Appellate Division Docket No. 2013-07052
Dutchess County Clerk's Index No. 2007-220

COURT OF APPEALS

of the

STATE OF NEW YORK

- -

ROBERT J. CONGEL, BRUCE A. KEENAN and JAMES A. TUOZZOLO, as the Executive Committee of POUGHKEEPSIE GALLERIA COMPANY, a general partnership, on behalf of THE POUGHKEEPSIE GALLERIA COMPANY,

Plaintiffs-Respondents,

v.

MARC A. MALFITANO,

Defendant-Appellant.

MOTION FOR LEAVE TO APPEAL AND FOR A STAY PENDING DETERMINATION OF MOTION AND APPEAL

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September 15, 2016

COURT OF APPEALS
STATE OF NEW YORK

ROBERT J. CONGEL, BRUCE A. KENAN and JAMES A. TUOZZOLO, as the Executive Committee of POUGHKEEPSIE GALLERIA COMPANY, a general partnership, on behalf of the POUGHKEEPSIE GALLERIA COMPANY,

Plaintiffs-Respondents,

v.

MARC A. MALFITANO,

Defendant-Appellant.

NOTICE OF MOTION FOR LEAVE TO APPEAL AND FOR A STAY PENDING DETERMINATION OF MOTION AND APPEAL

App. Div. Dkt. No.: 2013-07052

Dutchess County Index No.: 2007-220

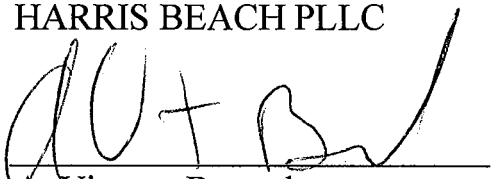
PLEASE TAKE NOTICE, that upon the annexed supporting papers, Defendant-Appellant Marc A. Malfitano will move this Court, at the Court of Appeals Hall, Albany, New York, on the 3rd day of October, 2016 for an Order granting leave to appeal to the Court of Appeals pursuant to CPLR § 5602 (a) (1) (i) and Rule 500.22 from a Decision and Order of the Appellate Division, Second Department, dated May 18, 2016, and the Second Amended Judgment of Dutchess County Supreme Court entered on August 15, 2016 and served on Defendant's counsel on August 26, 2016, along with such other and further relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule 500.21 (a) of this Court, this motion will be submitted on the papers herein and that your personal appearance in opposition to the motion is neither required nor permitted.

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, are required to be filed with the Court and served upon the undersigned attorneys pursuant to Rule 500.21(c) of the Court of Appeals.

Dated: September 15, 2016
Pittsford, New York

HARRIS BEACH PLLC

By: 

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COURT OF APPEALS
STATE OF NEW YORK

ROBERT J. CONGEL, BRUCE A. KENAN, and JAMES A. TUOZZOLO, as members of the Executive Committee of POUGHKEEPSIE GALLERIA COMPANY, a general partnership, on behalf of the POUGHKEEPSIE GALLERIA COMPANY,

Plaintiffs-Respondents,

v.

MARC A. MALFITANO,

Defendant-Appellant.

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS AND FOR A STAY PENDING DETERMINATION OF MOTION AND APPEAL

App. Div. Dkt. No.: 2013-07052

Dutchess County Index No.: 2007-220

A. Vincent Buzard states the following under penalties of perjury:

1. I am an attorney duly admitted to practice law in the courts of the State of New York and am appellate counsel at Harris Beach PLLC, attorneys for the Defendant-Appellant Marc A. Malfitano in the above-captioned action. I am fully familiar with the facts and circumstances relating to this motion for leave to appeal. My knowledge of the facts is premised upon my thorough review of the Record on Appeal and other documentary evidence pertaining to this matter.

2. I submit this Affirmation in support of Malfitano's motion for an Order pursuant to Civil Practice Law and Rules ("CPLR") § 5602 granting permission to appeal a Decision and Order of the Appellate Division, Second Department, dated May 18, 2016, which became final and binding on August 15, 2016, upon entry of the Dutchess County Supreme Court's Second Amended Judgment pursuant to the remittal ordered by the Appellate Division, and from any and all interlocutory or intermediate decisions, orders and rulings of the Appellate Division or Supreme Court. Copies of the Appellate Division Decision and Order and Supreme Court's Second Amended Judgment with Notice of Entry are attached as Exhibits A and B, respectively.

PRELIMINARY STATEMENT

3. This case presents an opportunity for this Court to address the proper application of Partnership Law, article 6, § 62 regarding the exercise of a minority partner's right to receive the fair value of an investment in a partnership. Despite the popularity of this form of business organization in New York, there is a scarcity of case law regarding this statute that addresses partnership dissolution. The decision of the Appellate Division at issue conflicts with this Court's precedent regarding the definition of "definite term" in the application of the statute. Furthermore, the Appellate Division's decision is contrary to the well-established "American Rule" on counsel fee allocation and the treatment of goodwill in connection with a real estate

holding company. The proposed appeal will further provide guidance to the courts as to what categories of reductions or discounts are appropriate in determining the value of a minority partner's interest in a partnership.

PROCEDURAL HISTORY

4. This Court has jurisdiction of the proposed appeal under CPLR 5602 (a) (1) (i), as demonstrated by the following recitation of the relevant procedural events in this litigation.

5. On November 24, 2006, Defendant-Appellant Marc A. Malfitano ("Malfitano"), a partner in the Poughkeepsie Galleria Company Partnership (the "Partnership"), exercised his right to elect to dissolve the Partnership under Partnership Law § 62(1)(b) (hereinafter "PL" refers to the Partnership Law) in order to obtain the value of his minority interest in the Partnership. The Partnership was organized pursuant to the terms of the Poughkeepsie Galleria Company Partnership Agreement ("Partnership Agreement"), which is attached as Exhibit C.

6. Prior to this action, Malfitano had made numerous attempts to convince his partners that certain practices or financial matters of the Partnership needed serious revision. When his efforts proved unsuccessful, in accordance with PL § 62(1)(b), Malfitano issued a notice of dissolution by correspondence, dated November 24, 2006, a copy of which is attached as Exhibit D.

7. In response to Malfitano's notification, the Plaintiffs-Respondents in this action, Robert J. Congel, Bruce A. Kenan and James A. Tuozzolo, collectively the Executive Committee of the Partnership (collectively, the "Executive Committee") commenced this litigation against Malfitano by service of a Summons and Verified Complaint on January 11, 2007.

8. The Verified Complaint alleged two primary causes of action, both of which are at issue in this appeal. The first cause of action sought a declaratory ruling that Malfitano wrongfully sought to dissolve the partnership under New York Partnership Law. The second cause of action was a claim for damages based on an alleged breach of contract. A copy of the Verified Complaint is attached as Exhibit E.

9. Malfitano served a Verified Answer with Counterclaims on January 16, 2007, denying the accusations asserted by the Executive Committee and interposing several counterclaims. A copy of the Verified Answer is attached as Exhibit F.

10. Shortly after issue was joined, Malfitano moved to dismiss the Verified Complaint, contending that it failed to state a claim. He claimed that he had not acted wrongfully in seeking to dissolve the Partnership since he had a statutory basis under PL § 62(1)(b) to commence dissolution. His contention was premised on the fact that the Partnership Agreement lacked a provision establishing a definite term and did not provide that the Partnership was created for a specific purpose. In the absence of either requisite provision, Malfitano asserted that the Partnership qualified as an "at

will" partnership that was subject to statutory dissolution. A copy of Malfitano's Memorandum of Law in support of the Motion to Dismiss is attached as Exhibit G.

11. On April 20, 2007, Supreme Court denied Malfitano's Motion to Dismiss, finding that the Verified Complaint adequately pled the contested causes of action. A copy of Supreme Court's Decision and Order is attached as Exhibit H.

12. Nearly a year after this law suit was commenced, the parties exchanged a Verified Amended Complaint and a Verified Amended Answer with Counterclaims. Copies of those pleadings are attached as Exhibits I and J, respectively. None of the additional causes of actions contained in the Amended Verified Complaint are at issue in this motion.

13. Thereafter, both sides engaged in several rounds of motion practice, which included the following:

a. The Executive Committee filed a Motion for Summary Judgment in connection with its wrongful dissolution and breach of contract claims. On May 29, 2008, Supreme Court issued a Decision and Order granting the Executive Committee's motion, holding that Malfitano wrongfully dissolved the Partnership and had violated the Partnership Agreement in doing so. The court reached this conclusion after determining that the Partnership Agreement did not contain a definite term but had a specific purpose, and therefore, PL § 62 (1)(b) was not available to Malfitano. A copy of this Decision and Order is attached as Exhibit K.

b. Malfitano then pursued two appeals: (1) the denial of his Motion to Dismiss and (2) the Judgment in favor of the Executive Committee's request for summary judgment. On April 21, 2009, the Appellate Division, Second Department,

issued two separate Decisions. The first affirmed the denial of Malfitano's Motion to Dismiss, concluding that PL § 62 (1)(b) did not apply under the facts of this case because although the Partnership Agreement did not have a temporal limit, it nonetheless stated a "definite term." The second Decision modified Supreme Court's May 29, 2016 Order and remitted the matter to that court for further proceedings on the issue of damages related to the breach of contract claim. Copies of the two Appellate Division Decisions are attached as Exhibits L and M, respectively.

c. Malfitano subsequently moved for partial summary judgment requesting a ruling that the Executive Committee was not entitled to obtain damages for its attorneys' fees related to the breach of contract cause of action. On March 30, 2011, Supreme Court ruled that the Executive Committee was entitled to seek damages for counsel fees and expert fees. A copy of Supreme Court's Decision and Order is attached as Exhibit N.

14. In early November 2011, after extensive motion practice and the courts below having concluded that Malfitano had wrongfully sought to dissolve the Partnership based on the terms in the Partnership Agreement, Supreme Court conducted a non-jury trial to establish the valuation of Malfitano's interest in the Partnership, along with the amount of damages, if any, owed to the Executive Committee. On the first day of trial, the parties stipulated that the value of Malfitano's interest in the Partnership as of November 24, 2006 (the date he notified the Partnership that he was seeking dissolution under PL § 62 [1][b]) was $4,850,000.00 (see Exhibit A, at 69).

15. Both sides presented expert testimony in support of their contentions. Supreme Court generally accepted the deductions and discounts in valuation that were submitted by the Executive Committee's expert, with the exception of a proposed reduction for a minority discount. Consequently, on September 27, 2012, Supreme Court (Hon. Charles D. Wood) issued a Decision and Order concluding that Malfitano's stipulated $4,850,000.00 interest in the Partnership would be reduced by a goodwill reduction in the amount of $727,500.00, along with a 35% marketability discount of $1,442,875.00, and another $1,596,157.50 deduction for damages to cover the Executive Committee's counsel and expert fees. After these calculations, the value of Malfitano's interest was drastically reduced, resulting in a Judgment in his favor in the sum of $1,083,467.60, to be further reduced by statutory interest on the Executive Committee's fee award. A copy of the September 27, 2012 Decision and Order is attached as Exhibit O. For ease of analysis, the below chart lists the reductions:

4,850,000.00	Stipulated value of Malfitano's interest
- 727,500.00	Goodwill reduction
4,122,500.00	
-1,442,865.00	35% Marketability discount
2,679,625.00	
-1,596,157.50	Damages award for fees
1,083,467.50	Malfitano's Judgment

16. Malfitano appealed Supreme Court's determinations, but the Appellate Division agreed that Malfitano had wrongfully dissolved the Partnership and affirmed the award of attorney and expert fees, together with concurring on the application of

both the goodwill and marketability discounts. However, the Appellate Division went further and modified the Order below, holding that Supreme Court had improperly declined to apply a minority discount to the value of Malfitano's partnership interest. The matter was therefore remitted to Supreme Court for a new assessment of damages, specifically for the calculation of the 66% minority discount that was proposed by the Executive Committee's expert (see Exhibit A, at 8).

17. Upon remittal, Supreme Court issued a Second Amended Judgment on July 21, 2016 that resulted in: (1) the stipulated value of Malfitano's interest in the Partnership ($4,850,000.00) was reduced by a goodwill factor and the minority and marketability discounts accepted by the courts below, reducing Malfitano's minority interest to the sum of $911,072.50; (2) based on the holding that the Executive Committee was entitled counsel and expert fees as damages, a further deduction in the amount of $1,822,460.25, which included statutory interest, was applied. In sum, as a result of these reductions in value, a Judgment, dated July 21, 2016, in the amount of $911,287.75 was ordered *in favor of the Executive Committee* (see Exhibit B).

18. Incredibly, Malfitano not only failed to receive any return on his 20-year investment and active participation in the profitable Partnership, but he was also saddled with a huge judgment against him and in favor of the recalcitrant Executive Committee. All of the years of expensive litigation and emotional turmoil for both sides could have been avoided if the Executive Committee had originally engaged in a

reasonable valuation and payment of Malfitano's interest. It is this injustice and the misguided application of the law by the courts below that this proposed appeal seeks to rectify for the benefit of minority partners in future similar situations.

19. With respect to the timeliness requirement under the Rules of the Court of Appeals (12 NYCRR §500.22 [2]), Notice of Entry of Supreme Court's Second Amended Judgment (filed on August 15, 2016 with the Dutchess County Clerk) was served on Malfitano on August 26, 2016 by regular mail (see Exhibit B, at 6).

20. Malfitano respectfully submits that this motion for leave to appeal is timely because, pursuant to CPLR 5513(b) and 2103(b)(2), it is made within 35 days of the service of the Notice of Entry upon him.

FACTUAL BACKGROUND

21. To better understand the impetus for Malfitano's actions underlying the litigation in this case, it is necessary to present the history of Malfitano's relationship with the Partnership.

22. Marc Malfitano is an attorney duly admitted to practice in the State of New York, as well as an adjunct professor at Syracuse University College of Law.

23. In 1978, upon his graduation from law school, he began employment with the Pyramid Companies, and later its affiliate, Pyramid Management Group, Inc. ("Pyramid"). Pyramid was and remains one of the largest privately-held developers of destination shopping centers in North America. In 1982, Malfitano was elevated to the

position of General Counsel for the development arm of Pyramid (see relevant excerpts of Malfitano's trial testimony, attached as Exhibit P, at 655-59). Malfitano is now retired from Pyramid.

24. Over time, Malfitano acquired a financial interest in several of the real estate entities that owned certain malls which were managed by Pyramid. One of these general partnerships was the Poughkeepsie Galleria Company Partnership (the Partnership at issue in this case). On January 1, 1985, Malfitano and other individuals entered into a written agreement to form the Partnership (see Exhibit C, at 1, 59), whose sole purpose was to own a portion of what became known as the Galleria Mall in Poughkeepsie, New York. Malfitano acquired a 3.08% ownership interest in the Partnership at the time it was formed (see Exhibit E, at ¶ 1).

25. The Partnership currently owns a portion of the popular 1.2 million square-foot Galleria retail shopping center (see Exhibit E, ¶ 1). The Partnership does not manage the mall, nor does it negotiate and enter into leases with the various tenants. Instead, Pyramid serves that function and has responsibility for the day-to-day operations of the shopping center, including oversight of security at the mall (see Exhibit P, at 730-32). Therefore, the Partnership at issue did not have any management responsibility for the Galleria Mall, nor did it have an independent relationship with vendors or tenants (id).

26. The Partnership has been a successful enterprise because Pyramid secured lease agreements with well-known anchor tenants for the Galleria Mall, such as JC Penny's, Macy's, DSW Shoe Warehouse, and Regal Stadium 16 (see Pyramid Management Group, Portfolio, Poughkeepsie Galleria, http://www.pyramidmg.com/index.php?page=poughkeepsie-galleria, [accessed September 15, 2016]).

27. During his years as a member of the Partnership, Malfitano dedicated over 20 years of work and service to its business, all in the best interest of the Partnership and his co-partners. Malfitano's managerial and legal responsibilities for Pyramid further benefited the Partnership (see Exhibits E, ¶ 26; P at 655-56).

28. As the years passed, Malfitano worried that the Executive Committee was undertaking a course of conduct that raised serious concerns about the long-term financial stability of the Partnership and the legality or appropriateness of proposed actions. These concerns were particularly troubling to him as an attorney with ethical and fiduciary responsibilities. The actions of the Executive Committee that Malfitano disagreed with included, but are not limited to:

- The withholding of information from Malfitano that he was entitled to receive under the Partnership Agreement;
- Adding liabilities to the balance sheet of the Partnership in order to provide sources of funds directed to Executive Committee member Congel's son,

- The Executive Committee's contemplation of refinancing the Galleria Mall to finance a litigation settlement unrelated to the Partnership or its property;

- The abuse of the Executive Committee members' positions to further their own interests by using a "cash call" to finance mall projects rather than borrowing money, with the expressed intention of harming minority partners;

- Charging hundreds of thousands of dollars per year in expenses against the Partnership that Malfitano considered inappropriate because they were not incurred pursuant to any written agreement binding the Partnership; and

- Causing agreements to be entered in Malfitano's capacity as an individual partner of the Partnership and granting individual releases to third parties without his knowledge or consent.

(see Exhibit P, at 659-660; Exhibit I, at ¶¶ 17, 64 (a), (c), (d), (e), (g), (j), (k) and (l)).

29. As a result of Malfitano's increasing discomfort and belief that some of the partners, particularly the Executive Committee, were breaching their fiduciary duties, and in an effort to curtail those actions, Malfitano sent the Executive Committee over a dozen letters expressing his concerns (see Exhibit J at ¶ 4). This correspondence represented Malfitano's efforts to draw attention to the pertinent issues that he believed were undermining the proper operation of the Partnership, and to resolve the relationship problems among the partners (see id, ¶ 35). Unfortunately, his involvement and recommendations were rejected by the Executive Committee, which eroded Malfitano's relationship with the Partnership and his confidence in the

integrity of the Partnership's business plans to fulfill the Executive Committee's fiduciary duty (see id).

30. Based on Malfitano's legal experience, and spurred by what he considered were contractual and ethical breaches by the Executive Committee, he decided to withdraw from the Partnership in November 2006 as permitted under the Partnership Law.

31. After researching and considering the available remedies, Malfitano elected to exercise his rights under PL § 62(1)(b) in order to simultaneously remove himself from the Partnership and receive the value of his investment. He did so by issuing a letter, dated November 24, 2006, declaring his intention to seek dissolution in accordance with the Partnership Law. A copy of Malfitano's letter invoking his rights under PL § 62(1)(b) was previously annexed as Exhibit D.

32. Malfitano did not lightly decide to proceed with the procedure authorized by PL § 62(1)(b), nor was it a vindictive effort to damage the Partnership, receive a windfall from the Executive Committee, or thwart any effort to sell the Partnership (see Exhibit J, at ¶ 26; Exhibit P, at 661-62). Rather, Malfitano believed that his actions were justified since the Partnership refused to provide him with the information he was entitled to as a partner and he could no longer condone the improper actions of the Partnership.

33. After Malfitano issued his PL § 62(1)(b) notice, the Executive Committee commenced this litigation against him, lodging incorrect and inflammatory accusations against Malfitano in an effort to avoid compensating him for his interest in the Partnership (see Exhibit E).

34. Much to Malfitano's anguish, the litigation resulted in a series of unjust and legally questionable decisions, the end result being that Malfitano owes the Partnership – that was quickly reorganized and remains a going-concern to this day – nearly $1 million (see Exhibit B; Exhibit P, at 664; see also meeting minutes of the Partnership from January 2007, attached as Exhibit Q). This severely inequitable outcome was the result of the lower courts' erroneously determining that the Partnership did not have "at-will" status, leading to the holding that Malfitano triggered a wrongful dissolution. This determination of wrongfulness was not based on any nefarious actions by Malfitano, but on an interpretation of a provision of the Partnership Agreement that was inconsistent with the requirements for a "definite term" as prescribed by this Court in Gelman v Buehler, 20 NY3d 534 (2013).

35. Furthermore, contrary to the long-established "American Rule," an award of counsel fees totaling over $1.5 million was assessed (see Exhibit B). Such an unjust consequence is clearly contrary to the legislative intent of the Partnership Law and demands this Court's review.

JURISDICTIONAL PREREQUISITES

36. Viewed in the full procedural context of this case, the terms of the May 18, 2016 Appellate Division Decision and Order became final and binding after the remittal proceedings were completed, resulting in the issuance of the July 21, 2016 Second Amended Judgment (see Exhibit B).

37. An order of the Appellate Division remitting a matter to Supreme Court for the recalculation of damages in a breach of contract dispute requires further judicial action and, therefore, is deemed nonfinal (see Hirschfeld v IC Securities, Inc., 132 AD2d 332 [1st Dept 1987], lv denied, 72 NY2d 841 [1988]). And where, as here, the "Appellate Division order directs the entry of an amended judgment . . . the Appellate Division order will be viewed as the final paper once the amended judgment is entered" (see Whitfield v City of New York, 90 NY2d 777, 780 [1997]). Accordingly, the May 18, 2016 Decision and Order of the Appellate Division became final and binding on August 15, 2016 when the July 21, 2016 Decision of the Supreme Court was entered.[1]

[1] In relevant part, the May 18, 2016 Decision by the Second Department decided the following issues: (1) whether the Court of Appeals decision in Gelman was to be retroactively applied to this case; 2) whether the Executive Committee was entitled to an award of attorneys' fees absent a statute or contractual provision allowing for such recovery; and (3) whether the courts should, for the first time, recognize a minority discount in the context of valuing a minority partner's interest under PL § 69(2)(c)(II). Ultimately, the Appellate Division concluded that Gelman did not require reversal of its prior decision establishing the at-will nature of the Partnership, that the Executive Committee could recover attorneys' fees, and Supreme Court should have applied a minority discount to Malfitano's partnership interest when calculating damages (see generally Exhibit A). Given the Appellate Division's reversal of Supreme Court's declination on the subject of the application of a minority discount, the remittal ordered Supreme Court to apply a minority discount and recalculate the Executive Committee's damages for entry of an appropriate amended judgment.

38. Therefore the May 18, 2016 Decision and Order (see Exhibit A) should be viewed as the final determination that comports with this Court's jurisdictional requirement for appealability. Further, all of the issues raised on appeal and decided by the Appellate Division in its May 18, 2016 Decision and Order, and any prior intermediary or interlocutory orders, rulings, and decisions are ripe for appeal.

QUESTIONS PRESENTED

Question One:

Did the Appellate Division's decision determining that Malfitano engaged in a wrongful dissolution of the Partnership based on its finding that the Partnership Agreement contained a "definite term" conflict with Court of Appeals precedent?

Answer:

Yes. Because this case remained in the normal course of litigation, the Appellate Division should have followed Gurnee v Aetna Life & Cas. Co., 55 NY2d 184, 191 (1982) and applied the definition of "definite term" as specified in Gelman v Buehler, 20 NY3d 534 (2013). The failure to do so was inconsistent with the reasoning of Gelman and resulted in the court's determination that Malfitano's election to dissolve the partnership was improper under Partnership Law § 62(1)(b).

Question Two:

Did the Appellate Division create a conflict with the other Departments when it ruled that counsel fees were recoverable by a prevailing partnership in a breach of contract

action contesting a minority partner's notice of dissolution under Partnership Law § 62(1)(b)?

Answer:

Yes. It is well established in New York that the party prevailing in a breach of contract claim is not entitled to a judgment for counsel fees absent a contractual or statutory provision authorizing such recovery. The Appellate Division's award of counsel fees in this breach of contract action stands in direct conflict with precedent from each of the other Appellate Division Departments in this State.

Question Three:

Did the Appellate Division err in applying a minority discount, a marketability discount, and a goodwill reduction when determining the value of a minority partner's interest under Partnership Law § 69(2)(c)(II)?

Answer:

Yes. This case raises a novel point of law that is of critical importance to all members of partnerships. The value of a minority partner's interest should not be subject to the minority or marketability discounts in order to discourage abuses of majority control and the receipt of a windfall by a partnership. Moreover, under the facts of this case, the goodwill reduction to Malfitano's shares was unsupported and improper.

REASONS WHY THE QUESTIONS PRESENTED MERIT REVIEW

39. This case presents issues worthy of review because the decisions of the courts below conflict with prior decisions of this Court, create a conflict between the Departments of the Appellate Division, and raise novel issues of statutory interpretation with serious public policy implications.

40. Unless remedied on appeal, the Appellate Division precedent here will narrow the applicability of this Court's decision in Gelman, thereby restricting its scope to solely oral partnership agreements. That creates a serious disparity between parties that negotiate written partnership agreements and those who merely agree orally to engage in a partnership. There is no rational policy justification for such disparate treatment under Gelman. This Court's decision in Gelman held that the statutory phrase "definite term," as it appears in PL § 62(1)(b), is intended to be durational in nature and requires an identifiable termination date at the outset of any partnership. Moreover, the Appellate Division's failure to apply this specification runs afoul of the doctrine of retroactivity recognized in Gurnee and its progeny.

41. Additionally, the Appellate Division's attorney fee award abrogates the longstanding rule that counsel fees are not available to a prevailing party in a breach of contract action in New York absent a statutory or contractual provision to the contrary. The Second Department's decision a creates a conflict with the other Appellate Division Departments regarding the continued viability of the "American

Rule" in contract disputes (see Gotham Partners, L.P., et al. v High River Limited Partnership, 76 AD3d 203, 204 [1st Dept 2010] [recognizing "longstanding American Rule"]; 214 Wall Street Associates, LLC v Medical Arts-Huntington Realty, 99 AD3d 988, 990 [2d Dept 2012] [same]; Schuyler Meadows Country Club, Inc. v Holbritter, 95 AD3d 1408, 1409 [3d Dept 2012] [same]; Wharton Associates, Inc. v Continental Indus. Capital LLC, 137 AD3d 1753, 1755 [4th Dept 2016] [same]).

42. Finally, the question of what discounts and reductions should be applied when determining the value of minority partnership interests under PL § 69(2)(c)(II) is a novel issue that has not been addressed by this Court. This is a salient concern for all minority partners in New York and there is a pressing need for this Court to establish uniformity and clarify regarding the benefits/ risks to minority partners who proceed to exercise their rights under the Partnership Law.

43. Failure to accept this appeal will signal to minority partners troubled by the abuse of power by their majority counterparts that there is no recourse to contest allegedly inappropriate partnership activities since they will likely face severe deductions in the value of their interests and possible counsel fee judgments if they attempt to exercise their rights under PL § 62(1)(b). This is a "catch 22" for minority partners confronted with the difficult choice of walking away from thousands or millions of dollars in partnership value, or sitting by and allowing controlling partners to engage in what they honestly believe is conduct harmful to the partnership, or even

illegal. The wide-reaching implications of this case involving a statute that has been the subject of scant precedent calls out for this Court to settle the law on how the judiciary should review valuation when a minority partner takes advantage of PL § 62(1)(b) and what fair damages can be recovered in the event of a determination of wrongful dissolution.

ARGUMENT

I. THE APPELLATE DIVISION IMPROPERLY REFUSED TO APPLY THE RULE IN GELMAN V BUEHLER TO THE FACTS OF THIS CASE, CONTRARY TO WELL-ESTABLISHED PRECEDENT MANDATING SUCH AN APPLICATION.

44. The Appellate Division's failure to apply this Court's requirements for evaluating the existence of a "definite term" in a partnership agreement lead to the determination that Malfitano instituted a wrongful dissolution.

45. "It is well established that . . . a change in decisional law usually will be applied retrospectively to all cases still in the normal litigating process" (see Gurnee, 55 NY2d at 191[citations and internal quotations omitted]). In contrast, if a decision announces a new principle of law that will impose a sharp break on the continuity of the law, that decision can be applied prospectively only (see id, at 191-92). However, "a judicial decision construing the words of a statute [ ] does not constitute the creation of a new legal principle" and such a construction can be applied retroactively (id).

46. This directive makes good sense since lower courts should not pick and choose what new precedent they wish to apply, and neither should the guise of a law-of-the-case argument displace this principle. This Court summarized the rationale behind these principles in People v Favor:

> judicial decisions reveal or elucidate, rather than create, the law…. [Therefore, when] taken to its logical conclusion,… recently announced rules of law…. are not new law but an application of what is, and therefore had been, the true law. Accordingly,…. retroactive application of current rules **is always required**, since it would be unthinkable to apply anything less than the 'true' law to an actual controversy

(see 82 NY2d 254, 260-61 [1993] [citations and internal quotations omitted] [emphasis added]).

47. Here, the Partnership Agreement states the following regarding dissolution:

> 12. Dissolution of the Partnership.
>
> 12.1 The Partnership shall dissolve upon the happening of any of the following events:
>
> (a) The election by the Partners to dissolve the Partnership; or
>
> (b) The happening of any event which makes it unlawful for the business of the Partnership to be carried on or for the Partners to carry it on in Partnership.

(see Exhibit C, ¶ 12.1).

48. The Appellate Division reviewed the Partnership Agreement and determined that the above provision equated to a "definite term" because the partners "expressed their intention that the duration of the partnership was to be limited by providing that it shall dissolve upon an election of a majority of the partners" (see Exhibit K, at 2). But there was no description of a specific time period or the circumstances under which a vote is required to be taken by the Partnership, so for all practicable purposes, the Executive Committee of the Partnership can thwart any consideration of dissolution. At the time of this ruling in 2009, this Court had not yet decided Gelman and had not opined on the definition of "definite term" within the context of PL § 62(1)(b).

49. Given the lack of controlling precedent from this Court in 2009, the Appellate Division relied on prior Appellate Division case law in concluding that an agreement to dissolve after "[t]he election of the Partners" is sufficient to create a definite term (see Exhibit A, at 4). Yet, the decisions that the Appellate Division used to base its conclusion were inapposite and distinguishable from the facts of this case. For example, to support its holding that Malfitano wrongfully sought dissolution, the court cited Hardin v Robinson, 178 AD 724 [1st Dept 1916], ignoring the fact that Hardin involved a joint venture with a specific purpose, a condition which precluded dissolution under PL § 62(1)(b). Similarly, Hooker Chemical & Plastics Corp. v International Minerals & Chemical Corporation, 90 AD2d 991 [4th Dept 1982]

actually supports Malfitano's position because the court there found that the clause in the partnership agreement permitting the partnership to continue unless "terminated by mutual consent of the parties" did not, when read in isolation, constitute a definite term.

50. Notably, after the 2009 decision was issued by the Appellate Division, this Court acknowledged that it had yet to examine the meaning of "definite term" with respect to PL § 62(1)(b) (see Gelman, 20 NY3d at 537-38 ["Since the enactment of the Partnership Law in New York, courts *in other jurisdictions* have held that the commonly-used statutory phrase – a 'definite term' – is intended . . ."]). As a result of the decision in Gelman, this Court clarified that a partnership agreement will be deemed to contain a definite term only if it includes "a specific or even a reasonably certain termination date" (see id, at 538). In applying this test for a "definite term," this Court determined that the partnership agreement in Gelman, which allowed the partnership to continue "for an indeterminate duration (perhaps four to seven years) until a liquidity event would hopefully occur" did not represent a definite term and lacked a "fixed, express period of time during which the enterprise was expected to operate" (id).

51. Gelman therefore established a guiding principle – a partnership agreement will be viewed as having incorporated a definite term only if it contains a provision setting forth a specific or reasonably certain termination date. Open-ended

partnerships without a fixed operational period lack a definite term and, absent a specific undertaking, will be deemed "at will" and subject to dissolution under PL § 62(1)(b).

52. Although Gelman involved an oral partnership agreement, nothing in the Gelman opinion limited the applicability of the meaning of "definite term" to oral partnership agreements or questioned whether the Gelman holding should be applied to written partnership agreements.

53. Subsequent to the issuance of Gelman precedent, in 2016 when faced with the opportunity to apply "the true law" to this case that remained in the "pipeline" – the normal litigating process – the Appellate Division failed to credit the rule of retroactivity recognized in Gurnee, and declined to revisit its prior holding that the Partnership Agreement contained a definite term when so requested by Malfitano on appeal (see Exhibit A). Moreover, the court erroneously concluded that a case involving an oral partnership agreement is distinguishable from a dispute involving a written partnership agreement, thereby limiting the applicability of Gelman to oral partnership agreements (see id). The court should have instead followed Gurnee and applied the definition of "definite term" announced in Gelman to the facts of this case, thereby acknowledging that the provision in this Partnership Agreement which authorized dissolution upon the "election of the Partners" did not constitute a definite term. Gurnee mandates such retroactive application of the Gelman rule.

54. Malfitano had legitimate fiduciary and ethical concerns about the future financing plans of the Partnership which constituted his claim for breach of fiduciary duty against the Executive Committee (see Exhibit F, at 4). If leave to appeal is not granted, the Appellate Division's decision will encourage majority partners to ignore the legitimate concerns of minority members. This should not be the law in New York, a State which has been particularly protective of minority corporate members (see Business Corporation Law § 1104-a [providing protections to oppressed minority shareholders]; see also Matter of Kemp & Beatley, 64 NY2d 63, 69 [1984] [recognizing that majority shareholders owe fiduciary obligations to "*all* shareholders fairly and equally"] [emphasis added]). Surely, minority members of partnerships deserve no less protection than minority shareholders in corporations. The nature of the business organization should not affect the right to a fair return on investment. The Partnership Law itself expresses this policy in providing for payment to minority members even in the event that the minority partner's request for dissolution is found to be wrongful.

55. The May 18, 2016 Decision and Order of the Appellate Division therefore warrants review by this Court not only to clarify the applicability of Gurnee in matters such as these, but also to confirm that Gelman established a rule that also applies to written partnership agreements. Without a definite term, and because there is no dispute that the Partnership Agreement does not specify a particular purpose, the

Partnership was terminable at-will and therefore Malfitano did not commence a wrongful dissolution. Hence, this Court should accept this appeal to consider whether Malfitano's election to dissolve the Partnership was proper under PL § 62(1)(b), and, if so, whether he is entitled to the full stipulated value of his interest without reductions.

56. If Gelman directs the resolution that Malfitano was within his rights under PL § 62(1)(b) to seek dissolution, the remaining questions presented in this motion are moot and need not be decided since no damages would flow to the Partnership. If, however, this Court agrees with the Appellate Division and does not apply the Gelman holding here as required by the mandate of Gurnee, the remaining issues presented are critically important, not only to the outcome of this action, but to future pending actions premised on this statute.

II. THE APPELLATE DIVISION IMPROPERLY AWARDED ATTORNEYS' FEES IN CONTRAVENTION OF THE "AMERICAN RULE" AND THE LONGSTANDING PRINCIPLES ARTICULATED BY THIS COURT.

57. The Appellate Division's award of counsel fees to the Executive Committee was contrary to settled law in New York. When deciding whether to award a party counsel fees, New York courts adhere to the "American Rule," which generally prevents a prevailing litigant from collecting legal fees from its unsuccessful opponent (see Hunt v Sharp, 85 NY2d 883, 885 [1995]; see also, Alyeska Pipeline Service Co v Wilderness Society, 421 US 240, 245 [1975] [stating "the general

'American rule' [is] that the prevailing party may not recover attorneys' fees as costs or otherwise"]). "'Under the general [American] rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule'" (see Mount Vernon City School Dist. v Nova Casualty Co., 19 NY3d 28, 39 [2012], quoting Matter of A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1, 5 [1986]; see also, Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375, 379 [2010] [same], citing Hooper Assoc. v AGS Computers, 74 NY2d 487, 491 [1989]). This precept extends to actions sounding in equity (see Millman v Brownlee, 133 AD2d 221, 222 [2d Dept 1987] [citation omitted]).

58. Moreover, this Court has announced the "fundamental legislative policy decision that, save for particular exceptions or when the parties have entered into a special agreement, it is undesirable to discourage submission of grievances to judicial determination" (see Mighty Midgets v Centennial Ins. Co., 47 NY2d 12, 21-22 [1979] [citations omitted]). The Appellate Division, Second Department, has acknowledged as recently as June 8, 2016 that the "American Rule" "is followed in New York" and, that "an attorney's fee is merely an incident of litigation and is not recoverable absent a specific contractual provision or statutory authority" (Chicago Title Ins. Co. v LaPierre, 140 AD3d 821, 822 [2d Dept 2016] [citations omitted]). Notably, there is a conflict within the Second Department's own precedent.

59. In this case the Appellate Division failed to adhere to the "American Rule," and as a result, it issued an opinion that directly conflicts with this Court's precedent, as well as the prior and subsequent case law within the Second Department itself, creating confusion for parties evaluating the benefits or detriments of the dissolution process in the Partnership Law.

60. In response to Malfitano's contention that that "American Rule" prohibited the award of attorneys' fees because there is no statute that allows for such an award, and the parties' Partnership Agreement was silent as to the issue of counsel fees in the event of a dissolution, Supreme Court declared that the Executive Committee was "not precluded from seeking attorneys fees damages" because "[t]he costs and expenses of forming a new partnership and seeking a judicial ruling that the defendant's dissolution was wrongful are not incidental to the litigation, rather, they are incidental and consequential damages caused by the defendant's breach" (see Exhibit M at 4). To the contrary, the Executive Committee admitted that the fees sought were for the "pursuit of a judicial determination of wrongfulness" (see the Executive Committee's counsel fee summary, attached as Exhibit R).

61. How is a minority partner who genuinely believes that the actions of the majority partners are harmful to the business to evaluate whether such beliefs will be discredited by the courts, thereby burdening the minority partner with all legal costs? Clearly this conundrum is a major disincentive and will chill minority objections and

the exercise of statutory rights under the Partnership Law. This action was undoubtedly commenced in part to punish Malfitano for exercising his right under the Partnership Law.

62. Malfitano timely pursued an appeal, along with other subsequent rulings of the Supreme Court, on October 26, 2012 (see Notice of Appeal, attached as Exhibit S). Without recognizing the implication of the "American Rule," the Appellate Division affirmed Supreme Court's award of counsel fees indicating that these "expenses were recoverable expenditures directly occasioned and made necessary by the defendant's breach of the partnership agreement, and were thus properly included as damages" (see Exhibit A, at 7).

63. However, the three cases cited by the Appellate Division in support of this award are distinguishable from, and even inapposite to the facts here, and should not have been relied upon to displace the time-honored "American Rule."

64. For example, the Appellate Division, with a "*cf*" or "confer" signal, relied on RAD Ventures Corp v Artukmac, 31 AD3d 413 [2d Dept 2006]. But a careful review of RAD Ventures supports a finding that no award for counsel fees should have been rendered against Malfitano. In RAD Ventures, the Second Department recognized the general rule that, "the award of an attorneys' fee as part of a recovery in an action is not permitted, unless the right to such an award has been established by agreement, statute, or court rule" (see 31 AD3d at 414 [citations

omitted]) and noted that "[t]he contract in dispute contain[ed] . . . an agreement" for the recovery of attorneys' fees (see id). No such agreement regarding legal fees exists in this case.

65. Moreover, there is no statute or court rule that allows for the recovery of counsel fees in breach of contract actions. As stated in Tag 380, LLC v ComMet 380, Inc., 10 NY3d 507, 515-16 (2008), "generally, in a breach of contract case, a prevailing party may not collect attorneys' fees from the nonprevailing party unless such an award is authorized by agreement between the parties, statute or court rule" (see also, Robert L. Haig, Commercial Litigation in New York State Courts, §52:76 [4th Ed. 2015] [listing all New York statutes that provide for or affect a party's right to recover attorneys' fees, none of which relate to a breach of contract action]).

66. In light of this principle that attorneys' fees are not recoverable under the "American Rule" unless explicitly provided for by contract or statutory recognition, this error, and the magnitude of the Judgment here, merits review by this Court.

III. THE APPELLATE DIVISION'S VALUATION METHODOLOGY FOR CALCULATING MALFITANO'S MINORITY INTEREST WAS IMPROPER UNDER PL § 69(2)(c)(II).

A. The Appellate Division's application of a marketability discount and a minority discount to value Malfitano's partnership shares under PL § 69 (2)(c)(II) was unjustified and improper.

67. New York Partnership Law permits a partner to elect to dissolve a partnership, even in contravention of the governing partnership agreement.

Partnership Law § 62(2) recognizes that dissolution can be caused by the express will of any partner "at any time," even if such dissolution is in contravention of the governing agreement (see also Dawson v White & Case, 88 NY2d 666, 670, n.1 [1996] [stating that "partners are statutorily employed to dissolve the partnership at any time"]). In the event dissolution is wrongfully triggered, partners who have not caused the wrongful dissolution may "continue the business in the same name" as if they paid the partner who elected to dissolve the value of his interest at the time of dissolution (see PL § 69 [2][b], [c][II]). If the business continues, the "value of the good-will of the business shall not be considered" when ascertaining the value of the dissolving partner's interest in the business (see id). Accordingly, New York Partnership Law contemplates that continuation of a partnership after an election to dissolve and the absorption by the continuing partners of the departing partner's financial interest.

68. Alternatively, after a wrongful dissolution, the partners who did not cause the dissolution can elect to wind-up the affairs of the partnership and receive a cash payout after the partnership is liquidated (see PL § 69 [1], [2][a][I]). However, the statutory scheme does not provide that those partners who elect to continue a partnership following a wrongful dissolution are to receive a windfall.

69. In this case, the Executive Committee chose to continue the Partnership, which, upon information and belief, remains an ongoing and thriving business entity (see Exhibit Q). As such, the remaining partners have absorbed Malfitano's 3.08% interest in the Partnership (valued at over $4.8 million).

70. Notwithstanding the acquisition of Malfitano's interest, which eliminates a concern regarding another party purchasing a minority share in the Partnership, the Appellate Division approved the following discounts to Malfitano's interest in the Partnership related to minority ownership: a 35% discount for lack of marketability and a 66% minority discount. Not only was it error to apply either discount in this case, but the percentages assessed were unjustified.

71. The Louisiana Supreme Court in Cannon v Bertrand, 2008-1073, 2 So3d 393 [Sup. Ct., La. 2009], in a case involving a limited liability partnership and the valuation of a 33.33% ownership interest of a withdrawing partner, spoke directly to this issue in rejecting the application of any discounts:

> [B]ecause the partners have already determined to purchase the partnership share themselves by opting to continue the partnership and avoid liquidation, neither is lack of marketability an issue . . . . The withdrawing partner should not be penalized for doing something the law allows him to do, and the remaining partners should not thereby realize a windfall profit at his expense.

(see 2008-1073, at *6, 2 So3d at 396-97).

72. Malfitano urges this Court to adopt a similar analysis and hold that the Appellate Division erred by applying marketability and minority discounts in this case, which allowed the Executive Committee to receive a windfall from Malfitano's effort to dissolve the Partnership.

73. Additionally, leave to appeal should be granted because this Court has not yet opined whether a minority or marketability discount should be applied when determining the value of a minority partner's interest for the purpose of ascertaining what a minority partner is entitled to recover under PL § 69(2)(c)(II).

74. The closest this Court has come to examining this issue was in 1995 in In re Friedman v Beway Realty Corp., 87 NY2d 161 (1995), when this Court analyzed the application of a minority discount to shares held by a minority shareholder in a closely-held corporation subject to a Business Corporation Law § 623 buyout and where the corporation continued operations after the buyout. This Court determined that such a discount should not be applied because doing so would "deprive minority shareholders of their proportionate interest in a going concern[,]"allow majority shareholders to reap a windfall after "cashing out a dissenting shareholder[,]" and "encourage oppressive majority conduct" (see Friedman, 87 NY2d at 169 [citations and internal quotations omitted]). These considerations are clearly just as relevant in partnership disputes.

75. This case presents an opportunity for this Court to decide this novel issue whether minority or marketability discounts need to be calculated when ascertaining a minority partner's partnership value pursuant to PL § 69(2)(c)(II). This Court's review is necessary in order to protect oppressed minority shareholders from being forced to cash out their partnership shares at a steep and unjustified discount (see e.g., East Park Ltd. Partnership v Larkin, 167 Md. App. 599, 620, 893 A2d 1219, 1231 [Md Ct of Spec App 2006] ["[w]e disagree with [the appellant's] position that the dissenting shareholder cases offer a poor analogy to the withdrawal of a limited partner . . . . In both situations, the individuals are exercising a statutory right to withdraw from an entity, and the entity is absorbing the interests of those individuals"].

76. By condoning the application of a minority discount of 66% and the application of a 35% marketability discount, the Appellate Division rendered Malfitano's shares practically worthless. In essence, such a rule encourages majority partners to increase their misconduct because, "the greater the[ir] misconduct, the less they need to pay for the minority's share" (see Friedman, 87 NY2d at 170 [citation omitted]).

77. For these reasons, Malfitano seeks permission to appeal for this Court to decide whether a minority or marketability discount should be applied to a minority partner's partnership value when the remaining partners elect to continue the

partnership. Such a determination will be helpful in guiding the actions of minority partners and their counsel, and will provide improved uniformity in valuation procedures.

78. In the event that this Court finds that the application of the minority and marketability discounts was justified in this case, Malfitano nonetheless asks this Court to grant the pending motion to determine whether the percentage allocation of those discounts – at a staggering 66% and 35%, respectively – were reasonable.

B. The Appellate Division erred when it concluded the Partnership had goodwill.

79. Generally, the goodwill value of a business is the "portion of the value over and above the value of the business's tangible assets less its liabilities" (see Grunfeld v Grunfeld, 255 AD2d 12, 14 [1st Dept 1999]. Based on this understanding, and prior to the May 18, 2016 Order here, it was well-settled in the Second Department that goodwill does not exist in a real estate holding company, like the Partnership at issue (see e.g., Cohen v Cohen, 279 AD2d 599, 599-600 [2d Dept 2001] [holding there is no goodwill in real estate holdings]; In re Cinque v Largo Enters. of Suffolk Cty., 212 AD2d 608, 609-10 [2d Dept 1995] [holding a corporation whose value is attributable solely to "real property and cash" does not have goodwill]).

80. The Partnership in this case is an entity that exists solely to own a portion of the Galleria Mall. The Partnership does not manage the mall, solicit tenants, negotiate leases, or have employees (see Exhibit P, at 730-33). Although the

Partnership's real estate holding is a portion of a successful shopping mall, that shopping mall is managed, maintained, secured, and occupied exclusively based on the efforts of the Pyramid Management Group. Any goodwill should be attributable to Pyramid, not the Partnership. It stands to reason that the popularity of the Galleria Mall with shoppers is not the result of the Partnership's efforts; it is largely, if not solely, due to the managerial efforts of Pyramid and the reputation garnered by the tenants of the Mall. Accordingly, the Appellate Division erred when it concluded that the Partnership possessed goodwill due to its "operation of the shopping mall that it owned" (see Exhibit A, at 7) since the Partnership did not operate or manage the Galleria Mall.

81. The record is uncontroverted that there was no history of goodwill value in this Partnership (see Exhibit C; Exhibit P, at 710-11). Furthermore, the Partnership's financial statements that were deemed the proper accounting method for over 20 years by the Partnership did not reflect any goodwill asset (see Exhibit P, at 710-11). If left uncorrected, this decision will create confusion as it conflicts with the precedent in In re Brown, 242 NY 1 (1925). In Brown, this Court ruled if where a partnership's course of dealing is not to account for goodwill on its financial books, not to mention goodwill in its partnership agreement, and incoming partners pay nothing for goodwill, there is a "tacit understanding" that there will not be an accounting for goodwill (see 242 NY at 7). This precedent continues to be relied on

where partnership's financial statements or formation documentation do not reflect goodwill (see Siddall v Keating, 8 AD2d 44 [1st Dept 1959], aff'd 7 NY2d 846 [1959]; Saltzstein v Payne, 292 AD2d 585 [2d Dept 2002]; Kaplan v Schachter & Co., 261 AD2d 440 [2d Dept 1999]).

82. The Appellate Division's decision to abandon its prior position that real estate holding companies, such as this Partnership, do not possess goodwill warrants review to prevent conflicting precedent.

REQUEST FOR STAY

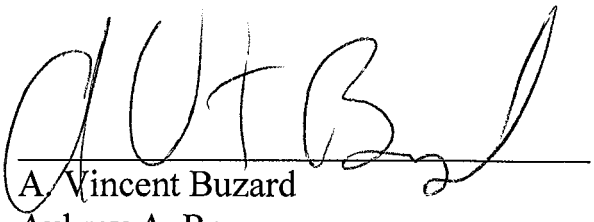
83. Pursuant to CPLR 5519(c), Malfitano respectfully requests that this Court exercise its discretion and stay the enforcement of the Judgment entered against him on July 21, 2016 by Supreme Court during the pendency of this motion and potential appeal to ensure that the Judgment is not enforced until this matter has reached its final conclusion (see Grisi v Shainswit, 119 AD2d 418, 421 [1st Dept 1986] [holding that the granting of a stay pursuant to CPLR 5519(c) pending appeal is a matter of discretion]).

84. The failure to stay the enforcement of the Second Amended Judgment against Malfitano will expose him to nearly $1 million in liability, virtually all of which stems from an award for attorneys' fees, along with interest thereon. Given Malfitano's showing of a meritorious appeal on the issue of whether or not counsel fees were properly awarded in this case, and whether Malfitano is even liable for

damages in the first instance, it would be unfair to allow the underlying judgment to be enforced against Malfitano during the pendency of this motion or appeal. In the event that this Court were to determine that a reversal or modification of the Appellate Division's May 18, 2016 Decision and Order is warranted, and no stay is granted, Malfitano would be forced to recoup from the Executive Committee any monies that might be paid under the Judgment before this Court renders a decision on this motion or the appeal. Malfitano therefore respectfully requests a stay pending determination of this motion and subsequent appeal to avoid the unfairness and prejudice that will result if this Court determines to reverse or modify the Appellate Division order.

85. Wherefore, Malfitano requests that this Court issue an Order granting him leave to appeal the May 18, 2016 Decision of the Appellate Division, along with all underlying interlocutory and intermediary decisions rulings, and orders of the lower courts, in this matter. He also requests that a stay of the enforcement of the underlying money judgment be granted pending the determination of this motion or the appeal, along with such other and further relief as this Court may deem just and proper.

Dated: September 15, 2016

By: 

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