SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

----------X

U-TREND NEW YORK INVESTMENT L.P., Individually and Derivatively on Behalf of Nominal Defendant Hospitality Suite International, S.A. and its wholly-owned subsidiary US Suite Corp.,

Plaintiff,

-against-

US SUITE LLC, AURA INVESTMENTS LTD., AND 440 WEST 41ST LLC,

Defendants,

and

HOSPITALITY SUITE INTERNATIONAL, S.A. and US SUITE CORP.,

Nominal Defendants.

Index No. 652082/2014

----------X

U-TREND NEW YORK INVESTMENT L.P., Individually and Derivatively on Behalf of Nominal Defendant Hospitality Suite International, S.A. and its wholly-owned subsidiary US Suite Corp.,

Plaintiff and Counter-Defendant,

against-

AURA INVESTMENTS LTD., YAACOV ATRAKCHI, MICHAEL KLEINER and YOHAI ABTAN,

Defendants and Counterclaim-Plaintiffs,

and

HOSPITALITY SUITE INTERNATIONAL, S.A. and US SUITE CORP.,

Nominal Defendants.

AURA INVESTMENTS LTD., YAACOV ATRAKCHI, MICHAEL KLEINER and YOHAI ABTAN,

Defendants and Counterclaim-Plaintiffs,

-against- Index No. 650498/2015

TOMER SHOHAT AND OREN ELMALICH,

Third Party Defendants,

and

HOSPITALITY SUITE INTERNATIONAL, S.A. and US SUITE CORP.,

Nominal Defendants.

----------X

Hon. C. E. Ramos, J.S.C.:

Findings of Fact and Conclusions of Law

In 2009, Naftali Mendelovich formed what is now known as U-Trend New York Investments L.P. ("U-Trend"), a partnership formed under the laws of the British Virgin Islands for the purpose of investing in a joint venture (the "Joint Venture") with Aura Investments Ltd. ("Aura"). [DTX GY 5-6, 15; Shohat Aff ¶¶ 10, 12; Compl ¶ 10].

The purpose of the Joint Venture between U-Trend and Aura was to acquire and operate a property located at 440 West 41st Street, New York (the "Property"). [Compl ¶¶ 18-20, 27; PTX 1 at 1; PTX 2 at 1].

Tomer Shohat, a friend and student of Mendelovich, was an investor in U-Trend and the Joint Venture. [May 1, 2018 (Shohat) hearing Tr. 2117:5-10; Jan. 25, 2018 (Kleiner) hearing Tr. 860:19-23].

Although the full organizational structure of the Joint Venture is complex, there are four additional entities that are most relevant for the purposes of this proceeding: (i) Nominal Defendant Hospitality Suite International, S.A. ("HSI"), a Luxembourg company, (ii) Nominal Defendant US Suite Corp. ("US Suite Corp."), a Delaware corporation, (iii) Defendant US Suite LLC ("US Suite LLC"), a Delaware limited liability company, and 440 West 41st St LLC ("440 West"), a limited liability company owned in part by Ben Zion Suky.

The Property is indirectly owned by U-Trend, Aura, and 440 West through subsidiaries as follows:

a. HSI is owned equally by U-Trend and Aura.

b. HSI owns 100% of US Suite Corp.

c. US Suite Corp. owns a 70% interest in, and is the managing member of, US Suite LLC.

d. 440 West owns the remaining 30% interest in, and is the minority member of, US Suite LLC.

e. US Suite LLC was title holder of the Property.

In effect, Aura and U-Trend each owned 35% of the Property (together, 70%), and 440 West (i.e. Mr. Suky) owned 30%. [Compl ¶¶ 20, 23, 25, 26, 62; Shohat Aff ¶¶ 14-19].

US Suite LLC purchased the Property on March 5, 2010 for $17,500,000. [Locatell Report at 9; Von Ancken Report ¶ 24]. The Property, built in 1988, has 13 stories, 95 units, including one superintendent room, 9 rent stabilized tenants on floors 3, 4, 5, 6, 8, and 9, two elevators, a land area of 9,875 sq. ft., a zone of property C6-3 in Sub-area D3 of special Hudson Yards District, and a gross building area of 64,662 sq. ft., inclusive of a basement. [Locatell Report at 1, 39, 43, 44, 49; Von Ancken Report ¶ 23].

On December 17, 2009, Aura and U-Trend entered into an agreement (the "Founders Agreement") with respect to the proposed purchase of the Property and management of HSI. [PTX 1]. The Founders Agreement was created by the parties to "regulate the relationship between [U-Trend and Aura] and between them and [HSI], the management method of [HSI], funding [HSI's] activity and such, including during the interim period until the actual establishment of HSI . . . ." [*Id.* at 2].

Under section 1.4 of the Founders Agreement, "Aura shall be responsible, and shall execute all management and operations related to and/or pursuant to this agreement, including managing the Project Company [i.e., US Suite LLC], subject to the board's

decisions." [*Id.* § 1.4]. Moreover, "Aura shall bear the responsibility and the authority to manage [HSI's] ongoing business, in exchange for full reimbursement of costs and management fees as shall be agreed between the parties, and subject to the instructions of the Company's [HSI's] board, in which each party shall have the right to appoint an equal number of directors." [*Id.* § 1.1].

Paragraph 6 of subsection b of Appendix A provides that "[t]he Manager shall appoint a representative for the Company's [HSI's] management. Mr. Naftali Mendelovich shall be appointed as a first representative." [*Id.* at Appendix A ¶ b(6)].

The Founders Agreement was amended ("the Amendment") on January 20, 2010, "in order to prevent a deadlock in the Company [HSI]." [PTX 2 at 1]. Pursuant to the Amendment, "[t]he Company's board of directors shall include up to 5 members, out of which Aura has the right to appoint up to 3 directors and U-Trend has the right to appoint up to 2 directors, and in any case it is agreed that at any time Aura's representatives shall be the majority in the Company's board of directors." [*Id.* at 1]. The Amendment was signed by Mr. Mendelovich on behalf of U-Trend. [Jan. 29, 2018 (Scharf & Abtan) hearing Tr. 953:4-9]. Ultimately, Aura held three seats on the HSI board of directors, and U-Trend held two.

The Founders Agreement was not terminated when Mr. Atrakchi

later acquired control of Aura.

Clearly, Aura had both the responsibility and the authority to manage the Property under the plain terms of the Founders Agreement and its Amendment. This Court finds that the Founders Agreement was valid, that at all times Aura availed itself of the benefits of the Founders Agreement and that Aura was bound to the obligations of the Founders Agreement to manage the Joint Venture.

The Founders Agreement stated that Aura would bear the responsibility and the authority to manage HSI's ongoing business and would execute all management and operations related to and/or pursuant to the agreement, including managing US Suite LLC. The Aura Defendants therefore owed a duty of care to HSI which included "the obligations of candor and of good and prudent management of the corporation." [*Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 569 (1984) (internal citations omitted)].

Appendix A to the Founders Agreement additionally provided that Aura and U-Trend were to establish a foreign company (i.e., US Suite Corp.) that "shall be managed by a joint board of directors of Aura and a representative appointed by U-Trend Ltd. or any factor specified by it." [PTX 1 at Appendix A ¶¶ a(1), a(3)]. US Suite LLC was to be established jointly with Livorno Properties LLC, an affiliated company, or another company held

by Mr. Suky or anyone on his behalf. US Suite Corp. would hold 70% of US Suite LLC, and Livorno (later to be named 440 West) would hold 30% of US Suite LLC. [*Id.* at 1].

Paragraph 9 of subsection a of Appendix A to the Founders Agreement provided that "Aura and Livorno [i.e., 440 West] shall act to the best of their abilities to re-finance the Company's assets, or to perform any other financial activity, so that the principal and the interest accrued for it shall be repaid as soon as possible." [*Id.* at Appendix A ¶ a(9)].

US Suite LLC was formed on December 4, 2009. [PTX 3 at 1]. On February 24, 2010, US Suite Corp. and 440 West entered into an operating agreement for US Suite LLC (the "Operating Agreement"). [*Id.*].

The Operating Agreement was signed by Mr. Suky on behalf of 440 West, and Tomer Saliah (a former director of Aura) on behalf of US Suite Corp. [*Id.* at 32]. The Operating Agreement is valid and binding. [*See* Shohat Aff ¶ 23; Compl ¶ 219].

Pursuant to the Operating Agreement, the purpose of US Suite LLC was to "acquire, own, finance, refinance, hold, transfer, lease, license, repair, maintain, improve, manage, operate, and otherwise use or dispose of the Property." [PTX 3 at § 1.3(a)(i)].

The Operating Agreement named US Suite Corp. as Managing Member of the Property and 440 West as Minority Member of the

Property. [*Id.* §§ 2.1, 6.1]. Pursuant to Section 6.1(a), the Managing Member (i.e., US Suite Corp.) "has the exclusive right to manage the Company's business . . . . Except as otherwise specifically limited in this Agreement or under applicable law, the Managing Member shall: (i) manage the affairs and business of the Company; (ii) exercise the authority and powers granted to the Company; and (iii) otherwise act in all other matters on behalf of the Company." [*Id.* § 6.1(a)].

Section 6.1(c) of the Operating Agreement limited the authority granted to US Suite Corp. under Section 6.1(a) by requiring the unanimous consent of US Suite Corp. and 440 West (i.e. Mr. Suky's company), for any "Major Decision," including a decision to:

a. "borrow money on behalf of the Company or refinance any loan . . . " [*Id.* § 6.1(c)(ii)];

b. "enter into any contract providing for a Company obligation, except those which are customary for the ordinary day-to-day operations of the business of the Company" [*Id.* § 6.1(c)(iv)];

c. "[t]ransfer the Property or any part thereof" [*Id.* § 6.1(c)(viii)];

d. "select any leasing broker, real estate broker, mortgage broker, investment banker or other third party financial advisor to act on behalf of the Company . . . " [*Id.* §

6.1(c)(xix)];

e. "dissolve, terminate or wind up the Company (or take any action which has substantially the same effect . . .)" [*Id.* § 6.1(c)(xx)]; or

f. "amend, modify or terminate this Agreement [the Operating Agreement]" [*Id.* § 6.1(c)(xvi)].

Section 6.2(a) of the Operating Agreement contains an exculpation clause: "no Member or any of its Affiliates, nor any of their respective officers, directors, partners, employees or agents, shall be liable, in damages or otherwise, to the Company or to any of the other Members, for any act or omission performed or omitted by such Member pursuant to the authority granted by this Agreement, except if such act or omission results from gross negligence, willful misconduct or bad faith."

Under the terms of the Operating Agreement, 440 West (i.e. Mr. Suky) had a veto right over US Suite Corp.'s ability to enter into new agreements, re-finance the mortgage, hire a broker, or sell the Property. [*Id.* § 6.1]. US Suite Corp. was also prohibited from modifying any of these terms without 440 West's consent. [*Id.*].

On March 29, 2012, Mr. Atrakchi was identified as the winning bidder to acquire all of Aura's assets in an Israeli bankruptcy proceeding (the "Bankruptcy"). On May 23, 2012, Mr. Atrakchi closed on the purchase and took control of Aura,

including (among other things) the obligations of Aura's subsidiaries, such as HSI and US Suite Corp., under the ongoing agreements. Part of Aura's assets was Aura's indirect 35% interest in US Suite LLC.

On April 22, 2012, shortly after it was announced that Mr. Atrakchi had won the bid to acquire control of Aura, Mr. Shohat was appointed as an authorized representative of U-Trend to oversee U-Trend's $10.2 million investment in the Property.

On May 21, 2012, Mr. Shohat, on behalf of U-Trend, signed an agreement with Mr. Suky related to Mr. Suky's and U-Trend's co-management of the Property (excluding Aura). [PTX 10]. On October 14, 2012, Mr. Shohat and Mickey Bar, on behalf of U-Trend, entered into a second agreement with Mr. Suky related to Mr. Suky and U-Trend's continued co-management of the Property (excluding Aura), and authorizing Mr. Suky's salary. [PTX 12 ¶¶ 7, 12].

In January of 2015, the City of New York filed a nuisance abatement action, *City of New York v US Suite Mgmt LLC*, Index No. 450084/2015 (NY Sup Ct 2015). The City sought, among other things, civil penalties and damages incurred as a result of the illegal operation of the Property as a transient hotel in violation of the Certificate of Occupancy, lacking suitable fire and safety measures for such use. [Locatell Report at 45-46; Von Ancken Report ¶ 26]. The action was discontinued following

settlement. [Index No. 450084/2015, ECF # 199].

In 2016, U-Trend commenced the two instant actions individually and derivatively on behalf of HSI and US Suite Corp. seeking damages against Aura and three individuals affiliated with Aura: Yaackov Atrakchi, Yohai Abtan, and Michael Kleiner (collectively, with Aura, the "Aura Defendants"). U-Trend also seeks damages against 440 West and US Suite LLC. U-Trend alleges that the Aura Defendants failed to manage the Property with due care and in accordance with their fiduciary and contractual obligations after Mr. Atrakchi took control in May 2012. U-Trend additionally alleges that Aura caused the Property to be sold for less than fair value.

The Aura Defendants have asserted counterclaims against U-Trend and Mr. Shohat, and Aura has asserted cross-claims against 440 West. The Aura Defendants allege variously that: (1) U-Trend is estopped from asserting its claims due to alleged misconduct by Mr. Shohat and U-Trend, (2) the contractual management responsibilities of Aura were discharged in the 2012 Bankruptcy proceeding in Israel, and (3) the eventual sale of the Property was at fair market value.

The following findings and conclusions are the result of an extensive bench trial.

The evidence presented at trial failed to show that 440 West was willing to cooperate with Aura or U-Trend to hire a new

management company, to re-finance, or to sell the Property. The evidence showed that Mr. Suky blocked prospective buyers or brokers from accessing the Property, and refused to sell it to potential bidders proposed by Aura and U-Trend. [Atrakchi Aff ¶ 99; May 3, 2018 (Atrakchi) hearing Tr. at 2372, lines 18-23; DTX HC (Shohat Aff July 16, 2014) ¶ 116; Abtan Aff ¶ 127].

A June 6, 2012 letter from Aura's counsel to Mr. Suky shows that the Aura Defendants were aware of "alarming and disturbing information" regarding "mismanagement, misappropriation of funds" and other misconduct by Mr. Suky and 440 West. [PTX 178 ¶ 1]. U-Trend contends that Aura breached its duties by failing to remove Mr. Suky from the Property (even when the Aura Defendants knew Mr. Suky was mismanaging and looting the Property), by failing to obtain control of the Property's bank accounts and by failing to obtain financial information about the Property.

According to the Founders Agreement, Aura was responsible for executing all management and operations of the venture, including with respect to HSI. The Founders Agreement required HSI to provide U-Trend with annual audited financial statements and quarterly reports reviewed by HSI's accountants.

Mr. Kleiner admitted that Mr. Suky refused to provide Aura with financial information about the Property. The first time the Aura Defendants obtained financial information was in June

2013, more than a year after becoming involved with the Property. When Aura received this financial information, it was incomplete and Mr. Abtan testified the information could not be trusted or relied upon.

Around the time that US Suite LLC acquired the Property, US Suite LLC obtained a mortgage (the "Mortgage") from New York Community Bank ("NYCB") in the amount of $10 million. The Mortgage matured by its terms on August 1, 2014.

As the controlling shareholder of US Suite LLC, Aura had the obligation to deal with the Property's mortgage. In addition, the Founders Agreement included Aura's duty to "re-finance the [Property], or to perform any other financial activity, so that the principal and interest accrued for [the Property's mortgage] shall be repaid as soon as possible." [PTX 1 Appendix A ¶ (a)(9)]. Despite this responsibility, Aura took no meaningful steps at any time to avoid Mortgage defaults or mitigate the damage caused by those defaults.

Mr. Kleiner and Mr. Abtan both admitted in their direct testimonies that it became clear to them in June 2013 that the Property did not have reserves sufficient to repay the Mortgage when it matured. Both Mr. Abtan and Mr. Kleiner also stated that, by around March 2013, the Aura Defendants concluded that the Property had to be sold. [Abtan Aff ¶ 118; Kleiner Aff ¶ 80]. Yet, despite knowing for more than a year that some plan

was necessary to address the looming Mortgage maturity in August 2014, the Aura Defendants offered no evidence that they took any steps to refinance the Mortgage or pay it off.

The evidence at trial showed that the parties were aware of the need to promptly address the violations. On March 22, 2013, 440 West's attorney sent a demand letter to Aura stating that the Property was in serious need of repair, that the Property had a number of significant violations (including fire safety violations), and that the Property was operating without a valid certificate of occupancy (the "March 2013 letter"). [PTX 16 ¶¶ 4(a),(f)]. Aura failed to do anything to address the issues raised in the March 2013 letter.

On or about December 30, 2013, the Aura Defendants received a letter from Jack Jaffa & Associates (the "Jaffa letter"), describing multiple serious violations at the Property, including critical health and life safety issues relating to fire sprinklers, egress, and ingress. [PTX 102].

In response to the Jaffa letter, Aura made a public announcement in a filing with the Israel Securities Authority dated January 2, 2014, stating that Aura would take control of the Property to address the issues raised in the Jaffa letter. [PTX 103]. Separately, Aura also told U-Trend that Aura would take action to address the issues. [PTX 43 ¶ 4; Shohat Aff ¶

65]. Aura offered no evidence at trial showing that it took steps to do so, or that the critical violations had been cured.

On March 20, 2014, NYCB delivered a notice of default on the Mortgage resulting from the illegal operation and violations at the Property (the "Default Notice"). [PTX 26]. The Default Notice provided US Suite LLC with thirty days to cure. [*Id.*].

On March 31, 2014, Aura made a public announcement to the stock market in Israel about the Mortgage default, and informed Aura's investors that Aura would address the default. Aura thereafter stated that it would take steps to address the default in an April 1, 2014 letter that enclosed a copy of the Default Notice to U-Trend. [*Id.*]. Again, Aura presented no evidence at trial showing that it addressed the default.

Mr. Kleiner testified that, until April 2014, the Property had always paid the Mortgage. On April 14, 2014, the Property's bookkeeper sent an e-mail to Aura stating that the Property could not pay its Mortgage. Nine days later, the bookkeeper made an e-mail request for Aura to pay its share of the Mortgage. Mr. Kleiner testified that Aura received the e-mails from the bookkeeper, but did not respond.

After ongoing Mortgage payments were not made, NYCB issued a payment default notice. Aura did nothing to cure the payment default and did not inform U-Trend of it.

The Aura Defendants did not present any evidence at trial showing efforts they made to market the Property, or to assess the Property's value between March 2013 (when the Aura Defendants determined the need to sell) and July 2014.

A meeting of the HSI board of directors took place on July 9, 2014 ("HSI board meeting"). The Aura Defendants summoned Mr. Shohat and another member of U-Trend, in their capacity as directors of HSI, to the meeting. There, the Aura Defendants indicated that they were in favor of seeking a sale of the Property but had no buyer in mind.

The Aura Defendants asked U-Trend's directors to vote to authorize Mr. Abtan as the sole and exclusive authority to negotiate for a sale of the Property. [PTX 31, ¶ 3.2.1]. U-Trend's directors objected, but the Aura Defendants overrode the objection with a 3 to 2 vote. The meeting minutes also reflect the Aura Defendants stating that they would "try and sell the Property in the open market" if HSI wished to save its investment. [*Id.* ¶ 1.7].

Mr. Kleiner testified that the HSI board of directors did not hire a broker to value the property prior to the meeting. [Tr. 420:3-10]. Mr. Abtan similarly admitted that the Aura Defendants did not conduct an appraisal to determine the Property's value before voting to set a minimum price for sale. [Tr. 1172:2-4].

Nonetheless, Aura had fully negotiated a deal to sell the Property to Mr. Suky and his partner in other properties, Solly Assa, prior to the HSI board meeting. [Abtan Depo 340:23-341:16; Tr. 1057-60]. One day after the meeting, Mr. Abtan signed a unanimous written consent resolution of US Suite LLC (along with Mr. Suky), approving a sale of the Property to Mr. Assa for $26 million. [PTX 33, 176].

The Aura Defendants offered no evidence at trial showing that the deal with Mr. Assa reflected fair market value for the Property. Mr. Abtan conceded that the Property was not marketed between the HSI board meeting and the signing of the resolution with Mr. Suky to sell to Mr. Assa. [Tr. 1172:10-13; PTX 33].

At the time of the HSI board meeting, U-Trend contemporaneously commenced the first of these two consolidated cases. [Index No. 652082/2014, ECF # 1]. In the context of its newly-commenced action, U-Trend repeatedly asked Aura to join in a competitive sales process for the Property. [PTX 34, 44, 45, 161]. Aura refused. [Kleiner Depo 118:15-22].

U-Trend was able to locate a well-known New York real estate buyer, George Comfort & Sons ("GCS"), for the Property. GCS was willing to pay $27 million for the Property without accessing it, and with only limited information from U-Trend. GCS represented that it would be willing to pay more if the Property were put to auction, with access to the Property for

due diligence. Aura insisted that only Mr. Assa would purchase the Property. Immediately after U-Trend had located the $27 million buyer, Mr. Assa raised his offer to $27 million.

Nonetheless, the evidence presented at trial failed to show that there were more potential buyers for the Property in the marketplace, and that the price offered by Mr. Assa did not reflect fair market value. In addition, Mr. Suky did not cooperate in consenting to purchase offers on behalf of 440 West, as was required. This Court also finds that, notwithstanding the Aura Defendants' failure to market the Property well, U-Trend did not establish that a price higher than $27 million could be obtained.

In support of their claims, the Aura Defendants primarily offered the direct testimonies of Mr. Kleiner, Mr. Abtan and Mr. Atrakchi, submitted by affidavit. This Court finds that their testimony is largely not credible.

On cross-examination, this Court was frustrated by Mr. Kleiner's evasion, inconsistency, refusal to provide direct answers and general lack of veracity. [Tr. 124; 125:23-126:14; 133; 417; 422; 882]. While Mr. Kleiner is a lawyer and the head of the Supreme Court of the Likud Party in Israel [Tr. 72:21-25], this Court found that he gave evasive answers that contradicted documentary evidence, prior sworn statements and even his own written direct testimony. As an example, on cross-

examination, Mr. Kleiner denied under oath that he knew in June 2013 that the Property had insufficient funds to pay the Mortgage. [Tr. 104-05]. But in his direct testimony affidavit, Mr. Kleiner swore that in June 2013 he knew "there were insufficient funds to pay off the mortgage." [Kleiner Aff ¶ 84].

Mr. Abtan also contradicted his prior sworn statements and documentary evidence. Mr. Abtan testified on cross-examination that he did not know that anybody from Aura possessed signature rights for HSI or US Suite Corp. [Tr. 953-54]. But in his deposition, Mr. Abtan swore he had the only signature rights for US Suite Corp. [Abtan Depo 329:9-330:8]. Indeed, all of the material documents signed by HSI or US Suite Corp. were executed by Mr. Abtan, including the unanimous consent of US Suite LLC to sell the Property and split the proceeds with Mr. Suky in July 2014. [PTX 33, 176]. Mr. Abtan also signed the Notice of Special Meeting of the Members of US Suite LLC on behalf of US Suite Corp. in August 2012 [DTX DE], among other documents he signed between 2012 and 2017. [PTX 31, 68, 300, 301; DTX JF].

Mr. Atrakchi (a lawyer like Mr. Kleiner [Tr. 2372:3-4]) similarly offered testimony that lacked credibility. In an attempt to justify Aura's inaction throughout the period it controlled the Property, Mr. Atrakchi referred to an alleged agreement that gave U-Trend a "veto right" for the sale. [Tr.

2400]. Mr. Atrakchi described this document as a four or five-page agreement. [Tr. 2401]. This "veto right" agreement had never been referred to at any time in the four-year history of this litigation and was not part of the hundreds of exhibits offered at trial. Moreover, this agreement is unlikely to exist because every Aura Defendant, including Mr. Atrakchi, testified that they voted 3-2 to sell the Property over U-Trend's objection during the July 9, 2014 HSI board meeting.

Mr. Atrakchi also conceded that he was an uninvolved director of HSI. [Tr. 2398]. Aura's former lawyer, Claudio Dessberg, confirmed that Mr. Atrakchi had "little to no personal knowledge of the facts relating to" Aura's activities. [PTX 214; Tr. 190:22-191:9]. Mr. Atrakchi's prior affidavits in the case stated the same. [Tr. 2360; DTX IR; Index No. 652082/2014, ECF # 1490]. Surprisingly, Mr. Atrakchi filed a 29-page affidavit of direct testimony before trial, purporting to have detailed knowledge of the facts. Much of Mr. Atrakchi's direct testimony had to be stricken. [Tr. 2347-60].

By contrast, U-Trend offered as its primary witness the written testimony of Mr. Shohat, who answered questions on cross examination directly, and gave pertinent answers. Mr. Shohat's direct testimony was well-supported by, and consistent with, the documentary evidence.

At trial, Aura tried to blame U-Trend for its own inaction. Aura received letters from U-Trend's counsel in the summer of 2012 claiming that Aura was in default of its management responsibilities, and threatening to cancel those responsibilities. The evidence showed these letters had no impact on Aura and posed no impediment to Aura's management responsibility. According to Mr. Abtan, Aura rejected U-Trend's letters and continued to act on behalf of US Suite Corp. [Tr. 1013-16]. Indeed, this Court has noted that U-Trend's letters merely served to put Aura on notice that U-Trend would hold Aura responsible if it did not fulfill its management duties. [Tr. 1342:10-16].

Moreover, on March 28, 2012, the Aura trustees wrote a letter to U-Trend stating that "continuing agreements to which [Aura] is a party, are not terminated or diminished in any way." [PTX 106 ¶ 4; Tr. 1090:10-1091:19].

Aura's contention that the Aura Bankruptcy proceeding in Israel discharged Aura's management obligations under the Founders Agreement is unwarranted. In July 2012, after the Bankruptcy, Aura cited to the Founders Agreement and expressly stated that "[i]n the hands of Aura, the authority and responsibility were given to manage the ongoing business . . . ." [PTX 4; Tr. 87:26-88:4; DTX 4]. Mr. Abtan testified that management was a right, and the Bankruptcy discharged only

financial obligations. [Tr. 1020:2-5]. Indeed, Aura's counsel conceded that there were no obligations that had matured at the time of the Bankruptcy.

In addition, the bid pursuant to which Mr. Atrakchi assumed control of Aura made quite clear that ongoing agreements like the Founders Agreement were not discharged. The Aura Defendants knew when they acquired control of Aura that the Property had a $10 million mortgage from NYCB. The Mortgage matured in August 2014, and Aura was aware of numerous Property violations that could cause a default in the Mortgage. [PTX 7, 16]. Aura knew that it would be required to deal with the Mortgage as part of its management responsibilities, but took no meaningful action to address the Mortgage. [PTX 209; Tr. 1266:12-20].

The Aura Defendants [except Mr. Atrakchi] asserted counterclaims against U-Trend and Mr. Shohat that sought to hold U-Trend and Mr. Shohat liable for the mismanagement of the Property and Mr. Suky's looting. Aura's counterclaims are hereby dismissed.

This Court finds that Aura has presented no evidence to support its claims that U-Trend or Mr. Shohat had any responsibility to manage the Property, that U-Trend or Mr. Shohat actually managed the Property, that U-Trend or Mr. Shohat in any way precluded Aura from fulfilling its responsibilities

to manage the Property, or that U-Trend or Mr. Shohat caused any damages to Aura or the Property.

Accordingly, the Court finds that all of Aura's claims and counterclaims of any kind asserted against U-Trend or Mr. Shohat are dismissed with prejudice. The Clerk is directed to enter judgment accordingly.

U-Trend asserted three claims for damages at trial:

(1) Direct and derivative claims against Aura, Mr. Atrakchi, Mr. Kleiner, and Mr. Abtan for forcing a sale of the Property at a price below fair market value (the "Sale Claims"), seeking $4 million of direct damages to U-Trend's 35% interest. The Sale Claims are premised on the breach of fiduciary duty.

(2) Direct and derivative claims against Aura, 440 West and US Suite LLC alleging damages for the looting, waste and mismanagement of the Property (the "Looting Claims"). The Looting Claims are premised on breach of fiduciary duty, breach of contract, and aiding and abetting liability, and seek damages of $3,700,904.38.

(3) Direct and derivative claims against Aura, alleging that Aura failed to arrange for the repayment, refinance, or satisfaction of the Mortgage on the Property, and failed to adequately address the Mortgage defaults, causing the accrual of substantial debt to the lender that diminished the recovery by $1.9 million, leaving U-Trend unable even to recover the full

amount of its loans (the "Mortgage Claims"). The Mortgage Claims are premised on the breach of fiduciary duty and breach of contract.

With respect to the Sale Claims, we have already explained why such damages are unwarranted.

The parties are in agreement that Mr. Suky looted the Property and breached his duties to the members of the Joint Venture. The evidence at trial established that Aura bears responsibility for Mr. Suky's looting both on the breach of contract and aiding and abetting theories of liability, but only through October 3, 2012.

Under New York law, a fiduciary can be liable for "substantial assistance" when the fiduciary fails to act. [*Kaufman v Cohen*, 307 AD2d 113, 126 (1st Dept 2003)]. "[T]he mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff." [*Id.*]. Aura had actual knowledge of 440 West's wrongdoing, provided "substantial assistance" to 440 West; and U-Trend suffered damages as a result.

Aura owed a fiduciary duty directly to U-Trend by virtue of being the controlling shareholder of the Joint Venture. Accordingly, Aura is liable for aiding and abetting Mr. Suky's breach of fiduciary duty by failing to remove Mr. Suky, failing

to take control of the Property's bank accounts away from Mr. Suky, and failing to obtain reliable financial information for the Property.

Aura argues that it should not be held responsible for Mr. Suky's looting because U-Trend had asked Aura in early October of 2012 to delay taking action against Mr. Suky. [DTX DQ; Tr. 1434:21-1436:18]. At the time, U-Trend was going to take the lead in negotiating a potential management agreement among the three parties. [Kleiner Aff ¶¶ 39-41; Shohat Aff ¶ 43]. While U-Trend did have such discussions, the negotiations proved fruitless. By December 2, 2012, U-Trend had asked Aura for an emergency meeting to discuss taking steps against Mr. Suky. [PTX 104 ¶¶ 4-6, 10].

Due to U-Trend's request to delay taking action against Mr. Suky, the Court reiterates its trial ruling that the looting damages that arose after October 3, 2012 are not attributable to Aura. [Tr. 1343:15-18].

U-Trend is awarded damages attributable to payments by Mr. Suky to Gemini Capricorn, Inc. ("GCI") in 2012. On June 25, 2012, Aura expressly instructed Mr. Suky to make those payments, and never withdrew that authorization. [PTX 15]. Mr. Abtan admitted that the payments to GCI were improper and that Aura was trying to recover them. The amount of $289,785.56 [Garibaldi Report at 4] paid to GCI constitutes looting by Mr.

Suky that is jointly and severally attributed to Aura, 440 West, and US Suite LLC.

Because Aura is not deemed responsible for all of Mr. Suky's 2012 looting, the damages relating to NYC Midtown LLC and Direct Realty, LLC reflected in Mr. Garibaldi's report, totaling $324,531 [Garibaldi Report at 4], should be recoverable only from US Suite LLC and 440 West, not Aura.

With regard to the Mortgage Claims, Aura's failure to make provisions for the refinancing or repayment of the Property's Mortgage caused the Property to accrue unnecessary expense.

In March 2014, the Mortgage fell into default and began accruing default interest. [PTX 26]. Aura has previously conceded in a sworn affidavit submitted by Mr. Abtan (and incorporated into Mr. Abtan's direct testimony to support Aura's claimed damages) that the damages accrued by reason of the Mortgage default were $1,998,711.31. [Abtan Aff ¶ 174; Index No. 652082/2014, ECF # 1264 ¶54; PTX 229; Tr. 1177:11-1178:23]. This exact amount was included in the final April 1, 2015 payoff letter attached to Mr. Abtan's affidavit, which reflected "Default Interest at 20.00% from 3/20/2014 to 4/1/2015: $1,998,711.31." [Index No. 652082/2014, ECF # 1286]. Default interest would not have accrued had Aura acted to address the Property's Mortgage in a timely way.

Aura argues that it is not responsible for the default

interest accrued on the Mortgage because the Property could not be re-financed, and a default was inevitable. But this defense lacks merit. The evidence presented at trial showed that Aura knew in 2013 that the Property would not have sufficient funds to repay the Mortgage. [Kleiner Aff ¶ 84; Abtan Aff ¶ 123]. Aura was also aware of the violations on the Property well before maturity. Yet Aura did nothing to address the Mortgage or the numerous Property violations.

If Aura had simply shut down the Property temporarily (as U-Trend repeatedly urged) to perform the needed Property renovations, then the Mortgage default would not have been triggered. [Tr. 1264:4-13]. The Property could have been refinanced before the loan matured, and the penalty interest would have been averted. Aura simply abdicated its responsibility to act, rather than attempting to fulfill it.

The financing experts at trial agreed that re-financing was, in fact, possible. The expert witnesses called by U-Trend and the Aura Defendants agreed that the value of the Property was at least $30 million, and that the NYCB Mortgage balance was only $9.3 million. Assuming a lender was willing to lend up to 65% of the Property's value – which Aura's expert conceded [Tr. 1568:24-1570:7] - a loan of nearly $20 million was achievable on the value of the Property. The substantial untapped equity in the Property would have allowed Aura to repay the Mortgage and

finance the renovation. Aura made no effort to tap into this equity.

Aura also cannot reasonably dispute that financing was available because the Property was sold in April of 2015. The sale was backed by non-recourse financing of $28 million, notwithstanding the existing violations and issues at the Property. [PTX 232, Claim Summary ¶ 1(a)]. The same sophisticated lender advanced an additional $3,775,000 to the Property, for total principal financing of $31,775,000. [*Id.* ¶¶ 1(a), 2, 4]. By comparison, US Suite LLC only needed $9.3 million in financing to repay the Mortgage in 2014.

Aura's expert conceded that refinancing for the Mortgage would have been available at a market rate between 7% and 12%. [Tr. 1572:16-18]. U-Trend's expert opined that re-financing was available at rates between 6% and 7.5%. [Falik Aff ¶ 57]. The evidence is clear that refinancing was available had Aura tried to obtain it.

Accordingly, damages are assessed against Aura for breach of contract and breach of fiduciary duty for failing to appropriately deal with the Mortgage in the amount accrued due to the Mortgage default, *to wit*, $1,998,711.31.

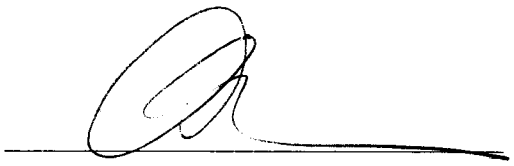
The damages collected on behalf of HSI shall in the first instance be paid to satisfy the remaining unpaid balance on U-Trend's loans until the U-Trend loans have been fully paid.

Any amounts collected on account of any other claims after the balance of U-Trend's loans have been fully repaid shall be a distribution directly to U-Trend due to its equity interest in the Property.

All claims not assessed above are hereby dismissed.

Settle judgment accordingly.

Dated: October 22, 2018



J.S.C.

CHARLES E. RAMOS