stuart Silver Assocs.*, the gravamen of this action is the alleged fraudulent inducement of Respondents' investments in the Property LLCs. The fundamental reason why Appellants owe no fiduciary duty to Respondents is that at the inducement stage, the parties were at arm's length, at opposite ends of a bargaining table about the investments. Any fiduciary duty of Appellants arose only *after* Respondents made their investments.

Accordingly, because of the arm's length nature of these transactions and the lack of special or superior knowledge by Appellants, the Appellate Division properly concluded that, as a matter of law, there were no fiduciary duties between

Appellants and Respondents based on these factors. *See Henneberry*, 532 F. Supp. 2d at 550 ("a fiduciary obligation will not be imposed on one party merely because it possesses relative expertise as compared to the other (internal quotation marks omitted); *Boley v. Pineloch Assoc., Ltd.*, 700 F. Supp. 673, 681 (S.D.N.Y. 1988) ("Allegations of reliance on another party with superior expertise, standing by themselves, will not suffice."); *M&T Bank Corp. v. Gemstone CDO VII, Ltd.*, 68 A.D.3d 1747, 1750, 891 N.Y.S.2d 578, 581(4th Dep't 2009) (reversing denial of motion to dismiss breach of fiduciary duty claim on the pleadings on the grounds that no special relationship was pled "particularly in light of the facts that the parties had no relationship prior to this arms-length transaction and that offering circulars contained the various limitations and disclaimers" and that a party's "'unique or special expertise' alone is insufficient to create an issue of fact concerning the existence of a special relationship").

III. THE DECISION BELOW SHOULD BE REVERSED ON THE ALTERNATIVE GROUND THAT THE MARTIN ACT PREEMPTED THE BREACH OF FIDUCIARY DUTY, ACCOUNTING, AND CONSTRUCTIVE FRAUD CLAIMS

Both Appellants and Respondents agree that, if this Court finds it necessary to reach the issue of whether Respondents' claims sounding in breach of fiduciary duty were preempted by New York's Martin Act, the resolution of this issue in the pending *Assured Guaranty* appeal will be dispositive of that issue in this case. What the parties to this appeal continue to disagree about, however, is whether it is

necessary for this Court to reach the issue of Martin Act preemption in this appeal at all.[8] Respondents argue that this Court need not reach the issue of Martin Act preemption for two reasons, one of which was reached by the Appellate Division and one of which was not.

The issue that was reached by the Appellate Division was that the Martin Act's anti-fraud provision does not apply to private offerings of securities, even though (as discussed in Appellants' opening brief) the text of the statute makes clear that it does. Respondents raise several arguments in support of affirming the Appellate Division's decision, none of which has any merit. *First*, Respondents argue (Resp. Br. at 36-37) that the Martin Act and the existing precedents of this Court and the Appellate Divisions exempt non-public "limited" offerings from all of the Act's requirements. But even a cursory examination of the cases cited by Respondents demonstrates that it is pure fiction. For example, this Court's decision in *People v. Federated Radio Corp.*, 244 N.Y. 33, 39, 154 N.E. 655, 657 (1926), does not hold that the anti-fraud provision of the Martin Act applies only to public offerings. Instead, it merely states that the purpose of the Act "is to prevent all kinds of fraud in connection with the sale of securities and commodities" and to prevent "the public" from being "fraudulently exploited." 244 N.Y. at 38, 154 N.E. at 657. Likewise, the Fourth Department's decision in *People v. F.H. Smith*

[8] Of course if this Court agrees with Appellants that no fiduciary duty was pled by Respondents as a matter of law, it need not reach any of the Martin Act issues briefed by the parties.

Co., 230 A.D. 268, 269, 243 N.Y.S.2d 446, 448 (4th Dep't 1930), does not hold that the anti-fraud provision of the Martin Act applies only to public offerings. Instead, it merely states that the Act authorizes prosecutions against those who "defraud the public."

The last decision relied on by Respondents below for the fallacious proposition that the anti-fraud provision of the Martin Act has long been held to apply only to public offerings of securities—this Court's decision in *People v. Landes*, 84 N.Y.2d 655, 660-61, 621 N.Y.S.2d 28, 285 (1994)—actually supports the exact opposite proposition, *i.e.*, that the anti-fraud provision of the Act has *never* been held to apply only to public securities offerings. While this Court did state in *Landes* that the purpose of the Act was to "protect the public from fraudulent exploitation in offering and sale of securities," *id.*, this Court's treatment of the defendant's conviction for violating both the anti-fraud and the registration provisions of the Act could not be clearer that the latter applies only to a public securities offering while the former does not.

Specifically, this Court's decision begins by affirming the defendant's conviction for violating the anti-fraud provision of the Act on the grounds that "the term 'fraud' is broadly defined for purposes of the [Martin Act], and that the jury could have determined that defendant's oral misrepresentations to the investors fell within its scope" 84 N.Y.2d at 658, 621 N.Y.S.2d at 283. No mention is made of

whether there was a public offering of securities by the defendant. In contrast, this Court's decision discussing the defendant's conviction for violating the registration provision of the Act asks the question "were the transactions at issue public offerings or personal sales of stock in a private corporation to which the statute does not apply?" 84 N.Y.2d at 661, 621 N.Y.S.2d at 285. Indeed, this Court expressly stated that the registration provision applied "only if [defendant] was selling securities 'to the public'" and quotes Section 359-e(1)(a) of the Act, which unlike the anti-fraud provision, expressly limits itself to the public offerings of a securities.

Once again betraying their lack of confidence in the merits of their arguments, Respondents urge this Court to affirm the Appellate Division's decision based on an argument decided in their favor in the Motion Court but not reached by the Appellate Division, i.e., there is no Martin Act preemption here because the Property LLC membership interests that were sold to Respondents were not offered "within or from" New York, as required by the Martin Act. *See* N.Y. Gen. Bus. Law § 352-c(1)(c) (prohibiting acts if "engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from state of any securities"). But this argument is both factually and legally flawed. It is factually flawed because, no where in the Amended Complaint is it alleged that these investments were exclusively solicited and negotiated in Israel.

Respondents' argument is legally flawed because the facts alleged in the Amended Complaint more than satisfy the statutory "within or from [New York]" requirement. Specifically, the Amended Complaint alleges that Appellants resided and operated their business from New York, that all Respondents invested through LLCs formed by them in New York, that all the Property LLCs were formed in New York, and that all of Respondents' claims arise under New York law. (R. 58-77) And documentary evidence submitted by Appellants also conclusively establishes that the promotional materials distributed to Plaintiffs were prepared in New York. (R. 134-93) Thus, because a "substantial portion of the events" giving rise to Plaintiffs' claims occurred in New York, the "within or from" New York requirement has been satisfied. *See Horvath v. Banco Comercial Portugues, S.A.*, 2011 WL 666410, at *8 (S.D.N.Y. Feb. 15, 2011); *Ashland Inc. v. Morgan Stanley & Co.*, 700 F. Supp. 2d 453, 472-73 (S.D.N.Y. 2010); *Abu Dhabi Bank v. Morgan Stanley & Co., Inc.*, 651 F. Supp. 2d 155, 181-82 (S.D.N.Y. 2009); *Heller v. Goldin Restructuring Fund, L.P.*, 590 F. Supp. 2d 603, 611 n.9 (S.D.N.Y. 2008); *In re Bayou Hedge Fund Litig.*, 534 F. Supp. 2d 405, 422 (S.D.N.Y. 2007); *Dover Ltd. v. A.B. Watley, Inc.*, 423 F. Supp. 2d 303, 331 (S.D.N.Y. 2006); *Sedona Corp. v. Ladenburg Thalmann & Co., Inc.*, 2005 WL 1902780, at *21-*22 (S.D.N.Y. Aug. 9, 2005).

Respondents rely on one federal district court case where there were no disputes that the offerings were conducted exclusively outside New York and where there was not even a securities offering at all, *see Lehman Bros. Commercial Corp. v. Minmetals Int'l Special Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 159, 165 (S.D.N.Y. 2001), and on one case where the complaint alleged that the offerings were made "exclusively outside of New York," *see Fraternity Fund v. Beacon Hill Asset Management*, 376 F. Supp. 2d 385 (S.D.N.Y. 2005). Thus, these cases are completely inapposite and against the overwhelming weight of authority cited above.

Accordingly, because the anti-fraud provision of the Martin Act is not limited to public offerings of securities, and—for the reasons set forth in the briefs filed by defendants-appellants and their *amici* in the *Assured Guaranty* appeal—and because Respondents' breach of fiduciary duty, constructive fraud, and accounting claims sound in non-disclosure and are preempted by the Martin Act, the decision below should be reversed on the alternative ground of Martin Act preemption.

IV. THE DECISION BELOW SHOULD BE REVERSED ON THE GROUND THAT RESPONDENTS FAILED TO PLEAD FRAUD DAMAGES AS A MATTER OF LAW

Turning to their failure to plead "out-of-pocket" losses as fraud damages, as required by a long line of cases such as this Court's decisions in *Lama Holding Co.*

v. Smith Barney Inc., 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76 (1996), and *Continental Casualty Co. v. PricewaterhouseCoopers*, 15 N.Y.3d 264, 270, 907 N.Y.S.2d 139, 143 (2010), Respondents concede that they have not alleged that they lost money in the transactions that are the subject of their fraud claims.[9] Nor do they explain how there can be an out-of-pocket loss for an investor who made money on the deal and nonetheless claims that, had he known the truth, he would never have invested at all.

Instead, Respondents rely (Resp. Br. 44-45) on several inapposite cases and on the argument that they are entitled to receive disgorgement of any profits received by Appellants as the proper measure of their damages. These arguments are simply not correct.

For example, Respondents reliance on this Court's decision in *Hotaling v. A.B. Leach & Co., Inc.*, 247 N.Y. 84, 159 N.E. 870 (1927), is misplaced. There, the plaintiff purchased a bond for $980. The bond was secured by property owned by the issuing oil company and was purchased by the plaintiff as an investment

[9] In a related action, the Appellate Division later affirmed an order by the Motion Court directing the Property LLCs to pay Appellants millions of dollars in upside fees based on the prices at which the Property LLCs' real estate holdings were sold in 2006, *see Arfa v. Zamir*, 63 A.D.3d 484, 880 N.Y.S.2d 635 (1st Dep't 2009), which no doubt explains why Respondents have gone out of their way to avoid pleading that they suffered any out-of-pocket losses.. That the Appellants were successful in selling the Property LLCs assets at such spectacular profits and in earning their upside fees also puts the lie to another theme that pervades Respondents' Brief, i.e., that Appellants' and Respondents' interests were not aligned when Appellants were soliciting Respondents to invest in the Property LLCs. Rather, both Appellants and Respondents had an interest in selling the Property LLCs' assets for the highest possible price.

with the express representation that it would be a profitable long-term investment. More than two years after the purchase, the debtor oil company encountered financial difficulties and the property securing the trust indenture was sold on foreclosure. Plaintiff's pro-rata share of the proceeds of the sale was $5.84. Although plaintiff could have sold his bond for a much higher price at an earlier period, the court held that the damages must represent the actual loss which plaintiff sustained, .i.e., the sum of $980 with interest from the date of payment, minus the sum of $5.84 (the amount which plaintiff was entitled to receive upon the sale of the property) and the bond interest that plaintiff had received. The court reasoned the loss that was proximately caused by the defendant's fraud was the difference between the price he paid and the value of what he received as an investment.

Hotaling is irrelevant here because the plaintiff there recovered his actual, out-of-pocket loss. The holding in *Hotaling* was merely that an earlier opportunity to sell did not prevent the plaintiff from recovering his actual loss. Here, Respondents in all but two transactions bought a security and later sold it at a profit, incurring no out-of-pocket loss. Moreover, this issue was neither presented nor decided in *Orbit Holding Corp. v. Anthony Hotel Corp.*, 121 A.D.2d 311, 503 N.Y.S.2d 780 (1st Dep't 1986), another case upon which Respondents rely.

Finally, Respondents rely on this Court's decisions in *Diamond v. Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78 (1969), and *Feiger v. Iral Jewelry*, 41 N.Y.2d 928, 394 N.Y.S.2d 626 (1977), for the proposition that the out-of-pocket damages rule does not apply because they have alleged a breach of fiduciary duty. But these cases merely hold that disgorgement is the appropriate remedy for a breach of fiduciary duty. These cases do not say, however, that disgorgement is the appropriate remedy for fraud or constructive fraud where there is also a meritless breach of fiduciary duty claim alleged. Accordingly, the fraud and constructive fraud claims should be dismissed for failing to allege out-of-pocket-loss damages.

Accordingly, the Appellate Division's decision sustaining Respondents' fraud claims should be reversed.

CONCLUSION

For the reasons set forth above, this Court should reverse the order below on the grounds that: (i) a fiduciary duty was not pled as a matter of law; (ii) the breach of fiduciary duty, accounting, and constructive fraud claims are preempted by the Martin Act; and (iii) the fraud and constructive fraud claims fail to allege fraud damages as a matter of law.

Dated: New York, New York
June 21, 2011

Respectfully submitted,

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