SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CEDRO LLC, NEYOR, LLC, and SILVER LINING NYC, LLC, *each individually and derivatively on behalf of the 40 East 72nd Street Condominium*, Plaintiffs, vs. AXIA REALTY, LLC, IONIAN MANAGEMENT, INC., THE BOARD OF MANAGERS OF THE 40 EAST 72ND STREET CONDOMINIUM, SPIROS N. MILONAS, ANTONIA K. MILONAS, and ANDREW DAFNOS, Defendants.	Index No. 653182/2019 Motion Seq. No.: 001

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Reed Smith LLP
599 Lexington Avenue
New York, New York 10022
(212) 521-5400

Attorneys for Plaintiffs

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Plaintiffs CEDRO LLC ("CEDRO"), Neyor, LLC ("Neyor"), and Silver Lining NYC, LLC ("Silver Lining") (together, "Plaintiffs" or "Unit Owners"), by and through their attorneys, Reed Smith LLP, submit this Memorandum of Law, along with the emergency affirmation of Christopher W. Healy, Esq., and the affirmation of Christopher W. Healy, Esq., ("Healy Aff."), in support of their Order to Show Cause for a Temporary Restraining Order and Preliminary Injunction, pursuant to CPLR §§ 6301, 6311, and 6313, requesting the Court issue an Order: (i) appointing Plaintiffs as interim members of the Board of Managers to preserve the status quo of the operation and management of the 40 East 72nd Street Condominium pending the outcome of this litigation; (ii) directing Plaintiffs, as interim members of the Board of Managers, to file a lien for unpaid Common Charges against Axia Realty LLC ("Axia" or "Sponsor") with the appropriate recording officer, or in the alternative, restraining the Sponsor from taking any action that would result in the sale, transfer, mortgage, or encumbrance of the Sponsor-owned units pending the outcome of this litigation; and (iii) restraining Ionian Management, Inc. ("Ionian"), the Sponsor, and Antonia Milonas from transferring or disposing of any assets belonging to or meant for use by the Condominium pending the outcome of this litigation.

PRELIMINARY STATEMENT

This action requires immediate intervention due to the unique and irregular circumstances at issue. Indeed, this is not the typical condominium fact pattern where a condominium's board of managers initiates an action on behalf of unit owners or where condominium unit owners file suit against a condominium's board of managers for actions arguably beyond the scope of the board's authority. In this case, Plaintiffs, as individual unit owners, initiated this action against the Defendants, including the Sponsor and the members of the Board of Managers, for total nonfeasance and their failure to take *any* action, including actions they are contractually and

statutorily obligated to take. The Defendants' complete inaction has caused an ongoing financial and administrative crisis at the Condominium which will continue absent judicial intervention.

Specifically, Plaintiffs have sought to work with Defendants to fix various issues at the Building and avert imminent safety issues. Yet to date, Plaintiffs' demands upon the Sponsor and the Board of Managers Defendants for action have proved futile in light of Defendants' internal family disputes, and the inherent conflict of interest between the Sponsor, the current Sponsor-designated Board of Managers, and the Condominium's officers on the one hand and the Plaintiffs (as the remaining unit owners) and the Condominium's interests on the other hand. Indeed, Defendants Spiros Milonas and Antonia Milonas are each half owners of Axia, the Sponsor, *and* also serve as two of three members of the Board of Managers, in addition to Andrew Dafnos, an employee of the Sponsor. Complicating things more, Spiros Milonas, Antonia Milonas, and Andrew Dafnos are officers of the Condominium and Spiros Milonas' daughters run the day-to-day operations of Defendant Ionian. Beyond that inherent conflict of interest, the Milonas family has been involved in protracted litigation and family infighting regarding control over Axia's financial obligations, such as Axia's obligations to pay Common Charges (as discussed below), which has served as a material distraction from the urgent issues at the Condominium at Plaintiffs' expense.

It is indisputable that Defendants' collective failure to act or cooperate with Plaintiffs have effectively frozen operations at the Building which has led to an untenable situation for the Condominium at 40 East 72nd Street. Defendants' decision to neglect their duties and obligations have exposed the Building and Condominium to, among other things, imminent health and safety risks as well as diminished the Plaintiffs' property values, as individual unit owners, for which compensation is insufficient to make Plaintiffs whole. Accordingly, judicial intervention is

necessary to preserve the status quo at 40 East 72nd Street because certain risks to health and safety are imminent as a result of Defendants' continued failure to uphold their duties and obligations.

STATEMENT OF FACTS

A. THE CONDOMINIUM

As detailed in the Complaint, which Plaintiffs incorporate herein, Plaintiffs are owners of residential condominium units within the building located at 40 East 72nd Street, New York, New York (the "Building"), subject to Article 9-B of the New York Real Property Law (the "Condominium Act"), as the "40 East 72nd Street Condominium" (the "Condominium").[1] *See generally* Healy Aff, Exhibit A, Complaint. The Condominium is an unincorporated association made up of unit owners, formed by the recordation of the Condominium Documents pursuant to an offering plan filed by the Sponsor on or about November 19, 2014 with the Attorney General of the State of New York (the "Offering Plan"). *See id.*, Exhibit B, Offering Plan. On April 18, 2017, pursuant to Condominium Act, the Sponsor recorded a declaration (the "Declaration"), which included the By-Laws (the "By-Laws") and the Rules and Regulations (collectively, the "Condominium Documents") for the purpose of establishing a plan for condominium ownership of the property and the Building. *Id.*, Exhibit C, Declaration.

CEDRO owns Unit 4, Neyor owns Unit 5, and Silver Lining owns Unit 3. The Sponsor owns the remaining units: 1, 1A, 2, and 6. Moreover, Spiros and Antonia Milonas reside in Unit 6 (the penthouse). Spiros Milonas and Antonia Milonas each also hold a 50% membership interest in Axia, the Condominium's Sponsor, and are the sole members and managers of the Sponsor. Further, and as detailed in the Sixth Amendment to the Offering Plan, the Sponsor

[1] Plaintiffs paid a substantial sum, in excess of $30 million, for the use and enjoyment of their individual units under the expectation that the Sponsor would uphold its contractual and statutory obligations regardless of any Milonas interfamily dispute.

controls the Board of Managers of the Condominium, which consists of three Sponsor-designated Members: Spiros Milonas, as President, Antonia Milonas, as Vice-President, and Andrew Dafnos, an employee of the Sponsor, as Secretary/Treasurer (the "Board of Managers Defendants"). Thus, Mr. and Mrs. Milonas control the Sponsor and collectively make up a majority of the Board of Managers.

B. THE DEFENDANTS FAIL TO TAKE ANY ACTION TO OPERATE THE CONDOMINIUM CREATING SEVERE HEALTH AND SAFETY CONCERNS

1. Due to Family Infighting and Domestic Disputes, the Sponsor and Board of Managers Defendants Have Neglected Their Duties and Obligations

The untenable situation at the Building is the result of litigation, finger pointing, and family infighting between members of the Milonas family which has caused ongoing damage to the Condominium and the Plaintiffs. A cursory review of the intrafamily fighting further underscores Plaintiffs' urgent need for judicial intervention.

The Milonas family is engaged in hostile and contentious litigation regarding (1) the ability of Phoenix Capital Finance LTD's ("Phoenix")[2] to recover on a $2.2 million promissory note made to Axia (the Sponsor) (*Phoenix Capital Finance LTD. v. Axia Realty LLC*, No. 654934/2017 (Sup. Ct. N.Y. Cnty.)) and (2) Antonia Milonas's rights to enforce obligations under a prenuptial agreement with Spiros Milonas (*Milonas v. Milonas*, No. 306820/2018 (Sup. Ct. N.Y. Cnty., Matrimonial Part)). The core issue surrounding both cases is the disagreement over who maintains responsibility for the control and finances of Axia (the Condominium's Sponsor). In *Phoenix*, Antonia Milonas argues that, due to a prenuptial agreement, Spiros Milonas, and not Axia, is personally responsible for Axia's obligations, including the repayment of the $2.2 million loan. Interestingly, in *Phoenix*, Antonia Milonas filed an affidavit that the

[2] Defendant Ionian oversees Ionian Group that has many subsidiaries and affiliated entities. Phoenix is one of those subsidiaries/affiliated entities, like Ionian, and is run by Defendant Spiros Milonas's daughters.

common charges for the Sponsor-owned units at the Building "is the personal obligation of [Spiros Milonas] since Axia is marital property for which he is required to pay the common charges pursuant to our prenuptial agreement." *See* Index No. 654934/2017, Dkt. No. 102, ¶ 3. To the contrary, Axia, and Phoenix (as stated *supra*, like Defendant Ionian, Phoenix is run by Spiros Milonas' daughters), argue that Axia, and not Spiros Milonas, is responsible for Axia's finances and therefore Axia is required to repay the loan.

The *Phoenix* filings outline the overtly hostile relationship between Antonia Milonas and Spiros Milonas' daughters, who run both Phoenix and Defendant Ionian. Indeed, in *Phoenix*, Antonia Milonas filed an affidavit stating that Spiros Milonas' daughters "manipulate" Spiros Milonas into taking positions and stances contrary to the interests of Antonia Milonas. *See* 654934/2017, Dkt. No 58. The filings also portray a messy and an ongoing dispute between Antonia Milonas and Spiros Milonas regarding the control of Axia and their marital agreements.

Plaintiffs have no doubt that the Milonas family dispute is the cause of the disarray at the Building and will present itself in this Action, serving no purpose other than to prolong Plaintiffs', and the Condominium's, entitlement to equitable relief. This is especially true considering the representations made by counsel to Antonia Milonas in response to Plaintiffs' requests for action to the Board of Managers Defendants: that "payment of charges and assessments relating to units owned by Axia Realty, LLC is the personal obligation of Spiros N. Milonas, which he has acknowledged, has paid in the past and has attempted to pay currently, but which his daughters have deliberately prevented him from paying." *See* Healy Aff., Exhibit F, April 17, 2019 Email from A. Tersigni. Indisputably, therefore, the Milonas family infighting has created an intractable logjam for the Condominium and the Milonas domestic disputes have caused operations at the Building to grind to a halt. Plaintiffs now find themselves as collateral

damage to a family dispute and seek the Court's assistance to maintain the status quo at the Building so that they may maintain the benefit of the use and enjoyment of their Condominium units.

2. The Sponsor's Failure to Pay its Share in Common Charges Caused Plaintiffs to Pre-Pay Two Months of Their Share in Common Charges

The Sponsor and the Board of Managers Defendants are obligated to comply with various responsibilities provided for in the Condominium Documents. *See generally* Healy Aff., Exhibit B, Offering Plan, Exhibit C, Declaration. As laid out more fully in the Complaint, each unit owner has an "obligation to pay Common Charges, Assessments and Special Assessments or other expenses when due." *See* Exhibit B, Offering Plan, page 139. "Common Charges," as defined in the By-Laws, are "[e]ach Unit Owner's proportionate share of the Common Expenses, payable by the individual Unit Owner." *See* Exhibit C, Declaration, By-Laws, page 281. "Common Expenses," as defined in the By-Laws, are "(a) expenses of operation of the Property; and (b) all sums designated Common Expenses by or pursuant to the provisions of the New York Condominium Act, the Declaration or the By-Laws." *Id.* "Assessments," as defined in the By-Laws, are "charges allocated and assessed by the Board of Managers to the Unit Owners, pro rata, in accordance with their respective Common Interest."[3] *Id.*, at 280.

Article VI, Section 1 of the By-Laws states in pertinent part: "The Sponsor or Sponsor-designee shall be responsible for the Common Charges assessed against a Unit owned by it from the date of the First Unit Closing until such Unit is sold to a bona fide purchaser." *Id.*, at page 313.

Article VI, Section 6 of the By-Laws provides: "In the event of default by any Unit Owner in paying to the Board of Managers the Common Charges or any Assessment as

[3] References to "Common Charges" include Assessments.

determined by the Board of Managers, such Unit Owner shall be obligated to pay interest at the highest legal rate on such Common Charges or Assessments from the due date thereof, together with all expenses, including late fees charged by the Board of Managers and attorneys' fees incurred by the Board of Managers in any proceeding brought to collect such unpaid Common Charges or Assessments." *Id.* at 318.

The Sponsor, as owner of Units 1, 1A, 2, and 6, has directly violated Section 5 of the "Rights and Obligations of the Sponsor" portion of the Offering Plan and Article VI, Section 1 of the By-Laws, because, as of June 14, 2019, the Sponsor has failed to pay its Common Charges against Units 1, 1A, 2, and 6 in the amount of $174,564.00, exclusive of late fees and interest, which continue to accrue. *See* Healy Aff., Exhibit E, Delinquency Report, dated June 14, 2019.

The Sponsor's failure to uphold its obligations has rendered the Condominium nearly insolvent and without adequate funds to operate and maintain the Building. Towards the end of May 2019, having received no response from the Defendants to their request that the Board of Managers Defendants collect unpaid Common Charges or otherwise impose a lien for unpaid Common Charges against the Sponsor-owned units, Plaintiffs prepaid two monthly installments of their Common Charges, in addition to their May installment of Common Charges. Plaintiffs made these one-time prepayments fearing for the alternative: absolutely no operation at the Condominium, defaults to third party vendors, and insufficient funds for staff salaries and utilities. However, Plaintiffs' prepayment is not enough to fund Condominium operations beyond mid-to-late June 2019.

3. The Board of Managers Defendants Refuse to Administer the Affairs of the Condominium

The Board of Managers Defendants are contractually obligated to take action "necessary for the administration" of the Condominium pursuant to Article II, Section 3 of the By-Laws,

which imposes "Powers and Duties" upon the Board of Managers Defendants. *See* Healy Aff., Exhibit C, By-Laws, Article II. Among those responsibilities, the Board of Managers Defendants must: contract for necessary services for the operation, care, upkeep, and maintenance of the common elements, determining Common Charges, collecting the Common Charges from all unit owners, employing the Building's staff necessary for the operation of the Condominium, opening bank accounts for the Condominium, negotiating all claims related to the Condominium, and levying late payment charges against unit owners for late payment of Common Charges. *Id.*

However, the Board of Managers Defendants have taken no action to manage, operate or administer the Condominium, as required by the By-Laws. Indeed, Plaintiffs have issued notices and demands requesting the Board of Managers Defendants uphold their responsibilities by, among other things, collecting unpaid Common Charges from the Sponsor. *See* Healy Aff., Exhibit F, Plaintiffs' Petition and Respective Correspondence, dated April 12, 2019. However, these requests have proven futile given the obvious conflict between the interests of the Condominium and the Plaintiffs versus the interests of the Sponsor, the Board of Managers Defendants, and the Condominium's Officers. As stated above, Mr. and Mrs. Milonas control the Sponsor and the entire Board of Managers.

The By-Laws provide that the President shall "call a special meeting of the Unit Owners … upon a petition signed by a majority of the Unit Owners as defined in Section 9 of this Article III having been presented to the Secretary." *See* Healy Aff., Exhibit C, Declaration, By-Laws, Article III, Section 3, at page 309. The Plaintiffs, hoping to force the Board of Managers Defendants to respond to an official petition pursuant to the By-Laws, petitioned the Board of Managers Defendants to hold a special meeting of the unit owners. Accordingly, on April 12,

2019, Plaintiffs, constituting a majority of the unit owners as defined in Article III, Section 9 of the By-Laws,[4] presented Defendant Andrew Dafnos, in his capacity as Secretary/Treasurer of the Condominium, with a petition to hold a special meeting of the unit owners on May 3, 2019. *See* Healy Aff., Exhibit F. A copy of the Petition was also provided to Mr. Milonas, in his capacity as President of the Condominium, to Mrs. Milonas in her capacity as Vice-President of the Condominium, and to the Sponsor. *See id.*

The purpose of the petition was to elect new members of the Board of Managers who would properly operate and administer the affairs and finances of the Condominium and the Building, especially in consideration of the Sponsor's and the Board of Managers Defendants' total refusal and failure to uphold their statutory and contractual obligations. Moreover, the Plaintiffs requested that the Board of Managers Defendants file a valid lien against the units owned by the Sponsor for unpaid Common Charges.[5] Defendants failed to comply with those requests.

4. The Sponsor's Failure to Pay its Share of Common Charges and the Board of Managers Defendants' Refusal to Administer the Affairs of the Condominium Have Created Risks to Health and Safety at the Building

As a result of the Sponsor's non-payment of its share of Common Charges, and the Board of Manager Defendants' refusal to file liens or take any other action to collect those Common Charges, the Sponsor-controlled Board of Managers has created incipient health and safety

[4] Plaintiffs constitute 100% of the authorized votes because the Sponsor, as the unit owner of delinquent units, cannot vote. *See* Healy Aff., Exhibit C, Declaration, By-Laws, Article VI, Section 6; Article III, Section 9.

[5] The Offering Plan incorporates the Condominium Act and explicitly provides that "[u]nder the provisions of Section 339-z of the Real Property Law of the State of New York, the Board of Managers on behalf of the Unit Owners will have a lien on each Unit for unpaid Common Charges assessed by the Board of Managers." The Offering Plan, incorporating Section 339-aa of the Condominium Act, further provides that "[s]uch lien may be foreclosed by a suit brought in the name of the Board of Managers acting on behalf of the Unit Owners . . . ."

concerns for the Plaintiffs and the Condominium. As stated herein and in the Complaint, in the absence of an active governing body, the Condominium will be unable to pay its bills or take action necessary to ensure the habitability of the Condominium. Indeed, after mid-to-late June of 2019, the Condominium will be unable to (i) pay utility bills, (ii) issue payments to staff who run the maintenance and operation of the Condominium, including trash collection and consolidation, or (iii) pay insurance premiums, management fees and maintenance costs.

If the Court does not order corrective action, the Condominium will default on property taxes and utility bills, which would mean that electricity to the Building's common areas will likely be shut off. Without electricity to the common areas, the Building's fire alarm panels will be non-functioning, the intercom system will be offline, video surveillance will cease operating, and the Building's elevator will be inoperable. If the Condominium cannot pay staff, security will be compromised and other risks to occupant and worker health and safety will be realized. Without a staff, the Building's common areas will not be attended to and Building-wide trash removal will cease. Without a doorman or operating intercom system, anyone will be able to enter the Building at any day or time, raising serious safety and security concerns. Further, if the Condominium cannot pay its fees the Building's management company will cease servicing the Building and, as a result, there will be no designated manager to coordinate tax payments, pay vendors and staff, negotiate third-party contracts, and generally handle day-to-day operations at the Building. As long as Defendants fail to correct the issues at the Condominium, Plaintiffs' property values will continue to decline and the owners will be unable to enjoy the units they purchased at 40 East 72nd Street. Essentially, there will be complete chaos with respect to the administration and management of the Condominium.

C. DEFENDANTS HAVE RETAINED FUNDS BELONGING TO OR MEANT FOR USE BY THE CONDOMINIUM

Ionian and Antonia Milonas are in possession of funds belonging to or meant for use by the Condominium. Indeed, Mrs. Milonas attested in legal documents that she transferred approximately $196,871.23 from Axia's account to her personal account, which she claims is her effort to safeguard the funds for Axia. These funds belong to Axia, not Mrs. Milonas, and should be available to the Condominium. Moreover, these funds were *not* used to pay the unpaid Common Charges on behalf of the Sponsor.

Further, Ionian received a check from the Condominium's insurance carrier for approximately $187,525.17 on or about May 1, 2018, that was meant to be distributed to the Condominium's contractors who were retained to repair damage at the Condominium caused by a water leak at the Building. Despite Plaintiffs' requests, there has been no accounting for these proceeds and many contractors are still owed money from the Condominium.

ARGUMENT

A. PLAINTIFFS ARE ENTITLED TO IMMEDIATE INJUNCTIVE RELIEF

Pursuant to CPLR § 6301, a preliminary injunction may be granted "in any action where it appears that the defendant threatens or is about to do . . . an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." CPLR § 6301.

To obtain a preliminary injunction, a party seeking relief must demonstrate: (1) a likelihood of ultimate success on the merits of the party's underlying claim; (2) an irreparable harm to the party if the relief is withheld; and (3) that the balance of equities tips in favor of the

party. *Second on Second Cafe, Inc. v. Hing Sing Trading, Inc.*, 66 A.D.3d 255, 264, 884 N.Y.S.2d 353 (1st Dep't 2009); *Handler v. 1050 Tenants Corp.*, 295 A.D.2d 238, 239 (1st Dep't 2002). The decision whether to grant a preliminary injunction "is a matter ordinarily committed to the sound discretion of the court hearing the motion." *Harbor View Ass'n v. Sucher*, 237 A.D.2d 488, 490 (2d Dep't 1997). Moreover, CPLR § 6312(a) "in no way compels a movant to submit any proof in support of an application for a preliminary injunction other than an affidavit." *Park South Assocs. v. Blackner*, 171 A.D.2d 468, 469 (1st Dep't 1991). Nor does a dispute of fact bar the granting of a preliminary injunction. *See* CPLR § 6312(c) ("Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion…."). Further, a mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought as a final judgment, is granted in situations "where the granting of the relief is essential to maintain the status quo pending trial of the action. *Second on Second Cafe*, 66 A.D.3d at 264.

As set forth below, Plaintiffs satisfy the standards for obtaining a preliminary injunction and temporary restraining order here through the provision of the accompanying Affidavits and evidence attached thereto.

1. Plaintiffs Are Highly Likely to Succeed on the Merits of their Claims

To establish a likelihood of success on the merits, Plaintiffs need only show a *prima facie* entitlement to relief. *Ying Fung Moy, v. Hohi Umeki*, 10 A.D.3d 604, 604-05 (2d Dep't 2004); *McLaughlin, Piven, Vogel Inc. v. W. J. Nolan & Co.*, 114 A.D.2d 165, 172-73 (2d Dep't 1986). As discussed below, Plaintiffs are likely to succeed on their underlying claims, including their claim for injunctive relief. It is indisputable that Defendants have failed to meet their statutory

and contractual obligations. These are black and white issues as to which there can be no material facts in dispute.

a. The Sponsor and Board of Managers Defendants have Breached the Condominium Documents and Will Continue to Do So

Plaintiffs are likely to prevail on their contractual claims at trial. *JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803 (2d Dep't 2010) (breach of contract claims requires "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages").

Here, it is indisputable that the Sponsor and the Board of Managers Defendants have breached their contractual obligations to the Plaintiffs and to the Condominium. First, there were binding contracts between the parties: the Condominium Documents and the Offering Plan.[6] *See Caprer v. Nussbaum*, 36 A.D.3d 176, 190, 825 N.Y.S.2d 55, 68 (2d Dep't 2006) (A "sponsor is thus liable in contract to satisfy the obligations set out in the offering plan and entered into by each individual unit owner."). Second, Plaintiffs fulfilled all of their obligations under the Condominium Documents. Third, the Sponsor and the Board of Managers Defendants have failed to fulfill their obligations under the Condominium Documents with respect to the Plaintiffs' interests, as unit owners, and with respect to the Condominium's interest, as outlined above. *See Caprer*, 36 A.D.3d at 190 ("[A] unit owner may bring a derivative action on behalf of the condominium" to protect the interests in the common elements of the condominium). Finally, the Plaintiffs, as individual unit owners, and the Condominium, have suffered, and continue to suffer, as a result of the Sponsor's and the Board of Managers Defendants' breaches

[6] Plaintiffs are unit owners who purchased their units pursuant to purchase and sale agreements with the Sponsor. Plaintiffs' purchase and sale agreements expressly provide that the Offering Plan, and all filed amendments thereto, which includes the Condominium Documents, are incorporated into each purchase and sale agreement and that all conflicts between the provisions of each purchase and sale agreement and the Offering Plan will be resolved in favor of the Offering Plan.

because, among other reasons, they are unable to use and enjoy the Condominium due to the total abdication and dereliction of duties by the Sponsor and the Board of Managers Defendants; namely their obligations to manage and administer the Condominium.

b. The Board of Managers Defendants Have Breached their Fiduciary Duties

Plaintiffs are similarly likely to prevail on their alternative claim against the Board of Managers Defendants for breach of their fiduciary duties. It is well settled that "a sponsor-appointed board of managers of a condominium owes a fiduciary duty to the unit purchasers." *Bd. of Managers of Fairways at N. Hills Condo. v. Fairway at N. Hills*, 193 A.D.2d 322, 327, 603 N.Y.S.2d 867, 870 (1993); *Caprer*, 36 A.D.3d at 193 ("[T]here is no dispute that … members of the board owe a fiduciary duty to the individual unit owners in their management of the common property."). Moreover, under New York law, "the failure of the board members to cause the association to discharge its obligations may be proper grounds" to hold condominium board members liable in their official capacities. *Alexander Condo., by its Bd. of Managers v. E. 49th St. Dev. II, LLC*, No. 15813/2016, 2018 WL 4352128 (N.Y. Sup. Ct. N.Y. Cnty. 2018).

Here, the Board of Managers Defendants have breached their fiduciary duties to Plaintiffs and the Condominium for the reasons set forth above and in the Complaint and by taking absolutely no action to manage, operate or administer the Condominium, all to Plaintiffs' detriment.

c. The Sponsor and the Board of Managers Defendants have Breached the Condominium Act and Will Continue To Do So

Plaintiffs have already established *prima facie* facts supporting their claims against the Sponsor and the Board of Managers Defendants. Plaintiffs have standing to assert both direct and derivative claims under Section 339-j of the Condominium Act:

> Each unit owner shall comply strictly with the by-laws and with the rules, regulations, resolutions and decisions adopted pursuant thereto. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief or both maintainable . . . *in a proper case, by an aggrieved unit owner*.

(emphasis added). This is a proper case because the Board of Managers is controlled by the Sponsor. Plaintiffs have made demands on the Defendants, but to no avail. Plaintiffs are aggrieved unit owners who have been damaged by the Sponsor's failure to uphold its obligations under the By-Laws. Specifically, as stated herein, the Sponsor owns Residential Units 1, 1A, 2 and 6 (the penthouse) and is required to comply with the By-Laws. Article VI, Section 1 of the By-Laws states in pertinent part that: "The Sponsor or Sponsor-designee shall be responsible for the Common Charges assessed against a Unit owned by it from the date of the First Unit Closing until such Unit is sold to a bona fide purchaser." The Sponsor has failed to pay Common Charges assessed against Units 1, 1A, 2 and 6, and the Board of Managers Defendants have failed to collect those unpaid Common Charges. Therefore, the Board of Managers Defendants and the Sponsor are in violation of the Condominium Act.

d. The Sponsor Fraudulently Induced Plaintiffs into Purchasing their Units

Plaintiffs will also be successful on their claims for fraudulent inducement, which were pled in the alternative. To establish a claim for fraudulent inducement, the plaintiff must allege and prove that "a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the

plaintiff, and resulting injury." *JMC Northeast Corp. v Oscar Porcelli and 2318, LLC*, No. 651166/2010, 2012 WL 8960501, at *5 (N.Y. Sup. Ct. May 31, 2012) (citing *Pope v. Saget*, 29 A.D.3d 437, 441 (1st Dep't 2006)).

Here, the Sponsor prepared and circulated all of the Condominium Documents, the Offering Plan to promote sales of the Condominium's units, and sales and marketing materials for the Condominium, all of which contained material misrepresentations. Among those misrepresentations were Defendants' knowingly false promises that the Sponsor would oversee and manage the Condominium and otherwise provide the necessary financial resources to meet its financial obligations, and that Sponsor would correct construction deficiencies within the Building. The Sponsor knew that Plaintiffs would rely upon the representations within the Condominium Documents and marketing materials when purchasing their respective units. Indeed, Plaintiffs did rely on the representations made within the Condominium Documents and marketing materials when Plaintiffs executed their respective purchase and sale agreements. Therefore, Plaintiffs are likely to succeed on their fraudulent inducement claim. *See Bhandari v. Ismael Leyva Architects, P.C.*, 84 A.D.3d 607, 608, 923 N.Y.S.2d 484, 485 (1st Dep't 2011) (finding common-law fraud where "defendant knowingly made a material misrepresentation, purposefully inducing plaintiffs to rely on it, and that plaintiffs, among other things, purchased and prepared to move into the unit").

e. <u>The Sponsor and Ionian Have Refused to Provide Plaintiffs with an Accounting of Insurance Proceeds Meant for Distribution on behalf of the Condominium</u>

Plaintiffs will also prevail on their claim for an accounting from Ionian and the Sponsor of the insurance proceeds issued to the Sponsor to reimburse costs associated with damage caused by a leak at the Building in or around January 2018. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty

imposed by that relationship respecting property in which the party seeking the accounting has an interest." *See Lawrence v. Kennedy*, 95 A.D.3d 955, 958 (2d Dep't 2012). Here, and as stated in the Complaint, Ionian received insurance proceeds meant for the Condominium, and Ionian has to date failed to provide the Condominium's property manager with an accounting of those funds. Indeed, Ionian managed the construction and the marketing of the Condominium. Moreover, Spiros Milonas, a Sponsor-designated member of the Board of Managers who owes a fiduciary duty to the Plaintiffs, serves as Chairman and President of the Board at Ionian. Therefore, Plaintiffs are highly likely to succeed on their claim for an accounting.

f. Antonia Milonas has Converted Funds Belonging To and Meant for Use By the Condominium

Plaintiffs, derivatively on behalf of the Condominium, will also be successful on their claim for conversion against Antonia Milonas. Conversion "is established when one who owns and has the right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner." *Republic of Haiti v. Duvalier*, 211 AD2d 379, 384 (1st Dep't 1995); *Gamiel v. Curtis & Riess-Curtis, P.C.*, 16 A.D.3d 140, 141, 791 N.Y.S.2d 78, 79 (1st Dep't 2005); *see also Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 50, 860 N.E.2d 713, 717 (2006) ("Two key elements of conversion are (1) plaintiff's possessory right or interest in the property; and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights.") (citations omitted).

Plaintiffs, derivatively on behalf of the Condominium, will succeed on their claim for conversion. Antonia Milonas affirmed in legal documents that she transferred funds out of Axia's account—funds belonging to, and meant for use by, the Condominium—for

"safeguarding." The Condominium, therefore, has an interest in the funds, and Antonia Milonas has exerted control and possession over those funds to the Condominium's detriment.

g. Plaintiffs are Entitled to Injunctive Relief

Based on the above-outlined conduct, Plaintiffs have more than met their burden to show that they will likely succeed on their claims for injunctive relief against Defendants. *See Maestro W. Chelsea SPE LLC v. Pradera Realty Inc.*, 38 Misc. 3d 522, 535 (Sup. Ct. N.Y. Cnty. 2012) (granting preliminary injunction and finding likelihood of success on the merits where plaintiffs stated a claim for declaratory judgment to "establish the legal rights of the parties under the" relevant contracts for the purpose of preventing defendant from "selling or otherwise encumbering defendant's unused property rights"); *Larson Wulff & Co. v. Margulies*, 94 Misc. 2d. 847, 849 (Sup. Ct. N.Y. Cnty. 1978) (granting preliminary injunction and finding "likelihood of ultimate success on the merits in plaintiff's favor is almost inevitable.").

2. Plaintiffs Will Suffer Irreparable Harm in the Absence of Injunctive Relief and Will Have No Adequate Remedy at Law

Plaintiffs will suffer irreparable harm if the Court does not issue an Order: (i) appointing Plaintiffs as interim members of the Board of Managers to preserve the status quo of the operation and management of the Condominium pending the outcome of this litigation; (ii) directing Plaintiffs, as interim members of the Board of Managers, to file a lien for unpaid Common Charges against the Sponsor with the appropriate recording officer, or in the alternative, restraining the Sponsor from taking any action that would result in the sale, transfer, mortgage, or encumbrance of the Sponsor-owned units pending the outcome of this litigation; and (iii) restraining Ionian, the Sponsor, and Antonia Milonas from transferring or disposing of any assets belonging to, or meant for use by, the Condominium.

First, Plaintiffs and the Condominium will be irreparably harmed if the Court does not appoint Plaintiffs as interim members of the Board of Managers to preserve the status quo of the Condominium pending the outcome of this litigation. Indeed, without the Court's intervention, the Condominium and Building will cease to function and will violate various municipal health and safety ordinances.

More specifically, the Defendants' repeated failure to uphold their obligations has rendered the Condominium nearly insolvent and without adequate funds to operate and maintain the Building on an ongoing basis. As stated above, towards the end of May 2019, Plaintiffs made a one-time prepayment of two monthly installments of their Common Charges in recognition of the risks that would result if the Condominium was unable to operate on a day-to-day basis. However, Plaintiffs' prepayment is not enough to fund the Condominium's existing and ongoing expenses beyond mid-to-late June 2019, and Plaintiffs should not be required to prepay additional monthly fees during the pendency of this litigation.

Furthermore, under the current Sponsor-controlled Board of Managers, the Condominium is unable to pay its bills or take necessary action to ensure the safety and habitability of the Condominium. Indeed, after mid-to-late June 2019, the Condominium will be unable to pay utility bills, issue payments to staff who run the maintenance and operation of the Condominium (including trash collection and consolidation), or fund insurance premiums, management fees, and maintenance costs. As stated *supra*, if the Condominium does not have sufficient funds to pay its obligations, electricity to the Building's common areas will be turned off, fire alarm panels will become non-functioning, the intercom system will go offline, video surveillance will cease operating, and the Building's elevator will become inoperable. The functioning of these elements are critical to Plaintiffs' health, safety, and ongoing enjoyment of the Building.

Moreover, if the Condominium cannot pay staff, there will be no one to attend to the Building's common areas and Building-wide trash removal will cease, placing Plaintiffs' and the Building's health and hygiene at risk. The failure to ensure sufficient funding and ongoing administration of the Building would not only irreparably harm Plaintiffs but would also cause public nuisance and harm to the surrounding community and neighborhood at large.[7] Further, if the Condominium cannot pay its staff, the Building's safety will be in jeopardy. Indeed, without security, whether it be surveillance or staff, anyone can walk into the Building without concern or presentment thus creating great danger to the Building and Plaintiffs. Without doubt, the Defendants' failure to take corrective action will result in a dangerous and hazardous environment.

Plaintiffs' request for interim relief is made in light of the Milonas family disputes paired with the indisputable conflict of interest of the Sponsor, the Board of Managers Defendants, and the Condominium's officers. *See* discussion *supra*, Statement of Facts, Section A. Given Defendants' proven pattern of reckless behavior in which they ignore contractual obligations and Plaintiffs' requests that Defendants properly operate the Condominium, Plaintiffs have no faith that Defendants will ever fulfill their obligations. Therefore, absent an Order permitting Plaintiffs to assume interim positions on the Board, Plaintiffs expect they will need to re-appear before this Court every month asking the Court to direct Defendants to perform as they are statutorily and contractually obligated to do so that the Condominium can function as was promised in the Condominium Documents and the Offering Plan.

[7] Indeed, the Sponsor and related entities have already been subject to litigation for public nuisance at the Building as a result of their earlier failure to properly remediate a water leak at the Building. The Sponsor's continued failure to uphold its obligations outlined herein again will subject the Building and the Condominium to similar complaints and legal action from the community and neighboring buildings for unsanitary, hazardous and unsafe conditions. *See, e.g.*, *36 East 72nd Street Corp. v. Axia Realty LLC et al*, No. 153104/2015 (Sup. Ct. N.Y. Cnty.).

There has been no direction, control or management of the Condominium by the Defendants, and absent judicial intervention this administrative and financial crisis and untenable situation will continue in perpetuity or at least until the resolution of the Milonas family disputes and litigation – an unknown period of time. Therefore, an Order appointing Plaintiffs as interim members of the Board of Managers is necessary to preserve the status quo to maintain the continuous operation and administration of the Condominium over the course of this litigation.

Second, the Court should issue an Order directing Plaintiffs, as interim members of the Board of Managers, to file a lien for unpaid Common Charges against the Sponsor with the appropriate recording officer, or in the alternative, restraining the Sponsor from selling,[8] transferring, mortgaging, or otherwise encumbering the Sponsor-owned Units (1, 1A, 2, and 6) pending the outcome of this litigation because "denial thereof would render any final judgment ineffectual." *Board of Mgrs. of the 235 E. 22nd St. Condo. v. Lavy Corp.*, 233 A.D.2d 158, 161,649 N.Y.S.2d 668, 671 (1st Dep't 1996) (preliminary injunction was proper to restrain defendants from transferring condominium units where certain taxes had not been paid to maintain status quo pending resolution since denial would render final judgment ineffectual); *Elizabeth St. Inc. v. 217 Elizabeth St. Corp.*, 301 A.D.2d 481, 482, 755 N.Y.S.2d 33, 34 (1st Dep't 2003) (upholding preliminary injunction barring defendants from transferring or encumbering the property at issue to maintain status quo); *Blake v. Biscardi*, 52 A.D.2d 834, 382 N.Y.S.2d 831 (2nd Dep't 1976) (enjoining the respondents from conveying certain properties pending a final determination on the merits since such a conveyance might render any judgment ineffectual); *Dermot Co., v. 200 Haven Co.*, No. 601098/2006, 2006 WL 4682185 (N.Y. Sup. Ct.

[8] While New York law is clear that a preliminary injunction restraining the transfer of real property is proper to maintain the status quo, the Sponsor is unable to sell *any* units because the Offering Plan has expired. *See* Complaint, ¶ 5; *see also* 13 NYCRR Parts 20.3(a)(5) and 20.5(c) (implementing N.Y. GBL § 352-e; *Id.* Article 23-A).

N.Y. Cnty. Aug. 07, 2006); *Novello v 215 Rockaway, LLC*, No. 2426-07, 2008 WL 412625 (N.Y. Sup. Ct. Nassau Cnty. Feb. 05, 2008) ("The loss of realty satisfies as a predicate for irreparable harm, and 'a conveyance might render any judgment ineffectual'") (citation omitted).

As outlined above and in the Complaint, the Sponsor has failed to pay its share in Common Charges and despite Plaintiffs' demands, the Board of Managers Defendants have failed, and in fact ignored Plaintiffs' demands, to: (i) call a special meeting of the unit owners; (ii) file a lien for Common Charges against Sponsor, which is authorized by Section 339-z of the Condominium Act; and (iii) to begin an action to foreclose that lien as set forth in Section 339-aa of the Condominium Act. Under New York law, a lien for unpaid common charges "does not become effective until a verified notice of lien is filed in the office of the appropriate recording officer." *Mortg. Elec. Registration Sys., Inc. v. Levin*, 63 A.D.3d 890, 892, 882 N.Y.S.2d 183, 184 (2009); *see* N.Y. Real Prop. Law § 339-aa. Accordingly, while there exists a statutory lien against the Sponsor for unpaid Common Charges in theory, that lien is not valid and cannot be enforced against the Sponsor because the Board of Managers Defendants have failed to file notice of the lien.

Because there is no valid lien against the Sponsor to collect Common Charges, the Plaintiffs and the Condominium will be irreparably harmed absent an order restraining the Sponsor from selling, transferring, mortgaging or otherwise encumbering the Sponsor-owned Units. *Bd. of Managers of 235 E. 22nd St. Condo.*, 233 A.D.2d at 161. Specifically, a lien for common charges is considered the "only security for past due common charges" even where, such as here, Plaintiffs have asserted claims for monetary damages against the Defendants. *Id.* Consequently, if the Sponsor attempts to sell, transfer, mortgage, or otherwise encumber Units 1, 1A, 2 and/or 6, during the pendency of this litigation, the Condominium's claim to unpaid

Common Charges will be considered non-existent or become subordinate in status to any mortgage or sale of the Sponsor-owned Units. N.Y. Real Prop. Law § 339-z (a "board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon, prior to all other liens except only ... (ii) all sums unpaid on a first mortgage of record."). Therefore, the Court should restrain the Sponsor from selling, transferring, mortgaging, or otherwise encumbering Units 1, 1A, 2, and 6 to maintain the status quo pending the outcome of this litigation. *Id.*

Third, Plaintiffs and the Condominium will be irreparably harmed if Ionian, Axia, and/or Antonia Milonas, and all those acting in concert or cooperation with them, transfer or dispose of funds belonging to, or meant for use by, the Condominium during the pendency of this litigation. Under the By-Laws, the Sponsor was required to open a bank account in the name of Axia Realty, LLC to deposit funds for use by the Condominium. As detailed in the Complaint, however, on or around September 2018, Mrs. Milonas—who holds a 50% membership interest in Axia, is one of two members and managers of Axia, serves as Axia's Vice President, and is a Sponsor-designated member of the Board of Managers—filed a sworn affidavit in a separate court action wherein she stated she transferred Axia's funds into her own personal account. Specifically, upon information and belief, Mrs. Milonas attested that she transferred the remaining balance of $196,871.23 from Axia's account to her personal account, which Mrs. Milonas claims she is using to safeguard funds for Axia. These funds belong to Axia, not Mrs. Milonas and "the failure to grant the preliminary injunction may result in the assets being dissipated or secreted" rendering any judgment ineffectual. *See Morgenthau v. A.S. Goldmen & Co.*, 283 A.D.2d 212, 724 N.Y.S.2d 306 (1st Dep't 2001).

Similarly, Plaintiffs and the Condominium will be irreparably harmed if Ionian continues to retain funds properly belonging to the Condominium. Again, there is an inherent conflict of interest among Defendants that has served to benefit no one but the Milonas family while negatively impacting Plaintiffs and the Condominium. As detailed above, Ionian managed the construction and marketing of the Condominium. Mr. Milonas's daughters, Claire Milonas and Sofia Milonas, are each employed as Vice Presidents at Ionian, and Mr. Milonas serves as Chairman and President of the Board at Ionian. It is indisputable that a check for insurance proceeds ($187,525.17) for the Condominium was provided to Ionian for distribution on or about May 1, 2018. The funds were issued for expenses incurred related to a leak in the Building. To date, however, Ionian has failed to provide proof of distribution or an accounting regarding the insurance proceeds to the Condominium.

Therefore, Plaintiffs and the Condominium will be irreparably harmed if the Court does not issue an Order restraining Ionian, Axia, and/or Antonia Milonas from transferring or otherwise disposing of funds belonging to, or meant for use by, the Condominium. This type of relief is necessary "to restore the status quo that was disturbed by action undertaken immediately prior to suit so as to prevent the dissipation of property that could render the judgment ineffectual." *See 1650 Realty Assoc., LLC v. Golden Touch*, 101 A.D.3d 1016, 956 N.Y.S.2d 178 (2d Dep't 2012).

3. The Balancing of the Equities Favors Plaintiffs' Request for Injunctive Relief

Here, a balancing of the equities involves an assessment of the risk of serious injury to Plaintiffs and the Condominium versus Defendants' interest in continuing control of the Condominium. Plaintiffs' interests overwhelmingly tip the balance of the equities in their favor and demand the granting of a preliminary injunction. Plaintiffs have every right, in

their own capacity as unit owners and derivatively on behalf of the Condominium, to a properly operating, safe, and sanitary Building. Conversely, the Sponsor, including Mr. and Mrs. Milonas as 50% owners of Axia, have profited from the use of the penthouse, and ownership of the unsold units, all without paying Common Charges associated with their units. Indeed, the Board of Managers and Ionian have similarly reaped the benefits of the Defendants' malfeasance while Plaintiffs continue to suffer. Defendants have selfishly disregarded contractual and statutory responsibilities, and have instead put their own interests and needs over the health, safety, and security of Plaintiffs. Accordingly, the equities favor granting temporary and preliminary injunctive relief to Plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be granted in its entirety, along with such other and further relief the Court deems just, proper, and equitable.

Dated: New York, New York
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REED SMITH LLP

By: __/s/ *Christopher W. Healy*____

Christopher W. Healy
Spencer D. Wein
Melissa A. Brown
599 Lexington Avenue
New York, NY 10022
Tel: (212) 521-5400
Fax: (212) 521-5450
Email: chealy@reedsmith.com
swein@reedsmith.com
mabrown@reedsmith.com

Attorneys for Plaintiffs