SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 55

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STATE OF NEW YORK EX REL. JOHN SARIC,

Plaintiffs,

- against -

GFI BRESLIN, LLC, GFI BRESLIN MANAGER, LLC, AND ALLEN GROSS,

Defendants.

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DECISION AND ORDER

Index No. 101812/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 36, 38

were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 9, 10, 11, 12, 13, 14, 15, 16, 17, 31, 34, 35, 37, 39, 40, 41, 41-1

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for SANCTIONS.

Motion sequence nos. 002, 003 and 004 are consolidated for disposition.

This *qui tam* action filed by plaintiff/relator John Saric (Relator) on behalf of the State of New York pursuant to the False Claims Act (State Finance Law §§ 187 *et seq.*) stems from the alleged failure by defendants GFI Breslin, LLC (GFI), GFI Breslin Manager, LLC (GFI Manager) and Allen Gross (Gross) (collectively, defendants) to pay transfer taxes imposed by New York State (the State) and the City of New York (the City).

In motion sequence no. 002, defendants move by order to show cause for an order under Uniform Rules for Trial Courts (22 NYCRR) § 216.1 allowing them to file two exhibits under seal and a redacted memorandum of law in connection with a motion to dismiss the complaint.

In motion sequence no. 003, defendants move, pursuant to CPLR 3211 (a) (1) and (7), for pre-answer dismissal of the complaint with prejudice and for attorneys' fees and sanctions under State Finance Law § 190 (6) (d) and Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1.

In motion sequence no. 004, Relator moves to strike a passage from the reply memorandum of law filed by defendants on their motion to dismiss and for monetary sanctions under Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1.

BACKGROUND

The following facts are drawn primarily from the complaint and are assumed to be true for purposes of this motion (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 92 [1993]). In 2006, Relator began working with Gross and nonparty Andrew Zobler (Zobler) to convert an existing building located at 1186 Broadway, New York, New York (the Property) into a hotel (NY St Cts Elec Filing [NYSCEF] No. 11, Scott R. Matthews [Matthews] affirmation, exhibit A, ¶ 14). In January 2007, Relator, together with GFI Manager, an entity allegedly wholly owned and controlled by Gross, and nonparty Sydell Partners, LLC (Sydell), an entity allegedly wholly owned and controlled by Zobler, formed GFI to develop the Property (*id.*, ¶¶ 9, 18 and 22). At that time, the membership interests in GFI were divided as follows: 71.25% to GFI Manager; 23.75% to Sydell; and 5% to Relator (*id.*, ¶ 22). Manager presently owns a 95% membership interest in GFI and Relator owns a 5% interest (*id.*, ¶ 11).

In January 2007, GFI and nonparty Dune Real Estate Partners LP (Dune) through its affiliates, nonparties Dune Real Estate Fund LP and Dune Parallel AIV LP (Dune Parallel) (collectively, Dune), formed nonparty 1186 Broadway LLC (Broadway) as the entity to hold the ground lease for the Property (NYSCEF No. 11, ¶¶ 23-24). GFI owned a 20% membership interest

in Broadway and Dune owned an 80% interest (*id.*, ¶ 24). The "Ace Hotel" (the Hotel) opened in May 2009 (*id.*, ¶ 20).

On September 24, 2015, Dune, GFI and Gross executed a "Membership Interest Purchase Agreement" (the MIPA) in which Dune agreed to sell and GFI agreed to purchase "forty-nine (49) percentage points of the eighty (80) percentage points of limited liability company interests in Broadway owned by [Dune]" for a purchase price of $22 million[1] (NYSCEF Doc No. 12, Matthews affirmation, exhibit B at 2). The MIPA contained a confidentiality provision prohibiting the parties from disclosing the contents of the agreement except in the circumstances set forth therein (*id.* at 11).

At the same time, Dune, Dune Parallel, GFI and two "Independent Managers" executed a "Fourth Amended and Restated Limited Liability Company Agreement of 1186 Broadway LLC" dated September 24, 2015 (the Operating Agreement) (together with the MIPA, the Agreements) (NYSCEF Doc No. 13, Matthews affirmation, exhibit C at 5). The document identifies the "DREF Funds" and GFI as Broadway's sole members[2] (*id.* at 25). Article IV discusses management of Broadway, and Section 4.1 provides that management and control,

> "shall be vested in GFI (acting in its capacity as a Member) and no Member (other than GFI) shall have the right to, and no Member (other than GFI) shall, take part in the management or affairs of the Company, nor in any event shall any Member (other than GFI) have the power to act for, or bind, the Company in any way"

[1] Dune and its affiliates, collectively referred to as "DREF" in the MIPA, also agreed to sell 49 of the 80 percentage points they owned in nonparties 1186 Broadway II, LLC and 1186 Broadway Tenant LLC (with Broadway, collectively, the Broadway Entities) to GFI and its affiliates.

[2] The Operating Agreement defines "DREF" as Dune, and refers to Dune and Dune Parallel, together, as the "DREF Funds" (*id.* at 1). The "DREF Group" is defined as "DREF, DREF Parallel AIV, any other DREF Control Person that is a Member and any permitted transferee or assignee" (*id.* at 9 [Section 1.1]). The agreement also refers to Broadway as the "Company" (*id.* 8 [Section 1.1]).

(*id.* at 31). Section 4.2 states that GFI shall deliver a "final Business Plan" each calendar year, and that "neither DREF nor DREF Parallel AIV shall have any approval right over any such Business Plan or any amendment or modification thereto (or any portions thereof including the Operating Budget set forth therein)" (*id.* at 35). Under the Operating Agreement, a "Business Plan" is "the strategic plan adopted and approved by GFI on behalf of the Company and in effect at such time for the operation, leasing, financing and/or disposition of the Property, which shall include and incorporate the Operating Budget" (*id.* at 7 [Section 1.1]). The term "Operating Budget" is defined, in part, as the "annual budget, prepared and approved by GFI and setting forth, in GFI's reasonable discretion, the estimated capital and operating expenses of the Company and the Property …" (*id.* at 13 [Section 1.1]).

Under Section 4.1 (a) (i), any "Major Decision" affecting Broadway required Dune's input and consent before the action may be taken (NYSCEF Doc No. 13 at 31). Section 4.1 (b) described the 20 different categories of actions that qualify as a "Major Decision" (*id.* at 32-35).

Article III discusses the disposition of a member's interests. Section 3.4, entitled <u>Resignation; DREF Interests Termination,</u>" partially states:

> "(a) Subject to the following proviso, a Member may not resign or withdraw from the Company without the prior written consent of DREF and GFI; provided, however, that solely upon the DREF Group's receipt of the entire sum of the DREF Redemption Amount in accordance with the terms and provisions of this Agreement, (i) the DREF Funds shall immediately be deemed to have resigned from the Company (and, to the extent a member thereof, from each of the other Broadway Entities (as defined in the MIPA)) and (ii) the DREF Group's entire Membership Interests in the Company (together with all of the DREF Group's interests in and to each of the other Broadway Entities) shall immediately terminate and be cancelled and the DREF Group shall have no further rights or obligations under this Agreement …"

(NYSCEF Doc No. 13 at 26-27). The "DREF Redemption Amount" is defined, in part, as:

> "an amount equal to the sum of (i) DREF Net Investment Amount as of such date, plus (ii) any accrued and unpaid DREF Return as of such date, plus (iii) any amounts due and owing to the DREF Group pursuant to Section 2.7, plus (iv) all costs and/or expenses incurred by the DREF Group (or its Affiliates) in accordance with this Agreement (taking into account Sections 11 and 12) in connection with a DREF Interests Termination (including costs and/or expenses incurred in connection with, or as a result of, any Financing encumbering the Property) which are payable by GFI or any of GFI's Affiliates hereunder. The determination of the DREF Redemption Amount shall be definitively calculated in good faith by DREF, who shall provide notice thereof to GFI (together with reasonably detailed information supporting such calculation) promptly upon completion of such calculation, and such calculation shall, absent manifest error, be binding upon the parties"

(*id*. at 10 [Section 1.1]). Section 1.1 defines the "DREF Net Investment Amount" as "an amount equal to Fourteen Million Dollars ($14,000,000)" less distributions and other payments made in accordance with other provisions in the Operating Agreement (*id.* at 9). The "DREF Return" is "a return accruing on the DREF Net Investment Amount from and after the date hereof until repaid in accordance with this Agreement" (*id*. at 10 [Section 1.1]).

Article VIII governs the priority of distributions made between members. Section 8.2, discusses the distributions of "Net Cash Flow," and states, in relevant part:

> "(a) First, during any Distribution Year, all Net Cash Flow shall be distributed one hundred percent (100%) to the DREF Funds until the DREF Funds (being treated as a single Member for this purpose) have received an aggregate amount of Net Cash Flow pursuant to this clause (a) in an amount equal to the DREF Priority Distribution Amount for such Distribution Year (including, for the avoidance of doubt, any unpaid portion with respect to prior Distribution Years);
>
> (b) Second, during any Distribution Year, any remainder of Net Cash Flow (after the distribution of such Net Cash Flow during such Distribution Year in the manner described in clause (a) above) shall be distributed one hundred percent (100%) to GFI until GFI has received an aggregate amount of Net Cash Flow pursuant to this clause (b) in an amount equal to the GFI Subordinate Distribution Amount for such Distribution Year (including, for the avoidance of

> doubt, any unpaid portion with respect to prior Distribution Years); and
>
> (c) Thereafter, during any Distribution Year, any remainder of Net Cash Flow (after the distribution of such Net Cash Flow during such Distribution Year in the manner described in clauses (a) and (b) above) shall be distributed fifty-one percent (51%) to GFI and forty-nine percent (49%) to the DREF Funds (being treated as a single Member for this purpose)"

(NYSCEF Doc No. 13 at 43-44). "Net Cash Flow" means "Net Operating Income less debt service on any financings of the Company" (*id.* at 13 [Section 1.1]). "'Net Operating Income' means, for any period, the amount by which Operating Revenues exceed Operating Expenses for such period (*id.*). The "DREF Priority Distribution Amount" refers to a scheme whereby Dune would be paid, together with the "DREF Priority Distribution Unpaid Amount," $1.5 million for the first four distribution years and $2 million for the fifth and sixth distribution years (*id.* at 9 [Section 1.1]). Beginning with the seventh distribution year, Dune would only receive the "DREF Priority Distribution Unpaid Amount" (*id.*).

Section 8.3 governs the distributions of "Capital Proceeds," and reads, in part, that:

> "Capital Proceeds shall be distributed to the Members promptly after the occurrence of the applicable Capital Transaction giving rise to such Capital Proceeds, but in any event within ten (10) days thereafter (subject to Section 8.5 and the establishment of reasonable reserves for Operating Expenses and other working capital as permitted pursuant to this Agreement and required pursuant to the terms of any Financing), in the following order of priority:
>
> (a) First, all Capital Proceeds shall be distributed one hundred percent (100%) to the DREF Funds (being treated as a single Member for this purpose) until the DREF Redemption Amount has been paid in full; and
>
> (b) Thereafter, any remainder of such Capital Proceeds (after the distribution of such Capital Proceeds in the manner described in clause (a) above) shall be distributed one hundred percent (100%) to GFI"

(NYSCEF Doc No. 13 at 44). The term "Capital Proceeds" means the "funds of the Company arising from a Capital Transaction" less cash used for certain transactions, such as the establishment of reserve and working capital or the restoration or improvement of Broadway's assets as required by contract (*id.* at 7 [Section 1.1]).

Relevant to this action are two provisions discussing Dune's potential exit from Broadway. Section 3.10, entitled "DREF Exit and Right of First Offer," provides that in the event Dune chooses to transfer its membership interest to an unaffiliated third-party, then GFI has the right of first offer (*id.* at 29). If Dune invokes its right to exit, then "GFI shall have the right, but not the obligation, to purchase all of the Membership Interest of [Dune]" (*id.*).

Article XI grants DREF a "put right" which requires GFI to purchase the DREF Group's membership interests in Broadway. Section 11.1, entitled "DREF Put Right," reads, in part:

> "(a) Notwithstanding anything to the contrary herein, at any time (i) during the period commencing on the date that is forty eight (48) months after the date hereof and ending on the date immediately prior to the first day of the period described in the following clause (ii), (ii) during the period commencing on the date that is seventy two (72) months after the date hereof and ending on the date that is seventy four (74) months after the date hereof, and (iii) from and after the occurrence of a GFI Default, DREF (on behalf of the DREF Group) shall have the right to deliver to GFI a written notice (such notice, a 'DREF Put Notice') stating that the DREF Group will exercise its right (the 'DREF Put Right') to sell all of its Membership Interests to, at DREF's election, any of (x) GFI, or (y) in the event a Springing Control Event (as defined on Schedule 2.9 hereto) has occurred, the Gross Control Person (as defined on Schedule 2.9 hereto) which assumes control of the Company or, solely if the Persons referenced in the foregoing clauses (x) and (y) are unable for any reason to purchase all of the DREF Group's Membership Interests, (z) any Person which is directly or indirectly owned and controlled by the GFI Key Man (such purchaser determined in accordance with the foregoing, the 'GFI Purchaser'), in which case the provisions of this Section 11.1 will apply. Notwithstanding anything herein to the contrary, if the DREF Group is unable for any reason to exercise the DREF Put Right in accordance with the terms and provisions of this Agreement or any

> Financing Document for any reason, then the provisions of Section 2.7(d) shall automatically apply in any such case.
>
> (b) If a DREF Put Notice is delivered, then the GFI Purchaser will be required to purchase, and the DREF Group shall be required to sell, all of the DREF Group's Membership Interests to the GFI Purchaser on the following terms:
>
> > (i) If the DREF Put Notice was delivered pursuant to clause (i) of Section 11.1(a) and a DREF Priority Distribution Shortfall has not occurred, then the purchase price for the DREF Group's Membership Interests shall be the entire sum of the DREF Redemption Amount as of the date of the DREF Put Closing …"

(NYSCEF Doc No. 13 at 53-54).

In the event of a default by GFI on the Operating Agreement, Article XII grants Dune the unilateral right to push through a "Forced Sale" of Broadway or the Property (NYSCEF Doc No. 13 at 55 [Section 12.1 (a)]). The proceeds from a forced sale shall be distributed to each Member as if the Broadway had sold its assets and the Capital Proceeds distributed as per the terms of the Operating Agreement (*id*. at 56 [Section 12.1 (b)]).

As with the MIPA, the Operating Agreement contains a confidentiality provision that prohibits each member from publicizing the terms of the Operating Agreement or disclosing information related to Broadway's business, operations or finances except in circumstances as provided therein (NYSCEF Doc No. 13 at 64 [Section 14.9]). The provision, though, also notes that GFI's parent company is subject to Israeli Securities Law and may have to disclose information as required by law (*id.*).

Relator alleges that he was not consulted on GFI's decision to purchase Dune's interest in Broadway (NYSCEF Doc No. 11, ¶ 26). He claims that defendants allegedly structured the transaction so that GFI immediately acquired 49% of Dune's 80% membership interest in Broadway for $22 million, with Dune's remaining 31% interest transferred at a later date for an

additional $14 million (*id.*, ¶ 28). Relator claims that the transaction was crafted this way so GFI could avoid having to pay transfer taxes imposed by State and City laws when an entity acquires a controlling interest in a partnership, corporation or other entity with an interest in real property (*id.*, ¶ 29). Relator asserts that as a result of completing the initial part of the transaction, GFI owned 69% of Broadway and became the majority owner of an entity that owned real property (*id.*, ¶ 31). Relator further alleges that transfer taxes must be paid when the aggregation of all transfers over a three-year period in the same corporation, partnership or entity results in a person or entity acquiring a controlling interest in that corporation, partnership or entity (*id.*, ¶¶ 32-33). He submits that GFI's subsequent acquisition of the remainder of Dune's ownership interest required the payment of transfer taxes, but none were remitted to the State or the City. Moreover, one of the questions posed on Schedule G of Form NYC-204, titled "Unincorporated Business Tax Return for Partnerships including Limited Liability Companies," asks whether there has been a transfer of 50% or more of the partnership ownership (*id.*, ¶ 47). Relator alleges that if defendants responded "no" to that question on the Form NYC-204 filed for the 2015 tax year, then the answer did not reflect "the truth of the transfer" and is a false statement (*id.*, ¶¶ 48-49). He alleges that "ACRIS indicates that no transfer tax was paid on the transaction" (*id.*, ¶ 36). Relator maintains that defendants' actions have resulted in damage to the public fisc such that GFI, together with Dune, are jointly and severally liable for $1 million in unpaid transfer taxes (*id.*, ¶ 35).

The complaint in this action pleads two causes of action: (1) a violation of State Finance Law § 189 (1) (d) and (2) a violation of State Finance Law § 189 (1) (g). Relator seeks the imposition of treble damages, civil penalties, and attorneys' fees and costs. The State has declined to intervene (NYSCEF Doc No. 35, Sept. 11, 2019 letter from Laura Jereski at 2).

In lieu of serving an answer, defendants filed separate motions for an order dismissing the complaint and for an order to seal the Agreements and for leave to file a redacted memorandum of law. They also seek an award of attorneys' fees, expenses and sanctions. Relator moves separately to strike defendants' reply memorandum of law and for monetary sanctions.

DISCUSSION

A. Defendants' Request for a Sealing Order (Motion Sequence No. 002)

Defendants concede that the public has an interest in recovering unpaid tax monies owed to the State and the City (NYSCEF Doc No. 25, defendants' mem of law at 7), but they request to file the Agreements under seal and for leave to file a redacted memorandum on the ground that the documents contain confidential business information. In support, defendants proffer an affirmation from Ilya Braz (Braz), Vice President for GFI and GFI Manager (NYSCEF Doc No. 24, Braz affirmation, ¶ 1). Braz affirms that the Agreements contain highly confidential business information, such as financial information, representations and warranties, governance matters and information about Dune, and contain strict confidentiality provisions prohibiting disclosure (*id.*, ¶ 3). Braz submits that revealing defendants' confidential business strategies and dealings in this litigation would place them at a severe competitive disadvantage in the hospitality industry by causing them to lose negotiating and bargaining power on potential business deals with third parties (*id.*, ¶¶ 5-6). Additionally, Braz avers that defendants store the Agreements on password-protected computer systems and limit access only to those employees who need to have the information (*id.*, ¶ 4).

Relator opposes the motion and argues that defendants have failed to demonstrate good cause. He submits that the Agreements are not trade secrets, and as such, defendants have not established any real harm from their disclosure. Additionally, Relator maintains that the much of

the language in the Agreements consists of "boilerplate" or a variation thereof of language found in other limited liability company operating agreements.

"[T]here is a broad presumption that the public is entitled to access to judicial proceedings and court records" (*Mosallem v Berenson*, 76 AD3d 345, 348 [1st Dept 2010]), but the "right of access is not absolute" (*Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1, 6 [1st Dept 2000]). "[C]onfidentiality is, in certain circumstances, necessary in order to protect the litigants or encourage a fair resolution of the matter in controversy" (*Matter of Twentieth Century Fox Film Corp.*, 190 AD2d 483, 486 [1st Dept 1993]). Uniform Rules for Trial Courts (22 NYCRR) § 216.1 provides:

> "(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.
>
> (b) For purposes of this rule, 'court records' shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103 (a)."

The court must "make an independent determination of good cause before it may grant a request for sealing" (*Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322, 324 [1st Dept 2006]). Since good cause is not defined, the court must consider the public and the parties' interests (*id.* at 325), since "a sealing order should rest on a sound basis or legitimate need to take judicial action" (*Danco Labs*, 274 AD2d at 8 [internal quotation marks and citation omitted]). Sealing a company's business records may be appropriate where trade secrets or proprietary information may be disclosed or where disclosure may negatively impact a company's competitive

advantage (*see Mosallem*, 76 AD3d at 350; *Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 503 [2d Dept 2007] [stating that "[p]roprietary information, in the nature of current or future business strategies which are closely guarded by a private corporation, is akin to a trade secret, which, if disclosed, would give a competitor an unearned advantage"]). The burden rests with the party seeking the order to demonstrate compelling circumstances (*Mancheski*, 39 at 502).

Applying these precepts, defendants have failed to carry their burden of demonstrating compelling circumstances such that a sealing order should be granted. As a preliminary matter, the fact that GFI and Dune deemed the Agreements "confidential" is not binding on this court (*see Eusini v Pioneer Elecs. (USA), Inc.*, 29 AD3d 623, 626 [2d Dept 2006]; *Matter of Benkert*, 288 AD2d 147, 147 [1st Dept 2001]).

Nor have defendants demonstrated that the information contained in the Agreements qualify as trade secrets or proprietary information. "[A] trade secret is 'any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it'" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 123 [1st Dept 1998] [internal citation omitted]). Factors to consider when assessing whether information qualifies as a trade secret include:

> "'(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others'"

(*id.* at 124 [internal citation omitted]). Here, the documents fail to disclose specific, confidential information about defendants' business strategies in the hospitality industry (*see Morelli v Dinkes*, 250 AD2d 530, 531 [1st Dept 1998] [declining to seal the record in a dispute over a partnership

agreement where it does not contain any proprietary information]). Braz's affidavit is also too conclusory as it fails to address which specific parts in both Agreements could negatively impact defendants' future business dealings. For the most part, the Agreements memorialize how GFI and Dune organized the entities formed to develop or manage the Hotel, their respective financing, operating and reporting obligations, and their rights and responsibilities upon termination of the Operating Agreement. Therefore, defendants' motion for a sealing order regarding the Agreements and for permission to file a redacted memorandum of law is denied.

B. Defendants' Motion to Dismiss (Motion Sequence No. 003)

On this motion, defendants posit that the documentary evidence utterly refutes Relator's assertion that Dune transferred or GFI acquired a "controlling interest" in Broadway since both State and City tax laws require the transfer of at least 50% of the capital, profits or beneficial interest in an entity that owns real property. As an alternative argument for dismissal, defendants contend that the complaint fails to plead a reverse false claim with particularity.

In response, Relator rejects defendants' self-serving description of the transaction as a transfer of a minority interest. He urges the court to look at the true economic substance of the transaction, which shows that a complete sale of Dune's membership interest was made since Dune sold all of its equity in Broadway and relinquished all power to direct or control it. He likens Dune's remaining 31% interest to a "debt" to be collected, and points to the following sections of the Operating Agreement – 1.1 (Definitions); 3.4 (Resignation; DREF Interests Termination); 3.10 (DREF Exit and Right of First Offer); 8.2 (Distributions of Net Cash Flow); and, 8.3 (Distributions of Capital Proceeds) – to show that once Dune receives the DREF Redemption Amount, its membership interest in Broadway terminates. An indemnity provision also shifts the obligation for paying the transfer tax from Dune to GFI (*id.* at n 11). In addition, Relator argues that adding

the initial 49% transfer to the subsequent 31% transfer, as is permissible under State and City tax laws, demonstrates that a transfer or acquisition of a controlling interest occurred. Lastly, Relator maintains that the complaint sufficiently alleges a reverse false claim sounding in tax fraud, in part, because Gross, who is a “billionaire real estate mogul,” should be aware of the transfer tax implications (NYSCEF Doc No. 34, Relator’s mem of law at 23).

In reply, defendants maintain that the documentary evidence disproves Relator’s claim that GFI purchased a controlling interest in Broadway, or that GFI agreed to purchase Dune’s remaining membership interest. After executing the MIPA, Dune retained a 31% interest, and assumed a role as a preferred limited member. Defendants describe the “put right” clause as an option, not a contractual obligation. Furthermore, they argue that none of the sections of the Operating Agreement cited by Relator convert Dune into a debt holder nor, as is suggested, can the purchase of a minority interest be considered the acquisition of a controlling interest. Defendants last argue that Relator failed to plead a claim for fraud with particularity.

The court on a motion to dismiss brought under CPLR 3211 must “accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law,” the motion will be denied (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Dismissal under CPLR 3211 (a) (1) is warranted “where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). “A paper will qualify as ‘documentary evidence’ only if it satisfies the following criteria: (1) it is ‘unambiguous’; (2) it is

of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010]). An unambiguous contract that utterly contradicts a breach of contract cause of action constitutes documentary evidence under CPLR 3211 (a) (1) (*see BT Holdings, LLC v Village of Chester*, 189 AD3d 754, 760 [2d Dept 2020]; *Madison Equities, LLC v Serbian Orthodox Cathedral of St. Sava*, 144 AD3d 431, 431 [1st Dept 2016]).

The False Claims Act applies to "any sort of looting of the public purse" (*State of New York ex rel. Seiden v Utica First Ins. Co.*, 96 AD3d 67, 71 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012]), and, as amended in 2010, applies to acts in violation of the Tax Law (*see* State Finance Law § 189 [4] [a]; *People v Sprint Nextel Corp.*, 26 NY3d 98, 107 [2015], *cert denied* 578 US ___, 136 S Ct 2387 [2016]). Importantly, State Finance Law § 189 (1) provides that any person or entity who:

> (d) has possession, custody, or control of property or money used, or to be used, by the state or a local government and knowingly delivers, or causes to be delivered, less than all of that money or property;
>
> …
>
> (g) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government;
>
> …
>
> (h) … shall be liable to the state or a local government, as applicable, for a civil penalty of not less than six thousand dollars and not more than twelve thousand dollars … plus three times the amount of all damages, including consequential damages, which the state or local government sustains because of the act of that person."

Thus, liability may be imposed where a person "knowingly make[s] a false statement or knowingly file[s] a false record" (*People*, 26 NY3d at 112). The New York State Attorney General or a private plaintiff may seek enforcement of the False Claims Act (*see* State Finance Law § 190

[1] and [2]). Because the False Claims Act is modeled after the Federal False Claims Act (31 USC § 3729 *et seq.*), New York courts look to federal case law for guidance (*see State of New York ex rel. Seiden*, 96 AD3d at 71).

As is relevant here, Tax Law § 1402 (a) imposes a tax on "each conveyance of real property or interest therein when the consideration exceeds five hundred dollars." A "conveyance" includes "the transfer or transfers of any interest in real property by any method, including but not limited to … transfer or acquisition of a controlling interest in any entity with an interest in real property" (Tax Law § 1401 [e]). A "controlling interest" is partially defined in Tax Law § 1401 (b) (ii) as "in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity." The implementing regulations mirror the Tax Law's definition of a "controlling interest," in part, and states that "[i]n the case of a partnership, association, trust or other entity having an interest in real property, the transfer or acquisition occurs when a person, or group of persons acting in concert, transfers or acquires a total of 50 percent or more of the capital, profits or beneficial interest in such entity" (20 NYCRR § 575.6 [a]).

Similarly, Administrative Code of the City of New York § 11-2102 (b) (1) imposes a "tax on each instrument or transaction … whereby any economic interest in real property is transferred by a grantor to a grantee, where the consideration exceeds twenty-five thousand dollars." An "economic interest in real property" includes "the ownership of an interest or interests in a partnership, association or other unincorporated entity which owns real property" (Administrative Code § 11-2101 [6]). As to what constitutes a transfer, Administrative Code § 11-2101 (7) states:

> "'Transfer' or 'transferred.' When used in relation to an economic interest in real property, the terms 'transfer' or 'transferred' shall include the transfer or transfers or issuance of shares of stock in a corporation, interest or interests in a partnership, association or other

> unincorporated entity, or beneficial interests in a trust, whether made by one or several persons, or in one or several related transactions, which shares of stock or interest or interests constitute a controlling interest in such corporation, partnership, association, trust or other entity."

A "controlling interest" is "in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity" (Administrative Code § 11-2101 [8]). 19 RCNY 23-02 also defines a "controlling interest," in relevant part as "(1) *General* … in the case of a partnership, association, trust or other entity, 50% or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity."

The rules and regulations implementing the tax laws, above, also include provisions allowing for the aggregation of transfers in the same entity made within a certain time period to determine if the transfer or acquisition of a controlling interest has occurred. 20 NYCRR § 575.6 (d) states, in relevant part:

> "Where there is a transfer or acquisition of an interest in an entity that has an interest in real property, on or after July 1, 1989, and subsequently there is a transfer or acquisition of an additional interest or interests in the same entity, the transfers or acquisitions will be added together to determine if a transfer or acquisition of a controlling interest has occurred …. No transfer or acquisition of an interest in an entity that has an interest in real property will be added to another transfer or acquisition of a interest in the same entity if they occur more than three years apart, unless the transfers or acquisitions were so timed as part of a plan to avoid the real estate transfer tax. An example of this would be if a shareholder acquired 40 percent of the stock in a corporation and simultaneously contracted for the purchase of 20 percent in three years and one day."

Its counterpart at 19 RCNY 23-02 partially reads:

> "(2) *Aggregation.* A transfer of a controlling economic interest made by one or several persons, or in one or several related transfers, is subject to the transfer tax. Related transfers are aggregated in

> determining whether a controlling economic interest has been transferred. Related transfers include transfers made pursuant to a plan to either transfer or acquire a controlling economic interest in real property. Transfers made within a three year period are presumed to be related and are aggregated, unless the grantor(s) or grantee(s) can rebut this presumption by proving that the transfers are unrelated …. Transfers aggregated with respect to whether a controlling economic interest has been transferred will also be aggregated with respect to the $25,000 threshold for imposition of the tax and the applicable rate of tax."

1. Whether the Transaction Involved the Transfer or Acquisition of a Controlling Interest

As an initial matter, the parties do not dispute whether the imposition of a transfer tax is appropriate when a person or entity transfers or acquires a controlling interest in an entity owning real property, like Broadway (NYSCEF Doc No. 17, defendants' mem of law at 9; NYSCEF Doc No. 34 at 5). Rather, this dispute centers on whether GFI acquired a controlling interest in Broadway such that the transaction is subject to tax liability.

Here, the clear, unambiguous language of the Agreements demonstrates that Dune did not transfer and GFI did not acquire a controlling interest in the capital, profits or beneficial interest in Broadway. As discussed above, a controlling interest means a transfer of 50% or more of the capital, profits or beneficial interest in an entity that owns real property (see Tax Law § 1401 [b] [ii]; Administrative Code § 11-2101 [8]). The terms of the MIPA demonstrate that Dune's sale of a 49% membership interest in Broadway does not technically fall within the statutory definition of a controlling interest (*see Matter of GKK 2 Herald LLC*, 2016 WL 3131497, *4, 2016 NY Tax LEXIS 248, *9-10 [NY St Div Tax Appeals DTA No. 826402, May 26, 2016], *revd on other grounds* 2018 WL 3340582, 2018 NY Tax LEXIS 110 [NY St Div of Tax Appeals DTA No. 826402, May 10, 2018] [reasoning that the petitioner's 45% membership interest in a limited liability company that owned real property did not exceed 50%, and as a result, the transfer of its

45% membership interest to another entity that owned a 55% membership in that company was not subject to a transfer tax under the Tax Law]).

The documents also refute Relator's argument that, irrespective of the percentages, Dune transferred all of its control, profits and beneficial interest to GFI. "[B]eneficial ownership encompasses 'command and control over property' in addition to financial or economic interest" (*GKK 2 Herald LLC v City of N.Y. Tax Appeals Trib.*, 154 AD3d 213, 226 [1st Dept 2017], *lv denied* 32 NY3d 905 [2018], quoting *Matter of CBS Corp. v Tax Appeals Trib. of State of N.Y.*, 56 AD3d 908, 910 [3d Dept 2008], *lv denied* 12 NY3d 703 [2009]). "Beneficial ownership also includes entitlement to profits, dividends and bonuses" (*GKK 2 Herald LLC*, 154 AD3d at 226, citing *Yelencsics v Commissioner of Internal Revenue*, 74 TC 1513, 1527-1528 [1980]). While Dune may have relinquished control over Broadway's day-to-day business operations, it retained significant control over the Major Decisions that could potentially affect that entity. For example, Dune's consent was necessary on no less than 20 different types of Major Decisions, such as acquiring real property or other material assets; amending or replacing any financing agreements; selling the Property; causing Broadway to merge with or acquire another entity; taking any action in contravention of the Operating Agreement; terminating certain management agreements related to the Ace Hotel; and, terminating or modifying the ground lease (NYSCEF Doc No. 13 at 32-34 [Section 4.1 [b]). Dune could request a member meeting to discuss the Property, the Business Plan and the Operating Budget (*id.* at 36 [Section 4.3]), and an audit of Broadway if certain conditions are met (*id.* at 41 [Section 5.1 (j)]). Dune was also entitled to receive specific distributions over the course of several years, as detailed in Article VIII.

Nevertheless, the court must look at the "'objective economic realities of a transaction,' rather than the 'particular form the parties employed … [to] determine tax consequences'"

(*Benenson v Commissioner of Internal Revenue*, 910 F 3d 690, 699 [2d Cir 2018], quoting *Frank Lyon Co. v United States*, 435 US, 561, 573 [1978]). Indeed, "'[i]t is the substance of a transaction, viewed in its entirety, which is material to a determination of its tax consequences'" (*GKK 2 Herald LLC*, 154 AD3d at 223, quoting *Matter of Exchange Plaza Partners v City of New Yor*k, 159 AD2d 333, 334 [1st Dept 1990], *lv denied* 76 NY2d 702 [1990]).

Here, the objective economic realities show that defendants and Dune negotiated a purchase price for Dune's total exit from Broadway, although the timing of the exit is contingent upon the happening of certain events. For instance, once Dune receives the full amount of the DREF Redemption Amount, then its membership interest in Broadway shall terminate while GFI shall continue as a member. Similarly, Dune may cause its own exit by seeking to transfer its membership interest to an unaffiliated third-party or by exercising the put right option. In the first instance, GFI is given the right of first offer, though it is not contractually obligated to purchase Dune's interest. In the latter, GFI is contractually obligated to purchase Dune's interest. If Dune subsequently sells or transfer its remaining 31% membership interest to GFI, then it appears that the transaction would be subject to aggregation (*see* 20 NYCRR § 575.6 [d]; 19 RCNY 23-02 [2]). But, until these events occur, Dune retains ownership of a 31% membership interest, and thus, a transfer or acquisition of a controlling interest has not yet occurred such that the transaction is subject to transfer taxes.

The plain language in the Agreements also belies Relator's characterization of Dune's remaining interest as debt. Relator focuses on the value of the DREF Redemption Amount at $14 million, but that amount reflects the negotiated, agreed-upon price at which Dune would sell the remainder of its interest in Broadway.

Although the facts in *GKK 2 Herald LLC*, relied on by Relator, are similar, the case is distinguishable. That matter involved an Article 78 proceeding challenging a determination made by the City of New York Tax Appeals Tribunal (the Tribunal) that upheld a determination made by the City's Commissioner of Finance imposing a real property transfer tax upon the sale by petitioner, GKK 2 Herald LLC (GKK), of its 45% membership interest in 2 Herald Owner LLC (Herald) to SLG LLC (SLG), the owner of a 55 % membership interest in Herald LLC (154 AD3d at 216). Initially, GKK and SLG owned 45% and 55%, respectively, of a parcel of real property as tenants in common (*id.*). On December 22, 2010, GKK and SLG executed three agreements: (1) a "TIC Contribution Agreement," in which GKK and SLG agreed to contribute their 45% and 55% interests in the property as tenants in common to Herald in exchange for membership interests in the same percentages; (2) an operating agreement for Herald in which distributions would be made by the members in their sole discretion; and, (3) a membership interest purchase agreement under which GKK sold its 45% membership interest in Herald to SLG for $23,312,500 million and for a release of GKK's pro rata mortgage obligation of $86,062,500 (*id.*). Under the step transaction doctrine, the Court agreed that the transactions resulted in GKK no longer holding a direct or indirect interest in the property either as an owner or as a member in Herald[3] (*id.* at 224-225). Significantly, the Court observed that SLG released GKK's obligations under a mortgage, that GKK received back its collateral, and the new operating agreement "lacked explicit determinations of profits, cash flows and other important aspects" (*id.* at 225).

By contrast, the Operating Agreement in this action shows that Dune retained authority and control over certain matters involving Broadway's operations. Significantly, the agreement

[3] The step transaction doctrine "treats the steps in a series of formally separate but related transactions involving the transfer of property as a single transaction, if all the steps are substantially linked" (*Barnes Group, Inc. v Commission of Internal Revenue*, 593 Fed Appx 7, 9 [2d Cir 2014] [internal quotation marks and citation omitted]).

specifies the annual distributions and proceeds Dune is entitled to receive. Thus, Dune retained the essential benefits that beneficial ownership affords. Moreover, the transfers of the entirety of GKK's interests were not contingent upon the happening of future events since they were completed in one day, whereas here, the Agreements contemplated a transfer of Dune's membership interest at some point in the future. Even then, a transfer of Dune's remaining interest to GFI, as opposed to some other entity, is not guaranteed.

The facts in *GKK 2 Herald LLC* are also distinguishable because the matter did not involve the transfer of a controlling interest. The Court concluded that the initial transfer of GKK's 45% interest as a tenant in common to Herald was a taxable event and not a mere change in the form of ownership, since GKK and Herald were not the same entity (154 AD3d at 227-228). As such, the Court found the issue of aggregation irrelevant to its determination since it was the initial contribution of GKK's interest as a tenant in common that was not exempt from taxation (id. at 228). Here, Broadway's form of ownership has not changed.

Furthermore, the relevant Tax Law and the Administrative Code provisions concern the actual transfer or acquisition of a controlling interest. Assuming the transfer occurs and assuming that GFI is the recipient of Dune's 31% membership interest, then GFI is liable for paying any transfer taxes as stated in the Operating Agreement. However, until such transfer occurs, it does not appear that a transfer tax on may be imposed. Accordingly, defendants' motion to dismiss the first cause of action is granted, and that first cause of action is dismissed.

2. Whether the Complaint Adequately Pleads a Reverse False Claim

The False Claims Act permits recovery for a "reverse false claim [which] occurs when someone uses a false record to avoid an obligation to pay the government" (*State of New York ex rel. Seiden*, 96 AD3d at 71 [internal quotation marks and citation omitted]). As stated above, State

Finance Law § 189 (1) (g) applies to any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government." To prevail on a reverse false claim,

> "a plaintiff [or relator] must state facts tending to show: (1) that the defendant made, used, or caused to be used a record or statement to conceal, avoid, or decrease an obligation to the government; (2) that the statement or record was false; (3) that the defendant knew that the statement or record was false; and (4) that the state suffered damages as a result'"

(*Total Asset Recovery Servs. LLC v Metlife, Inc*., 189 AD3d 519, 521 [1st Dept 2020], quoting *State of New York ex rel. Seidin*, 96 AD3d at 71-72). A reverse false claim must be pled with particularity (*State of New York ex rel. Seidin*, 96 AD3d at 72).

It is also an established precept that a fraud claim is subject to a heightened pleading standard (*see* CPLR 3016 [b]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 558 [2009]), and reverse false claims generally concern fraud. While the False Claims Act "require[s] no proof of a specific intent to defraud" (State Finance Law § 188 [3] [b]), the complaint must still "plead the factual basis which gives rise to strong inference of fraudulent intent" (*United States ex rel. Gelbman*, 2018 WL 4761575, *4, 2018 US Dist LEXIS 169435, *9-10 [SD NY Sept. 30, 2018, 14-CV-771 (VSB)]). Furthermore, State Finance Law § 192 (1-a) provides that in applying CPLR 3016,

> "the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct, or any specific records or statements used, if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section one hundred eighty-nine of this article are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or a local government effectively to investigate and defendants fairly to defend the allegations made."

Thus, while a *qui tam* plaintiff need not identify specific claims, records or statements, the plaintiff must still plead sufficient facts to provide a reasonable indication that the False Claims Act was violated (*see State of New York ex rel. Edelweiss Fund, LLC v JPMorgan Chase & Co*., 67 Misc 3d 1204[A], 2020 NY Slip Op 30874[U], *9-10 [Sup Ct, NY County 2020], *affd* 189 AD3d 723 [1st Dept 2020]).

Here, Relator has not adequately pled a reverse false claim under State Finance Law § 189 (1) (g). A reverse false claim involves one who knowingly submits a false record to avoid paying an obligation to the government. The term "knowingly" under the False Claims Act means "actual knowledge of the information … [or] acts in deliberate ignorance of the truth or falsity of the information … [or] acts in reckless disregard of the truth or falsity of the information" (State Finance Law § 188 [3]). The "scienter requirement is 'rigorous'" (*United States ex rel. Gelbman.*, 2018 WL 4761575, *4, 2018 US Dist LEXIS 169435, *10, quoting *Universal Health Services, Inc. v United States ex rel. Escobar*, — US —, 136 S Ct 1989, 2002 [2016]). The claim herein is grounded on the allegation that defendants may have falsely responded "no" to a question on a tax form asking whether 50% or more of the partnership ownership was transferred (NYSCEF Doc No. 11, ¶ 47) in furtherance of a scheme in which "[d]efendants knowingly structured the buy-out of Dune" to avoid paying transfer taxes (*id.*, ¶ 42). These conclusory allegations are insufficient to plead the scienter element with particularity (*see State of New York ex rel. Seiden*, 96 AD3d at 72; *cf. State of New York, City of New York, ex rel. Campagna v Post Integrations, Inc*., 162 AD3d 592, 593 [1st Dept 2018] [concluding that allegations that "defendants intentionally structured a scheme to avoid the obligation to pay taxes in New York, knowing that they were required to pay taxes in New York" were adequate]). The complaint lacks other, specific factual allegations

sufficient to infer that defendants had either actual knowledge of the fraud, or acted with reckless disregard or deliberate ignorance of the falsity when they responded "no" on a City tax form.

Moreover, where a claim for fraud is pled "against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant," it will be dismissed (*Aetna Casualty & Surety Co. v Merchants Mut. Ins. Co.,* 84 AD2d 736, 736 [1st Dept 1981]). Leave to replead, rather than dismissal, may be the appropriate remedy in some circumstances (*see Total Asset Recovery Servs. LLC*, 189 AD3d at 523), but such is not the case here. Relator does not allege which defendant was involved in the filing of the false tax form or had knowledge of the false information on the form and either deliberately ignored or recklessly allowed it to be filed. Furthermore, the assertion that Gross is familiar with the tax laws, by itself, is insufficient to satisfy the scienter element or to infer that he had actual knowledge of the false filing at issue. Thus, the part of the motion to seeking to dismiss the second cause of action is granted, and the second cause of action is dismissed.

3. Defendants' Request for Fees, Costs and Sanctions

Defendants seek to recover their reasonable attorneys' fees and expenses. They maintain that Relator has commenced other litigation captioned *Saric v GFI Breslin, LLC*, Sup Ct, NY County, index No. 651683/2017, related to GFI's business, and that Relator commenced the present action to harass them. Plaintiff argues that fees and sanctions are not warranted.

State Finance Law § 190 (6) (d) provides that:

> "If the attorney general or a local government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."

Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1 (a) allows the court, in its discretion, to impose monetary sanctions on a party as the result of that party's frivolous conduct, Conduct is considered "frivolous" where:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.
>
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party."

(Uniform Rules for Trial Cts [22 NYCRR] § 130-1.1 [c]). An award of monetary sanctions is proper if a party manifests "extreme behavior" (*Ray v Ray*, 180 AD3d 472, 474 [1st Dept 2020], *lv dismissed* 35 NY3d 1007 [2020] [internal quotation marks and citation omitted]). The court must look at the offending party's "broad pattern" of conduct (*Levy v Carol Mgt. Corp*., 260 AD2d 27, 33 [1st Dept 1999]).

Here, the court declines to award defendants' their attorneys' fees and expenses, despite the lack of merit to the Relator's claims (*see Highland Capital Mgt., L.P. v Stern*, 157 AD3d 501, 501 [1st Dept 2018], *lv denied* 31 NY3d 906 [2018]). Although the parties are presently involved in separate litigation, Relator's actions herein do not rise to the level of frivolous conduct.

C. Motion Sequence No. 004

Relator moves for an order striking a portion of defendants' reply memorandum of law on their motion to dismiss and for sanctions under Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1 (a). He objects to a purported misstatement in defendants' reply brief that reads:

> "Finally, Plaintiff mischaracterizes the circumstances under which Dune would be deemed to have resigned, claiming that it is impossible for Dune to prevent its exit. This is not so. It is only impossible following a 'Capital Transaction', which is entirely appropriate. The documentary evidence before the Court establishes that, only upon receipt of the 'DREF Redemption Amount' will Dune be deemed to have resigned. (Matthews Aff., Ex. C, § 3.4(a).) **The 'DREF Redemption Amount' will only be paid to Dune, other than if the Put Right is exercised by Dune and accepted by GFI, in the event that there is a distribution of 'Capital Proceeds'** (Matthews Aff., Ex. C, § 8.3), **in connection with a 'Capital Transaction'**, which is defined as the "sale, financing, refinancing or similar transaction of, or involving, the Property ... ." (Matthews Aff., Ex. C, § 1.1, pg. 3.) In those circumstances, Dune would realize its investment in the venture and exit"

(NYSCEF Doc No. 43, Relator's mem of law at 3). Relator contends the statements are materially false because a capital event is not the only trigger for payment of the DREF Redemption Amount since distributions of Net Cash Flow and Capital Proceeds may be used to pay down the DREF Redemption Amount. Relator repeats the contention that the DREF Redemption Amount is merely a debt obligation.

Defendants argue that no false statement was made since Broadway's audited financial statements show that Broadway has made only one distribution of Net Cash Flow to Dune in 2016, and that there have been no capital transactions resulting in the distribution of Capital Proceeds (NYSCEF Doc No. 55, William Barrett affirmation, ¶¶ 5-6). Given the interest due on the DREF Net Investment Amount, the DREF Redemption Amount is increasing (*id.*, ¶ 7).

Here, Relator fails to cite a statute or legal precedent for granting a motion seeking to strike a party's memorandum of law based on a purportedly false statement. While CPLR 3024 (b)

provides that scandalous or prejudicial matter may be stricken from a pleading, a memorandum of law, which is a "statement of the relevant law and arguments" (*Tripp & Co., Inc. v Bank of N.Y. (Del), Inc.*, 28 Misc 3d 1211[A], 2010 NY Slip Op 51274[U], *6 [Sup Ct, NY County 2010]), is not a pleading. Thus, Relator's motion to strike the defendants' reply memorandum of law is denied (*see China Gen. Aviation LLC v Jingxian Chen*, 2019 WL 339653, *8, 2019 NY Misc LEXIS 5096, *21-22 [Sup Ct, NY County 2019]; *Kaplan v Ladenburg Thalmann & Co., Inc.*, 2017 NY Slip Op 32282[U], *4 [Sup Ct, NY County 2017]; *Attallah v Milbank, Tweed, Hadley & McCloy, LLP*, Sup Ct, Nassau County, Dec. 18, 2015, Murphy, J., index No. 606650/2014, *affd* 168 AD3d 1026 [2d Dept 2019]).

Similarly, the part of the motion seeking sanctions is also denied since the alleged misstatement does not rise to the level of frivolous conduct as contemplated in Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1 (*see Highland Capital Mgt., L.P.*, 157 AD3d at 501).

Accordingly, it is

ORDERED that the motion brought by defendants GFI Breslin, LLC, GFI Breslin Manager, LLC and Allen Gross for an order sealing two exhibits and for leave to file a redacted memorandum of law in connection with their motion to dismiss (motion sequence no. 002) is denied; and it is further

ORDERED that the motion brought by defendants GFI Breslin, LLC, GFI Breslin Manager, LLC and Allen Gross to dismiss the complaint brought by Relator John Saric and for an award of its reasonable attorneys' fees and/or monetary sanctions (motion sequence no. 003) is granted to the extent of dismissing the complaint with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants, and the motion is otherwise denied; and it is further

ORDERED that the motion brought by Relator John Saric to strike a passage from the reply memorandum of law filed by defendants GFI Breslin, LLC, GFI Breslin Manager, LLC and Allen Gross in connection with their motion to dismiss (motion sequence no. 004) is denied.

4/16/2021
DATE

JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:	x CASE DISPOSED		NON-FINAL DISPOSITION	
	GRANTED	DENIED	x GRANTED IN PART	OTHER
APPLICATION:	SETTLE ORDER		SUBMIT ORDER	