

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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DAVID J. MACE,

Index No. 68644/2016

Plaintiff,

-v-

**AMENDED COMPLAINT**

NICHOLAS TUNICK,  
NICHOLAS TUNICK as Trustee  
for THE IRREVOCABLE TRUST FOR THE BENEFIT OF  
NICHOLAS TUNICK, NICHOLAS TUNICK, ORIGINAL  
TRUSTEE, UNDER AGREEMENT, DATED  
NOVEMBER 27, 2012 and  
PEDANI REALTY SERVICES, LLC,

Hon. Alan D. Scheinkman  
Assigned Justice

Defendants,  
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The plaintiff, David J. Mace, by his attorneys, McMillan, Constabile, Foster & Perone, LLP,  
alleges:

**The Parties**

1. The plaintiff, David J. Mace, is an individual formerly residing in the State of New York and now residing in the State of Florida.

2. Upon information and belief the defendants, Nicholas Tunick and Nicholas Tunick as Trustee for the Irrevocable Trust for the Benefit of Nicholas Tunick, Nicholas Tunick, Original Trustee, under Agreement, Dated November 27, 2012 (“Nicholas Tunick as Trustee”) currently reside in the State of South Carolina at 3952 Ashton Shore Lane, Mt. Pleasant, SC 29466.

3. Pedani is a limited liability company, organized and existing under the laws of the State of New York, formed on July 9, 2007 and located in Westchester County. A copy of Pedani’s

Articles of Organization is annexed hereto as **Exhibit 1**.

4. The plaintiff, David J. Mace, and the defendants, Nicholas Tunick and Nicholas Tunick as Trustee, are currently the sole members of Pedani.

### **Background**

5. Pedani was formed in July 2007. The initial Ownership/Membership interests in Pedani were as follows: Peter Tunick 60%, Nicholas Tunick 20%, and David J. Mace 20%. Nicholas Tunick is Peter Tunick's son.

6. At the time Pedani was formed in 2007, its then owners, Peter Tunick, Nicholas Tunick and David J. Mace, were also the owners of Ceres Chemical Co., Inc. ("Ceres") — in the same percentages as their ownership interests in the newly created Pedani.

7. Ceres had been in business since 1974, primarily serving the pharmaceutical industry. Prior to 2007 Ceres had been renting office space. In 2007 the then owners of Ceres formed Pedani for the sole purpose of purchasing and holding real property at 26 Westchester Avenue in Pound Ridge, New York ("the Pound Ridge Property") to serve as headquarters for Ceres.

8. By deed, dated September 26, 2007. Pedani took title to the Pound Ridge Property. The purchase was funded by the then owners of Ceres, Peter Tunick, Nicholas Tunick, and David J. Mace, who contributed to the \$1,250,000 purchase price in same percentages as their ownership interests in Ceres.

9. With the exception of a small amount of cash, the Pound Ridge Property is the sole asset of Pedani.

10. From approximately October 2007 through December 2012, Ceres occupied the Pound Ridge Property under a lease with Pedani and paid \$13,000 per month to Pedani as rent.

11. In or about 2012, Peter Tunick retired from Ceres and transferred his remaining stock in Ceres to his son, Nicholas Tunick, directly and/or to a trust for the benefit of Nicholas Tunick. By an assignment agreement, dated December 17, 2012 (“Assignment”), Peter Tunick also assigned his 60% ownership interest in Pedani, with the consent of all the members of Pedani, to the defendant, Nicholas Tunick as Trustee.

12. As a result of the Assignment ownership of Pedani is currently as follows:

60% NICHOLAS TUNICK AS TRUSTEE

20% NICHOLAS TUNICK

20% DAVID J. MACE

**AS AND FOR A FIRST CAUSE OF ACTION  
FOR JUDICIAL DISSOLUTION OF PEDANI**

13. Subsequent to December 31, 2012, Ceres remained in possession of the Pound Ridge Property, but ceased paying rent or other compensation to Pedani. At the time, no conflict of interest arose in permitting Ceres to use and occupy the Pound Ridge Property without paying rent, because the plaintiff and defendant, Nicholas Tunick, were the sole owners of both Pedani and Ceres—with each having same percentage interest Pedani as they did in Ceres. Subsequent to December 31, 2012, money that Ceres would have been obliged to pay Pedani as rent—and which Pedani would, in turn, have distributed to its owners in accordance with their percentage interests—was simply paid directly to the owners of Ceres in accordance with their percentage interests. Accordingly, so long as the plaintiff retained a 20% interest in Ceres he suffered no damages as a result of Ceres’ rent-free use and occupancy of the Pound Ridge Property.

14. On or about October 31, 2013, the plaintiff, David J. Mace, retired from Ceres and

sold his interest therein to defendant, Nicholas Tunick, with the understanding that Ceres would remain at the Pound Ridge Property and would pay rent to Pedani, since the plaintiff was no longer an owner of Ceres.

15. However, as the controlling member of Pedani, Nicholas Tunick, both individually and as trustee, permitted Ceres to continue to use and occupy of the Pound Ridge Property subsequent to October 31, 2013 for no rent and/or without adequate compensation to Pedani. While this may have been financially beneficial to Ceres (and to Nicholas Tunick as its now sole shareholder), it was decidedly not so for Pedani and its 20% owner, the plaintiff, David Mace.

16. At some time subsequent to December 31, 2013, Nicholas Tunick moved the headquarters of Ceres to Mount Pleasant South Carolina and Ceres vacated The Pound Ridge Property. The date Ceres vacated the Pound Ridge Property is presently unknown to the plaintiff.

17. Upon information and belief, Ceres continued to use and occupy the Pound Ridge Property throughout 2013 and thereafter pursuant to a written lease or other agreement between Ceres and Pedani.

18. Upon information and belief, Nicholas Tunick, acting in both an individual capacity and as trustee, purported to terminate any lease or other agreement between Pedani and Ceres in effect at the time Ceres vacated the Pound Ridge Property.

19. With Ceres' departure from The Pound Ridge Property, the purpose for which Pedani was formed had ceased. Accordingly, the plaintiff requested that Nicholas Tunick sell The Pound Ridge Property and dissolve Pedani. However, Nicholas Tunick has refused to do so.

20. Instead, Nicholas Tunick, acting in both an individual capacity and as trustee, orchestrated a capital call on behalf of Pedani. Specifically, by notice dated, November 14, 2014,

Nicholas Tunick called a meeting of the members of Pedani to be held on November 25, 2014, stating:

The purpose of the Meeting is (i) to elect an Operating Manager, (ii) to discuss the Company's need for an additional \$25,000 to fund operations; (iii) to make an equity offering to the Members of an aggregate of 6.67% Membership Interests for an aggregate of \$25,000 in capital, such offering to be made to the Members on a pro rata basis; and (iv) to address any other items as are properly raised at the Meeting. In the event the offering is not fully subscribed for by the Members, pro rata, then the participating Members shall be entitled to fund the amount not subscribed for in exchange for additional Membership Interests.

21. A meeting was held on November 25, 2014, at which Nicholas Tunick, acting in both an individual capacity and as trustee, elected himself as the Operating Manager and stated that Pedani would need \$25,000 over the next 12 months.

22. Subsequently, on or about November 26, 2014, Nicholas Tunick sent a document to himself (individually and as trustee of a trust for his benefit) and the plaintiff—the only members of Pedani—entitled “Notice of Offer of Additional Membership Interests.” In effect, this notice required the plaintiff to make an additional capital contribution in the amount of \$5000 or have his 20% interest in Pedani diluted to 18.666%.

23. Nicholas Tunick, individually and/or as trustee, had no authority to extract a capital contribution from the plaintiff under threat of dilution.

24. There is nothing in Pedani's operating agreement authorizing such a capital call.

To the contrary, Pedani's operating agreement specifically states

SECTION 3.1 No Member will be bound by, or be personally liable for the expenses, liabilities or obligations of the Company.

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SECTION 6.1 The Members have contributed to the Company in exchange for their Membership Interests, the cash and other property as set forth on Schedule A, annexed hereto.

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SECTION 6.3 Except as expressly provided in this Agreement, **no Member shall be required to make any additional contributions to the capital of the Company** [emphasis added].

25. Pedani's operating agreement contains no provisions expressly requiring a member to make any additional capital contributions.

26. Pedani's operating agreement contains no provisions stating that the membership interest of any member who fails to make any requested capital contribution shall be subject to any specified consequences (including dilution of the membership interest) of such failure.

27. Moreover, even if the capital call orchestrated by Nicholas Tunick had been authorized, the 6.67% Membership Interest which was being offered for sale was vastly undervalued at \$25,000 — a price set by Nicholas Tunick. This would have impliedly valued The Pound Ridge Property at approximately only \$375,000 when, in fact, the fair market value of the property is, upon information and belief, well over \$600,000. Indeed, the Town of Pound Ridge has The Pound Ridge Property assessed at \$648,253 in its most recent assessment.

28. Under protest, the plaintiff paid the additional \$5000 demanded in order to avoid the dilution of his interest.

29. Had the plaintiff not paid additional capital to Pedani—which he did under protest—not only would his equity interest in Pedani have be diluted, but the defendant, Nicholas Tunick, would have been able to acquire this additional interest at nearly half of the fair value thereof. Thus, the 'equity offering' orchestrated by Nicholas Tunick left the plaintiff with two options, both of which are financially deleterious to him: (1) pay additional capital into Pedani (an entity in which

he has no control) or (2) permit Nicholas Tunick to buy the interest offered to the plaintiff, thus diluting the plaintiff's equity and increasing Nicholas Tunick's equity interest — at a discounted cost (set by him) to boot.

30. In June 2015, Nicholas Tunick informed the plaintiff that Pedani —on Nicholas Tunick's sole initiative— had entered into a lease, to lease The Pound Ridge Property for a rent of \$43,500 per annum, or \$3,625 per month, which is upon information and belief, is below fair market value.

31. Nicholas Tunick, both individually and as Trustee, at all times aforementioned had, and continues to have, a fiduciary to Pedani and to the plaintiff— the only other member of Pedani.

32. As the controlling member of Pedani, Nicholas Tunick's interests, both individual and as trustee, were in direct conflict with his interest as the controlling shareholder of Ceres with respect to the non-payment, or underpayment, of rent and the continuation of Ceres tenancy at the Pound Ridge Property.

33. Over the past year and a half prior to the commencement of this action, the plaintiff made numerous requests to Nicholas Tunick and Pedani, orally and in writing, to examine the books and records of Pedani. However, those requests were ignored.

34. Nicholas Tunick, individually and as Trustee, breached a fiduciary duty to Pedani and the plaintiff by, without limitation: (A) permitting Ceres to use and occupy the Pound Ridge Property subsequent to October 31, 2013 for no rent and/or without adequate compensation to Pedani, (B) assenting, on behalf of Pedani to the termination of Ceres tenancy at the Pound Ridge Property, for the benefit of Ceres and to the detriment of Pedani, (C) leasing the Pound Ridge Property to a new tenant in June 2015 for inadequate rent.

35. As noted above, Pedani's business as originally intended was purchase and hold The Pound Ridge Property to serve as headquarters for Ceres. With Ceres departure from The Pound Ridge Property, the purpose for which Pedani was formed had ceased.

36. There is disagreement and conflict between the plaintiff and Nicholas Tunick regarding the means, methods, and finances of Pedani's operations so fundamental and intractable as to make it unfeasible for Pedani to carry on its business as originally intended.

37. Accordingly, judicial dissolution should be granted.

**AS AND FOR A SECOND CAUSE OF ACTION  
FOR EXAMINATION OF PEDANI'S BOOKS AND RECORDS**

38. The plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "38" hereof as if fully set forth herein.

39. Section 1102(b) of the Limited Liability Company Law provides:

(b) Any member may, subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable.

NY Limit Liab Co § 1102 [McKinney]

40. Further, Section 11.1(C) of Pedani's operating agreement provides:

C. Any Member shall have the right from time to time at his expense to have his accountants and representatives examine and/or audit the books and records of the Company and the information referred to in this Section, and the Operating Managers will make such books and records and information available for such examinations and/or audits.

41. Accordingly, the plaintiff has both a statutory and contractual right to examine the books and records of Pedani. However, as stated above, the plaintiff's requests to Nicholas Tunick and Pedani to examine the books and records of Pedani have been ignored.

42. By reason of the foregoing, Pedani and Nicholas Tunick have violated Section 1102 of the Limited Liability Company Law and have breached the operating agreement.

**AS AND FOR A THIRD CAUSE OF ACTION  
FOR BREACH OF FIDUCIARY DUTY**

43. The plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "42" hereof as if fully set forth herein.

44. By reason of the foregoing, Nicholas Tunick, individually and as trustee, has breached his fiduciary duties to the plaintiff and Pedani, and the plaintiff has suffered damages as a result, including, but limited to diminution of the value of his interest in Pedani.

**AS AND FOR A FOURTH CAUSE OF ACTION  
FOR BREACH OF CONTRACT**

45. The plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "44" hereof as if fully set forth herein.

46. By reason of the foregoing, Nicholas Tunick, individually and as trustee, and Pedani have breached the operating agreement, and the plaintiff has suffered damages as a result.

Wherefore, the Plaintiff prays for an order:

(1) on the First Cause of Action (a) pursuant to Section 702 of the Limited Liability Company Law, decreeing the dissolution of Pedani Realty Services, LLC; and (b) pursuant to Section 703 of the Limited Liability Company Law, appointing a receiver to gather the assets of Pedani Realty Services, LLC, to market and liquidate such assets, and thereafter to distribute to the members the

net proceeds of such liquidation in accordance with the terms of the Operating Agreement of Pedani Realty Services, LLC;

(2) on the Second Cause of Action, pursuant to Section 1102 of the Limited Liability Company Law and in accordance with Pedani's operating agreement, permitting the plaintiff to inspect and copy the books and records of Pedani;

(3) on the Third Cause of Action, granting judgment in favor of the plaintiff and against the defendants, Nicholas Tunick and Nicholas Tunick as Trustee, in the amount of \$250,000, together with interest thereon.

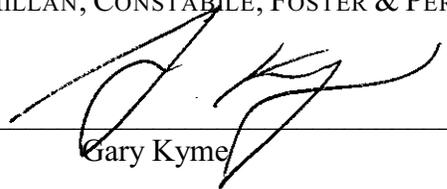
(4) on the Fourth Cause of Action, granting judgment (a) in favor of the plaintiff and against the defendants, Nicholas Tunick, Nicholas Tunick as Trustee and Pedani in the amount of \$5,000, together with interest thereon, and (b) declaring that the plaintiff's 20% ownership interest in Pedani is not subject to dilution based upon his failure to make any requested capital contribution to Pedani; and

(5) granting the plaintiff such other and further relief as is just and proper, together with the costs and disbursements of this action.

Dated: Larchmont, New York  
January 20, 2016

McMILLAN, CONSTABLE, FOSTER & PERONE LLP

By



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