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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

LINCOLN STUDIOS, LLC, a California Limited Liability Company; NEIL SHEKHTER, an individual; NMS CAPITAL PARTNERS, LLC, a California Limited Liability Company; NMBROADWAY STUDIOS, LLC, a California Limited Liability Company; NMSLUXE375, LLC, a California Limited Liability Company; NMSLUXE415, LLC, a California Limited Liability Company; and 9901 LUXE, LLC, a California Limited Liability Company,

Plaintiffs,

v.

ERIC SAMEK; MARC DAVIDSON; P6 LA MF HOLDINGS SPE, LLC; AEW CAPITAL MANAGEMENT, L.P.; AEW PARTNERS VI, L.P.; AEW PARTNERS VI, INC.; AEW VI, L.P.; P6 LA MF HOLDINGS I LLC; LINCOLN WALK STUDIOS, LP; LUXE WASHINGTON, LLC; LUXE LA CIENEGA, LLC; NMS BROADWAY, L.P.; 1410 5TH STREET, LLC; and DOES 1 through 100, inclusive,

Defendants.

CASE NO. BC551551
(Previously Related to Case **BC550227**)

FOURTH AMENDED COMPLAINT FOR FRAUD; AND DEMAND FOR JURY TRIAL

Assigned for All Purposes to:
Hon. Monica Bachner, Dept. 71

Action Filed: July 15, 2014
Trial Date: None Set

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Plaintiffs allege in their Fourth Amended Complaint ("FAC") as follows:

INTRODUCTION

A. The Demurrer and Sanctions Appeals

1. On June 20, 2018, the Court of Appeal, Second District, issued two opinions in this matter: (1) Demurrer Opinion [*Lincoln Studios LLC, et al. v. P6 LA MF Holdings SPE, LLC*, No. B276726, attached hereto as Exhibit "A"]; and (2) Sanctions Opinion [*Lincoln Studios LLC, et al. v. P6 LA MF Holdings SPE, LLC*, No. B279305, attached hereto as Exhibit "B"].

2. In the Demurrer Opinion, the Court of Appeal *reversed* the trial court's dismissal of Plaintiffs' Third Amended Complaint ("TAC"). In April 2016, the trial court (Hon. Suzanne G. Bruguera) sustained a demurrer without leave to amend as to all causes of action and held that the TAC was a sham pleading. The Court of Appeal specifically found that the TAC was not a sham pleading. [*See* Ex. "A" at 2, 13.]

3. The Court of Appeal held that the TAC "adequately allege[d] causes of action for breach of contract, fraud and breach of fiduciary duty." [*Id*. at 2.] The court only affirmed the demurrer as to the First Cause of Action for Breach of Contract as to Article 6 of the joint venture agreement. It reversed with respect to all remaining causes of action.

4. In doing so, the Court of Appeal held that Plaintiffs could amend the complaint: "The matter is remanded to the trial court with instructions to permit the appellants an opportunity to amend the surviving claims." [*Id*.]

5. Accordingly, Plaintiffs are filing this Fourth Amended Complaint (hereinafter referred to as the "Complaint"). The Complaint alleges a single cause of action for fraud. As discussed below, the fraud claim alleged herein is in line with the Court of Appeal's Demurrer Opinion.

6. In the other opinion issued on the same date, the Sanctions Opinion, the Court of Appeal affirmed a portion of the trial court's award of terminating sanctions against one of the Plaintiffs—NMS Capital Partners I, LLC. [*See* Ex. "B" at 17.] Therefore, NMS Capital Partners I, LLC is not a plaintiff in this Complaint. NMS Capital Partners, LLC is a party to this case but it is a completely different entity and has no affiliation with NMS Capital Partners I, LLC.

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7. The Court of Appeal also reversed the trial court's order granting terminating sanctions against ten of eleven of the Plaintiffs named in the TAC. [*See id.* at 26.]

8. Also, in the Demurrer Opinion, the Court of Appeal held that the claims alleged by those ten Plaintiffs were not rendered moot because of its decision to reverse the trial court's order imposing terminating sanctions against those Plaintiffs. As such, the Court of Appeal held that the claims of the remaining Plaintiffs herein can go forward.

9. In addition, the Court of Appeal overturned the award of monetary sanctions against all plaintiffs, including NMS Capital Partners I, LLC, finding that the trial court exceeded its authority and "violated due process" when it imposed over $6 million in sanctions against them. [*See id*. at 24-25.]

10. The court explicitly said that this case should proceed on the merits: first, when it held that, "[t]he matter is remanded to the trial court with instructions to permit [Plaintiffs] an opportunity to amend the surviving claims" [Ex. "A" at 2]; and second, when it "decline[d] to hold that any error in the ruling on the demurrer is harmless because the complaint was subsequently dismissed as a discovery sanction" [*id*. at 25].

11. In deciding that Plaintiffs' fraud claims can proceed, the Court of Appeal held that the "TAC alleges that facts were misrepresented to fraudulently induce appellants to enter into the [joint venture agreement] which are separate and distinct from the breach of contract claim that AEW refused to honor provisions of the [joint venture agreement]." [*Id*. at 23.]

12. It further held that the "TAC alleges that during negotiations, AEW knowing [sic] made false representations about the joint venture program, including that there was a monetization right and that [plaintiff Neil] Shekhter's transfer of his properties to the joint venture at below fair market value would be 'of no moment' because of his right to 'take-out' AEW within a few years." [*Id*.]

13. Plaintiffs are amending the Complaint in accordance with the Court of Appeal's decision. Defendants fraudulently induced Plaintiffs to transfer five valuable real properties into the joint venture at significantly below fair market value by promising and misrepresenting that Plaintiffs had a right to take-out, or monetize, Defendants' interests in the joint venture based on a

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negotiated formula, as alleged in detail below. Plaintiffs justifiably relied on these representations and would never have transferred the Properties into the joint venture if Defendants did not represent to Plaintiffs that they would have the take-out right.

14. The allegations here are based on: representations made by AEW that Plaintiff Neil Shekhter ("Neil"), either directly or through entities that he controlled, had a take-out right which Plaintiffs relied on to transfer the Properties, make contributions and provide services to the joint venture. These representations were oral and made in writing.

15. The Court of Appeal's findings of spoliation have nothing to do with these representations. No documentary evidence relating to this issue was destroyed or is otherwise unavailable to AEW. AEW's representations were made in 2010 and Plaintiffs' transfers of the Properties occurred shortly thereafter.

16. The spoliation occurred years later, in 2015. AEW's right to a fair trial on the issues raised by this Complaint has not been—and cannot be—affected by any spoliation of evidence.

B. Allegations of Wrongdoing

17. Neil is a successful real estate developer and, through his affiliated companies, owns over 2,000 apartment units in the Los Angeles area. Neil and his family have been working on developing the properties at issue in this case for over ten years.

18. Defendant AEW Capital Management, L.P. ("AEW") is one of the largest hedge funds in the world; it is headquartered on the East Coast, with assets of over $60 billion, and operates throughout the country, including in California. It is a sophisticated international investment company.

19. Defendant Eric Samek ("Samek") was an executive at AEW in charge of operations on the West Coast. This lawsuit arises, in large part, from AEW and Samek concocting and implementing a scheme to cheat Plaintiffs out of the fruits of their labor and their portfolio of real estate projects. Samek has since left AEW and started his own hedge fund called Brasa Capital Management operating in Century City, California.

20. Samek was introduced to Neil in early 2010 by Ed Zimbler ("Zimbler"), a broker

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with Berkadia Commercial Mortgage, LLC ("Berkadia"). Samek befriended Neil and gained his trust and confidence. He proposed that Neil, through one of his entities, partner with AEW to acquire, develop and operate residential and commercial real estate projects in the Los Angeles area.

21. Samek and AEW induced Neil and the other Plaintiffs to enter into a joint venture with AEW by making false representations about AEW's joint venture program: namely, that Plaintiffs would have the right to acquire, or monetize, the assets in the joint venture based on a payment formula.

22. Specifically, Samek told Neil that Plaintiffs would have the right to "monetize," or take-out, AEW's interest in the joint venture by ensuring that AEW would receive, by payments from Plaintiffs, the greater of: (1) 1.75 times its invested capital, or (2) a 24% annual return (the "Monetization Formula"). In the real estate business, to "monetize" an asset, such as an interest in real estate or in an entity that owns real estate, is understood to mean to engage in a transaction that results in the interest being exchanged for money.

23. For example, to "monetize" a membership interest in a limited liability company that owns an interest in real estate is to exchange that interest for the payment of cash. This process is often referred to as a "take-out" or "buy-out." Neil relied on Samek's representations and agreed to proceed with a joint venture with AEW on that basis. Neil trusted Samek and believed he was being honest and truthful when he made those representations.

24. Samek told others, including Daniel Lennon, who was an employee at AEW at the time, that he and Neil negotiated the deal on the understanding that Plaintiffs had a take-out right. Lennon has submitted a sworn declaration attesting the following: "Mr. Samek told me that NMS believed the deal between NMS and AEW was that NMS had the right to monetize or take-out AEW's interest in the joint venture by paying AEW 1.75 times its invested capital, or 24% per year on its investment, whichever was greater." [A true and correct copy of Mr. Lennon's declaration is attached hereto as Exhibit "C."] Lennon further stated: "Mr. Samek told me that this was how he and Mr. Shekhter negotiated the deal." [*Id.* ¶ 10.]

25. That Samek made these representations to Neil has been confirmed in other ways.

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For instance, Zimbler has confirmed that Samek told him that Neil negotiated for and would have a take-out right. Specifically, Zimbler testified under oath that he spoke with Samek, and he confirmed that the take-out right was part of the deal between Plaintiffs and AEW. In fact, Zimbler testified that he introduced AEW to other developers in California because of Samek's representations regarding AEW's joint venture program and the ability for developers, like Neil, to take-out, or monetize, AEW's interest in the joint venture.

26. In addition, in an e-mail sent by Samek in May 2010 to an attorney and another executive at AEW, Samek confirmed that he had agreed to terms with Neil, which included the right to "monetize AEW's investment" and provided that, if he did so within five years, then Plaintiffs "will keep all proceeds above AEW's 24% annual return" and AEW's "minimum equity multiple of 1.75x." In other words, Plaintiffs would have the right to take-out AEW by paying AEW whatever amount was needed to ensure that AEW had received the greater of 1.75 times its investment or a return of 24% per year because at that point at that point all of the economic benefits from the joint venture would inure to Plaintiffs' benefit.

27. In reliance on Samek's representations, Neil agreed to enter into the joint venture with AEW and to transfer properties that he owned through his entities to the joint venture entity. As such, Plaintiffs transferred four properties into the joint venture for below fair market value, namely: (a) 375 N. La Cienega Blvd., Los Angeles, California (the "La Cienega Property"); (b) 9901 Washington Blvd., Culver City, California (the "Washington Property"); (c) 819-829 Broadway, Santa Monica, California (the "Broadway Property"); and (d) 1447 Lincoln Blvd., Santa Monica, California (the "Lincoln Property").

28. Plaintiffs transferred these four properties to the joint venture for nearly $50 million below their fair market value, as summarized below:

Property	Date Transferred	Market Value @ Transfer	Amount Paid	Description
Broadway	09/08/10	$18,000,000	$4,300,000	116 units & 3,000 SF Retail
Lincoln	11/09/10	$18,000,000	$8,975,891	97 units & 7,000 SF Retail
La Cienega	03/14/12	$25,000,000	$11,000,000	125 units & 7,000 SF Retail
Washington	06/12/12	$25,000,000	$12,000,000	131 units & 12,000 SF Retail
Total		**$86,000,000**	**$36,275,891**	

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29. Plaintiffs transferred the Properties for below fair market value only because of the monetization feature. As Samek repeatedly told Neil, the amount at which the Properties would be contributed to the joint venture would be irrelevant given the monetization right promised by AEW. Samek told Neil that because the deal was structured to have Neil take AEW out within five years, the take-out price was based on the Monetization Formula.

30. The Monetization Formula, in turn, was based on the amount of financing that AEW provided—not on the value of the joint venture's assets (*i.e.*, the Properties). Therefore, the "prices" that the joint venture paid for the Properties was irrelevant. The Properties were going to be Plaintiffs once AEW was paid off. Samek also pointed out that by transferring the Properties to the joint venture for less than their fair market values, more properties could be acquired and developed, which would inure to Plaintiffs' benefit when they reacquired them.

31. In addition, Neil also arranged for the transfer of a fifth property, located at 1410 5th Street, Santa Monica, California (the "1410 Property"), to the joint venture. The 1410 Property includes 62 residential units and approximately 8,000 square feet of retail. The 1410 Property was in escrow at the time of the transfer. Neil intended to develop the 1410 Property and keep it for his family.

32. In total, Plaintiffs transferred five properties (together referred to as the "Properties") to the joint venture. Plaintiffs did so only because Neil and Samek agreed that Plaintiffs could monetize, or take-out, AEW's interest by way of the Monetization Formula.

33. AEW's representations also induced Plaintiffs to make capital contributions to the joint venture and the Properties in excess of $10 million. Plaintiffs would have not made these contributions had Samek and AEW not repeatedly represented to Neil that he would have the right to take-out, or monetize, AEW's investment in the joint venture. Plaintiffs justifiably and reasonably relied on AEW's representations.

34. Plaintiffs made the aforementioned Property transfers and capital contributions between 2010 and the first half of 2013. In June 2013, pursuant to Samek's and AEW's representations that Plaintiffs had a right to take-out, or monetize, AEW's interest in the joint venture, Neil attempted to exercise this right on behalf of Plaintiffs.

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35. In June 2013, Neil, on behalf of Plaintiffs, notified Samek in writing that he was exercising his take-out right and, accordingly, would pay AEW what it was entitled to under the Monetization Formula, *i.e.*, the amount needed to ensure that AEW received a 24% annual return but not less than a 1.75 multiple of its investment. AEW ignored the notice.

36. Then, in November 2013, AEW claimed, for the first time, that Plaintiffs did not have the monetization right that was promised. At this point, the Properties had appreciated significantly in value, due to Plaintiffs' development and management.

37. In 2015, Neil on behalf of Plaintiffs reiterated his offer, made in 2013, to pay AEW the sum of $106,265,500, the maximum amount to which AEW was entitled based on the Monetization Formula, which equated to an over $46 million profit for AEW. But because the Properties had appreciated more in value than the 24% annual return, AEW and Samek again refused and sought to hold the properties for themselves.

38. Plaintiffs bring this lawsuit to rescind their transfers of the Broadway, Lincoln, La Cienega, Washington and 1410 Properties to the joint venture. Each of these transfers and contributions was induced by Defendants' false and fraudulent representations and promises that Plaintiffs could take-out, or monetize, AEW's interest in the joint venture pursuant to the Monetization Formula.

39. Alternatively, Plaintiffs are entitled to damages for having been fraudulently induced to transfer the Broadway, Lincoln, La Cienega, Washington and 1410 Properties to the joint venture. The amount of damages sought by Plaintiffs is the current market value of the Properties believed to be in excess of $300 million minus debt.[1] As they are allowed by California law, Plaintiffs will elect their remedy—rescission or damages—before trial.

40. Plaintiffs are also seeking damages for over $10 million in contributions they made to the joint venture and for the unpaid services that they provided to the joint venture in reliance on AEW's representations that they had a take-out right, plus punitive damages according to law.

[1] Plaintiffs have filed a separate lawsuit to rescind and unwind the improper and illegal sale of the Properties by Defendants to the Dennis Wong buyers. The case is captioned: *Shekhter v. Wong*, LASC Case No. SC126760 (Hon. Gerald Rosenberg).

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THE PARTIES

A. Plaintiffs

41. Plaintiff Lincoln Studios, LLC is a California limited liability company. It owned the property located at 1447 Lincoln Boulevard, Santa Monica, California.

42. Plaintiff NMSLUXE375, LLC is a California limited liability company. It owned the property at 375 North La Cienega Boulevard, Los Angeles, California.

43. Plaintiff NMSLUXE415, LLC is a California limited liability company. It owned the property at 375 North La Cienega Boulevard, Los Angeles, California.

44. Plaintiff 9901 LUXE, LLC is a California limited liability company. It owned the property located at 9901 Washington Boulevard, Culver City, California.

45. Plaintiff NMS Capital Partners, LLC is a California limited liability company. It owned the property located at 819-829 Broadway, Santa Monica, California.

46. Plaintiff NMBroadway Studios, LLC is a California limited liability company. It was a partner and owner of the property located at 819-829 Broadway, Santa Monica, California.

47. Plaintiff Neil Shekhter is an individual residing in Los Angeles County, California.

B. AEW Defendants

48. Defendant P6 LA MF Holdings SPE, LLC is a Delaware limited liability company and the Investor Member in the Joint Venture (the "P6").

49. Defendant AEW Capital Management, L.P. is a Delaware limited partnership and the manager of Defendant AEW Partners VI, L.P.

50. Defendant AEW Partners VI, L.P. is a Delaware limited partnership and the "fund" managed by AEW Capital Management that invested in the joint venture.

51. Defendant AEW Partners VI, Inc. is a Delaware corporation that serves as the general partner of Defendant AEW VI, L.P.

52. Defendant AEW VI, L.P. is a Delaware limited partnership and the general partner of Defendant AEW Partners VI, L.P.

53. Defendant Lincoln Walk Studios, LP is a limited partnership that owns the property located at 1447 Lincoln Boulevard, Santa Monica, California.

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54. Defendant Luxe Washington, LLC is a Delaware limited liability company that owns the property located at 9901 Washington Boulevard, Culver City, California.

55. Defendant Luxe La Cienega, LLC is a Delaware limited liability company that owns the property located at 375 North La Cienega Boulevard, Los Angeles, California.

56. Defendant NMS Broadway, L.P. is a limited partnership that owns the property located at 819-829 Broadway, Santa Monica, California.

57. Defendant 1410 5th Street, LLC is a Delaware limited liability company that owns the property located at 1410 5th Street, Santa Monica, California.

58. Defendant Eric Samek is an individual residing in Los Angeles, California. At all relevant times, Samek was acting individually and on behalf of AEW in connection with the matters that are the subject of this action. Samek obtained personal benefits from AEW by engaging in the malfeasance described herein. Samek culpably participated in the misconduct on which Plaintiffs' claims are based. Samek has since left AEW and is now at a firm called Brasa Capital Management based in Century City, California. Samek personally made misrepresentations and concealed material facts as alleged herein.

59. Defendant Marc Davidson ("Davidson") is an individual residing, on information and belief, in Suffolk County, Massachusetts. At all relevant times, Davidson has been an officer, director and/or managing agent of AEW and was actively acting individually and on behalf of AEW in connection with the matters that are the subject of this action. Davidson obtained personal benefits from AEW by engaging in the malfeasance described herein. Davidson served as supervisor to Samek, knowingly authorized and approved of Samek's conduct in connection with the matters that are the subject of this action, and personally and culpably participated in the misconduct on which Plaintiffs' claims are based. Davidson personally made misrepresentations and concealed material facts as alleged herein.

60. Plaintiffs are informed and believe, and on that basis allege, that except as otherwise alleged herein, each of the Defendants is, and at all times relevant to this Complaint was, the employee, agent, employer, partner, joint venturer, alter ego, affiliate, and/or co-conspirator of the other Defendants and, in doing the acts alleged herein, was acting within the

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course and scope of such positions at the direction of, and/or with the permission, knowledge, consent, and/or ratification of the other Defendants. In the alternative, Plaintiffs are informed and believe and based thereon allege that each of the Defendants, through its acts and omissions, is responsible for the wrongdoing alleged herein and for the damages suffered by Plaintiffs.

61. At all relevant times, each of the Defendants was the agent of each of the other Defendants and was acting within the course and scope of such agency and with the permission of the other Defendants. Defendants conspired with and aided and abetted each other in connection with the misconduct as alleged herein.

62. Plaintiffs specifically allege, as follows:

(a) With the exception of defendant AEW Capital Management, the remaining AEW defendant entities do not function as separate entities, but are mere shells designed to allow AEW Capital Management to circumvent laws and regulations and to otherwise gain unfair advantages;

(b) With the exception of defendant AEW Capital Management, the remaining AEW defendant entities have no employees, or separate offices, bank accounts or letterhead;

(c) Defendants utilize the same employees, *i.e.*, employees of AEW Capital Management, and the same e-mail address, *i.e.*, (name)@aew.com. Defendant AEW Capital Management controls the operations of the other AEW defendant entities;

(d) With the exception of defendant AEW Capital Management, the remaining AEW defendant entities do not observe entity formalities;

(e) The AEW defendant entities are conducted as a common enterprise, lacking independence or an arms-length relationship;

(f) With the exception of defendant AEW Capital Management, the remaining AEW defendant entities are materially undercapitalized;

(g) Defendant P6 did not open or maintain a bank account or obtain authorization to do or transact business in California to further an unlawful practice of avoiding paying taxes to the Franchise Tax Board of the State of California;

(h) The AEW defendant entities are not separate or independent entities for

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legal purposes;

(i) With the exception of defendant AEW Capital Management, the remaining AEW defendant entities are mere instrumentalities of AEW Capital Management; and

(j) It would be manifestly unjust to treat the AEW entities as anything but alter egos of each other.

63. The true names and capacities of Defendants Does 1 through 100 are unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names. Plaintiffs will, if necessary, amend this Complaint to show the true names and capacities of Does 1 through 100 when their names and capacities have been ascertained. Does 1 through 100 culpably participated in or in some other way are responsible for the misconduct committed by the other Defendants and liable for the damages sustained by Plaintiffs, as alleged herein.

THE FRAUDULENT SCHEME

A. Discussions with Zimbler About a Joint Venture with AEW

64. In early 2010, Zimbler was approached by Davidson and Samek (and other individuals employed by AEW), who said that AEW was looking for an operating partner with whom to enter into a joint venture to develop multi-family residential projects in the Los Angeles area. Samek told Zimbler that AEW would give its partner in the joint venture the right to acquire the interest of AEW at an acceptable rate within a set amount of time.

65. Thereafter, in February 2010, Zimbler telephoned Neil for the purpose of exploring a possible joint venture between Neil and AEW. Zimbler's intention was, in part, for the joint venture between Neil and AEW to use Zimbler's company, Berkadia, to procure financing for the acquisition and development of the joint venture properties. On the call, Zimbler told Neil that he wanted to set up an in-person meeting with Neil, AEW and himself.

66. Neil had previously done business with Zimbler, who had provided Neil with advice and counsel; and the two had developed a relationship of trust and confidence. Zimbler told Neil about AEW's joint venture program and how it might enable Neil to obtain financing for his various projects.

67. In particular, Zimbler told Neil about a feature of AEW's program that was

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unusual, if not unique—that its joint venture partner could take-out, or "monetize," AEW at the amount invested by AEW, plus an interest rate and/or a multiplier.

68. Based on Zimbler's representations and the trust that he placed in Zimbler, Neil agreed to pursue negotiations with AEW.

B. Negotiations with AEW

69. February 19, 2010 Meeting: Zimbler arranged for Samek and Neil to meet to discuss the possibility that AEW would provide financing for Neil and his plaintiff entities to further his acquisition and development plans. The first in-person meeting between Zimbler, Samek and Neil took place on or about February 19, 2010. They met at Neil's home located in Los Angeles, California. During the meeting:

(a) Neil said that he had no experience in financing transactions of the nature or complexity that were being considered.

(b) Neil said that because his business was a family business and because he wanted to keep it that way, he would only consider a partnership with someone having the highest level of integrity and only if he would have the right to take-out AEW. Neil explained that, regardless of the form of the transaction, he was merely looking for short-term financing, not a long-term equity partner.

(c) Samek assured Neil that AEW had a sterling reputation and was a company worthy of Neil's trust. He noted that its investors were largely pension funds, that AEW was highly regulated, and therefore, that Neil could expect that AEW would exercise the highest level of honesty, good faith and integrity.

(d) Samek represented that Neil and his entities would have the right to take-out, or monetize, AEW's interest in exchange for whatever amount was needed to repay AEW's capital plus a return to be negotiated and that, in this respect, the substance of the transaction was effectively a high interest loan, as Neil wanted. Samek explained that AEW's investors did not expect or want to make a long-term investment. Samek represented that AEW's investors usually expected returns at around 15% annually so a return of 24% would be very attractive and exceed their expectations. Therefore, the investment plan that AEW would present to its investors would

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be based on the assumption that Neil/Plaintiffs would exercise the take-out right; and therefore, the transaction and take-out right would be structured to incentivize Neil/Plaintiffs to exercise it.

(e) Samek explained that the joint venture would include two members: (1) the "Operating Member," whose role would be fulfilled by Neil's affiliated entity, and whose responsibility would be to conduct the day-to-day operations of the joint venture, including the construction and management of the properties; and (2) the "Investor Member," whose role would be fulfilled by AEW or an affiliated entity, and whose responsibility would be to provide or obtain funding for the joint venture.

(f) Samek also explained to Neil that if AEW was to enter into a joint venture with him, and effectively contribute tens of millions of dollars, AEW wanted him to transfer some of the properties he owns or controls to the joint venture for amounts below their fair market value. Samek explained that the transfer of the properties at the low prices would be of no significance to Plaintiffs because of Plaintiffs' right and intention to take-out AEW's interest within a few years; and further, that it would enable the venture to invest in more properties.

70. Subsequent Negotiations: From March to May 2010, Neil continued negotiating with Samek, over the telephone and in face-to-face meetings. Specifically:

(a) On or about March 12, 2010, Zimbler, Samek and Neil spoke on the telephone. Neil reminded Zimbler and Samek that his right to buy-out AEW was a "deal breaker." Samek again assured Neil that Plaintiffs would have the right to take-out, or monetize, AEW's interest in the joint venture.

(b) On or about March 17, 2010, Zimbler, Samek, Neil and others met for lunch at Toscana, a restaurant located in Los Angeles, California. Samek confirmed that Neil or his entity would have the right to buy-out or otherwise acquire AEW's interest within a specified amount of time. Neil reminded Zimbler and Samek that the right to buy-out, or otherwise acquire, the interest of AEW was a "deal breaker."

(c) Samek, Neil and Zimbler met in person approximately three other times during this period, including at (1) an American Israeli Public Affairs Committee (AIPAC) event in Los Angeles; (2) the Four Seasons Hotel in Beverly Hills; and (3) Samek's condominium in

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Los Angeles, California. During these discussions:

(i) Neil reiterated the importance of the take-out feature and of the integrity of his partner, and explained that this was the reason why he kept raising these points; and Samek continued to assure Neil that he understood and appreciated the importance of these points to Neil, and reiterated that the take-out was also important to AEW so that AEW could meet the projections that it provided to its investors.

(ii) Samek provided details regarding the take-out feature. Specifically, he explained that Neil or his entity would be able to take-out AEW's interest by paying, within five years, whatever amount was needed to ensure that AEW would receive the greater of: (1) AEW's net capital contributions times 1.75, and (2) an "internal rate of return" ("IRR") of 24% per year—*i.e.*, the Monetization Amount. Zimbler has testified, under oath, that Samek told Neil that he would have a right to take-out AEW based either on an internal rate of return of 24%, or 1.75 times AEW's capital contribution, whichever was greater.

(iii) Samek told Neil that because of Neil's take-out right and his plan to exercise that right, Neil or his entities could transfer the Properties for "zero dollars," and it would make no difference in the end because of the Monetization Amount and Neil's intent to exercise his take-out right, and that the transfers would be a "win-win" in that: (A) Neil would get the financing that he needed for his projects, it would free up more money to allow the joint venture to diversify and expand its investments, and Neil would benefit from this when he exercised the take-out right; and (B) AEW would receive substantial benefits for its investors (*i.e.*, returns being the greater of 1.75 times its investment, or 24% per year).

(d) Neil agreed to these terms. He wanted to keep the Properties within his family. He made it clear that he would exercise his take-out right, or what was often referred to by the parties as his right to "monetize" AEW, at the first opportunity when it made economic sense to do so, which was on or about the three-year anniversary of the formation of the venture. The parties completed their negotiations and agreed to principal deal terms on or about May 19, 2010. They agreed in telephone conferences in which Neil and Samek participated that Plaintiffs would have the right to take-out AEW, or monetize all of AEW's investment, within five years provided

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that AEW was paid what was needed to ensure that AEW would receive a 24% annual return but not less than 175% of its net invested capital.

(e) In other words, if AEW received this amount within five years, AEW would get taken out of the joint venture. Because the Properties would be the sole assets of the joint venture, Plaintiffs would effectively get the Properties. They also agreed on what would happen if AEW is not taken out within five years: In that case, NMS would receive 45% of any joint venture proceeds in excess of AEW's 24% per annum. Based on this, if AEW is not taken out within the first five years, it stays in the joint venture and Neil receives a promote (*i.e.*, higher distribution) after AEW is paid its annual 24% per annum.

71. Confirmation of Samek's Representations:

(a) Confirmation by Davidson: In a July 2010 meeting with Davidson, at the Le Pain Quotidien coffee house in Santa Monica, Neil and Samek specifically discussed the fact that it did not make sense for Neil/Plaintiffs to monetize AEW before the three-year anniversary because of the minimum requirement that AEW receive 1.75 times its net invested capital, or to do so significantly after the three-year anniversary because of the other requirement that AEW receive a 24% annual IRR. Davidson personally confirmed to Neil that Plaintiffs had the take-out right based on the Monetization Formula at that meeting.

(b) Confirmation by Lennon:

(i) Independent third-party witnesses like Daniel Lennon have confirmed that Samek represented to Neil that NMS had the right to monetize or take-out AEW's interest in the joint venture. Lennon submitted a declaration regarding his dealings with Samek. (*See* Exhibit "C.")

(ii) Lennon is a former employee of AEW. He is a graduate of the United States Naval Academy and The Wharton School of Finance at Penn. He is a Navy veteran, a decorated pilot who flew combat missions in Iraq. Lennon worked at AEW from August 2010 to July 2011. Samek was Lennon's supervisor; Lennon worked closely with Samek on the deals Samek was involved in for AEW. (*See id.* ¶¶ 2-5.)

(iii) Samek told Lennon that NMS had the right to monetize AEW's

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investment within five years by paying AEW 1.75 times AEW's investment or a 24% yearly return, whichever was greater. But Samek also told Lennon that even though this was the deal, unbeknownst to Neil, AEW did not intend to let Neil or his entities monetize the investment in the joint venture. (*See id.* ¶¶ 10-12.) Thus, AEW/Samek meant to deceive Neil/Plaintiffs all along.

(c) Confirmation by Zimbler:

(i) Another third-party witness is Zimbler. Zimbler testified in a deposition that Samek told Neil that he would have a right to take-out AEW either on an internal rate of return of 24%, or 1.75 times AEW's capital contribution, whichever was greater.

(ii) Zimbler further testified that Neil told him on many occasions that the take-out right was very important to him and that it was part of his deal with AEW. Zimbler testified: "I 100 percent believed, at all times, that Neil had this buyout right. Not a buy/sell. A buyout right."

(iii) Zimbler also testified that he spoke to Samek in 2011—after the joint venture was signed up and after Plaintiffs began transferring the Properties—who again confirmed that Neil had the right to take-out AEW. In fact, when Zimbler introduced Samek to his business associates, he explained that AEW was a unique lender because it allowed a buy-back right for its investors. Samek concurred.

(d) May 19, 2010 E-Mail: In an e-mail sent in May 2010 by Samek, Samek agreed that Neil/Plaintiffs would have the right to "monetize AEW's investment," *i.e.*, to convert AEW's interest in the joint venture into cash, thus enabling Neil/Plaintiffs to keep all proceeds from the joint venture, but that this right would terminate after five years. Samek forwarded the email to Neil and congratulated him on the deal that the parties had reached by writing "Mazel tov," a Hebrew word for "congratulations."

(e) On May 20, 2010, AEW sent a "term sheet" to Neil, confirming the deal and, in particular, Samek's representation that if AEW was "monetized in its investment within five years," Neil/Plaintiffs would own 100% of the venture.

72. Execution of the Joint Venture Agreement:

(a) After Neil and Samek reached agreement in May 2010, the lawyers for the

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joint venture drafted the contract by which the parties would operate, which took the form of a Limited Liability Company Agreement for the limited liability company formed for the purpose of carrying out the joint venture, called Defendant P6 LA MF Holdings I, LLC. The joint venture agreement was executed on September 9, 2010.

(b) At no time between the time when Neil and Samek reached agreement, as alleged above, and the time when the joint venture agreement was executed, did Zimbler, Samek or anyone else at AEW ever give Neil any reason to believe that AEW was unwilling to abide by the terms that he had negotiated with Samek, as alleged above, or that the contract that was being drafted would be inconsistent with those terms.

(c) Plaintiffs believed that the take-out right was contained in Section 6 of the joint venture agreement. In the Demurrer Opinion, however, the Court of Appeal held that Article 6 did not provide this right. Nevertheless, the Court of Appeal held that Plaintiffs' fraud claims based on AEW's misrepresentations regarding the take-out right could proceed:

> The TAC alleges that facts were misrepresented to fraudulently induce appellants to enter into the [joint venture agreement] which are separate and distinct from the breach of contract claim that AEW refused to honor provisions of the [joint venture agreement]. The TAC alleges that during negotiations, AEW knowing [sic] made false representations about the joint venture program, including that there was a monetization right and that Shekhter's transfer of his properties to the joint venture at below fair market value would be "of no moment" because of his right to "take-out" AEW within a few years. This is separate and distinct from allegations the contract was breached in several ways, including by falsely accusing the Operating Member of misappropriating funds or of fabricating defaults in the appellants' performance such that the Operating Member could be removed. [Demurrer Opinion, p. 23.]

73. Transfer of Properties to the Joint Venture: Relying on the representations by AEW that Plaintiffs would have a take-out, or monetization, right based on the Monetization Formula, as alleged above, starting in October 2010, Neil, through his entities, began transferring Properties to the joint venture, as follows:

(a) Broadway Property: In October 2010, Plaintiff NMBroadway Studios, LLC transferred to the joint venture its interest in the Broadway Property for approximately $4.3 million. This transfer was substantially below the estimated $18 million fair market value of the

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Broadway Property.

(b) Lincoln Property: In November 2010, Plaintiff Lincoln Studios, LLC transferred its interest in the Lincoln Property to the joint venture for $8,975,891, consisting of (1) the property purchase price of $7,787,000, and (2) the assigned rights purchase price of $1,188,891. This transfer was substantially below the estimated $15 million fair market value of the Lincoln Property.

(c) Washington Property: In January 2011, Plaintiff 9901 LUXE, LLC transferred its interest in the Washington Property to the joint venture for $12 million. This transfer was substantially below the estimated $25 million fair market value of the Washington Property.

(d) 1410 Property: In January 2012, Neil arranged for an affiliate entity he owned and controlled to transfer and assign its rights to the 1410 Property to the joint venture. The 1410 Property was then in escrow.

(e) La Cienega Property: In March 2012, Plaintiffs NMSLUXE375, LLC and NMSLUXE415, LLC transferred their interests in the La Cienega Property to the joint venture for $11 million, consisting of (1) the property purchase price of $6 million, and (2) the assigned rights purchase price of $5 million. This transfer was substantially below the estimated $25 million fair market value of the La Cienega Property.

74. Other Actions Taken by Plaintiffs in Reliance on Samek's Representations:

(a) Capital Contributions to the Joint Venture: In addition to the property transfers, Neil provided funds for capital contributions to the joint venture. In doing so, Neil relied on Defendants' representations that Plaintiffs could monetize AEW's interest in the joint venture. Neil would not have made or authorized these contributions if he had not been led to believe that he, either directly or through an entity that he controlled, would have the right to take-out, or monetize, AEW's interest in the joint venture and these Properties.

(b) Additional Cash Contributions: Neil made additional cash contributions for construction and development of two of the Properties for which neither he nor any of his entities ever received any consideration. He made these contributions because he had been led to believe

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that he would own these assets upon exercising his take-out right. Neil and his entities would not have made these cash outlays if he was not repeatedly assured by Samek and AEW that he would have the right to take-out AEW's interest in the joint venture. There would be no reason for Neil to make these investments otherwise. It would be tantamount to throwing money away. These contributions included the following:

(i) In January 2012, the joint venture purchased the 1502 and 1511 Properties. Samek induced Neil to contribute approximately $1.5 million toward the purchase price. Samek told Neil that in light of Neil's right and intent to monetize AEW, it made no difference whether neither Neil nor his entities received credit for this $1.5 million capital contribution.

(ii) Neil also provided funding for building improvements for retail and commercial space at (1) the 1410 Property in the amount of $615,255; (2) the property at 1420 5th Street, Santa Monica, California (the "1420 Property") in the amount of $1,332,001; and (3) the property at 1430 5th Street, Santa Monica, California (the "1430 Property") in the amount of $1,315,916.

75. AEW kept for itself special distributions made for Neil and his entities by a third-party lender. These special distributions were for the 1420 Property and the 1430 Property in the amount of $1 million each.

76. In total, Neil did not receive credit for over $10 million of contributions to the joint venture. The contributions identified above are summarized as follows:

Property	Contribution Description	Date	Amount
Lincoln	Seller Note	11/2010	$3,340,000
1410	Building improvements funded by Plaintiffs	2012-13	$615,255
1420	Special distribution retained by AEW	07/2011	$1,000,000
1420	Building improvements funded by Plaintiffs	2012-13	$1,332,001
1430	Special distribution retained by AEW	07/2011	$1,000,000
1430	Building improvements funded by Plaintiffs	2012-13	$1,315,916
1502/1511	Contribution to purchase price	01/2012	$1,500,000
		Total	**$10,103,207**

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77. Affordable Housing Liability: Certain legal obligations relating to the construction of affordable housing were met by Neil personally to assume these obligations, *i.e.*, to construct the affordable housing units at his other projects, as opposed to the joint venture's projects. Since Neil was led to, and did, believe that he would be re-acquiring the Properties from the joint venture, he agreed to assume this obligation, the effective cost of which is about $10 million. He would never have agreed to assume this obligation otherwise.

78. Personal Guarantees: Neil and others executed personal guarantees of various financial obligations of the joint venture or its subsidiaries, including loans obtained from third-party financial institutions to fund the development of joint venture projects. This occurred on or about December 9, 2010, April 13, 2011, July 27, 2011, September 27, 2011, January 9, 2012, and June 1, 2012. They did this because of the take-out, or monetization, right permitting them to take-out AEW within five years. There would be no reason for them to execute personal guarantees, subjecting themselves to personal liability, if they did not believe that they had the take-out right.

79. Indemnities: Neil and others also executed an Undertaking of Principals, dated September 8, 2010, by which they agreed to personally indemnify the joint venture against liability, losses, costs (including reasonable attorney's fees), and damages relating to the joint venture. A true and correct copy of the Undertaking of Principals is attached hereto as Exhibit "D." Neil would never have executed these instruments if they had not been led to believe that they had the take-out right.

80. Development Services: Neil/Plaintiffs developed most of the Properties without charging a "developer's fee." A developer's fee covers the expenses necessary to develop the property. As a result, Neil paid for costs associated with developing those Properties, including for NMS employees who worked on the Properties. It's unheard of for developers to work for free to develop a property. Neil only did this because he was led to believe that he had a take-out right and would be the property owner.

81. Repeated Re-Confirmation of the Monetization Feature: On multiple occasions after the joint venture agreement was executed, and as Plaintiffs were making the transfers of the

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Properties, Samek repeated and reaffirmed to Neil that Plaintiffs had the right to monetize, or take-out AEW provided that AEW received the greater of 1.75 times its invested capital and a 24% IRR. Samek told Neil that he understood that Neil or his entity would exercise that right at or soon after the three-year anniversary of the formation.

82. This was discussed at meetings in or about: (a) September 2010; (b) November 2010; (c) January 2011; (d) August 2011; (e) early September 2011; (f) November 2011; (g) January 2012; (h) May 2012; and (i) August 2012, among other dates. Had Samek or anyone else at AEW told Neil that Plaintiffs did not have the take-out, or monetization, right, Plaintiffs would have ceased transferring the Properties and ceased making capital contributions to the joint venture. Indeed, Plaintiffs had no obligation to transfer any of the Properties and certainly had no obligation to transfer all five and contribute millions of dollars to the joint venture, and only did so because of representations about the take-out right made by AEW.

83. Bank Financing: AEW obtained financing for the Properties from federally insured banks and institutions. In those loan applications, AEW represented to the banks that the value of the Properties was what Plaintiffs paid for the Properties, not the actual value it paid for these Properties at the time they were transferred by Plaintiffs. By doing so, AEW defrauded the banks.

84. Neil Attempts to Exercise the Take-Out Right:

(a) In April 2013, NMS' employees Steven Williford, Jim Anderson and Brian Bowis met with Samek and AEW executives David Chun and David Boillot at Akasha, a restaurant in Culver City. At the lunch meeting, the parties discussed Neil/Plaintiffs buying out AEW's interest in the joint venture and the Properties per the take-out right. Specifically, they discussed various ways to effectuate the take-out, including bringing in outside money through loans or having Neil/Plaintiffs sell or use equity in their other properties to buy-out AEW.

(b) They also talked about what would happen to AEW's interest once NMS paid it back per the Monetization Formula, and discussed "cleaning up" the joint venture agreement to effectuate the payback. During the meeting, no one at AEW said that Neil/Plaintiffs did not have the right to take-out AEW's interest in the joint venture or anything to that effect. At the conclusion of the meeting, the parties agreed to continue to discuss the take-out/buy-out

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mechanics.

(c) Following the meeting, employees at NMS including Brian Bowis, and their counterparts at AEW including David Chun, exchanged projections, calculations and spreadsheets to effectuate the take-out right. No one at AEW ever told anyone at NMS that there was no take-out right. On June 26, 2013, Neil sent a letter to Samek invoking the take-out right based on the Monetization Formula.

(d) The June 26th letter referenced the April 2013 meeting, above, in which NMS and AEW discussed "cleaning up" the joint venture agreement to provide for AEW's withdrawal under these circumstances. Neil suggested this be accomplished in a single transaction whereby AEW would receive everything to which it was entitled under the Monetization Formula, and would withdraw as a member of the joint venture—leaving Neil and his entities as the owners of the Properties, like the parties had discussed and agreed on.

(e) On August 2, 2013, Neil sent another letter to Samek advising him that NMS had received multiple offers to refinance the Properties. Neil noted that the proceeds from the refinancing would provide a significant portion, if not all, of the funds that would be needed to enable AEW to receive a return of its capital contributions and the Monetization Amount to which it would be entitled. In the letter, Neil stated that "refinancing these assets as contemplated by any of these proposals would move us a long way down the road toward our agreement of a buy-out of [AEW] at the greater of (i) an IRR of 24% and (ii) the product of 1.75 multiplied by [AEW's] aggregate [c]apital [c]ontributions."

(f) As Neil advised Samek, during this time period, Neil had liquidated assets in his personal portfolio in order to raise the funds that would be needed to monetize AEW. Specifically, Neil sold two properties that he owned located at 884 and 939 Palm Avenue in West Hollywood, California for $29.5 million, netting him $10 million in cash. Neil would not have sold these properties had it not been for the take-out right. These two properties have appreciated significantly since and are worth approximately $46 million. Plaintiffs lost approximately $16.5 million as a result of the untimely sale. Samek did not deny, or dispute in any way, that Neil/NMS had the right to monetize, or take-out, AEW.

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(g) On November 18, 2013, Neil sent an e-mail to Samek inquiring, among other things, as to why AEW had not responded to his letters and reiterating that Neil had a right to acquire AEW's interest in the joint venture by monetizing it.

85. AEW Repudiates Neil's Take-Out Right: On or about November 22, 2013, Samek sent Neil an e-mail stating, for the first time ever, that Neil did not have the right to acquire AEW's interest under the joint venture agreement, but he did not deny that he and Neil had agreed in their negotiations that Neil would have that right. On December 11, 2013, Neil sent a text message to Samek, again asking him why AEW was not responding to his points about the right to monetize AEW. Specifically, Neil said:

> I don't understand why you told me that you will tell the truth when asked, but keep referring to AEW attorneys and playing games and not talking to me regarding the agreement we made re 1.75/24% Buy-out. I never imagined that institutional partners can act this way. The truth will come out. Many people where (sic) present during our meetings and know what you promised for the last few years. You where (sic) even discussing with me doing a deal at 20% per a year on Lincoln in case you forgot. You never told me why AEW is not living up to the deal we made. Let me know. Thanks.

86. Samek did not respond. By then, he had put his and AEW's scheme to work.

87. On December 13, 2013, Neil sent Samek another text, stating: "Why can't you tell the truth regarding the buy-out deal we made? Is your job and potentially more profit more important to you then (sic) truth and integrity." Again, although a statement of this nature warranted a response, Samek gave none.

88. Plaintiffs' Discovery of the Fraud:

(a) Samek had no intention of honoring his promises to, and the agreement that he had made with, Neil. He even confided in Lennon that AEW did not intend to allow Neil to take-out AEW's interest, notwithstanding his representations to the contrary. In his declaration, Lennon stated:

> During a conversation I had with Mr. Samek, Mr. Samek told me that although Mr. Shekhter believed he could monetize or take-out AEW's interest in the joint venture, AEW did not intend to allow that to happen. Instead, according to Mr. Samek, AEW intended to put the joint venture's real estate portfolio up for sale. Mr. Samek told me that Mr. Shekhter did not know AEW's plan in this regard.

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[Exhibit "C" ¶ 12.]

89. Plaintiffs did not suspect or have any reason to suspect that they had been defrauded, until November 2013, when Samek for the first time claimed that Neil/NMS did not have the right to acquire AEW's interest.

90. Defendants' Bogus Sale of the Properties:

(a) On November 17, 2016, before any order was entered by this Court authorizing the sale of the Properties, AEW purported to sell the Properties, in secret, to a group of buyers. AEW did this without Plaintiffs' or this Court's involvement or authorization.

(b) Plaintiffs only learned of the "sale" when AEW and the purported buyers orchestrated a hostile takeover of the Properties, resulting in assault, battery and false imprisonment of Plaintiffs' employees.

(c) Plaintiffs subsequently discovered that the purported "sale" of the Properties was a below-market, sweetheart deal. The sale price was tens of millions of dollars below market, based on a contemporaneous sale of two apartment buildings in the same area. Plaintiffs further discovered that the transaction was a private "auction" arranged by AEW with (at least) one of its long-time partners—Mark Friedman, Fulcrum Property Corp. and their affiliates have been partners with AEW for 26 years on a project in Sacramento, California. In fact, the Director of AEW's Direct Investment Group currently serves as the Managing Partner of the joint venture that owns the Sacramento project.

91. Defendants' Other Wrongdoing:

(a) Despite purportedly selling the Properties, Defendants refused distribute to Plaintiffs any proceeds from the "sale." They stonewalled Plaintiffs' requests for information regarding these transactions and refused to provide any financial records. Plaintiffs created a valuable portfolio of developments that netted AEW a large return but Defendants refused to pay Plaintiffs any portion of the proceeds from the sale.

(b) Defendants sent Plaintiffs K-1s allocating millions of dollars in taxable income despite not distributing any money to them, creating substantial potential tax liabilities to

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Plaintiffs.

(c) Defendants forged a "Customer's Authorized Signature" for a bank account at Pacific Commerce Bank which belonged to one of Plaintiffs' entities. They submitted the form to the bank, which caused the bank to flag the forgery and issue a fraud alert.

CAUSE OF ACTION FOR FRAUD

(*By All Plaintiffs Against All Defendants*)

92. Plaintiffs incorporate by reference herein the preceding paragraphs of this Complaint, including subparagraphs.

93. This cause of action arises from misrepresentations, false promises and concealment by Defendants during negotiations for the joint venture and after the joint venture was formed. These misrepresentations and false promises were made for the purpose and with the effect of defrauding Plaintiffs and inducing them to transfer the Properties to the joint venture at below fair market value, to make contributions to the joint venture without receiving consideration, personally assuming obligations that rightfully belonged to the joint venture, executing guarantees and indemnities, and providing services to the joint venture without receiving consideration. In particular:

(a) *Misrepresentations*:

(i) Between February and May 2010, Defendants made false or misleading representations to Plaintiffs about: (A) AEW and their joint venture program; and (B) Neil/Plaintiffs' right to take-out, or "monetize," AEW. These misrepresentations were made over the course of in-person meetings between Neil, Samek and Zimbler, as well as in telephone calls between them during this period, as set forth above.

(ii) After the joint venture agreement was executed, Defendants continued to falsely represent to Neil/Plaintiffs that: (A) they had a right to monetize, or take-out, AEW based on the Monetization Formula; and (B) Plaintiffs' transfer of the Properties to the joint venture at below fair market value, capital expenditures and other contributions to the joint venture made, at AEW's request, without receiving consideration, "would be 'of no moment' because of [Neil's] right to 'take-out' AEW within a few years." These misrepresentations were

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made during meetings between Plaintiffs and Defendants in or about: (a) September 2010; (b) November 2010; (c) January 2011; (d) August 2011; (e) early September 2011; (f) November 2011; (g) January 2012; (h) May 2012; and (i) August 2012, among other dates.

(b) *False promises*: As alleged above, Defendants knowingly made false promises with the intent to defraud Plaintiffs. Defendants made false promises relating to Neil/Plaintiffs' right to monetize AEW by paying it 1.75 times the invested capital or 24% IRR. whichever is greater.

(c) *Concealment*: Defendants intended, but until November 2013 when construction was largely completed, concealed their intention, to repudiate and not honor their promises, including, but not limited to, those relating to Neil/Plaintiffs' take-out right. During this period of time, Defendants knew and intended that, if the Properties had increased in value by more than the 24% rate of return, they would reverse course and contend that he had no such right.

(d) *Materiality*: The right promised to Plaintiffs allowing them to take-out, or monetize, Defendants' interest in the joint venture was highly material. Neil and Zimbler and Samek discussed this feature of AEW's joint venture program, and Samek assured Neil that Plaintiffs would have this right on numerous times between February and May 2010. Neil repeatedly told Zimbler and Samek the buy-out right was very important to him. This right was critical to Plaintiffs' decisions to: (i) enter into the joint venture with AEW; (ii) transfer the Broadway, Lincoln, La Cienega, Washington and 1410 Properties to the joint venture for nearly $50 million below then fair market value; (iii) expend over $10 million on capital contributions without receiving any consideration; (iv) provide development services and other benefits to the joint venture without receiving any consideration; and (v) personally assume obligations that rightfully belong to the joint venture. Plaintiffs would not have transacted with Defendants, transferred the Properties or provided services to the joint venture, contributed funds to or for the benefit of the joint venture or assumed what should have been joint venture obligations had Defendants accurately represented their true intention, which was to repudiate Plaintiffs' take-out right after all of this had been done.

(e) *Knowledge of falsity (scienter)*: Defendants made their materially false or

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misleading representations or promises, as alleged above, knowing that such statements or promises were false or misleading or were made recklessly and without regard for their truth. Defendants knew, or stated recklessly and without regard for the truth, that they would not permit Neil/Plaintiffs to take-out, or monetize, AEW's interest in the joint venture by paying the greater of: (1) 1.75 times invested capital, or (2) a 24% annual return, or otherwise. That Defendants had no intention of permitting Plaintiffs to take-out AEW's interest in the joint venture is shown by their refusal to accept Plaintiffs' tender at a 24% rate of return in 2013 (and again in 2015). In fact, Samek brazenly confided to his employee at AEW that "although Mr. Shekhter believed he could monetize or take-out AEW's interest in the joint venture, AEW did not intend to allow that to happen." [Exhibit C ¶¶ 10-12.] Defendants admitted that "Mr. Shekhter did not know AEW's plan in this regard." [*See id*. ¶ 12.] Defendants were not satisfied with the 24% per annum return and wanted the whole valuable portfolio for themselves. They acted deliberately and with full knowledge of the falsity of their representations.

(f) *Intent to induce reliance*: Defendants made their materially false and misleading representations and promises, as alleged above, with the intent of deceiving Plaintiffs and with the expectation that Plaintiffs would rely on them to their detriment. Defendants told Plaintiffs that AEW had a sterling reputation, was a company worthy of Plaintiffs' trust, had a unique joint venture program that included a take-out feature, AEW was highly regulated; and that Plaintiffs should expect AEW to exercise the highest level of honesty, good faith and integrity, and the projections for the fund in which the joint venture would be placed assumed that NMS would exercise its take-out right. Defendants further told Plaintiffs their deal was a "win-win" because AEW would receive high returns for its investors while Neil/Plaintiffs would secure financing and have the right to take-out, or monetize, AEW. After the joint venture agreement was executed, Defendants induced Plaintiffs, by confirming their prior representations and promises and concealing their true intention, and by knowingly representing that the prices paid by the joint venture for the Properties did not matter and would enable the joint venture to obtain more properties for the joint venture at pre-entitlement, below-market valuations.

(g) *Justifiable and actual reliance*: Plaintiffs reasonably and justifiably relied

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on Defendants' knowingly false representations and promises to their detriment by, among other things, transferring the Properties for below fair market value, expending a substantial amount of time and effort developing the Properties, contributing over $10 million to the joint venture for no consideration, assuming joint venture obligations, and arranging to complete the monetization and/or take-out of AEW by selling assets. Defendants employed fraud, deceit and lies to induce Plaintiffs to transfer the Properties to the joint venture. Had Plaintiffs known the true facts and not been defrauded by Defendants, they would not have conducted business with Defendants and would not have transferred the Properties to the joint venture and otherwise benefitted the joint venture to Plaintiffs' detriment.

94. *Actual Fraud*: Defendants' conduct amounts to fraud and deceit within the terms of California Civil Code sections 1572 and 1710 in that, as alleged above:

(a) Defendants suggested as fact that which was not true and knew that it was not true.

(b) Defendants positively asserted in a manner not warranted by the information of the person making the assertion that which was not true.

(c) Defendants made promises without any intention of performing them.

(d) They suppressed and concealed of material facts.

95. *Rescission or, Alternatively, Damages*:

(a) Defendants employed fraud, deceit and lies to induce Plaintiffs to transfer the Properties to the joint venture. Had Plaintiffs known the true facts and not been defrauded by Defendants, they would not have carried out business with Defendants and would not have transferred the Properties to the joint venture. To undo the consequences of Defendants' fraud, Plaintiffs seek the rescission of the transfers of the Broadway, Lincoln, La Cienega, Washington and 1410 Properties to the joint venture, all of which were transferred in reliance upon Defendants' false and misleading statements and promises that Plaintiffs could take-out, or monetize, AEW's interest in the joint venture pursuant to the Monetization Formula.

(b) Alternatively, Plaintiffs seek the value of the Properties transferred by Plaintiffs to the joint venture, as set forth above. The specific amount of Plaintiffs' damages will

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be established at trial, but is believed to be in excess of $300 million.

96. *Rescission of the Undertaking of Principals:* In addition, Plaintiffs seek to rescind the Undertaking of Principals which was obtained by Defendants under false pretenses by representing to Plaintiffs that they had a take-out right.

97. *Additional Damages*: Plaintiffs also seek damages to compensate them for millions of dollars in losses they have sustained as follows:

(a) Contributions that Plaintiffs made to the joint venture for which they did not receive any consideration in an amount to be established at trial in excess of $10 million;

(b) Value of the development services provided by Neil in an amount to be established at trial in excess of $3 million;

(c) Losses on the sale of the two properties located at 884 and 939 Palm Avenue in West Hollywood, California in an amount to be established at trial in excess of $16.5 million; and

(d) Obligations assumed relating to affordable housing.

98. *Exemplary Punitive Damages*: In light of the fraudulent, malicious and oppressive nature of the conduct, as alleged above, Plaintiffs are entitled to recover exemplary/punitive damages in an amount sufficient to punish and/or deter Defendants, and all other relief available under law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants, as follows:

(1) That Plaintiffs' transfers to the joint venture of the Properties shall be rescinded in their entirety, with all rights, title and interests in the Properties restored to Plaintiffs; or, alternatively, actual damages for the value of the Properties the amount of which shall be established at trial but is believed to be in excess of $300 million;

(2) Plaintiffs' actual damages for losses they sustained in an amount to be established at trial in excess of $30 million;

(3) Pre- and post-judgment interest at the maximum rate permitted by law;

(4) Rescission of the Undertaking of Principals;

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DATED: September 27 2018

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.

DATED: September 27, 2018

MILLER BARONDESS, LLP

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EXHIBIT A

Filed 6/20/18

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LINCOLN STUDIOS, LLC et al., Plaintiffs and Appellants, v. P6 LA MF HOLDINGS SPE, LLC et al., Defendants and Respondents.	B276726 (Los Angeles County Super. Ct. No. BC551551)

APPEAL from a judgment of the Superior Court of Los Angeles County. Suzanne G. Bruguera, Judge. Affirmed in part, reversed in part and remanded.

Miller Barondess, Louis R. Miller, James Goldman and A. Sasha Frid; Greines, Martin, Stein & Richland, Timothy T. Coates and Gary J. Wax for Plaintiffs and Appellants.

Gibson, Dunn & Crutcher, James P. Fogelman, Jay P. Srinivasan, Kahn A. Scolnick and Marysa Lin for Defendants and Respondents.

Appellants Lincoln Studios, LLC, Neil Shekhter, individually, Neil Shekhter, as Trustee of The NMS Family Living Trust Dated September 3, 1991 (2000 Restatement), Margot Shekhter, individually, Margot Shekhter, as Trustee of The NMS Family Living Trust Dated September 3, 1991 (2000 Restatement), The NMS Family Living Trust Dated September 3, 1991 (2000 Restatement), NMS Capital Partners, LLC, NMS Capital Partners I, LLC, NMSLUXE375, LLC, MNSLUXE415, LLC and 9901 Luxe, LLC appeal from a judgment of dismissal resulting from an order sustaining a demurrer without leave to amend.

Appellants contend that the Third Amended Complaint (TAC) was not a sham pleading and that it adequately alleges causes of action for breach of contract, fraud and breach of fiduciary duty. In the alternative, they argue it was an abuse of discretion to deny leave to amend.

We conclude the court erred in dismissing the TAC as a sham pleading and the tort claims as duplicative of the contract claims. We affirm the ruling sustaining the demurrer, without leave to amend, to the first cause of action for breach of Article 6 on the ground Article 6 is not reasonably susceptible to an interpretation that it provides a right in the appellants to acquire the interest of the respondents, but reverse the ruling as to the remaining causes of action. The matter is remanded to the trial court with instructions to permit the appellants an opportunity to amend the surviving claims.

DISCUSSION

Appellants appeal from an order and judgment of dismissal after the trial court sustained, without leave to amend, respondents' demurrer to the TAC. They argue (1) that the TAC

is not a sham pleading because it makes permissible alternative allegations as to which version of the parties' agreement is operative, and therefore is not inconsistent with prior pleadings; (2) it was an abuse of discretion to rule that the complaint failed to allege an enforceable contract because the first version of the agreement is attached as an exhibit; (3) it was error to sustain the demurrer without leave to amend as to the second cause of action for breach of section 8.2 of the agreement because adequate supporting facts are alleged in the prefatory paragraphs of the complaint and are incorporated into the cause of action; (4) the fraud cause of action was erroneously dismissed on the ground that it was superseded by contract claims under Delaware law; and (5) that the breach of fiduciary duty claim was wrongfully dismissed as barred by the agreement's fiduciary duty disclaimer.

BACKGROUND

A. *The Parties and the Joint Venture Agreement.*

Appellant and plaintiff Neil Shekhter (Shekhter) owns and develops residential and commercial real estate projects through various related entities of which he is a principal, including NMS Capital Partners I, LLC (collectively, appellants or NMS). Respondent AEW Capital Management (AEW) is a large hedge fund that manages real estate assets. Respondent Eric Samek (Samek) is an executive at AEW who negotiated the terms of a joint venture between AEW and Shekhter.

On September 8, 2010, AEW, as the Investor Member, and NMS Capital Partners I, LLC, as the Operating Member, entered into a written joint venture agreement (JVA) to develop and own properties in the Los Angeles area through a new entity called P6 LA MF Holdings I, LLC.

Two provisions of the agreement are important to this appeal. The first, Article 6, is entitled "Distributions."[1] It defines how profits are to be distributed at each of seven successive stages. In the final stage, " . . . one hundred percent (100%) shall be distributed to Operating Member if within five (5) years from the date hereof Investor Member receives all amounts it is entitled to receive under Section 6.1(i) through (vi)." In section 6.1(vi), the Investor Member is entitled to receive an "IRR of twenty-four percent (24%), and (ii) aggregate distributions under this Section 6 equal to the product of 1.75 and Investor Member's aggregate Capital Contributions."

The second provision is Article 11, entitled "Buy/Sell." It provides that after five years, either party may buy the other party's interest pursuant to a specified procedure.

Shortly before the three year anniversary of the joint venture, Shekhter sent a letter to Samek proposing for AEW's "consideration and approval" that NMS pay AEW all it is entitled to receive under Article 6 in return for AEW's withdrawal as a member of the joint venture. When AEW ignored the letter, Shekhter sent another letter proposing the same transaction, which also was ignored. By email of November 18, 2013, Shekhter asked Samek why AEW had not responded to his letters and on November 22, 2013, Samek's return email stated that the Operating Member did not have the right to acquire the Investor Member's interest under the agreement.

In 2014 and 2015, AEW also rejected various offers from third parties and the Operating Member to purchase the entire

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[1] The court refers to various provisions of the JVA as "Articles," which is the terminology used in the JVA. However, the parties sometimes use "Section" in lieu of "Article."

joint venture portfolio for $500 million or more. Then, just a few days before the five-year anniversary of the venture, AEW declared an Event of Default under the JVA and sent NMS Capital Partners I, LLC a notice removing it as the Operating Member. This litigation ensued.

B. *Appellants' Complaints.*

In July 2014, appellants sued the law firm of DLA Piper, LLP, the counsel retained by AEW during the negotiation and drafting of the JVA. Appellants asserted that counsel conducted themselves fraudulently in drafting the Operating Member's right to "buy-out" the Investor Member in the JVA.

Respondents were added to the First Amended Complaint (FAC). It alleged that the parties reached an agreement in principle in 2010 to form a joint venture which included a right in the Operating Member to "acquire AEW's interest at any time within 5 years (consistent with [Shekhter's] plan to implement the acquisition at the 3 year anniversary), via various mechanisms, including rights to 'buy-out,' 'buy/sell,' 'distribution,' 'monetization' and/or a combination thereof, as long as AEW received its investment plus the greater of its investment multiplied by 1.75 or a 24% IRR." The parties call this amount the "monetization amount." In September of 2010, the parties executed Version 1 of the JVA "which contained language consistent with the acquisition rights that [Shekhter] had negotiated."

The FAC somewhat inconsistently also alleged that when Shekhter received Version 1 of the JVA, he "noticed that [it] appeared to contain a mistake, i.e., that the buy/sell provisions stated that the buy/sell procedure could occur after 5 years, instead of after 3 years," and that when he raised the issue with

Samek, Samek said that he "would ask [counsel] to revise Version 1 so that it stated that the 'buy/sell' acquisition mechanism could be triggered at the 3 year anniversary, instead of after 5 years." Thereafter, in September 2010, AEW delivered a "corrected" Version 2 of the JVA which stated, according to appellants, that "the Operating Member could buy-out and otherwise acquire the interests of AEW under various mechanisms within 5 years, and as of the 3 year anniversary of the formation of the joint venture, which were consistent with [Shekhter's] plan, which he repeatedly articulated and which AEW repeatedly confirmed. Version 2 also specifically expressed that the 'buy/sell' acquisition mechanism could occur after 3 years." The correction in Version 2 was made in Article 11 simply by changing one word; that is, by changing the word "five" to "three" when stating the year at which the "buy/sell" option became available.

Appellants also plead that respondents subsequently fabricated an unauthorized Version 3 of the JVA which removed language "to the effect" that the Operating Member could trigger the buy/sell provision after three years and altered aspects of the waterfall distribution provision. Appellants plead that neither Version 1 nor Version 3 are valid or enforceable. However, they also plead "in the alternative" that if the court or trier of fact disagrees, then appellants reserve the right to argue no version of the JVA is enforceable, requiring the rescission and cancellation of the JVA or reformation of the document to reflect their agreement.

Demurrers to the FAC were sustained with leave to amend.

The Second Amended Complaint (SAC) contained 31 causes of action asserted against the same defendants. Appellants once again alleged they had been defrauded and misled into signing a

JVA that contained a five-year "buy-out" provision, instead of a three-year provision. Appellants continued to deny the validity of the various versions of the JVA, including "Version 1," while alleging "but if any version is in effect it is Version 2." They repeated their allegation that after conversation with Samek, Version 2 was created to correct the mistake in Version 1 by "specifically express[ing] that the 'buy/sell' acquisition mechanism could occur after 3 years." This is a reference to the change of the word "five" to "three" in Article 11.

On December 2, 2015, demurrers to the SAC were sustained, with leave to amend, on several grounds. Appellants once again alleged Version 2 "is the only valid [JVA]," and stated that "had AEW acknowledged the Operating Member's right to buy-out or that Version 3 was not the true operating agreement and that if any Version was in effect it was Version 2, Plaintiffs would have suffered no damage." Since the causes of action for fraud, negligent misrepresentation and breach of fiduciary duty were premised on allegations that the Operating Member was defrauded into signing a JVA with a five-year Buy/Sell provision when it believed the agreement it signed contained a three-year provision, the court found the causes of action failed because Version 2, the operative version according to appellants, contained the three-year provision. The court also found that plaintiffs failed to allege sufficient facts to constitute a cause of action for breach of Version 2.

Before appellants filed the TAC, controversy arose concerning the validity of Version 2. Respondents filed a cross-complaint alleging that during the negotiation of the JVA the Operating Member had specifically requested the five-year buy/sell period in Article 11, that Version 2 containing the three-

year buy/sell period and other documents relating to the joint venture properties were forgeries created by appellants, and that the Operating Member breached the JVA in various ways.

The TAC was filed on January 13, 2016. At 27 pages, it is vastly streamlined from prior versions which boasted 232 (FAC) and 278 pages (SAC), respectively, and over 30 causes of action each. It contains 20 pages of factual background, incorporates those allegations into each cause of action and then alleges only six causes of action in a conclusory fashion.

The first cause of action of the TAC alleges the Investor Member breached Article 6 of the JVA by refusing to accept the offer of NMS Capital Partners I, LLC of $106 million to "monetize" or "take-out" AEW's interest, which sum was 1.75 times its net invested capital of approximately $60 million. The second alleges breach of the provision in the JVA which "prohibits the Investor Member from taking any act in contravention" of the JVA and lists nine specific breaches, one of which involves respondents' repudiation of NMS Capital's right to serve a Buy/Sell Notice.[2] The third alleges the "AEW

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[2] The TAC alleges that in October 2015, Shekhter contacted Samek, pointed out that the five year anniversary had passed and stated that he wanted to know what AEW's position was regarding NMS Capital Partners I, LLC's buy/sell rights since it would be time consuming and costly to make arrangements to complete a purchase of AEW's interest. This is apparently an indication of an intent to exercise the "buy/sell" rights clearly provided in Article 11. Samek responded that AEW had removed NMS Capital Partners I, LLC as Operating Member and therefore, that it no longer had any such rights. This allegation of a violation of Article 11 at the five-year mark appears to be the breach alleged in paragraph 42g, not any claim regarding the

Defendants" made misrepresentations concerning, among other things, NMS's "right to monetize the Investor Member" which induced appellants to enter into the JVA. The fourth alleges respondents did not intend to honor their promise to allow appellants to take-out or monetize AEW's interest. The fifth claims that AEW and Samek breached their fiduciary duties to appellants by operating the joint venture to diminish NMS's interest and to misappropriate the joint venture's assets for themselves. The last cause of action for constructive fraud is identical to the fifth cause of action for breach of fiduciary duty.

Gone were virtually all references to Article 11, its "buy/sell" and "buy-out" terminology and the controversy over whether Article 11 rights were available at three years or at five years, all of which had figured prominently in the prior iterations of the complaint. Instead, the TAC asserted that Article 11 was "not implicated here, because [Shekhter], in 2013, exercise [sic] his right under Section 6 of the JVA to monetize, or take-out, AEW after three years." The focus is on a three-year "take-out" right alleged to originate in Article 6, along with breaches of other unspecified provisions in the JVA and tort claims premised upon the "take-out" right under Article 6 and its "buy/sell" right at the fifth anniversary under Article 11.

The TAC no longer identified Version 2, or any version, as the operative agreement. Instead, it states it makes no difference which version is operative because all versions are the same with respect to the pertinent portions of Article 6, but it attaches Version 1 as an exhibit. It no longer seeks rescission or reformation of the JVA, asking instead for enforcement of NMS's

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right to "take-out" AEW under either Article 6 or 11 at the three-year mark.

2013 "offers of tender to monetize AEW's investment in the Joint Venture pursuant to Section 6 of the JVA," for compensatory damages in excess of $100 million, for punitive damages, indemnification for potential tax liability for AEW's filing of fraudulent tax returns, and interest, attorneys' fees and costs of suit.

On April 5, 2016, the court issued an order sustaining respondents' demurrer to the TAC without leave to amend and on June 7, 2016, the court executed respondents' proposed order reflecting that ruling. The June 7, 2016 order stated the TAC was a sham pleading that "change[d] critical facts . . . and omit[ted] certain facts, without offering any explanation for the discrepancies." The order also stated other independent bases for rejecting each specific cause of action. It construed the TAC to plead that no version of the JVA is effective and remarked that even if appellants' claims were based on only one version, they failed to identify which version it was. Leave to amend was denied on the basis that appellants had already been given three opportunities to state their claims and amendment would be futile in light of the sham pleading findings.

This appeal followed on August 5, 2016.

DISCUSSION

A. *Standards of Review*

A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 922.) The "allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) The complaint is given a reasonable interpretation, reading it as

a whole and its parts in their context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The court reviews de novo the trial court's conclusion that the TAC fails to allege facts sufficient to state a cause of action. (*Blank v. Kirwan*, *supra,* 39 Cal.3d at p. 318; *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1089-1090; *Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) All material facts properly plead are treated as true, but contentions, deductions or conclusions of law or fact are not. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

The trial court's denial of leave to amend is reviewed for an abuse of discretion. (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946-947 (*Vallejo*).) That discretion is abused if there is a reasonable possibility that the defect in the complaint can be cured by amendment. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865; *Greenberg v. Equitable Life Assur. Society* (1973) 34 Cal.App.3d 994, 998.)

The court's denial of leave to amend based on the sham pleading doctrine is also reviewed for an abuse of discretion. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742; *Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 951.)

B. *The Court Has Jurisdiction to Hear This Appeal.*

Respondents argue this court lacks jurisdiction to hear this appeal because it was prematurely noticed before any judgment issued and while other issues were pending. We are not persuaded. Code of Civil Procedure section 581d provides that written orders dismissing an action which are signed by the court and filed "shall constitute judgments" and "the clerk shall note those judgments in the register of actions in the case." Regardless of the trial court's intentions with respect to future

proceedings, its order sustaining the demurrer also ordered the case dismissed. That order of dismissal was signed by the court and filed in the action and constituted a judgment under section 581d from which an appeal was properly taken.

C. *The Sham Pleading Doctrine is Not Applicable.*

Respondents contend the trial court did not abuse its discretion by dismissing the entire TAC as a sham pleading because appellants contradicted or omitted without explanation detailed factual allegations in prior iterations of the complaint to evade the consequences of the prior demurrer rulings. Respondents contend there are no unexplained discrepancies and that the TAC is not a sham pleading.

When a party attempts to avoid defects in a prior complaint by omitting facts which made the previous complaint defective or by adding facts inconsistent with those of previous pleadings, the court may examine the prior complaint to determine whether the amended complaint is untruthful, or a sham. "'A pleader may not attempt to breathe life into a complaint by omitting relevant facts which made his previous complaint defective.'" (*Vallejo, supra,* 24 Cal.App.4th at p. 946, citation omitted.) This rule "relates to inconsistent factual averments; it does not apply to alternative or even inconsistent pleading of the legal effect of the same facts." (*Lim v. The.TV Corp. Internat.* (2002) 99 Cal.App.4th 684, 690 (*Lim*).) Inconsistencies with prior pleadings must be explained and if the pleader fails to do so, the court may disregard the inconsistent allegations. (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 343; *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 426.)

The trial court found there were two unexplained discrepancies between the TAC and the two prior complaints.

One related to which version of the JVA controlled the parties' relationship and the other related to whether Article 6 or 11 controlled the buy-out or take-out process.

With respect to which version of the JVA controlled, the court found appellants alleged in the prior complaints that if any version of the JVA was controlling it was Version 2 and that the three-year buy-out right found only in that version was crucial to Shekhter's decision to enter into the joint venture, but inconsistently allege in the TAC that Version 2 and its three-year Buy/Sell provision in Section 11.1 are irrelevant because the right to take-out AEW is found in Article 6. Since appellants attached only Version 1 to the TAC, the trial court concluded that "plaintiffs are no longer alleging that 'Version 2' is the only valid version of the JV Agreement," that "[t]hese are contradictory factual allegations" which "[p]laintiffs fail to explain," and "as such they violate the sham pleading doctrine."

We disagree that there are contradictory allegations of fact. Allegations concerning which version of an agreement is "valid" and "enforceable" are legal conclusions which will be determined after receiving and considering evidence of all of the facts surrounding the creation of each version. While issues of fact may not be plead inconsistently, legal conclusions may. (*Lim, supra,* 99 Cal.App.4th at p. 690.) Because the determination will be made by the trier of fact, the FAC and SAC make alternative allegations to respond to whichever version of the agreement is found to be controlling.

The FAC and SAC both relied on, and attached, Version 2 of the JVA, but they also both alleged "in the alternative" that "Version 1 is enforceable and of impact" and that determining which version controls will have to be resolved by the trier of fact.

To the extent that appellants allege in the SAC that Version 1 is unenforceable, it is expressly stated to be an alternative allegation, and it is prefaced by a statement that "[p]laintiffs believe that all 3 Versions give the Operating Member the right to acquire the interests of AEW as of the 3 year anniversary of the formation of the joint venture." It is alleged more specifically in later paragraphs that appellants believe that both Version 1 and Version 2 give the Operating Member the right to acquire the interests of AEW within five years, and "through various mechanisms, allows the Operating Member to acquire the interests of the AEW as of the 3 year anniversary." While it might be frustrating to defend against a complaint that fails to commit to the operative version of a contract, pleading in the alternative is permissible.

Appellants also argue that regardless of which version is the operative one, the relevant provisions to the action are the same in all of them. Appellants attach Version 1 to the TAC, but also allege that a Version 2 was created to correct a mistake in Version 1, and that the language of Article 6 under which appellants claim a "take-out" right is consistent across all versions of the JVA such that it does not matter which one is ultimately determined to be valid. Appellants explain these allegations stem from their anticipation of argument from AEW as to which version is operative and are designed to demonstrate that appellants should prevail regardless of which version is determined to be enforceable. It is clear from the FAC to the TAC that appellants consistently advocate they have the right to acquire AEW's interest within five years by the payment of 1.75 times AEW's net capital investment no matter which version of the JVA is found to be legally operative. While changing

allegations as to which version of the JVA controls is not ideal, it is a switch in legal theory that remains based on the same general set of facts that are alleged consistently in each complaint.

The cases cited by respondents do not compel a different result. Each of them involves an allegation of inconsistent fact or the omission of a dispositive fact, not a theory, solely to avoid the successful argument in a prior demurrer or motion. (See, *Womack v. Lovell* (2015) 237 Cal.App.4th 772 [denial in answer to cross-complaint that general contractor was licensed ignored as a sham in light of plaintiff's complaint seeking recovery under general contractor's license bond]; *Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147 [summary judgment in favor of County on grounds of immunity affirmed; plaintiff's amended pleading stating negligent operation of a motor vehicle, rather than firefighter negligence, ignored as a sham pleading because it "changed the facts and was made solely to avoid the summary judgment"]; *Reichert v. General Ins. Co. of America* (1968) 68 Cal.2d 822 [amended complaint omitting allegation plaintiff previously had been adjudicated bankrupt deemed to be a sham pleading designed to avoid prior ruling on demurrer that he lacked capacity to assert pre-bankruptcy claims due to bankruptcy adjudication]; *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336 [operative complaint omitting allegations that injuries were caused by negligent medical care was deemed a sham because a trial court in a prior action had relied on those facts in sustaining the doctor's demurrer]; *Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383 [allegation of an oral nondisclosure term in a fifth complaint inconsistent with the allegations in four earlier

complaints that there was no express nondisclosure term]; *Cf. Avalon Painting v. Alert Lumber Co.* (1965) 234 Cal.App.2d 178 [amendment changing only conclusion of law regarding agency was not a sham].)

Accordingly, we find the trial court erred in finding the sham pleading doctrine was applicable to dismiss the TAC.

D. *The Court Did Not Err In Sustaining the Demurrer to Appellant's Claim for Breach of Article 6.*

It is basic hornbook law that the existence of a contract is a necessary element to an action based on a contract. (*Roth v. Malson* (1998) 67 Cal.App.4th 552, 557.) Although the TAC attaches Version 1 of the JVA as an exhibit, no allegation of the TAC commits to that version, or any version, as being the operative version of the parties' agreement.[3] Appellants argue the attachment of Version 1 states the existence of a contract sufficient to survive demurrer, even if the attachment is inconsistent with the allegations of the complaint, because the law provides that an attached written instrument controls in that instance. (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955; *Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.) They also argue, in essence, the exhibit is simply representative of the language of Article 6, which is purportedly the same in all versions of the JVA.

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[3] It is still plead in paragraph 22(b) of the TAC that respondents created a new version of the JVA "to correct a mistake in 'Version 1' relating to Article 11," but there is no allegation that Version 2, the corrected version, is the operative one. It is expressly alleged that Versions 3 and 4 did not become effective because "none was 'executed and delivered by all of the Members' of the Joint Venture, as required by Section 15.10 of the JVA."

Assuming the attached exhibit is sufficient to plead the existence of a contract and further that the allegations in that version and all other versions are the same with respect to Article 6, the TAC nonetheless fails to state a claim for breach of that contract because Article 6 is not reasonably susceptible to an interpretation that it confers an acquisition right.

The TAC "disclaims any reliance on Article 11" and its "buy/sell" rights in favor of reliance upon Article 6's profit distribution formula as the source of appellants' acquisition rights. "Where a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible." (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239.) The trial court found Article 6 is not reasonably susceptible to plaintiff's interpretation. We agree.

Article 11 is entitled "Buy/Sell" and it provides that at any time after the five-year anniversary of the JVA, either member may give a Buy/Sell Offer Notice to the other member offering to buy the other member's interest. In contrast, Article 6, entitled "Distributions" governs non-liquidating distributions of "Net Operating Cash Flow" and "Net Capital Proceeds" and establishes the "order and priority" in which joint venture profits are allocated between the Operating and Investor Members in Article 6.1. Appellants contend that the language of Article 6 supports an interpretation that gives the Operating Member the right to "take-out" or "monetize" the Investor Member's interest in the joint venture. However, as the trial court explained, appellants fail to point to any language in Article 6 that confers

any acquisition, monetization, buy-out, or "take-out" rights upon either member.

What Section 6.1 does provide is for distribution of profits in a series of steps described as a "waterfall" by the parties.[4] The final level, found in section 6.1(b)(vi), is reached once the Investor Member receives distributions amounting to both an IRR of 24 percent and 1.75 times the Investor Member's aggregate capital contributions. According to section 6.1(b)(vii), 100 percent of the profits are to be distributed to the Operating Member "if within five (5) years from the date" of the JVA the "Investor Member receives all amounts it is entitled to receive under Section 6.1(i) through (vi)."

Appellants find a "take-out" right in subsection (vii) that permits the Operating Member to acquire the Investor Member's entire interest in the joint venture any time within the first five years by tendering 1.75 times the Investor Member's capital contributions, a unilateral right in which the Investor Member

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[4] In general, the first distributions are made to the Investor Member until it has received an amount equal to its capital contributions and an "IRR" of 12 percent. Profits then spill over to the Operating Member until it has received an amount equal to its capital contributions and 12 percent interest. Then, the profits are distributed 80 percent to the Investor Member and 20 percent to the Operating Member until the Investor Member has received an IRR of 17 percent. Once that return is achieved, 65 percent goes to the Investor Member and 35 percent goes to the Operating Member until the Investor Member has received an IRR of 24 percent and 1.75 times is capital investment.

must acquiesce.[5] However, nothing in Article 6 suggests that it creates a unilateral take-out, acquisition or monetization right in the Operating Member. It only purports to govern the manner in which the joint venture must distribute net operating cash flow and capital proceeds to its members. It does not refer to either member's ownership interest or provide that one member can force a sale by offering the other member the sum the joint venture itself would otherwise pay in profits.

On the other hand, Article 11 expressly establishes the parties' buy-out rights; that is, it specifies the mechanism by which one member may buy or sell its interest in the Company and the time at which it can occur. It does not mention or even suggest that there is another, alternate mechanism to buy out the other's interest anywhere within the agreement.

Appellants argue the trial court was required to accept that Article 6 means what appellants say it means. Not so. Courts are not bound to accept "conclusions of the pleader . . . contrary to the express terms of [an] instrument." (*Alphonso E. Bell Corp. v. Bell View Oil Syndicate* (1941) 46 Cal.App.2d 684, 691.)

They offer extrinsic evidence to explain the essential contractual terms they contend "were understood by the parties

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[5] Appellants actually argue that "AEW's financial interest is eliminated, i.e., taken out, upon AEW's receipt of ***either*** an internal rate of return of 24% ***or*** 1.75 times AEW's investment within five years" (italics added), despite the language of section 6.1(b)(vi) stating the Operating Member is to receive 100 percent of the profits once the Investor Member has received "(i) an IRR of twenty-four percent (24%), ***and*** (ii) aggregate distributions under this Section 6 equal to the product of 1.75 and Investor Member's aggregate Capital Contributions." (Emphasis added.)

but would otherwise be unintelligible to others." (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 767.) They offer Samek's May 19, 2010 email to Shekhter indicating that AEW agreed to a "minimum equity multiple of 1.75x" and that if AEW's investment is "monetize[d]" within five years "then NMS will keep all proceeds above AEW's 24% annual return."[6] This email states nothing about acquiring the other party's interest, much less about acquiring it for 1.75 times its investment. It simply describes how profits are distributed and interests are to be "monetized." In fact, other extrinsic evidence not mentioned by appellants suggests appellants do not interpret Article 6 to include the right to acquire the other party's interest upon "monetization" that they now advocate here. Shekhter's June 2013, letter to AEW attached as Exhibit D to the TAC, acknowledges that the JVA needs to be amended both "to provide for the withdrawal of the Investor Member from the Company once its economic interest becomes zero" and "to allow the Operating Member to use outside funds to get the Investor Member to an IRR of 24% and 1.75 multiple." Accordingly, the trial court's finding that appellant's interpretation was not one to

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[6] Appellants quote the May 19, 2010 email from Samek to Shekhter which states "We've agreed to terms with NMS . . . [¶] 1) AEW minimum equity multiple of 1.75x and top hurdle in waterfall goes from 21% to 24%, compounded annually [¶] 2) If NMS monetizes all of AEW's Investment within 5 years then NMS will keep all proceeds above AEW's 24% annual return." This language suggests that even after AEW receives 1.75 times its capital investment it is still entitled to receive 24 percent interest annually, calling into question any interpretation that offering 1.75 times its investment was all that would be required to take out AEW's interest.

which the language of Article 6 was susceptible is not error. Because the contract is not susceptible to that interpretation, leave to amend was properly denied as to this cause of action.

E. ***The Court Abused its Discretion In Denying Leave to Amend the Second Cause of Action.***

The demurrer to the second cause of action for breach of "other" provisions of the contract was sustained on multiple grounds, including that there was a failure to specify the section number of the agreement that was breached. The court's discretion to deny leave to amend is abused where, as here, there is a reasonable possibility that the defect in the complaint can be cured by amendment. (*City of Dinuba v. County of Tulare, supra,* 41 Cal.4th at p. 865.) The TAC gives notice to respondents of what portion of the contract is being referenced in its allegation that "[t]he Joint Venture Agreement prohibits the Investor Member from taking any act in contravention of the Joint Venture Agreement." This mirrors the language in Section 8.2(a) of the JVA ("Notwithstanding anything to the contrary in this Agreement, the Investor Member shall not cause the Company . . . to . . . [¶] (a) take any act, including, without limitation, making any distribution, in contravention of this Agreement.") Even if greater specificity is required, it is readily apparent the TAC could be amended to state the section number. Denying leave to amend on this ground is an abuse of discretion.

The trial court also determined that appellants failed to allege specific facts demonstrating that AEW breached Section 8.2(a). For instance, the court cites a failure to articulate how the Investor Member wrongfully failed to give credit to the Operating Member for capital contributions it made and a failure to explain which defaults were "fabricated," and how that was done.

"[M]ere conclusions of law" that a defendant violated a contract do not state a claim for breach of contract "in the absence of allegations of fact showing such violations." (*Bentley v. Mountain* (1942) 51 Cal.App.2d 95, 98.) However, the facts underlying those allegations were stated earlier in the document in the factual background portion of the TAC. Paragraphs 21 and 23 plead in detail that Samek induced Shekhter to transfer various real estate projects to the joint venture for less than their fair market value and to contribute $1.5 million in cash without receiving the appropriate credit for these capital contributions. And fabricated defaults were explained in paragraph 27 to include falsely claiming (1) that the joint venture had been randomly selected for a year-end audit, then allowing the auditor to impose unreasonable document demands to be able to fabricate a claim that NMS would not cooperate and (2) that NMS had misappropriated funds so that NMS could be declared in default and removed as the Operating Member. The court abused its discretion in denying leave to amend this cause of action.

F. ***The Trial Court Erred in Dismissing the Tort Claims.***

Respondents argue the court properly dismissed appellants' tort claims as "completely duplicative" of their breach of contract claims because both sets of claims turned on the purported contractual right to "take-out" the Investor Member. Delaware law, applicable by virtue of the choice of law provision in the JVA, provides that "'where an action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort.'" (*ITW Global Investments Inc. v. American Industrial Partners Capital Fund IV, L.P.* (Del.Super.Ct., June 24, 2015, No. N14C-10-236) 2015 WL

3970908, at *6, fn. omitted.) They argue the trial court properly found that appellants' fraud claims arise from the contractual right of one member to take-out the other and must be treated as contract claims.

However, appellants more persuasively argue that their fraud claims allege pre-contractual tortious conduct which does not bootstrap a breach of contract claim into a fraud claim. The TAC alleges that facts were misrepresented to fraudulently induce appellants to enter into the JVA which are separate and distinct from the breach of contract claim that AEW refused to honor provisions of the JVA. The TAC alleges that during negotiations, AEW knowing made false representations about the joint venture program, including that there was a monetization right and that Shekhter's transfer of his properties to the joint venture at below fair market value would be "of no moment" because of his right to "take-out" AEW within a few years. This is separate and distinct from allegations the contract was breached in several ways, including by falsely accusing the Operating Member of misappropriating funds or of fabricating defaults in the appellants' performance such that the Operating Member could be removed.

The trial court also found that NMS failed to allege how it could have reasonably relied on representations contrary to the terms of the integrated agreement. The Supreme Court has held that a fraud claim based on fraudulent procurement of a contract is not barred by the presence of an integration clause. (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1174-1176, 1182 (*Riverisland*).) The trial court rejected appellants' reliance on *Riverisland* because a showing of reasonable reliance "may be

impossible as a matter of law where, . . . a party has failed to 'acquaint [it]self with the contents of a written instrument.'" However, the *Riverisland* court remarked that it was negligent failure to acquaint oneself with the contents of a written agreement that precluded finding a contract void for fraud in the execution (*Riverisland, supra,* at p. 1183, fn. 11) and that is a factual determination that cannot be made from the face of the TAC.

The trial court did properly find, however, that the fraud claims are not plead with sufficient specificity. (See *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) Appellants failed to identify each alleged misrepresentation, the names of the party who made the misrepresentation, to whom they spoke or wrote and their authority to speak on behalf of others, if applicable. Boilerplate allegations are insufficient; fraud must be stated with particularity. (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.) Since these matters are peculiarly within appellants' knowledge, the denial of an opportunity to amend was error.

The trial court improperly rejected the causes of action for breach of fiduciary duty and constructive fraud because it found that Section 8.17 of the JVA "expressly disavow[s] any fiduciary relationship between the parties." Section 8.17 provides only a limited disclaimer of fiduciary duties. It states that "with respect to any approval or other right granted to the Members, the other Member shall not have any fiduciary duty to any other Member or the Company and may exercise such right or grant or refuse to grant such approval under this Agreement for the sole benefit of such Member, as determined in its sole discretion." It also disclaims a fiduciary duty with respect to any action taken by the

Company at the direction or with the consent of one of the Members. In short, it is reasonable to interpret this provision to hold only that one member need not take the other member's interest into account when exercising a right under the Agreement, not that one party may violate terms of the agreement or engage in tortious conduct to the detriment of the other party.

The breach of fiduciary claim against Samek adequately alleges a relationship of trust and confidence that triggers a fiduciary duty. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1160.) However, the TAC does not adequately identify the conduct appellants allege violated that duty and must be amended.

Last, we decline to hold that any error in the ruling on the demurrer is harmless because the complaint was subsequently dismissed as a discovery sanction. The ruling on the terminating sanctions order and resulting judgment of dismissal is the subject of another pending appeal.

DISPOSITION

We affirm the court's ruling sustaining demurrer as to all causes of action but find it was an abuse of discretion to deny an opportunity to amend as to all causes of action, except the first cause of action for breach of Article 6, as to which we affirm. The matter is remanded to the trial court. Respondents recover costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.*
MATZ

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

EXHIBIT B

Filed 6/20/18 Lincoln Studios, LLC v. P6 LA MF Holdings SPE, LLC CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LINCOLN STUDIOS, LLC et al., Plaintiffs and Appellants, v. P6 LA MF HOLDINGS SPE, LLC et al., Defendants and Respondents.	B279305 (Los Angeles County Super. Ct. No. BC551551)

APPEAL from a judgment of the Superior Court of Los Angeles County. Suzanne G. Bruguera, Judge. Affirmed in part, reversed in part and remanded.

Miller Barondess, Louis R. Miller, James Goldman and A. Sasha Frid; Greines, Martin, Stein & Richland, Timothy T. Coates and Jeffrey E. Raskin for Plaintiffs and Appellants.

Gibson, Dunn & Crutcher, James P. Fogelman, Jay P. Srinivasan, Kahn A. Scolnick and Marysa Lin for Defendants and Respondents.

Appellants Lincoln Studios, LLC, Neil Shekhter, individually, Neil Shekhter, as Trustee of The NMS Family Living Trust Dated September 3, 1991 (2000 Restatement), Margot Shekhter, individually, Margot Shekhter, as Trustee of The NMS Family Living Trust Dated September 3, 1991 (2000 Restatement), The NMS Family Living Trust Dated September 3, 1991 (2000 Restatement), NMS Capital Partners, LLC, NMS Capital Partners I, LLC, NMSLUXE375, LLC, NMSLUXE415, LLC, 9901 LUXE, LLC and cross-defendant NMS Capital Partners I, LLC appeal from a judgment entered in favor of respondents Eric Samek, Marc Davidson, P6 LA MF Holdings SPE, LLC, AEW Capital Management, L.P., AEW Partners VI, L.P., AEW Partners VI, Inc., AEW VI L.P., P6 LA MF Holdings I, LLC, Lincoln Walk Studios, LP, and Luxe La Cienega, LLC following the trial court's order striking appellants' complaint and cross-defendant NMS Capital Partners I, LLC's answer to the Cross-Complaint, and entering its default.

Appellants contend the trial court (1) lacked jurisdiction to enter a default judgment enjoining non-parties to the Cross-Complaint from certain actions; (2) lacked jurisdiction to dismiss the Third Amended Complaint as a discovery sanction while an appeal was pending from an order sustaining a demurrer without leave to amend to that pleading; (3) usurped appellants' right to a jury trial by resolving factual claims of forgery on a motion for terminating sanctions; (4) denied appellants due process by denying them the opportunity to obtain discovery necessary to defend against the terminating sanctions motion; (5) issued terminating sanctions which are excessive and punitive; and (6) denied appellants due process in ordering monetary sanctions.

We conclude that the trial court lacked jurisdiction to dismiss the Third Amended Complaint as to all appellants except NMS Capital Partners I, LLC, and denied NMS Capital Partners I, LLC due process in ordering monetary sanctions. We affirm the judgment as to the Cross-Complaint because we find that appellants' acts of intentional destruction and suppression of evidence and perjury constitute discovery abuse that is egregious and intolerable and infects the entire proceedings.

BACKGROUND

1. The Joint Venture

This case is a dispute arising out of a joint venture agreement to develop real estate. Appellant Neil M. Shekhter (Shekhter) develops and operates multi-unit real estate projects. He is the CEO of NMS Properties, Inc. and the manager of the other entity appellants. AEW Capital Management, L.P. (AEW) is a large hedge fund. Defendant Eric Samek (Samek) is a director at AEW whose duties include sourcing and managing AEW's West Coast real estate portfolios for its investment funds.

In early 2010, Samek and Shekhter began discussing entering into a joint venture or partnership to engage in real estate development and on September 8, 2010, one of Shekhter's companies, NMS Capital Partners I, LLC, and an AEW affiliate, P6 LA MF Holdings SPE, LLC, executed a written joint venture agreement to acquire, develop and operate real estate projects in the Los Angeles area.[1] NMS Capital Partners I, LLC, the sole "Operating Member," agreed to contribute four properties for which Shekhter paid more than $49 million along with $10

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[1] Except where necessary to draw distinctions, we refer to Shekhter and his plaintiff and appellant entities collectively as "NMS" and to the AEW-related parties collectively as "AEW."

million cash, and to be principally responsible for the day to day operations of the joint venture, including the development, construction, operation, management and leasing of the properties once developed. AEW, the sole "Investing Member," contributed $60 million, and was the principal decision maker.

2. The Forgery Dispute

Two provisions of the original Joint Venture Agreement are relevant to the current dispute. Article 6, entitled "Distributions" and characterized as a "waterfall" provision, describes a formula for the distribution of net operating cash flow between the parties. Pursuant to section 6.1(b)(vii), "if within five (5) years" from the date of the agreement AEW receives profits distributions pursuant to the waterfall formula in the amount of 1.75 times its invested capital and a 24 percent annual return, then NMS is entitled to 100 percent of the net operating cash flow from that point forward. Based on this language, NMS urges it has the unilateral right to "take out" or "monetize" AEW's financial interest at any time within the first five years by paying AEW the amount described in section 6.1(b)(vii), through net operating cash or otherwise, because there is no financial benefit to AEW to remain in the joint venture once that sum is received.

Article 11 is the "Buy/Sell" provision. The original version of the agreement provides that "after five (5) years" either party could trigger a process pursuant to which one party could "buy out" the other's interest in the joint venture by giving a written Buy/Sell Offer Notice. NMS states there is a subsequent Version 2 of the Joint Venture Agreement which is the operative agreement. Among other things, Version 2 alters the word "five" to become "three" in Article 11 to permit Buy/Sell Offer Notices to

be made after three years, rather than after the five years provided in Version 1 and subsequent versions. NMS maintains that *AEW* created Version 2 to correct the "scrivener's error" in the prior version concerning the number of years, but AEW maintains there was no error and that *Shekhter* fabricated the document.

On June 26, 2013, approximately three months before the joint venture's three year anniversary, NMS wrote to Samek reminding him that "pursuant to Section 6(b) of the LLC Agreement, the Investor Member's economic interest becomes zero if, within 5 years of the date of the LLC Agreement, the Investor Member receives all amounts it is entitled to receive under Section 6.1(b)(i) through (vi) of the LLC Agreement . . . ." Shekhter proposed a single transaction where NMS would pay AEW that sum through the use of third party funds (rather than the net operating cash distributions provided in Article 6) in return for AEW's withdrawal from the joint venture.

Samek did not respond, so Shekhter wrote again on August 2, 2013, to inform Samek of some favorable refinancing terms for the properties that "would move us a long way down the road toward our agreement of a buy-out of the Investor Member . . . ." On November 18, 2013, Shekhter told Samek that Shekhter understood their deal included his ability to buy out AEW pursuant to Article 6 and that he was getting mixed messages from Samek.

On November 22, 2013, Samek dispelled all uncertainty by sending Shekhter an email stating that the agreement did not include the buy-out right Shekhter claimed to have, that Version 3 was the operative version and had been certified as such to lenders by NMS, and that Shekhter fabricated Version 2.

3. The Litigation

For the next two years NMS continued to develop properties for the joint venture, while pursuing legal remedies.[2] First, NMS filed suit against its own deal attorneys alleging malpractice. Then in July 2014, it filed this action against AEW's former deal counsel alleging among other things that counsel "had not included a clear buy out provision" in the joint venture agreement. Respondents were added as defendants to the First Amended Complaint, which alleges that the Joint Venture Agreement included a right to "buy out" the other member, exercisable at the three-year anniversary, rather than the five-year term in Version 1. It asserts that when Shekhter received a copy of the executed Version 1, he noticed the "mistake," and discussed it with Samek, who purportedly said he would have counsel revise Version 1 to state the three year term in Article 11's Buy/Sell provision. The Second Amended Complaint asserts largely the same claims. However, the Third Amended Complaint, filed on January 13, 2016, alleges that the basis for the action is violation of Article 6 "take-out" rights, not Article 11 "buy out" rights.

AEW's demurrer to the Third Amended Complaint was sustained without leave to amend by an order of June 7, 2016, based in part upon the court's finding it was a sham complaint because it alleged inconsistent facts and theories when compared to the prior complaints. This ruling terminated the action as to all NMS entities except NMS Capital Partners I, LLC, which remained a party to AEW's pending Cross-Complaint.

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[2] By the time of the default prove up on the Cross-Complaint in December 2016, the joint venture owned, developed and controlled nine properties through eight subsidiary companies.

AEW filed a Cross-Complaint on November 6, 2015. It alleges, among other things, that NMS misrepresented the terms of the Joint Venture Agreement, fabricated Version 2, its alleged transmittal cover letter, and a property management agreement, and engaged in other acts of misconduct. It seeks, among other things, a declaration that Version 2 is not valid or operative, that NMS breached multiple provisions of the Joint Venture Agreement, and that AEW has the right under the Joint Venture Agreement to sell or finance the joint venture's properties in its sole discretion. It also seeks an injunction requiring NMS and its affiliates to vacate the properties.

4. The Discovery Sanctions

At an informal discovery conference of September 8, 2015, AEW argued it needed to conduct a forensic examination of NMS's documents and computer devices to prove NMS had forged Version 2. The court ordered appellants to "immediately take steps to freeze all of their electronic documents so that they cannot be modified or deleted" and to place "in escrow with a neutral 3rd party document vendor" all "original agreements, and original copies of agreements" pending a hearing on AEW's motion for a forensic examination of those items set for October 6, 2015 (the September 8, 2015 order).

In its opposition to AEW's motion, NMS requested it be granted the same right to image and forensically examine AEW's devices. The court found good cause to grant AEW's motion because "the facts and evidence independently establish that electronic documents are missing, have been destroyed, or questions about their integrity have been shown . . . ." It ordered production of the original and all copies of Version 2, the Samek transmittal cover letter and all property management

agreements, as well as the computers and devices that could have accessed those documents (the October 5, 2015 order). The court did not address NMS's request for a reciprocal order.

On January 13, 2016, while the forensic examination was in process, NMS filed its Third Amended Complaint alleging Section 6 of the Joint Venture Agreement was the operative provision, no longer relying on controversial Section 11 and the dispute over whether it was forged. Six days later, NMS filed a motion to compel a forensic examination of AEW's documents and computers which mirrored AEW's prior successful motion, arguing this examination was necessary to prove AEW created Version 2 and to defend against the terminating sanctions motion that AEW was planning to file. NMS set the hearing for March 7, 2016, but the court continued the hearing date twice on its own motion, ultimately setting the motion to be heard *after* AEW's motion for terminating sanctions. NMS tried repeatedly to have this motion heard before the sanctions motion, to no avail. In fact, it was never heard.

On June 7, 2016, the court issued an order sustaining AEW's demurrer to the Third Amended Complaint without leave to amend and ordering the complaint dismissed. The court found that the prior complaints had alleged the buy-out provision in Section 11 of Version 2 was crucial, but that the Third Amended Complaint now alleged the case turned on Section 6.1 of Version 1 and its cash flow distribution provisions without explanation for these "inconsistent and contradictory factual allegations."

On June 13, 2016, AEW's motion for sanctions was heard and submitted. The decision was issued in a detailed ruling on July 29, 2016, granting the motion on the ground "Plaintiffs' own evidence and/or undisputed facts establish violations of the

Court's 9/8/15 and 10/6/15 discovery orders." The court found that "[b]y his own admission, Shekhter violated the Court's discovery orders by failing to produce his personal computer, changing the hard drive of his personal computer, and/or failing to transfer all of the files to the new hard drive, *all with the admitted intention of preventing the forensic expert(s) from discovering deleted files.*" (Original italics.) Shekhter admitted in his declaration filed in opposition that "he deleted a zip file sent to him by a former AEW employee, Daniel Lennon ("Lennon"), containing Joint Venture related documents *before turning over his computer over for forensic examination.*" (Original italics.) NMS's IT administrator admitted to downloading a program called "Eraser Portable" and to using it to delete a file on a computer desktop belonging to NMS's Vice President of Finance. The court characterized these violations of its discovery orders as "purposeful, bold, breathtaking" and on a "grand scale" and ordered a further future evidentiary hearing to "determine the additional violations claimed by moving parties and the type and extent of sanctions to be imposed."

The evidentiary hearing was set for the latter half of October 2016, which would have been subsequent to the hearing of NMS' discovery motion in September, but the court continued NMS's hearing to January 18, 2017, on its own motion. Frustrated in its efforts to have its motion for discovery heard prior to the evidentiary hearing to determine the nature and extent of sanctions to be imposed, NMS noticed the depositions of AEW's two forensic experts who had filed reports of their examinations of NMS documents and devices on January 20, 2016, and would testify at the evidentiary hearing. On September 23, 2016, AEW served objections to the deposition

notices and the witnesses were not produced. On November 17, 2016, NMS filed a motion requesting that the court refrain from ruling on AEW's sanctions motion until the court heard and ruled on NMS's motion for forensic discovery. The reserved hearing date of June 14, 2017, was well after the October 14, 2016, date set for the evidentiary hearing.

The evidentiary hearing commenced on October 14, 2016, and concluded on October 28, 2016, with live testimony from 12 witnesses over eight court days "for the purpose of the court assessing credibility of the witnesses." The court issued its 94-page order granting AEW's motion on November 22, 2016. It ordered (1) the Third Amended Complaint dismissed with prejudice as a sanction for forgery, spoliation and perjury, as well as for the reasons stated in its April 5, 2016 and June 7, 2016 orders sustaining demurrers; (2) the Answer to the Cross-Complaint of cross-defendant NMS Capital Partners I, LLC stricken; and, (3) the entry of a default in favor of cross-complainant and AEW affiliate, P6 LA MF Holdings SPE, LLC, on all claims of the Cross-Complaint. A prove-up hearing was scheduled for December 1, 2016.

The court also found that all appellants were jointly and severally liable for all attorneys' fees, expert fees, court reporter fees, and costs incurred by AEW on or after September 8, 2015, the date of the court's freeze order, pursuant to Code of Civil Procedure section 2023.030, subdivision (a).[3] The order provided that "[w]ith respect to the Cross-Complaint," memoranda and materials supporting the attorneys' fees, expert fees and costs sought "shall be submitted in advance of the prove up hearing as

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[3] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

part of the documentation supporting Cross-Complainant's request for entry of default judgment." With respect to the complaint, the fees sought were ordered to be identified in a postjudgment motion pursuant to section 1032, et seq.

On December 1, 2016, the court entered a final judgment dismissing the Third Amended Complaint and a default judgment on the Cross-Complaint. Both judgments had blank spaces for monetary sanctions. In connection with the judgment on the Third Amended Complaint, AEW filed and served a Memorandum of Costs seeking $6,033,927.40 in monetary sanctions composed of the fees and costs incurred pursuing the forensic exam and terminating sanctions, and a declaration of an expert who opined the fees were reasonable. It did not file the motion ordered by the court. At the December 1, 2016 default prove up regarding the Cross-Complaint, the court heard testimony from AEW's employees, counsel and a fee expert, found the fees and costs of $6,033,927.40 were reasonable and awarded them as sanctions. On December 2, 2016, the court amended the Default Judgment to include the amount of monetary sanctions sought by AEW.

DISCUSSION

1. The Trial Court Had Jurisdiction to Enjoin NMS Capital Partners I, LLC and its Affiliate from Engaging in Prohibited Acts

The default judgment entered on AEW's Cross-Complaint enjoined NMS Capital Partners I, LLC, the former Operating Member, *and* its affiliates, including nonparty NMS Properties, Inc., from interfering with the joint venture properties or holding itself out as the property manager. Appellants argue that the trial court lacked jurisdiction to enter the default judgment

against NMS Properties, Inc. because it was not a party to the Cross-Complaint.[4] Although "[r]endering a judgment for or against a nonparty to a lawsuit may constitute denial of due process under the United States and California Constitutions," (*Bronco Wine Co. v. Frank Logoluso Farms* (1989) 214 Cal.App.3d 699, 717), neither appellants nor NMS Properties, Inc. has standing to assert an appeal from the judgment on behalf of NMS Properties, Inc.

Only a "party aggrieved" may appeal. (§ 902.) As a general rule, a "party" is a party of record in the trial court proceeding and is "'aggrieved'" for appeal purposes only if his or her "rights or interests are injuriously affected by the judgment." (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736, 737.) An order enjoining NMS Properties, Inc. from managing the joint venture properties or holding itself out as the manager of those properties does not injuriously affect rights belonging to NMS Capital Partners I, LLC or its affiliates (except NMS Properties, Inc.) and accordingly, appellants (other than NMS Properties, Inc.) may not appeal from the judgment against NMS Properties, Inc.

While NMS Properties, Inc.'s rights are affected by the judgment, it is not a named cross-defendant and therefore it is not a party of record to the Cross-Complaint. One who is not a party but who is aggrieved, may become a party by moving to vacate or set aside the judgment or order in the trial court and if the motion is denied, may appeal from that order. (*In re Elliott* (1904) 144 Cal. 501, 509.) There is no evidence any such motion

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[4] The only parties to the Cross-Complaint are AEW affiliate P6 LA MF Holdings SPE, LLC, cross-complainant, and NMS Capital Partners I, LLC, cross-defendant.

was made in the trial court and therefore, NMS Properties, Inc. has not demonstrated standing to appeal the judgment.

Even if standing were present, the law is clear that an enjoined party may not avoid the operation of an injunction by engaging nonparties to the action to perform the prohibited activities. (*Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 Cal.App.4th 345, 353.) Courts have held that an injunction can properly run to classes of persons through whom the enjoined party may act. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 906.) The trial court made unchallenged findings that NMS Properties, Inc. is an affiliate of NMS and that NMS managed the properties through NMS Properties, Inc. The ruling simply prevents NMS Properties, Inc. from doing what NMS is prohibited from doing by the injunction.

2. The Order Sustaining the Demurrer to the Third Amended Complaint Did Not Divest the Trial Court of Jurisdiction to Hear the Terminating Sanctions Motion

When the trial court sustained AEW's demurrer to the Third Amended Complaint without leave to amend and dismissed it with prejudice, the case was fully resolved for all parties except NMS Capital Partners I, LLC and AEW, the two parties to AEW's still pending Cross-Complaint. Appellants appealed the dismissal on August 5, 2016.

In NMS's briefing for the evidentiary hearing, NMS argued to the trial court that it lacked jurisdiction to issue terminating sanctions while the appeal from the demurrer ruling was pending because "[t]he Court cannot dismiss a complaint after it has already been dismissed . . . ." The trial court was not persuaded because "[n]o judgment has been entered in this action, and

[NMS's] 'appeal' of the June 7, 2016 Order is an improper attempt to divest this Court of jurisdiction, given that the instant Motion was pending and the Court was considering the extent of additional misconduct [NMS] committed and additional sanctions to be imposed." NMS argues once again that the trial court lacked jurisdiction to strike the Third Amended Complaint due to the pendency of the prior appeal from the order sustaining the demurrer without leave to amend.

As a general rule, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order . . . ." (§ 916, subd. (a); *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189.) Further trial court proceedings in contravention of section 916 are outside of the trial court's jurisdiction. (*Varian Medical Systems, Inc. v. Delfino*, *supra*, at pp. 198-199.) The purpose of the stay is obvious -- it preserves the appellate court's jurisdiction and prevents the trial court from rendering the appeal futile by altering the judgment or order from which the appeal is taken. (*Chapala Management Corp. v. Stanton* (2010) 186 Cal.App.4th 1532, 1542.) Ruling that the Third Amended Complaint should be dismissed as a discovery sanction clearly renders futile the appeal from the order on the demurrer.

No stay results, however, from an improper appeal from a nonappealable order. (*Hearn Pacific Corp. v. Second Generation Roofing Inc.* (2016) 247 Cal.App.4th 117, 146-147.) Citing *Berri v. Superior Court* (1955) 43 Cal.2d 856, 860, AEW argues that an order sustaining a demurrer without leave to amend is not appealable because it can be reconsidered by the trial court at

any time before entering judgment. The trial court agreed, expressly stating it had authority to proceed because no judgment had been entered and issues remained pending. However, section 581d states that "[a]ll dismissals ordered by the court . . . in the form of a written order signed by the court and filed in the action . . . shall constitute judgments" and therefore, the trial court's written, signed order which both sustained the demurrer *and* dismissed the action is a judgment.

"Under the 'one final judgment' rule, an order or judgment that fails to dispose of all claims between the litigants is not appealable under Code of Civil Procedure section 904.1, subdivision (a)." (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 436.) Even though the demurrer order in this case is a judgment under section 581d, it is not a "final" judgment under section 904.1, subdivision (a) as to AEW and NMS Capital Partners I, LLC, parties as to whom a Cross-Complaint remained pending. (*California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 Cal.App.3d 49, 58-60 [order dismissing complaint not appealable due to pendency of cross-complaint between the parties].) Accordingly, the appeal from the demurrer ruling did not divest the trial court of jurisdiction to hear the sanctions motion.

3. The trial court's imposition of terminating sanctions was not an abuse of discretion

Appellants do not argue there is no substantial evidence to support the imposition of terminating sanctions. Instead, they attack the order as depriving NMS of its constitutional right to a jury trial on the factual issue of forgery and of its due process rights to discovery on the same issue. We do not need to decide the merits of these arguments because the trial court also found

that separate and apart from forgery, NMS's acts of spoliation and evidence destruction themselves were sufficient to justify both terminating and monetary sanctions. We agree.

A trial court is invested with the inherent power to issue terminating sanctions when a party's deliberate and egregious misconduct makes any sanction other than dismissal inadequate to ensure a fair trial. (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 740; *Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 391 (*Los Defensores*).) California discovery law also "authorizes a range of penalties for conduct amounting to 'misuse of the discovery process,'" including terminating sanctions. (§ 2023.030, subd. (d); *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 991 (*Doppes*), quoting § 2023.030.) "Destroying evidence . . . [is] surely . . . a misuse of discovery within the meaning of section 2023," (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12 (*Cedars-Sinai*)), as are "repeated violations of . . . court orders," and "repeated efforts . . . to thwart discovery." (*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496.)

The determination of whether sanctions should be imposed for discovery misuse and, if so, the appropriate type of sanction, is reviewed for an abuse of discretion. (*New Albertsons, Inc. v. Superior* Court (2008) 168 Cal.App.4th 1403, 1422.) When the trial court's exercise of its discretion relies on factual determinations, the entire record on appeal is examined for substantial evidence, contradicted or uncontradicted, which will support the determination. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) The record is reviewed in the light most favorable to the court's ruling and all reasonable inferences are drawn in support of it. (*Stephen Slesinger, Inc. v. Walt*

Disney Co., supra, 155 Cal.App.4th at p. 765.) The trial court's decision will be reversed only for "manifest abuse exceeding the bounds of reason." (*Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988.) We conclude there is sufficient evidence to support the trial court's imposition of terminating sanctions.

A. The Destruction of Evidence

The eight-day evidentiary hearing produced compelling evidence that there had been significant violations of the court's prior discovery orders of (1) September 8, 2015, requiring a freeze of all electronic documents and (2) October 6, 2015 requiring the production for forensic imaging of all devices belonging to NMS Capital Partners I, LLC, all of its affiliates and Shekhter (including Shekhter's home and office computers). In his declaration, Shekhter admitted he violated the court's discovery orders by failing to produce his personal computer for examination, deleting files from it, changing out the hard drive without transferring to the new hard drive all of the files on the old hard drive, failing to produce external USB drives, including one called the Seagate drive, for examination, and by deleting a zip file received from a former AEW employee that contained joint venture related documents, all with the intention of keeping the information from discovery by the forensic experts.

In addition to his admissions, there was forensic evidence that on the morning before the forensic exam was to occur, Shekhter's son, Alan, ran a series of Google searches, including "secure wipe hard drive," "backdated secure wipe," "Los Angele[s] anti-computer forensics," and "how to avoid computer forensics." He and Shekhter also engaged in a text message exchange outlining a plan to remove Shekhter's old hard drive from Shekhter's 2012 home computer and replace it with another hard

drive that would be backdated and loaded with files. That same day, they executed the plan by removing a hard drive from Shekhter's home computer, replacing it with a new hard drive that looked similar to the old one after manipulating it by backdating the computer's clock to make files appear older than they were and then flooding it with more than 75,000 backdated files and folders. This resulted in the permanent loss of evidence and metadata, in violation of the October 6 order.

Moreover, this old 2012 computer appeared to the forensic examiner to be the "unknown" computer upon which he believed Shekhter created the allegedly forged Version 2 of the Joint Venture Agreement. Shekhter claimed to have discarded the old hard drive and the external drive (the Seagate device) used to create a backup of the old drive. However, forensic evidence revealed that the Seagate device had not been discarded before the litigation as Shekhter claimed because it had been connected to his computer as recently as 48 hours before the forensic exam was to occur.

Forensic analysis revealed that material documents were not transferred to the new hard drive, including copies of the Joint Venture Agreement and a document titled "'Property Management-375 ns.doc.'" This file no longer exists on Shekhter's computer or any other NMS device produced for examination. Even if the file was renamed, as Shekhter's expert speculated was possible, the act of renaming the file was a violation of the court's order that all documents and devices be frozen in their then-current state. A folder called "AEW" was renamed and certain files were deleted from it on the new home computer hard drive. This folder, and its subfolder called "Cover

Letter" clearly related to this action and their deletion was intentional destruction of relevant information.

Sometime between November 25, 2015 and December 4, 2015, Shekhter deleted a zip file emailed to him from Lennon purporting to contain files related to AEW and NMS. Shekhter admits the file contained joint venture related documents. In December 2015, NMS's IT Administrator searched the web for "file deletion utility windows 7," "free SSD secure erase," "wipe multiple hard drives simultaneously," "hard drive destruction service," and "hard drive destruction service Los Angeles," then downloaded an application called "Eraser Portable" which is a computer data destruction and wiping application. On December 4, the application was copied to the NMS corporate file server, where it was used by Brian Bowis, Vice President of Finance at NMS, on the day the forensic imaging was to occur. Bowis admitted he instructed the IT Administrator to delete files so that they could not be retrieved.

On December 3, 2015, Shekhter's assistant, deleted a copy of the La Cienega Property Management Agreement, another document that respondents alleged Shekhter forged.

B. The Manipulation of Evidence

Two days before the court-ordered imaging of Shekhter's computer, a new operating system was manually and volitionally installed on his new home computer hard drive. That new operating system made thousands of changes to the file system metadata on the computer, making it difficult to determine what existed on the computer before the new operating system was installed. This also was an intentional violation of the court's freeze order.

Between October 4, 2015 and December 4, 2015, the computer clock on the new hard drive was manually changed 17 times, affecting over 800,000 files, making forensic examination much more difficult. Just 10 minutes before the forensic expert arrived to conduct the forensic collection, the computer clock on the new hard drive was backdated and over 60,000 files were loaded onto the computer.

C. The Failure to Produce Evidence

Numerous USB external storage devices connected to Shekhter's new hard drive were withheld or destroyed, including the Seagate external hard drive that backed up the old hard drive. At least 21 devices that had been connected to the new hard drive were never produced in violation of the October 6, 2015 order that all devices be identified and produced for examination. In addition to Shekhter's old computer and the Seagate external drive backup, appellants failed to produce the USB drive containing the original Version 2 that was taken from an "'unknown computer'" and inserted into the computer of Shekhter's other son, Adam. Appellants also failed to produce Adam's computer, which was frequently used at the NMS offices up to the day before the imaging was scheduled. It was taken offline while the imaging was taking place and was not used again until December 21, 2015, after most of the imaging had concluded.

D. The Perjury

The court also found evidence that Shekhter and others in his employ provided false testimony under oath concerning spoliation to cover up their misconduct. For instance, Shekhter testified in a declaration that only files containing personal information were deleted or altered when the new hard drive was

installed. This was demonstrated to be false by the testimony of the forensic experts. Shekhter testified that he threw away the old computer "before there was any litigation with AEW," when the evidence demonstrated that the old computer was active and functioning as late as September 19, 2015, while the litigation was pending. He testified that he "instituted a litigation hold within [his] company around the time this lawsuit commenced, so as to prevent deletion of emails and other files," but the forensic evidence indicated Shekhter, Bowis, and Shekhter's assistant all deleted information from their computers in October 2015, over a year after the litigation first began.

E. The Court's Terminating Sanctions Order

The court found that the acts of spoliation, evidence destruction and perjury justified terminating and monetary sanctions. (*Cedars-Sinai, supra,* 18 Cal.4th at p. 12 ["[d]estroying evidence . . . [is] surely . . . a misuse of discovery within the meaning of section 2023" subject to terminating sanctions]; V*an Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1518 [affirming terminating sanctions where party "fail[ed] to obey a court order to provide discovery"]; *Los Defensores, supra,* 223 Cal.App.4th at p. 391.) The misconduct here was extensive, intentional and in violation of court orders designed to prevent the very abuse which occurred.

The purpose of sanctions is not to punish, but rather to remedy the harm caused by the misconduct. (*McGinty v. Superior* Court (1994) 26 Cal.App.4th 204, 210 [sanctions must be limited to correcting the problem caused by the discovery abuse].) The court has discretion to choose from a wide range of penalties to fashion an appropriate remedy, including monetary, evidentiary, issue and/or terminating sanctions. (§ 2023.030.)

"The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should "'attempt[] to tailor the sanction to the harm caused by the withheld discovery.'"" (*Doppes*, *supra*, 174 Cal.App.4th at p. 992; *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487 ["Discovery sanctions 'should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery'"].) "But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction." (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280.)

Appellants do not challenge the trial court's findings that the misconduct here included willful tampering with computers and documents and the failure to produce devices, all of which constituted multiple violations of two court orders. They do not deny that they misused the discovery process. Instead, they focus their argument on Article 11, argue all of the evidence manipulated or withheld goes to the issue of forgery in that Article and assert terminating sanctions are not warranted because Article 11 does not have "anything to do with [their] claims." Instead, they argue the claims, as stated in the Third Amended Complaint, are based on Article 6 and that since "the forgery is irrelevant, perjury about the forgery must be irrelevant too." They also argue that the terminating sanctions are "grossly excessive and impermissibly punitive" because all that was removed from the hard drive were personal photos of Shekhter's

wife and the tax returns of an employee and "neither these acts nor the alleged forgery remotely warrant terminating sanctions."

These arguments are an oversimplification of the record and neglect the fact that it is impossible to know the full extent of the evidence destroyed or withheld. The Cross-Complaint alleges NMS Capital Partners I, LLC breached the Joint Venture Agreement by, among other things, misrepresenting its terms and refusing to acknowledge its true terms and seeks a declaration that Version 2 is a forgery. Consequently, evidence probative of forgery is by no means irrelevant to the determination of the controversy from AEW's point of view. It is central to AEW's claims.

The trial court found pervasive, massive destruction of documents and files directly relating to the Joint Venture, that caused the "permanent loss of untold evidence and metadata" on Shekhter's computer, including the manipulation and deletion of files, backdating the computer more than 17 times which affected more than 800,000 files and folders and failing to identify and produce at least 21 devices that had access to the documents in question. All of this misconduct irreparably damaged respondents' ability to defend the litigation and pursue cross-claims, even those unrelated to the take-out or buy out of respondents' interest under either Article 6 or 11. Not surprisingly, the trial court rejected appellants' claim that AEW failed to meet its burden to show that the destroyed evidence had a substantial probability of damaging its ability to prove its defenses or claims. Instead, the trial court found that respondents "easily met [the] prima facie showing" of prejudice and appellants "have not and cannot disprove prejudice."

According to the trial court, there "is no way to effect compliance with civil discovery or the Court's Orders, since [Appellants] have already destroyed countless materials relevant to this case. And there is no way to know the full extent of the damage done." Appellants' "widespread misconduct infects the entirety of these proceedings," such that the "coordinated[,] intentional[,] widespread destruction of evidence has placed into doubt everything they produced, failed to produce, and any witness testimony [they] may intend to offer." We find no error in the imposition of terminating sanctions.

4. The Award of Monetary Sanctions Violated Due Process

On November 22, 2016, the trial court found an award of monetary sanctions was appropriate in connection with the judgment against all appellants on the Third Amended Complaint and directed that "the specific amount of attorneys' fees, expert fees, and related costs shall be identified and submitted in the context of a post-judgment motion such as one brought under California Code of Civil Procedure section 1032, et seq." The trial court stated that "the parties should have the [ability] to let the normal motion to tax costs be filed by [Appellants] in the main case."

On November 30, respondents filed and served a postjudgment memorandum of costs which was supported by the declaration of an expert who opined the fees were reasonable and necessary. No noticed motion for those fees was filed and no motion to tax the fees as costs was made. (See Cal. Rules of Court, rule 3.1702(b)(1).)- Then, only two days later, during the default judgment proceeding as to the Cross-Complaint, AEW was awarded as monetary sanctions all attorneys' fees and costs

incurred since September 8, 2015, consisting of $5,249,643 in fees and $784,284.40 in costs, as part of the default judgment. The total is $6,033,927.40.

Remarkably, the trial court awarded millions of dollars in monetary sanctions without ever affording appellants an opportunity to be heard as to the reasonableness of the amount awarded. It is true that NMS did not challenge the amount of fees sought in the memorandum of costs through a motion to tax costs. However, NMS had no reason to believe that only two days after the memorandum of costs was filed, and days before a motion to tax costs was due, that the court would decide the monetary sanctions during the default prove up hearing in which NMS was not permitted to participate. No motion for attorneys' fees as sanctions was ever filed by AEW, despite the fact that the trial court's order contemplated it would be. Once the sanctions amount was determined to be reasonable by the court, it would have been futile to file a motion to tax. We reverse the imposition of monetary sanctions.[5]

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[5] The court is not persuaded that the court erred in awarding fees under section 580 on the ground the specific amount sought is not plead in the operative pleadings. In *Simke, Chodos, Silberfeld & Anteau, Inc. v. Athans* (2011) 195 Cal.App.4th 1275, the court rejected that argument, finding that the "relief" which must be stated under section 580 does not include attorneys' fees, the amount of which cannot be known at the outset of the case. *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489 does not compel a different result. In that case, the Supreme Court vacated the attorneys' fee portion of a default judgment because plaintiff had failed to include a request for attorneys' fees in the prayer, not because the amount sought was not stated.

DISPOSITION

The trial court's judgment is affirmed in part and reversed in part. The judgment as to the Third Amended Complaint is reversed as to all appellants except NMS Capital Partners I, LLC on the ground that the proceedings against those parties were stayed pending determination of the appeal from the order sustaining the demurrer without leave to amend and dismissing the complaint. The monetary sanctions are reversed and the matter is remanded for further proceedings in the trial court which afford the appellants an opportunity to be heard as to the amount of reasonable monetary sanctions. The judgment on the Cross-Complaint is otherwise affirmed. Each side to bear their own cost.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.*
MATZ

We concur:

_____, P. J.
LUI

_____,
CHAVEZ

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

EXHIBIT C

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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

LINCOLN STUDIOS, LLC, et al.,

Plaintiffs,

v.

DLA, et al.,

Defendants.

CASE NO. BC551551
(Related Case **BC550227**)

DECLARATION OF DANIEL LENNON

[Filed Concurrently with Plaintiffs' Notice of Motion and Motion for Sanctions Pursuant to Code of Civil Procedure Section 128.7; Memorandum of Points and Authorities; Declarations of A. Sasha Frid and Neil Shekhter; and [Proposed] Order]

Reservation ID: 160127100082
Date: March 23, 2016
Time: 10:00 a.m.
Dept.: 71

Assigned for All Purposes to:
Hon. Suzanne G. Bruguera, Dept. 71

Action Filed: July 15, 2014
Trial Date: None

CONFORM

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
1999 AVENUE OF THE STARS, SUITE 1000 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

DECLARATION OF DANIEL LENNON

I, Daniel Lennon, declare as follows:

1. I am over the age of 18, and a United States citizen. I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would testify competently to all of said facts.

Background

2. I attended the United States Naval Academy from 1995 to 1999, where I received a Bachelor of Science degree in Oceanography.

3. I served as an officer and pilot on active duty in the United States Navy from 1999 to 2008 and I still serve as a Lieutenant Commander in the Navy Reserves. I am an experienced pilot in both the H-60 Seahawk helicopter and C-130 Hercules airplane. During my time in the Navy, I planned and executed combat operations in support of Operation Iraqi Freedom, and was awarded an Air Medal for flying more than 50 missions. I was selected from fleet squadron for performance, leadership, and instructing ability to serve as an instructor alongside an elite group of tactically experienced H-60F/H helicopter pilots. I led over 50 aviation and engineering experts in the first fleet review of Helicopter Training and Operations Manuals across 4 different models of Naval Helicopters. I also served as a Naval Aircraft Mishap Investigator, leading over 40 investigations and implementing procedural and engineering changes affecting 11 helicopter squadrons comprising over 85 aircraft and 3,000 personnel.

4. During my time in the Navy, I also attended the University of San Diego, where I completed a Master of Science in Leadership in 2008.

5. I attended The Wharton School (University of Pennsylvania) from 2008 to 2010, where I completed a Master of Business Administration (MBA). I studied Finance, Real Estate, Private Equity and Entrepreneurship.

Employment with AEW Capital Management

6. After graduating from The Wharton School, I began working in real estate private equtiy at AEW Capital Management ("AEW") approximately late August or early September 2010 as an associate in the Los Angeles group of AEW's Partners Fund. I worked at AEW until July 2011.

7. During my time at AEW, I worked directly for Eric Samek and Pete Cassiano, two of the senior private equity partners in the Los Angeles office. I worked closely with Mr. Samek on the deals he was involved in.

8. The majority of the transactions I underwrote while at AEW were investments made in AEW's joint venture with NMS Properties ("NMS") owned by Neil Shekhter. I worked with Mr. Samek, who was the senior AEW partner involved in closing the NMS transaction. In

the ordinary course of business, I received letters, emails, correspondence, memoranda, budgets and documents relating to the AEW-NMS joint venture.

9. For instance, I was recently shown a September 14, 2010 letter on which I was copied, a true and correct copy of which is attached as Exhibit A,. I have no reason to believe that I did not receive the letter at that time in the normal course of business. I was also copied on an email from an AEW employee, Jonathan Watson, dated September 14, 2010, a true and correct copy of which is attached hereto as Exhibit B. I was recently shown this email and believe I received it in the ordinary course of business.

10. During my discussions with Mr. Samek about AEW's joint venture with NMS, Mr. Samek told me that NMS believed the deal between NMS and AEW was that NMS had the right to monetize or take-out AEW's interest in the joint venture by paying AEW 1.75 times its invested capital, or 24% per year on its investment, whichever was greater. Mr. Samek told me that this was how he and Mr. Shekhter of NMS negotiated the deal.

11. All of the underwriting I did for AEW on the transaction with NMS and AEW's decision to enter into the joint venture was based on NMS having the right to monetize or take-out AEW's interest in the joint venture by paying AEW 1.75 times its invested capital, or a 24% per year on its investment, whichever was greater.

12. During a conversation I had with Mr. Samek, Mr. Samek told me that although Mr. Shekhter believed he could monetize or take-out AEW's interest in the joint venture, AEW did not intend to allow that to happen. Instead, according to Mr. Samek, AEW intended to put the joint venture's real estate portfolio up for sale. Mr. Samek told me that Mr. Shekhter did not know AEW's plan in this regard.

This Lawsuit

13. In January 2015, I received a subpoena to testify at deposition served by Plaintiffs in this case. The deposition was scheduled for January 16, 2015.

14. I contacted Mr. Watson at AEW to ask what the subpoena was about. He told me to not worry about it and the deposition would likely not go forward but if it did AEW's lawyers would represent me.

15. In December 2015, I received a second subpoena to testify at deposition served by Plaintiffs in this case. The deposition was scheduled for December 18, 2015.

16. After receiving the subpoena, I received a phone call from Mr. Watson that AEW's lawyers at Gibson Dunn & Crutcher were intending to represent all of the existing and former employees of AEW. I also received phone calls from lawyers at the law firm of Gibson Dunn & Crutcher and agreed to meet with them.

17. On December 16, 2015, I met with Jay Srinivasin and Rachel Perahia at their request.

18. During that meeting, Mr. Srinivasin told me that Mr. Shekhter had forged certain documents in connection with the joint venture including the September 14, 2010 letter attached hereto as Exhibit A. I told him I had no reason to believe that was true.

19. Mr. Srinivasin told me that I should hire Gibson Dunn to represent me and that his goal was to minimize my time with the case and to try to keep everyone from being deposed.

20. I did not retain Gibson Dunn and chose my own lawyer.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 16 day of January, 2016, at Los Angeles, California.

Daniel Lennon

EXHIBIT A

AEW

September 14, 2010

Mr. Neil Shekhter
NMS Properties
10599 Wilshire Blvd., Suite 108
Los Angeles, CA 90024

RE: JV AGREEMENT (3 YEAR BUY/SELL)

Dear Mr. Shekhter:

Pursuant to our earlier telephone conversation, attached please find a copy of the JV agreement we will be using.

We look forward to a long and profitable relationship.

Sincerely,

AEW CAPITAL MANAGEMENT, L.P.

By:

Eric Samek
Director

CC: Daniel Lennon (AEW)

EXHIBIT B

-------- Original Message --------
Subject: 9901 Washington
From: Jonathan Watson <jwatson@AEW.com>
Date: Tue, September 14, 2010 11:12 pm
To: Jim <jim@nmspr.com>
Cc: "johnc@nmspr.com" <johnc@nmspr.com>, "eddie@nmspr.com" <eddie@nmspr.com>, Daniel Lennon <Daniel.Lennon@AEW.com>, Eric Samek <esamek@AEW.com>, "Fein, Steven A." <steven.fein@dlapiper.com>, "McClure, Michelle K." <Michelle.McClure@dlapiper.com>

Jim,

I've come up for air to realize that we are under the gun again – Washington needs to go on the 30th (and obviously Broadway which we want to close ASAP.) The big issues in my head for Washington are:

.) Is the Forbearance Agreement and Capmark Loan assignable? What has to be done with Capmark to get uncle AEW in the deal? Please send all loan documents for our review – all I have is the 2nd Amendment/Forbearance agreement.

!) Assuming that we are going the same route that we did with Broadway and inserting AEW into the existing deal structure – can you please get Stewart Title to send an updated title report out to Michelle and I so we can get the date-down and any additional endorsements that we might need? We would also require an updated certification of the survey to include our chain of entities from our fund level down to the 9901 Luxe, LLC entity.

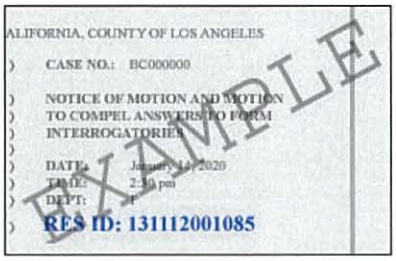
3) Please provide all entity formation docs, certificates, etc… and an existing org. chart so we can quickly understand where the JV is going to join party.

4) We need to get a letter/report out of the structural engineer stating that the designed fix for the parking structure will be to code and it will result in an SUL once the property is built of less than 20%. Please let me know if that will be an issue as I know the CD's are not 100% yet.

Jonathan Watson | AVP | AEW Capital Management, L.P.
601 S. Figueroa Street | Suite 2150 | Los Angeles, CA 90017-3405 | phone +1.213.312.2642 | cell +1.310.347.7255 | fax +1.213.312.2655 | jwatson@aew.com

CRS RECEIPT

INSTRUCTIONS
Please print this receipt and attach it to the corresponding motion/document as the last page. Indicate the Reservation ID on the motion/document face page (see example). The document will not be accepted without this receipt page and the Reservation ID.



RESERVATION INFORMATION

Reservation ID:	**160119097769**
Number of Motion(s):	1
Transaction Date:	January 19, 2016
Case Number:	BC551551
Case Title:	LINCOLN STUDIOS LLC ET AL VS DLA ET AL
Party:	LINCOLN STUDIOS LLC (Plaintiff)
Courthouse:	Stanley Mosk Courthouse
Department:	071
Reservation Type:	**Motion to Compel Discovery (not "Further Discovery")**
Date:	3/16/2016
Time:	10:00 am

FEE INFORMATION (Fees are non-refundable)

Description	Motion ID	Fee
Reschedule Fee - **Motion to Compel Discovery (not "Further Discovery")**	097770	$20.00
Total Fees:	**Receipt Number: 1160119K5185**	**$20.00**

PAYMENT INFORMATION

Name on Credit Card:	Jason Tokoro
Credit Card Number:	XXXX-XXXX-XXXX-1887

A COPY OF THIS RECEIPT MUST BE ATTACHED TO THE CORRESPONDING MOTION/DOCUMENT AS THE LAST PAGE AND THE RESERVATION ID INDICATED ON THE MOTION/DOCUMENT FACE PAGE.

EXHIBIT D

Undertaking of Principals

As of September 8, 2010

AEW Partners VI, L.P. ("Investor Member")
c/o AEW Capital Management, L.P.
World Trade Center East
Two Seaport Lane
Boston, Massachusetts 02210-2021
Attn: General Counsel

Re: Limited Liability Company Agreement of P6 LA MF Holdings I LLC, a Delaware limited liability company (the "Company"), dated September 8, 2010 (as the same may be amended from time to time, the "LLC Agreement"),

Ladies and Gentlemen:

Reference is made to the LLC Agreement. Capitalized terms used in this letter and not otherwise defined are used with the meanings indicated in the LLC Agreement.

NMS Capital Partners I, LLC, a California limited liability company ("Operating Member"), is the Operating Member of the Company. Operating Member is, directly or indirectly, wholly owned by Neil Shekhter, an individual (the "Principal"). The Principal and The NMS Family Living Trust dated September 3, 1991 (2000 Restatement) (the "Trust") are executing and delivering this agreement to induce Investor Member to enter into the LLC Agreement and to make substantial capital contributions to the Company.

1. Indemnity for Bad Acts. The Principal and the Trust (collectively, the "Principals") agree to indemnify, defend and hold the Company and Investor Member harmless from and against any liability, loss, cost (including reasonable attorney's fees) or damages arising from:

(a) any fraud, willful misconduct, gross negligence or any intentional misrepresentation of any material fact (including, but not limited to, the representations and warranties set forth on Schedule 2.3(a) to the LLC Agreement) by Operating Member or any Person controlling, controlled by or under common control with Operating Member (any such Person, a "Controlled Affiliate") in connection with the LLC Agreement, the Company, a Subsidiary Company or with respect to any Property;

(b) any misappropriation or embezzlement of funds of the Company or any Property by Operating Member or any of its Controlled Affiliates;

(c) any act of intentional damage, arson or intentional physical waste of or to the Property by Operating Member or any of its Controlled Affiliates;

(d) actions taken, or omitted to be taken, with respect to the Company or the Property in bad faith on the part of Operating Member or any of its Controlled Affiliates;

(e) Operating Member, the Property Manager or the Developer Manager (as long as they are an Affiliate of Operating Member), a Principals, the Approved Substitute Principal or any of their respective Affiliates or Related Parties: (i) bringing or participating in, or acting in concert with others to bring, any voluntary or involuntary bankruptcy, liquidation, receivership or similar proceeding against the Subsidiary Company or the Company or any Member; (2) being listed as a petitioning creditor in any such proceeding; or (3) soliciting or causing to be solicited petitioning creditors for any such proceeding; and/or

(f) any Transfer of Operating Member's interest in the Company or of the Principals' indirect interest in the Company, in either case, in violation of the LLC Agreement.

2. Guaranteed Obligations. The Principals unconditionally, irrevocably and absolutely guarantee to Investor Member (a) all obligations of Operating Member pursuant to Section 3.6(c) of the LLC Agreement, and (b) any obligation on the part of Operating Member to make any True-Up Contributions in accordance with Section 6.2(d) of the LLC Agreement.

3. Minimum Net Worth. As long as Operating Member (or any other entity directly or indirectly owned by the Principals) owns an interest in the Company, the Principals shall maintain a net worth, calculated in accordance with GAAP, of at least Ten Million Dollars ($10,000,000). From time to time upon the request of Investor Member, the Principals shall provide Investor Member with reasonably acceptable evidence of the Principals' compliance with the foregoing net worth covenant; provided, however, that as long as no Event of Default by Operating Member has occurred under the LLC Agreement, Investor Member shall not make such request more than once in any twelve (12) month period.

4. Delivery of Financial Information. On or before April 30 of each calendar year, the Principals agree to deliver to you unaudited annual financial statements, including balance sheets (including a statement of net worth) and income statements for the prior calendar year, in form and substance reasonably acceptable to you and certified by the Principals as true, correct and complete.

5. Waiver of Suretyship Defenses. The Principals hereby waive and agree not to assert any right of subrogation, reimbursement, indemnification, and/or contribution or any other suretyship rights or defenses of any kind or nature that are or may hereafter become available to the Principals. No extension of time or other indulgence or modification or amendment of the LLC Agreement entered into or granted by Investor Member will release or affect the obligations of the Principals and no act, omission or delay on the part of Investor Member in exercising any rights against the Company or the Principals or taking any action to collect or enforce payment or performance of any obligations of the Principals or the Company shall be a waiver of any such right or release of any such obligations. Investor Member may release or settle any claim with the Company or Operating Member without affecting the continuing liability of the Principals. All powers, rights and privileges hereunder are cumulative to, and not exclusive of, any powers, rights or privileges otherwise available. A separate right of action hereunder shall arise each time Investor Member acquires knowledge of any matter which may require payment to it pursuant to this Agreement or of any violation of any of the terms hereof. Separate and successive actions may be brought hereunder to enforce any of the provisions hereof at any time and from time to time. No action hereunder shall preclude any subsequent action, and the Principals hereby waive and covenant not to assert any defense in the nature of splitting of causes of action or merger of judgments.

6. Notices. Any and all notices and other communications required or permitted under this Agreement shall be deemed adequately given only if in writing delivered either by hand, by mail or by expedited commercial carrier which provides evidence of delivery or refusal, addressed to the recipient, postage prepaid and registered with return receipt requested, if by mail, or with all freight charges prepaid, if by commercial carrier. All notices and other communications shall be deemed to have been given for all purposes of this agreement upon the date of receipt or refusal. All such notices and other

communications shall be addressed to the parties at their respective addresses set forth below or at such other addresses as any of them may designate by notice to the other parties.

Notices to Investor Member shall be addressed to:

c/o AEW Capital Management, L. P.
World Trade Center East
Two Seaport Lane
Boston, Massachusetts 02210-2021
Attn: General Counsel
Facsimile No.: (617) 261-9555

With a copy to:

DLA Piper LLP (US)
33 Arch Street, 26th Floor
Boston, Massachusetts 02110
Attn: John L. Sullivan, Esq.
Facsimile No.: (617) 406-6129

Notices to the Principals shall be addressed to:

Neil Shekhter
c/o NMS Properties
10599 Wilshire Boulevard, Suite 110
Los Angeles, California 90024
Facsimile No.: (310) 441-3720

With a copy to:

The NMS Family Living Trust
c/o NMS Properties
10599 Wilshire Boulevard, Suite 110
Los Angeles, California 90024
Attn: Neil Shekhter
Facsimile No.: (310) 441-3720

7. Expenses and Damages. The Principals shall pay to Investor Member within ten (10) days after demand any and all actual and reasonable expenses, losses, costs or damages paid or incurred by Investor Member, including reasonable attorneys' fees and disbursements, as a result of a breach by the Principals of an obligation under this letter, together with interest at 12% per annum, but in no event at a rate which exceeds the highest rate permitted by applicable law, on any amounts owing under this letter from the date paid or incurred by Investor Member until paid by the Principals.

8. No Third Party Beneficiaries. Nothing in this letter is intended to provide benefit to or be enforceable by any creditor of the Company or any Property or otherwise to provide benefit to or be enforceable by any Person other than Investor Member and its successors and assigns.

9. Reinstatement. To the extent that any payments made to Investor Member pursuant to this letter are subsequently invalidated, declared to be fraudulent or preferential, set aside and/or required to be repaid under any bankruptcy law, state or federal law, common law or equitable cause, then, to the extent of such payment or repayment, the obligation hereunder which has been paid, reduced or satisfied

by such amount shall be reinstated and continued in full force and effect as to the time immediately preceding such initial payment, reduction or satisfaction.

10. Signatures; Amendments. This letter may be executed in any number of counterparts, each of which shall be deemed an original of this letter binding on the parties hereto. Signatures to this letter, any amendment hereof, and any notice given hereunder, executed and transmitted by facsimile (or by copies of physically signed documents exchanged via email attachments in PDF format or equivalent) shall be valid and effective to bind the party so signing. No amendment or modification of this letter shall be effective unless reflected in a document executed and delivered by all of the parties hereto

11. Consultation. The Principals represent and warrant that it has consulted with its advisors and counsel with respect to its obligations under this letter and the adequacy of the consideration that it has received with respect thereto, and that such consideration is in all respects adequate and the value thereof is not less than the value of its obligations under this letter.

12. Severability. If any of the provisions of this letter are declared illegal, or if the application thereof are judicially determined to be invalid or unenforceable, such illegality, invalidity or unenforceability shall not affect the other provisions hereof which can be given effect without the invalid provision, and to this end the provisions of this Agreement are intended to be and shall be deemed severable.

13. Headings Etc. The titles of provisions of this letter are for descriptive purposes only and shall not control or alter the meanings of this letter as set forth in the text. Words such as "herein", "hereinafter", "hereof" and "hereunder" when used in reference to this letter, refer to this Agreement as a whole and not merely to a subdivision in which such words appear, unless the context otherwise requires. The singular shall include the plural and the masculine gender shall include the feminine and neuter, and vice versa, unless the context otherwise requires. The word "including" shall not be restrictive and shall be interpreted as if followed by the words "without limitation." In the event the time for performance of any obligation or any deadline hereunder expires on a day that is not a business day, the time for performance shall be extended to the next business day. This letter shall not be construed more strictly against one party than against the other merely by virtue of the fact that it may have been prepared primarily by counsel for one of the parties, it being recognized that both the all parties contributed substantially and materially to the preparation of this letter. No amendment or modification of this letter shall be effective unless reflected in a document executed and delivered by the party to be bound. This letter shall be governed by and construed in accordance with the laws of the State of Delaware.

14. Entity Obligations. The Principals hereby represent and warrant that it is duly organized, validly existing and in good standing under the laws of its state of formation, that it has the organizational power to enter into and perform the obligations hereunder, that this Undertaking of Principals has been duly executed by or on behalf of the Principals, and that this Undertaking of Principals is and shall remain the valid and binding obligations of the Principals. At all times while any obligations hereunder remain outstanding, the Principals shall maintain its existence and shall not liquidate, dissolve or terminate unless and until a substitute principal reasonably acceptable to Investor Member has executed and delivered a substitute undertaking acceptable to Investor Member.

[The balance of this page had intentionally been left blank; signature pages follow.]

PRINCIPAL:

THE NMS FAMILY LIVING TRUST DATED SEPTEMBER 3, 1997 (2000 RESTATEMENT)

By: _____
Name: Naum Neil Shekhter, Trustee

By: _____
Name: Margarita V. Shekhter, Trustee

_____
NEIL SHEKHTER

[Signature Page to Undertaking of Principals – [P6 LA MF Holdings I LLC]