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

PRESENT: BERNARD J. FRIED PART 60

HON. BERNARD J. FRIED Justice

E-FILE

HF Lexington KY LLC,

Index No. #651003/2011

Plaintiff,

MOTION DATE

-against-

MOTION SEQ. NO. #001

Wildcat Synergy Manager LLC, et.al.,

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED.

Dated: 4/3/2012

J.S.C.

HON. BERNARD J. FRIED

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST [ ] REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 60

- X

HF LEXINGTON KY LLC,

Plaintiff,

- against -

Index No. 651003/2011
DECISION & ORDER

WILDCAT SYNERGY MANAGER LLC, YITZI KARASICK, and WILDCAT SYNERGY EQUITIES, LLC,

Defendants.

- X

APPEARANCES:

For Plaintiff:

Ganfer & Shore, LLP
360 Lexington Avenue
New York, New York 10017
(Mark A. Berman)

For Defendants:

Graber PLLC
405 Lexington Avenue, 7th Floor
New York, New York 10174
(Daniel Graber)

FRIED, J.:

Defendants move, pursuant to CPLR 3211 (a) (1), (3) and (7), to dismiss the Complaint.

This action arises out of the purchase of a 312-unit apartment complex in Lexington, Kentucky (the Property) for the purchase price of $13.6 million. Plaintiff HF Lexington KY LLC (Plaintiff) is a limited liability company owned by several New York real estate attorneys. On October 10, 2008, Plaintiff invested $480,000 with, and became a member of, defendant Wildcat Synergy Equities, LLC (Wildcat Equities), the entity that purchased the Property. Plaintiff claims that the managing member of Wildcat Equities, defendant Wildcat Synergy Manager LLC (Wildcat Manager) and its principal, defendant Yitzi Karasick

(Karasick), failed to conduct appropriate and basic due diligence prior to closing the deal, and ended up buying an apartment complex that was worth substantially less than the purchase price due to a high rate of vacancies, undisclosed rent concessions to certain tenants, municipal code violations, and the fact that many of the apartments were damaged, in need of repair, and, in some case, uninhabitable. Plaintiff brings this lawsuit seeking to rescind its participation in the purchase of the Property, or, alternatively, to recover Plaintiff's investment of $480,000 based on defendants' alleged false representations and omissions regarding the Property's condition and value.

As is relevant, the Complaint alleges that Wildcat Equities or its assignor entered into a contract to purchase the Property from WK Pegasus, LLC (Seller) for $13.6 million (the Contract of Sale) on June 3, 2008. Complaint, ¶ 14. Paragraph 8 of the Contract of Sale allegedly gave Wildcat Equities "the right to conduct a complete physical inspection of the Property and a review of the tenant leases." *Id.*, ¶ 21.[1] The Contract of Sale also required the Seller to provide Wildcat Equities with a certified rent roll that is complete and accurate as of the date of the closing. *Id.*, ¶ 22. In addition, the Seller was required to make available all tenant leases, audited financial statements for the prior three years, an interim rent roll, and all other records and information regarding the Property, including notices and correspondence to and from government entities. *Id.*, ¶ 23.

Plaintiff alleges that, on June 6, 2008, in order to induce it to make a significant investment in purchasing the Property, Karasick sent plaintiff an Offering Memorandum

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[1] The Contract of Sale is not an exhibit to the Complaint, and a copy has not otherwise been furnished to the court.

prepared by a representative of the Seller, Marcus & Millichap Real Estate Investment Services. Complaint, ¶ 24. This Offering Memorandum represented that only 21 of the 312 apartment units were vacant. *Id.* Each page of the Offering Memorandum indicated, however, that Marcus & Millichap did not verify the accuracy of any of the information, and that "'[b]uyer must verify the information and bears all risk for any inaccuracies" by conducting its own "thorough due diligence investigation." *Id.*, at 25.

Plaintiff alleges that Karasick accepted the information in the Offering Memorandum "as true and accurate and endorsed that information by forwarding the [Offering] Memorandum for Plaintiff's consideration" without verifying the accuracy of the information therein through his own due diligence. Complaint, ¶26. To further entice Plaintiff into investing in Wildcat Equities, Karasick represented that the rate of return on investment in the Property "'starts out close to 10%!'" and that they were "stealing" the Property for $13.6 million. Complaint, ¶¶ 28, 29. Based on these representations and on Karasick's alleged "failure to advise that he had conducted no appropriate due diligence that would even come close to confirming the representations made in the [Offering] Memorandum and that he had not and would not conduct appropriate inspections and reviews of the Property in advance of closing," Plaintiff claims that it agreed to make a $480,000 investment in Wildcat Equities in exchange for a 9.45% beneficial interest. *Id.*, ¶¶ 30, 32.

On or about October 15, 2008, Wildcat Equities and the Seller closed on the sale of the Property. Complaint, ¶ 45. In accordance with the Contract of Sale, the Seller provided to Wildcat Equities a closing certificate which included a certified rent roll. However, this certified rent roll revealed that 49 of the 312 apartment were vacant, more than double the

amount of vacant units disclosed in the Offering Memorandum and Wildcat Equities later discovered that the actual number of vacant apartments as of the date of the closing was as high as 86, demonstrating an occupancy rate of only 72.4%. *Id.*, ¶¶ 45, 46, 61. After taking possession, Wildcat Equities also discovered that 61 of the 86 vacant apartments were allegedly uninhabitable due to roach and bed bug infestation, broken windows, missing appliances, water damage and toxic mold presence and that the Property had been cited with over 70 municipal code violations. *Id.*, ¶ 61.

In late 2008, Wildcat Manager commenced an action against the Seller and others on behalf of Wildcat Equities in the Commonwealth of Kentucky, entitled *Wildcat Synergy Equities, LLC v WK Pegasus, LLC, et al.*, Case No. 98-CI-5781 (the Kentucky Lawsuit). Complaint, ¶ 59.[2] The Seller and its property management company were sued for fraud, and the Seller for breach of contract. Kentucky Complaint, ¶¶ 61-67, 98-101. Also named as a defendant therein was LandAmerica Assessment Corporation (LandAmerica), a company hired by Wildcat Equities to inspect the Property, including the individual units, and to prepare a Property Condition Report, which Wildcat Equities alleged was materially incorrect in many instances. Kentucky Complaint, ¶¶ 44-51. For example, while LandAmerica represented that it had contacted the local government authorities to check for the existence of municipal code violations, and found none, after the closing, Wildcat Equities discovered the existence of over 70 such citations or violations. *Id.*, ¶ 50.

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A copy of the First Amended Complaint filed in the Kentucky Lawsuit is attached to the moving affirmation of Daniel Graber as Exhibit G, and will be referred to as the "Kentucky Complaint."

Plaintiff alleges that a prudent purchaser of an apartment complex valued at $13.6 million would and should have conducted a pre-closing inspection of the Property in order to verify the accuracy of the Sellers' representations regarding the rent roll and physical condition of the apartment units. Complaint, ¶ 47. The failure to conduct such a pre-closing inspection allegedly "rises to the level of gross negligence." *Id.*, ¶ 49. However, the Complaint admits that Karasick and other representatives/employees of Wildcat Equities visited the Property on three occasions in May, July and September of 2008. *Id.*, ¶ 62; *see also* Kentucky Complaint, ¶¶ 33-43. On these visits, the Seller and its agents selected the apartments and areas of the Property that were shown to Karasick. Complaint, ¶ 63. During each of the visits, Karasick was shown "numerous, allegedly exemplary, occupied and unoccupied apartment units in many of the apartment buildings," and on the two latter visits, Karasick was shown different units. Kentucky Complaint, ¶¶ 34, 36, 41. On all three occasions, the apartment units that Karasick was shown "were habitable, and in fair to good condition." *Id.* Requests by Karasick and his agents to view additional apartments on the Property during the Summer of 2008 were denied by the Seller, purportedly because the Seller did not want to alert tenants and employees of the Property of a potential sale. Complaint, ¶ 64; Kentucky Complaint,¶ 42.[3] The Complaint in this action also alleges that a request by agents of Wildcat Manager to inspect the Property the day prior to closing was denied (*see* Complaint, ¶ 53), although this claim does not appear anywhere in the Kentucky

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3 In the Kentucky Lawsuit, Wildcat Equities accused the Seller and its property management company of deliberately showing only portions of the Property that were in rentable and good condition, and deliberately concealing portions that "were damaged, in need of repair and, in some cases, uninhabitable." Kentucky Complaint, ¶ 43.

Complaint.

The inspections that were conducted are alleged to have been inadequate, because they did not conduct a random inspection of apartments and that "the Seller's refusal to permit a contractually permitted random pre-closing inspection of the Property clearly should have alerted [Karasick and Wildcat Manager] that the Seller may have fabricated or exaggerated the information contained on the 'certified' rent roll or otherwise misrepresented the condition of the Property." Complaint, ¶ 54. In Plaintiff's view, this was a "red flag" that something was amiss, and should have alerted any reasonable purchaser of the need to conduct further due diligence. *Id.*, ¶ 55. Instead, Plaintiff alleges that the defendants "recklessly proceeded with the closing" *id.*), and that the "sheer breath of the problems uncovered post-closing" are indicative of the failure to conduct proper due diligence. *Id.*, ¶ 66.

Plaintiff alleges that the failure of Karasick and Wildcat Manager "to conduct appropriate due diligence on the Property demonstrates that Karasick was not and is not equipped to manage Wildcat Equities, the Property, or Plaintiff's investment." Complaint, ¶ 69. Because Wildcat Equities funding reserves had been depleted to pay for the repair and rehabilitation of the Property, Plaintiff fears that it will lose its entire investment. *Id.*, ¶ 70.[4] In May 2010, Plaintiff contacted Wildcat Manager and sought to withdraw from Wildcat Equities and requested a return of its investment. *Id.*, ¶¶ 71-72. This request and others were denied. *Id.*, ¶¶ 73-76.

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[4] According to defendants' counsel, Wildcat Equities eventually defaulted on its mortgage and the Property is in foreclosure. Defs. Mem. of Law, at 1.

This action was commenced on April 15, 2011. The Complaint asserts nine causes of action. The first cause of action is against Wildcat Manager for breach of the Wildcat Equities' Limited Liability Company Agreement dated October 10, 2008 (Operating Agreement). Plaintiff alleges that Wildcat Manager was contractually required to "take all actions which may be necessary or appropriate" to acquire company property, which includes conducting proper due diligence prior to closing, and Wildcat Manager's failure to do conduct appropriate due diligence prior to closing on the Property was a breach of the Operating Agreement. Complaint, ¶ ¶ 79-82. The second cause of action asserts a claim for negligence/gross negligence against Karasick and Wildcat Equities based on the same alleged misconduct. The third through sixth causes of action purport to assert claims for beach of fiduciary duty, fraudulent inducement, equitable fraud and negligent misrepresentations against Karasick and Wildcat Manager. The seventh, eighth and ninth causes of action seek equitable and declaratory relief against Wildcat Equities for the return of Plaintiff's investment.

Defendants now move for dismissal of all nine causes of action pursuant to CPLR 3211 (a) (1), based on documentary evidence, pursuant to CPLR 3211 (a) (3), for lack of standing to pursue derivative claims solely belonging to Wildcat Equities, and pursuant to CPLR 3211 (a) (7), for failure to state any cognizable cause of action. Defendants contend that Plaintiff is merely a disgruntled, albeit very sophisticated, real estate investor attempting to use the courts to withdraw its investment in a limited liability company after the real estate market turned and its investment went bad, and that the Plaintiff is now attempting to second guess the managing member's business decisions. Defendants argue that the Complaint fails

to validly state any cause of action, because Plaintiff does not allege with particularity facts showing bad faith or other misconduct sufficient to overcome the business judgment rule.

On a motion to dismiss under CPLR 3211 (a) (7), the pleadings are to be afforded a liberal construction, the facts as alleged in the complaint are presumed to be true, and all reasonable inferences must be drawn in favor of plaintiffs. *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). Dismissal is proper only when it appears conclusively that plaintiff has no cause of action (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]), but the plaintiff must provide more than bare assertions of legal conclusions and a formulaic recitation of the elements of a cause of action. *O'Donnell, Fox & Gartner, P.C. v R–2000 Corp.*, 198 AD2d 154 (1st Dept 1993). "Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v Martinez*, 84 NY2d 83, 88 (1994).

While New York law governs the procedural aspects of the action, Wildcat Equities is a Delaware limited liability company and both the Operating Agreement and the Subscription Agreement attached thereto provide, in Sections 14.2 and 5.1, respectively, that the laws of Delaware shall govern the agreements. Thus, the threshold question of whether Plaintiffs' claims are derivative is governed by Delaware law. *Rimawi v Atkins*, 42 AD3d 799, 800 (3d Dept 2007); *Finkelstein v Warner Music Group Inc.*, 32 AD3d 344, 345 (1st Dept 2006). In addition, Plaintiff's claims for breach of the Operating Agreement, fraud and breach of fiduciary duty all arise out of this agreement and thus are all governed by Delaware law. *Kagan v HMC-N.Y., Inc.*, __ AD2d __, 939 NYS2d 384 (1st Dept 2012). Since the parties recognize that Delaware law applies, and even though they cite almost exclusively

to New York authorities, I nonetheless apply the law of Delaware.

The Delaware Limited Liability Company Act (6 Del C §§ 18-101 et seq.) is modeled after the Delaware Limited Partnership Act. *Elf Atochem N. Am., Inc. v Jaffari*, 727 A2d 286, 290 (Del 1999). Since the determination of whether a lawsuit by a limited partner against a general partner is derivative or direct in nature is substantially the same as in corporate cases (*Litman v Prudential-Bache Prop., Inc.*, 611 A2d 12, 15 [Del Ch 1992]), those authorities apply equally to actions by regular members of a limited liability company against the managing member. "[C]ase law governing corporate derivative suits is equally applicable to suits on behalf of an LLC." *VGS, Inc. v Castiel*, 2003 WL 723285, at *11 (Del Ch 2003); *see also Lola Cars Intl. Ltd. v Krohn Racing, LLC*, 2009 WL 4052681, at *7 (Del Ch 2009).

In order to decide whether a stockholder's claim is individual or derivative in nature, the court must evaluate who suffered the alleged harm -- the entity or the suing investor and who would receive the benefit of any recovery or other remedy. *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1039 (Del 2004); *Capital Z Fin. Servs. Fund II, L.P. v Health Net, Inc.*, 43 AD3d 100, 107–109 (1st Dept 2007) (discussing Delaware law). "The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d at 1039; *see also Grimes v Donald*, 673 A2d 1207, 1213 (Del 1996); *Lipton v News Intl., Plc*, 514 A2d 1075, 1078 (Del 1986). A claim for diminution in value of corporate stock arising from the mismanagement of a

company is a derivative claim belonging to the corporation and not to a shareholder individually. *Kramer v Western Pac. Indus.*, Inc., 546 A2d 348, 353 (Del 1988); *VGS, Inc. v Castiel*, 2003 WL 723285, at *10 (Del Ch 2003); *accord Zissimatos v U.S. Trust Co. of N.Y.*, 10 AD3d 587, 587-88 (1st Dept 2004).

Plaintiff has failed to allege any harm to itself individually, because all of Plaintiff's alleged harms flow through its investment in Wildcat Equities. Any devaluation of Plaintiff's investment by the defendants' failure to do "appropriate due diligence" (Complaint, ¶ 69) before closing on the Property is shared collectively by all 14 investors in this company.[5] *Accord Longo v Butler Equities II*, 278 AD2d 97, 98 (1st Dept 2000) (applying Delaware law). Yet, none of the other investors are represented in this action nor are their rights, or the rights of Wildcat Equities to avoid duplicate liability for the same claims, protected.

Plaintiff argues that it has standing to pursue its claims individually, because this action is based on Karasick's misrepresentations to Plaintiff when it was solicited to invest in the Property. Yet the Complaint is devoid of any factual allegations of fraud or misrepresentation by any of the defendants. The Offering Memorandum does contain a lower vacancy rate, but this is a document that was not prepared by Karasick or Wildcat Manager and contains an express disclaimer on reliance by prospective buyers without independent investigation. The sole fact that Karasick forwarded this document to the investors (Complaint, ¶ 26) is not evidence that Karasick had endorsed that information.

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[5]*See* Graber Affirm., Ex. C: Operating Agreement, at 31, 38 & Sch. A.

Karasick's other alleged misrepresentations regarding a 10% rate of return and that the Property was a "steal" at $13.6 million (Complaint, ¶¶ 28, 29) are not actionable statements of fact. "Predictions about the future cannot give rise to actionable common law fraud. Nor can expressions of opinion." *Great Lakes Chem. Corp. v Pharmacia Corp.*, 788 A2d 544, 554 (Del Ch 2001); *see also In re IBP, Inc. Shareholders Litig. v Tyson Foods, Inc.*, 789 A2d 14, 74 (Del Ch 2001) (applying New York law,[6] court held that "[e]xpressing confidence about a projection of future results will not support a claim for material misrepresentation"); *accord Sidamonidze v Kay*, 304 AD2d 415 (1st Dept 2003); *Longo v Butler Equities II*, 278 AD2d at 97.

In addition, in the Operating Agreement, Plaintiff acknowledged that "any projections furnished to the Regular Members are for illustrative purposes only and no assurance can be given that the actual results of operation of the Company will correspond to such projections." Graber Affirm., Ex. C: LLC Agreement, § 7.1 (c) (iii), at 18. "To allow [Plaintiff] to assert, under the rubric of fraud, claims that are explicitly precluded by contract, would defeat the reasonable commercial expectations of the contracting parties and eviscerate the utility of written contractual agreements." *Great Lakes Chem. Corp. v Pharmacia Corp.*, 788 A2d at 556. In short, Plaintiff's attempt to fault defendants for not conducting "appropriate due diligence" prior to closing (Complaint, ¶ 30) is nothing more than a claim of negligence or corporate mismanagement.

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New York law and Delaware law are fundamentally similar for the tort claims of fraudulent misrepresentation and fraud. *Iotex Communications, Inc. v Defries*, 1998 WL 914265, *6 (Del Ch 1998).

Since the action is derivative, Plaintiff is required to comply with the requirements of 6 Del C § 18-1003, which provides that, in a derivative action, "the complaint shall set forth with particularity the effort, if any, of the plaintiff to secure initiation of the action by a manager or member or the reasons for not making the effort." Plaintiff, however, contends that it would be excused from having to make a demand upon Wildcat Equities as such a demand "is not likely to succeed." 6 Del. C § 18-1001. Only Wildcat Manager and Karasick have the authority to bring or authorize a lawsuit on behalf of Wildcat Equities, and Karasick is not likely to authorize an action against himself. *Haseotes v Bentas*, 2002 WL 31058540, at *5 (Del Ch 2002) (director-defendant must be assumed to be incapable of exercising independent and disinterested judgment on the issue of whether to cause the company to sue her); *accord Curreri v Verni*, 156 AD2d 420, 421 (2d Dept 1989).

Nevertheless, the Complaint does not plead any derivative claims and plaintiff has not sought leave to replead its claims on behalf of Wildcat Equities. Amendment of the Complaint, however, would be a futile effort, however, because defendants' actions are plainly protected by the business judgment rule, the Plaintiff's claims are barred by the express terms of the Operating and Subscription Agreements, and there is no basis to hold Karasick personally liable.

"The business judgment rule is a presumption that courts will not second guess decisions made by the managers of a corporation unless they 'are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process.'" *Kahn v Portnoy*, 2008 WL 5197164, at *5 (Del Ch 2008), quoting *Brehm v*

Eisner, 746 A2d 244, 264 n 66 (Del 2000); *accord Auerbach v Bennett*, 47 NY2d 619, 629 (1979) (business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes"). In addition, Section 18-406 of the Delaware Limited Liability Company Act provides that a "member, manager or liquidating trustee shall be fully protected in relying in good faith upon . . . information, opinions, reports or statements presented by . . . any [] person as to matters the member, manager or liquidating trustee reasonably believes are within such other person's professional or expert competence . . . ."

The Complaint is devoid of any allegations that Karasick acted in bad faith, engaged in self-dealing or was tainted by a conflict of interest. Plaintiff attempts to make a claim of gross negligence by claiming that defendants failed to do a pre-closing inspection of the Property. Complaint, ¶ 49. However, the Complaint itself acknowledges that Karasick and/or his agents toured the premises at least three times prior to the closing. *See* Complaint, ¶ 63. There is also no dispute that defendants hired LandAmerica to inspect the Property and that the resulting "Property Condition Report" did not identify any major problems or difficulty obtaining information from the Seller. *See* Kentucky Complaint, ¶¶ 44-52. According to the LandAmerica report, a site visit was made on July 22, 2008 and 5% of the occupied units were observed and 30% of the vacant units. Graber Affirm., Ex. E: Property Condition Report, at 9, 21-22.

Plaintiff's real complaint is that Karasick did not conduct "random" inspections of additional apartment units (Complaint, ¶¶ 51, 54) and should not have accepted the Seller's excuse for not allowing defendants to view additional apartment units. *Id.*, ¶¶ 54-55. This

is not gross negligence, which is defined as "reckless indifference" or conduct beyond the "bounds of reason." *McPadden v Sidhu*, 964 A2d 1262, 1274 (Del 2008).

> "Unless judges are mindful of the substantial difference between a simple negligence and gross negligence standard, the policy purpose served by Delaware's choice of a gross negligence standard risks being undermined. The definition of gross negligence used in our corporate law jurisprudence is extremely stringent."

In re Lear Corp. Shareholder Litig., 967 A2d 640, 652 (Del Ch 2008). The documentary evidence establishes that Karasick himself invested $470,000 in the venture (*see* Graber Affirm., Ex. C: Operating Agreement, at 31, 38 & Sch. A), and it defies common sense that he would recklessly risk his own investment. Absent a showing of bad faith or misconduct, defendants' business decisions are protected by the business judgment rule and not subject to second-guessing by the courts. *In re Dow Chem. Co. Derivative Litig.*, 2010 WL 66769 at *25 (Del Ch 2010). The factual allegations of the Complaint before me, even if true, support only a conclusion that the managing member of Wildcat Equities made a "poor business decision," a decision which is protected from judicial oversight by the business judgment rule. *In re Goldman Sachs Group, Inc. Shareholder Litig.*, 2011 WL 4826104, *1 (Del Ch 2011).

Plaintiff contends that a court cannot dismiss a complaint on a motion to dismiss, prior to discovery, based on the business judgment rule. Certainly, where the allegations of a complaint sufficiently suggest that directors or officers acted in bad faith, the question cannot be decided on a motion to dismiss. *See Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 667 (1st Dept 1993) ("[p]re-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate where those pleadings suggest that the directors did

not act in good faith."). In this case, however, the Complaint fails to plead any facts which could lead to a finding of bad faith, fraud or gross negligence on the part of Wildcat Manager or Karasick, and dismissal for failure to state a cause of action is appropriate. *Accord Lippe v Bairnco Corp.*, 230 BR 906, 917 n 6 (SD NY 1999); *see also Gantler v Stephens*, 965 A2d 695, 705–706 (Del 2009) (in Delaware, the complaint must plead facts overcoming presumption of the business judgement rule, that in making the challenged decision, the board of directors breached either its duty of loyalty or duty of care).

The Delaware Limited Liability Company Act gives members of a limited liability company wide latitude to order their relationships. 6 Del. C. § 18-1101(b); *see also Elf Atochem N. Am., Inc. v Jaffari*, 727 A2d at 291 ("The basic approach of the Delaware Act is to provide members with broad discretion in drafting the Agreement."). The company's operating agreement is a contract whose provisions are interpreted using the basic rules of contract law. "[T]he Court's role is to 'effectuate the parties' intent.'" *Bank of N.Y. Mellon v Commerzbank Capital Funding Trust II*, 2011 WL 3360024, at *7 (Del Ch 2011), quoting *Lorillard Tobacco Co. v Am. Legacy Found.*, 903 A2d 728, 739 (Del 2006). The agreement must be construed as a whole, "giving effect to all the provisions therein." *E.I. du Pont de Nemours & Co. v Shell Oil Co.*, 498 A2d 1108, 1113 (Del 1985).

There is no dispute that the Plaintiff is owned by veteran real estate attorneys who negotiated the terms of the Operating Agreement. In that agreement, Plaintiff warranted the following:

> "the Managing Member have made available all of the documents and other information which the Regular Member or his advisors has requested in connection with the transaction contemplated by this Agreement" (§ 7.1 [b] [iii]);

"he has fully investigated the merits of and risks of participating as a . . . Regular Member and is sophisticated, knowledgeable and experienced in evaluating such risks and merits" (§ 7.1 [b] [v]);

"Investment as a . . . Regular Member involves a high degree of risk of loss of such Member's entire investment in the Company" (§ 7.1 [c] [I]); and

"Any Regular Member or duly authorized agent or representatives of such Regular Member (subject to reasonable safety requirements), at such Regular Member's own expense and upon reasonable notice and with reasonable frequency, **may visit and inspect any of the properties of the Company** . . . (emphasis added)" (§ 8.2).

Graber Affirm., Ex. C: Operating Agreement, at 4, 17-19. Additionally, in the Subscription Agreement, Plaintiff agreed and acknowledged that:

"Subscriber, Subscriber's attorney and/or accountant, and other persons Subscriber has retained for advice with respect to this investment (an "Advisor") have received copies of, have been given the opportunity to review and have in fact reviewed, all relevant documents with respect to the Project Property" (§ 2.2);

"Subscriber understands the risks of, and other considerations relating to, a purchase of [a membership interest]" (§ 2.2);

"Subscriber has such knowledge and experience in financial matters, including investments in residential real estate, making it capable of evaluating the risks and merits of its investment" (§2 2.5);

"(i) Subscriber was previously informed that all documents, records and books pertaining to this investment were at all times available at the offices of the Company; (ii) that all documents, records, and books pertaining to this investment requested by Subscriber have been made available to Subscriber and Subscriber's Advisors; and (iii) that Subscriber and Subscriber's Advisors have been supplied with such additional information concerning this investment as they have requested" (§ 2.8); and

"Subscriber and Subscriber's Advisors have had an opportunity to ask questions and receive answers concerning the terms and conditions of investment and to obtain any additional information necessary to verify the accuracy of the information provided . . . Subscriber acknowledges that all such questions, if asked, were answered satisfactorily and all information or documents provided were found to be satisfactory" (§ 2.9).

Despite these numerous and clear acknowledgments of being provided with sufficient information and access to information regarding the Property, Plaintiff now contends that it was not provided with sufficient information regarding the scope of the due diligence that Wildcat Manager and/or Karasick planned to undertake. *See* Complaint, ¶ 30. To the extent that Plaintiff, a very sophisticated real estate investor, had specific due diligence requirements and intended to solely rely on Wildcat Manager in this regard, it could have negotiated for Wildcat Manager to assume additional responsibilities before warranting that it was completely satisfied with the information provided. Alternatively, Plaintiff could have conducted its own due diligence and inspection of the Property in accordance with Section 8.2 of the Operating Agreement prior to investing.

Plaintiff's only basis for holding Karasick personally liable for the return of Plaintiff's investment is a claim that he made bad faith misrepresentations regarding the veracity and accuracy of the Offering Memorandum. *See* Pls. Mem. of Law, at 23-24. As stated above, the Complaint fails to allege any basis for the assertion of a claim of intentional fraud or misrepresentation against any of the defendants on the basis of this document. In addition, in the Operating Agreement, Plaintiff expressly waived any right to pursue a return of its capital contribution from Wildcat Equities or Karasick. *See* Graber Affirm., Ex. C: Operating Agreement, § 2.3 (d), at 4 ("neither the Managing Member nor any of the Managing Member's members shall have any personal liability or obligation for the repayment of any Capital Contribution of the Regular Members . . . ").

For these reasons, it is hereby

ORDERED that defendants' motion to dismiss the Complaint is granted, the Complaint is dismissed, without leave to replead, and with costs and disbursements to defendants, and the Clerk is directed to enter judgment accordingly.

DATED: : April 3, 2012

ENTER:

J.S.C.

HON. BERNARD J. FRIED