AMERICAN ARBITRATION ASSOCIATION

PAN WANG, individually, and on behalf of all others similarly situated, Plaintiff, v. 76 ELEVENTH FUNDING GP, LLC, Defendant.	)	Case No. _____ CLASS ACTION **VERIFIED COMPLAINT**

Plaintiff Pan Wang, by and through her counsel, alleges the following against Defendant 76 Eleventh Funding GP, LLC. Plaintiff bases her allegations upon information and belief, except as to those allegations concerning Plaintiff, which are alleged upon personal knowledge. Plaintiff's information and belief are based upon, among other things, counsel's investigation, which included review and analysis of documents provided to Plaintiff by Defendant; communications issued by and disseminated by Defendant; and media reports and other public information.

NATURE OF ACTION

1. Plaintiff is an investor in, and a member of, 76 Eleventh Funding, LLC ("76 Eleventh" or the "Company"). Plaintiff brings this class action (the "Action") against Defendant on behalf of all members ("Members") of the Company ("Class"). In this Action, Plaintiff seeks to ensure that: (i) the Members are provided with more information relating to any proposal to settle various claims of the Company; (ii) the Members have the right to consult with and advise the Manager (as hereinafter defined) regarding any such proposed settlement; and (iii) any settlement of such claims first be approved by the Members.

2. 76 Eleventh was formed for the purpose of making mezzanine construction loans to fund a mixed-use two tower scheme commercial and residential as-of-right development located at 76 Eleventh Avenue, New York, New York (the "Project"). The Company is governed by an Operating Agreement of 76 Eleventh Funding, LLC, dated as of December 30, 2015 ("Operating Agreement"). Under the Operating Agreement, Defendant 76 Eleventh Funding GP, LLC is the manager ("Manager") of the Company.

3. Plaintiff is one of approximately 690 investors who each invested $500,000, and further paid an administrative fee of $50,000, to acquire their membership interests in the Company. The funds of these investors were then pooled to make a $345 million mezzanine loan ("Loan") to fund development of the Project.

4. In or around August 2021, the Manager informed Plaintiff and the other Members of the Company that the borrower under the Loan had defaulted, and that development of the Project had ceased.

5. In December 2021, a senior mezzanine lender to the Project (together with its affiliated senior secured lender, the "Senior Lender"), whose loan to the Project had priority over the Loan made by the Company, completed a foreclosure sale of the Senior Lender's collateral. As a result, the collateral securing the Company's Loan has been rendered worthless, and the Company now has no assets in the Project against which to recover to satisfy its Loan.

6. On December 23, 2021, Defendant Manager commenced an action, by filing a Summons with Notice, in the Supreme Court of the State of New York against certain defendants in connection with the Project and the Loan, captioned *76 Eleventh Admin Agent LLC v. HFZ Capital Group, LLC*, No. 657159/2021 (N.Y. Sup., County of New York) (the "HFZ Litigation").

7. In the Summons with Notice, Defendant Manager alleged claims arising out of acts of fraud, conversion, unjust enrichment, breach of contract, civil conspiracy, waste, breaches of

fiduciary duty and tortious interference with contract, based on the diversion of at least $246 million from the Project, and wrongful actions to conceal those diversions from the Company. Defendant Manager alleged that, because this diversion was concealed from 76 Eleventh, the Company continued to advance monies under the Loan to fund the Project that it otherwise would not have advanced and, ultimately, completely lost. In addition to claims based on the diversion of funds, Defendant Manager also asserted a right to payment under various guaranties provided by the defendants in the HFZ Litigation in connection with the Loan.

8. However, apart from filing the Summons with Notice ten months ago, Defendant Manager did not file a substantive complaint, and took no further action to advance the HFZ Litigation. Notably, Defendant Manager alleged misconduct by the Senior Lender to facilitate the diversion of at least $246 million, and that induced the Company to advance monies under the Loan. Yet Defendant Manager took no steps to name the Senior Lender as a defendant in the HFZ Litigation. Instead, on September 26, 2022, Defendant Manager inexplicably voluntarily discontinued the entire HFZ Litigation.

9. Plaintiff has learned, through her counsel, that Defendant Manager has been conducting settlement negotiations with the parties to the HFZ Litigation and potentially other interested parties, including the guarantors under the guaranties and the Senior Lender. Despite the importance of the terms of any such settlement to Plaintiff and the other Members of the Company, the Manager has failed to keep the Members apprised of the material terms of the settlement proposals, or to otherwise solicit the input of the Members. In short, despite the fact that the Members have already lost their entire investment in the Project, and even though the Members' claims against third parties remain as the only potential source of recovery, Defendant Manager is proceeding to resolve these potential claims without giving the Members of the Company any say. Defendant Manager's conduct violates the Operating Agreement, which expressly grants the

Members the ability to advise the Manager on the business, investment decisions, and policies of the Company.

10. Defendant Manager's actions are especially troubling given its own conflicts. In particular, there are serious questions as to Defendant Manager's own liability for, among other things, failing to monitor the Loan and to detect the diversion of at least $246 million from the Project. Furthermore, Defendant Manager's failure to aggressively pursue the HFZ Litigation, including against the Senior Lender, suggests that the Manager is half-hearted about pursuing a litigation that will negatively affect the Manager's reputation among other developers and sponsors of EB-5 projects (described further below).

11. In short, the proposed settlement has the potential to be a cozy deal in which the Members of the Company, who have lost everything, obtain nothing or very little in return for the release of valuable claims that are the only remaining source of recovery for the Members.

12. In this Action, Plaintiff and the putative Class seek an injunction requiring Defendant Manager to provide notice to the putative Class of any proposed settlement of the HFZ Litigation or any other claims arising from the Loan and the Project, and to enjoin Defendant from consummating any settlement without first obtaining the approval of the putative Class.

JURISDICTION AND VENUE

13. Pursuant to the Arbitration Provision contained within the Operating Agreement of 76 Eleventh Funding LLC, any dispute arising out of or in connection with the Operating Agreement must be submitted and settled by arbitration in the State of New York by the American Arbitration Association.

PARTIES

14. Plaintiff Pan Wang is an individual who invested in and is a current Member of the Company.

15. Defendant 76 Eleventh Funding GP, LLC is a limited liability company incorporated under the laws of the State of Delaware.

SUBSTANTIVE ALLEGATIONS

I. THE EB-5 IMMIGRANT INVESTOR PROGRAM

16. The EB-5 Immigrant Investor Program is a program that was created by Congress in 1992 to stimulate the U.S. economy through job creation and capital investment by foreign investors. The United States Citizenship and Immigration Services ("USCIS") administers the program. The program sets aside EB-5 immigrant visas for participants who invest in commercial enterprises approved by USCIS, which are sometimes administered by entities called "regional centers."

17. The investments offered by regional centers to EB-5 foreign investors are typically offered as an interest in an investment vehicle such as a limited partnership or limited liability company. These investment vehicles are managed by a person or entity other than the foreign investor, specifically, the general partner or managing member of the investment vehicle.

18. To be eligible for an EB-5 visa through a regional center, a foreign investor is required to invest money (at least $500,000 during the relevant time period), and put this money at risk for the purpose of generating a return. The investor may then petition USCIS for conditional permanent residency for a two-year period through an application called an I-526 petition. If at least ten U.S. jobs are created as a result of the foreign investor's investment, the investor may apply to have the conditions removed from her/his visa and live and work in the United States permanently (an I-829 petition).

II. THE COMPANY WAS FORMED TO OBTAIN INVESTMENTS FROM FOREIGN INVESTORS UNDER THE EB-5 IMMIGRANT INVESTOR PROGRAM FOR THE PURPOSE OF MAKING REAL ESTATE DEVELOPMENT LOANS

19. 76 Eleventh was incorporated on or about July 27, 2015. The Company was formed

for the purpose of making a mezzanine loan for purposes of developing the Project.

20. On April 21, 2016, Plaintiff Wang entered into a subscription agreement to acquire a unit in the Company, for the total subscription amount of $550,000, comprising a $500,000 purchase price for the unit and a $50,000 administrative fee.

21. In total, approximately 690 investors each contributed half a million dollars to the Company and further paid an administrative fee of $50,000.

22. Using these funds raised from investors, the Company made a junior mezzanine loan of $345 million (the Loan) to HFZ 76 11th Avenue Junior Mezzanine Borrower LLC (the "Borrower"). The Borrower was one of several developer entities incorporated for purposes of developing the Project. The Company advanced the Loan funds to the Borrower in various tranches.

23. Other developer entities were formed for purposes of developing the Project. These entities also entered into loan agreements with other lenders to obtain financing for the Project. Specifically, apart from the Loan obtained from the Company, the Project was financed by loans obtained from the Senior Lender, which loans were senior to the Loan and totaled $1,350,000,000 (the "Senior Loans"). The Senior Lender comprised various entities affiliated with The Children's Investment Fund ("TCI").

24. In connection with making the Loan, the Company obtained guaranties ("Guaranties") from (i) HFZ Capital Group, LLC ("HFZ Capital"), which was the over-arching developer of the Project, and (ii) Ziel Feldman ("Feldman"), who is a principal of HFZ Capital. Specifically, the Company obtained an Amended and Restated Junior Mezzanine Guaranty of Recourse Obligations, executed as of May 9, 2017, from HFZ Capital and Feldman. In addition, the Company obtained a Junior Mezzanine Guaranty of Cost Over-Runs and Completion, executed as of May 9, 2017, from HFZ Capital and Feldman.

III. THE PROJECT ENTERS INTO FINANCIAL DISTRESS AND THE BORROWER DEFAULTS UNDER THE LOAN

25. Commencing in approximately March 2020, the Project began to experience financial distress, and the Borrower and the other developer entities failed to make repayments under the Loan and the Senior Loans.

26. On July 12, 2021, the Senior Lender exercised their rights to accelerate the Senior Loans in full and declared the full amount of the Senior Loans, plus other amounts owing in relation to these Senior Loans, immediately due and payable. On August 8, 2021, the Senior Lender provided notice of a proposed foreclosure of certain of its collateral pursuant to Article 9 of the Uniform Commercial Code.

27. On August 11, 2021, the Members of the Company were notified that the Project had "sustained significant financial difficulties," that the Project was now at a "standstill," and that "the developer does not have sufficient funding in place to complete the Project." The Members were advised that the "the Borrower continues to have no money to cure the defaults under the various loan agreements, or to restart construction which stopped approximately one year ago."

28. On December 23, 2021, the foreclosure sale noticed by the Senior Lender was conducted. The winning bidder subsequently acquired all ownership interests in the Project.

29. However, while the Senior Lender/TCI recovered a substantial proportion of the Senior Loans that they extended to the Project, the same could not be said for the Company and its Loan. As a result of the Senior Lender's foreclosure sale, the interest of the Company (and, therefore, the interest of the putative Class) in the Project was completely wiped out.

IV. THE MANAGER COMMENCES THE HFZ LITIGATION, BUT FAILS TO VIGOROUSLY PROSECUTE ANY CLAIMS

30. On December 23, 2021, Defendant Manager commenced the HFZ Litigation on behalf of the Company. In the HFZ Litigation, the Manager made serious allegations against a

number of parties, including the Senior Lender.

31. Specifically, the Manager alleged "acts of fraud, conversion, unjust enrichment, breach of contract (including breach of the Guaranties), civil conspiracy, waste, breaches of fiduciary duty and tortious interference with contract" by HFZ and Feldman. The Manager alleged that these persons engaged in various wrongful actions, including:

- diversion of at least $246 million from the Project;
- wrongful actions in conspiring with the Senior Lender to facilitate the diversion;
- wrongful actions in concealing the diversion of these funds from the Company, which thereby induced the Company to advance and continue to advance funds to the Borrower;
- the failure by HFZ and Feldman to pay amounts owed under the Guaranties; and
- other wrongful conduct by Defendants.

32. Defendant Manager alleged that, "[b]y reason of Defendants' wrongful conduct, the Project was not completed, and Senior Lender conducted a UCC foreclosure sale which left [the Borrower] with no valuable assets and rendered the collateral for Plaintiffs' loans to [the Borrower] worthless."

33. Based on these allegations, Defendant Manager purported to assert direct and derivative claims against HFZ and Feldman.

34. However, despite implicating the Senior Lender in the diversion of the $246 million from the Project, the Defendant Manager failed to add the Senior Lender as a defendant in the HFZ Litigation.

35. Moreover, for nearly a year, Defendant Manager took no steps to file a substantive complaint setting forth the allegations and claims against HFZ, Feldman, or any other implicated party.

36. The only step Defendant Manager took in the litigation was to enter into a stipulation by which HFZ and Feldman were provided with additional time, until October 17, 2022, to demand a complaint in connection with the Summons with Notice.

37. Before HFZ and Feldman even filed a demand for a complaint in connection with the claims asserted in the Summons and Notice, on September 26, 2022, Defendant Manager voluntarily discontinued the HFZ Litigation, without any explanation to the Members.

V. THE MANAGER HAS FAILED TO KEEP MEMBERS OF THE COMPANY APPRISED OF, OR TO OTHERWISE CONSULT WITH THE MEMBERS IN CONNECTION WITH, A PROPOSED SETTLEMENT OF THE HFZ LITIGATION

38. Although the Manager has the "exclusive power and authority and discretion to administer the Company's business, property and affairs" under the Operating Agreement, the Manager must do so in the best interests of the Company and its Members. Specifically, Section 8(b) of the Operating Agreement (entitled "Specific Rights and Powers") provides that "the Manager and/or its designated agents shall have such other rights and powers required for or ***appropriate to its management of the Company's business***." (emphasis added). The Manager must also not take any actions that would deprive the Members of their contractual rights under the Operating Agreement. Section 8(k) provides that "the Manager and its Affiliates shall be subject to the ***implied contractual covenant of good faith and fair dealing.***" (emphasis added). Finally, the Manager "***shall not be entitled to be indemnified or held harmless due to, or arising from, fraud, bad faith, gross negligence or willful misconduct***." *Id.* at Section 8(g) (emphasis added).

39. Furthermore, the Operating Agreement provides the Members with various protections. Specifically, Section 18(f) of the Operating Agreement provides that the Members "may take part in the management of the Company" by, among other things, "***advising the***

Manager regarding investment decisions and policies of the Company," and that Members have the right to "***consult with and advise the Manager in making any decisions related to the Business[.]***" (emphasis added).

40. In addition, pursuant to Sections 8(d)(ii) and 8(d)(vi) of the Operating Agreement, the Manager does not have the ability to finalize a settlement without a vote by the majority of members in the Company. That is because the proposed settlement would result in a material modification of the purpose of the Company, which is to make a loan. *Id*. at Section 4. Through the Manager's counsel, Plaintiff understands that a proposed settlement would be structured so as to create a profit participation arrangement that is contingent upon the performance of future condominium sales. This proposed settlement therefore would not maintain a lending relationship between the Company and the Borrower, as required by Section 4 of the Operating Agreement.

41. On January 10, 2022, the Manager issued an update to the Members informing them that the Manager had filed the HFZ Litigation. The Manager also informed the Members that it had been "diligently negotiating with the prior owner and the New Owner [of the Project] to recover a portion of the net proceeds from the Project."

42. At a Special Meeting of the Members held on January 21, 2022, the Manager provided the Members with a further update.

43. Apart from these general pronouncements and update, however, the Manager has not otherwise kept the Members apprised of either the decision to voluntarily terminate the HFZ Litigation, and the reasons therefor, or the material terms of any proposed settlement, and does not intend to seek the consent of the Members before entering into a settlement. In a communication sent to Plaintiff's counsel on June 6, 2022, Defendant asserted that it had the "exclusive power and authority and discretion" to settle the claims asserted in the HFZ Litigation. Defendant Manager also asserted that it was not required to obtain the advice of, or consult with, the Members, and

that it was not required to first notify and seek approval from the Members before entering into any settlement of the HFZ Litigation. Indeed, the Manager, through its counsel, issued an explicit threat against Plaintiff, "caution[ing] [Plaintiff] and her agents not to interfere with the Company or its 700 members' interests, or the Manager will hold her liable for any damages or foregone recoveries, which may well dwarf her investment."

VI. THE MANAGER CANNOT REASONABLY REPRESENT THE INTERESTS OF THE COMPANY IN ANY SETTLEMENT NEGOTIATIONS

44. The fact that the Manager would threaten a Member of the Company seeking more information about any potential settlement of the HFZ Litigation is remarkable. This threat stands in sharp contrast to the utter torpor of the Manager in pursuing any claims against the Senior Lender, whom the Manager accused, in the December 23, 2021 Summons with Notice filed in the HFZ Litigation, of engaging in a conspiracy with HFZ and Feldman to conceal the diversion of $246 million from the Project, thereby inducing the Company to advance and continue to advance funds to the Borrower.

45. In this case, the Manager suffers from a number of conflicts that render it incapable of diligently prosecuting the HFZ Litigation and asserting claims against other parties.

46. Specifically, the Manager itself may have liability for failing to properly monitor the Project and/or investigate the diversion of $246,000,000 from the Project by various persons affiliated with the developers of the Project.

47. The Manager also caused the Company to extend the Loan, using the Members' investment monies, to the Borrower, HFZ 76 11th Avenue Junior Mezzanine Borrower LLC, when the Operating Agreement expressly provided that the mezzanine loan was to be made to a different entity, HFZ 76th 11th Avenue JV LLC. *See* Operating Agreement, Section 4(a).

48. The Manager caused or otherwise permitted the borrowing entity under the Loan

to become the indirect owner of the project company (*i.e.*, the fee owner of the real property of the Project), as opposed to the borrowing entity being the direct owner of the project company, contrary to the representations in the Confidential Offering Memorandum, dated December 30, 2015, that was provided to Plaintiff and other Members.

49. The Manager also failed to diligently prosecute the HFZ Litigation, including pursuing any claims against the Senior Lender, and instead terminated that litigation without explanation to the Members.

50. In short, based on the above conflicts and omissions by Defendant Manager, it is clear that the Manager's objectives are not aligned with those of the Members, and that the Manager may be more concerned about protecting against its own liability, and maintaining its relationships with existing and potential sponsors of real estate projects, as opposed to diligently protecting the rights of the Members.

CLASS ACTION ALLEGATIONS

51. Plaintiff brings this Action as a class action, on behalf of the Class, which consists of all approximately 690 Members of the Company.

52. The members of the Class are so numerous that joinder of all members is impracticable.

53. Plaintiff's claims are typical of the Class because Plaintiff's and the Class members' claims and damages arise from the same failure by the same breaches of the Manager under the Operating Agreement.

54. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and commercial litigation. Plaintiff has no interests antagonistic to or in conflict with those of the Class.

55. There are questions of law and fact common to the Class which predominate over

any questions affecting only individual Class members. Among the common questions of law and fact are:

(a) whether the Operating Agreement requires the Manager to notify Class members of the terms of any proposed settlement of the HFZ Litigation;

(b) whether the Operating Agreement requires the Manager to otherwise consult with, and obtain the advice of, the Class members in any proposed settlement of the HFZ Litigation;

(c) whether the Operating Agreement requires the Manager to first obtain the consent of the Class members before entering into any settlement of the HFZ Litigation or of any other claims against any other parties in connection with the Project; and

(d) to what extent the Class members have sustained damages.

56. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy because joinder of all members is impracticable. Furthermore, based on the damages suffered by individual Class members, the expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this Action as a class action.

CAUSE OF ACTION

COUNT I
BREACH OF CONTRACT

57. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

58. Plaintiff and the putative Class, and Defendant Manager, are parties to the Operating Agreement.

59. Section 18(f) of the Operating Agreement provides that the Members "may take

part in the management of the Company" by, among other things, "advising the Manager regarding investment decisions and policies of the Company," and that Members have the right to "consult with and advise the Manager in making any decisions related to the Business[.]". Sections 8(d)(ii) and 8(d)(vi) of the Operating Agreement also require that any settlement of the HFZ Litigation and of any claims against any other persons arising from the Loan and the Project be approved by a vote by of the majority of Members in the Company, because any such settlement would result in a material modification of the purpose of the Company.

60. In addition, Section 8(b) of the Operating Agreement requires the Manager to act in the best interests of the Company. Section 8(k) further provides for an express contractual covenant of good faith and fair dealing, such that the Manager cannot take any actions that would deprive the Members of their contractual rights under the Operating Agreement. Finally, Section 8(g) provides that the Manager cannot engage in "fraud, bad faith, gross negligence or willful misconduct."

61. Defendant Manager has breached and continues to breach the above provisions of the Operating Agreement. Among other breaches, Defendant has failed to diligently prosecute the HFZ Litigation, and to assert claims against other liable persons. Defendant has failed to provide information concerning the terms and scope of the proposed settlement of the HFZ Litigation and, potentially, claims against other persons. Defendant refuses to permit Members of the Company to consult with and advise the Manager with respect to any proposed settlement. Defendant also refuses to first obtain the approval of a majority of the Class before entering into any proposed settlement.

62. As a result of Defendant's conduct, Plaintiff and the Class have been, and continue to be, damaged.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment as follows:

A. Declaring that this Action is properly maintainable as a class action, certifying Plaintiff as class representative, and appointing her counsel HGT Law, LTL Attorneys LLP and Reid & Wise LLC as Co-Class Counsel;

B. Ordering Defendant to provide the Class with timely updates as to the status of, and material terms of, any proposed settlement;

C. Enjoining Defendant from consummating any settlement of the HFZ Litigation or from compromising any other claims against any person arising from the Loan and the Project, without first: (1) notifying the Class of the terms of the proposed settlement; (2) permitting the Class to consult with and advise Defendant Manager with respect to any proposed settlement; and (3) obtaining the approval of the Class for any proposed settlement.

D. Awarding Plaintiff and other members of the Class their reasonable costs and expenses incurred in this Action, and their attorneys' fees and expert fees;

E. Awarding such equitable/injunctive or other relief as the Court may deem just and proper, including permitting any putative Class members to exclude themselves by requesting exclusion through noticed procedures; and

F. Awarding Plaintiff and the other members of the Class such other and further relief as the Court may deem just and proper.

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