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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 48

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In the Matter of the Application of
ACTIVITY KUAFU HUDSON YARDS LLC,
a New York Limited Liability Company,

Petitioner,

For the Dissolution of REEDROCK KUAFU
DEVELOPMENT COMPANY LLC, a Delaware Limited
Liability Company pursuant to Section 18-802
of the Delaware Limited Liability Company Act,

- against -

REEDROCK KUAFU DEVELOPMENT COMPANY LLC,
SIRAS PARTNERS LLC and LUDWICK CHINA LLC,

Respondents .

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Index No. 650599/2015

April 14, 2015
60 Centre Street
New York, New York 10007

B E F O R E: THE HONORABLE JEFFREY K. OING, Justice.

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Terry-Ann Volberg, CSR, CRR

Official Court Reporter.
Terry-Ann Volberg, CSR, CRR, Official Court Reporter

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2 THE COURT: The court has before it the
3 matter of Activity Kuafu Hudson Yards LLC for the
4 dissolution of Reedrock Kuafu Development Company LLC,
5 Index Number 650599/2015. This is motion sequence
6 number two which is a motion by the respondent seeking
7 dismissal of this petition for dissolution.

8 Having said that, would the parties enter
9 their appearances for the record, for the petitioner?

10 MS. MAC AVOY: Janice Mac Avoy from Fried,
11 Frank, Harris, Shriver & Jacobson on behalf of Activity
12 Kuafu. We have substituted in for the Davidoff Hutcher
13 firm which originally filed this action.

14 THE COURT: Thank you.

15 For the respondent?

16 MR. SIEGMUND: Mark Siegmund also from the
17 law firm of Fried, Frank for petitioner.

18 THE COURT: Are we missing somebody?

19 MS. MAC AVOY: She was only here
20 representing the individual plaintiffs on the other
21 claim.

22 THE COURT: I learned when I was on that
23 side never to leave the courtroom until everything is
24 done. That's something that was taught to me a long
25 time ago. Funny things can happen when you are not
26 around. You are all laughing because I gather you

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2 think the same thing.

3 Having said that, for the respondent?

4 MR. CRACO: Louis A. Craco, Jr. from
5 Allegaert Berger & Vogel for the respondent-movant
6 Siras Partners LLC. With me at counsel table are my
7 partners Kevin MacMillan and Partha Chatteraj.

8 THE COURT: Thank you.

9 Having said that, we have motion sequence
10 number two here. I also have, which I am holding on
11 the side, motion sequence number one, the petition to
12 dissolve the LLC here.13 I read the arguments here. First and
14 foremost, the question is whether or not the court has
15 subject matter jurisdiction to dissolve this LLC. I
16 say LLC because there are a lot of terms being thrown
17 around, corporation, limited partnerships, LLC.18 There is no dispute that this LLC was
19 incorporated in Delaware. There is also no dispute
20 that the petition itself seeks dissolution of the LLC
21 pursuant to Section 18-802 of the Delaware Limited
22 Liability Company Act. It's not being sought to
23 dissolve pursuant to the New York LLC law, which it
24 can't be because it was formed in Delaware.25 So the question, the first question off the
26 top, right off the bat, is whether or not I have

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2 subject matter jurisdiction. The question is -- I read
3 your letter. It's really a surreply. I didn't need to
4 see the letter again, but thanks for the letter. I
5 looked at the cases. Why do you think I have subject
6 matter jurisdiction?

7 MS. MAC AVOY: Your Honor, I think the
8 controlling First Department law is actually quite
9 clear.

10 THE COURT: You're relying on -- are you
11 relying on Herskowitz v. Tomkins, 184 A.D.2d 402, First
12 Department 1992? Tell me why you think Herskowitz is
13 controlling.

14 MS. MAC AVOY: Your Honor, Herskowitz
15 specifically held that this court had the power, had
16 subject matter jurisdiction, to dissolve a New Jersey
17 corporation. Now, although it was a corporation, the
18 rules with respect to corporations, LLCs and limited
19 partnerships with respect to subject matter
20 jurisdiction is not different.

21 THE COURT: I have to disagree with you.
22 You know why? When I read this case, first of all,
23 they don't talk about the Delaware law. They don't
24 talk about Section 18-802 which I think, if my records
25 are correct, was passed, hang on a second, that law was
26 passed in 1992, something like 1995, effective 1995.

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2 So that the question for me is whether or not this law
3 that we are looking at in the petition was actually in
4 existence at the time that this decision came down in
5 '92.

6 And the other thing that I wanted to look at
7 was that they don't mention Delaware law. We know
8 Delaware law, at least Delaware itself, is the place to
9 be in terms of all corporate activity, so that would be
10 important to me.

11 A lot has developed since 1992. That case,
12 if you are relying on that case for the proposition
13 that I have subject matter jurisdiction, I'm not so
14 sure I am inclined to agree with you because, A, it
15 does not talk about Delaware law, and, B, it doesn't
16 really give me enough context to determine whether or
17 not I have subject matter jurisdiction because in the
18 case I have here the Delaware courts, the Delaware law
19 with respect to the LLC is very clear.

20 This is where I am going to disagree with
21 you. Again, in your letter or in the record in terms
22 of the briefs that were submitted, "On applications
23 by," that's the wrong one. That's the New York LLC
24 law. It's the Delaware LLC law. It says here, "On
25 applications by or for a member or manager, the Court
26 of Chancery may decree dissolution of a limited

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2 liability company whenever it is not reasonably
3 practical to carry on business in conformity with a
4 Limited Liability Company Agreement." That's the
5 Operating Agreement. That's virtually the same as the
6 Delaware LP law, and also virtually the same as New
7 York's 703 law, the New York LLC Law 702 -- sorry --
8 for judicial dissolution.

9 MS. MAC AVOY: Also, it's virtually similar
10 to the Delaware Corporation --

11 THE COURT: The thing that you pointed out
12 being the word "may" indicates to you that I have
13 subject matter jurisdiction because it's telling, it's
14 saying -- I will let you tell me why the "may" is
15 controlling.

16 MS. MAC AVOY: Because it's permissive.
17 Delaware courts have actually addressed this very
18 issue, that word "may," not in this statute, but in a
19 similar statute that said the Delaware Chancery Court
20 may do an appraisal proceeding.

21 THE COURT: It's discretionary because that
22 "may" basically -- it's not compulsory because if you
23 put the "shall" in there, that would mean that any time
24 somebody makes an application, the Chancery Court then
25 has to and is required to dissolve the corporation. So
26 the word "may" in there gives the Chancery Court the

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2 discretion -- we know who wrote these laws, lawyers
3 wrote these laws -- the discretion to decide whether or
4 not to dissolve, to dissolve the LLC. It doesn't mean
5 that, that doesn't mean -- what you are telling me is
6 that that also means that other courts can use this to
7 dissolve the Delaware LLC.

8 MS. MAC AVOY: That's exactly what the
9 Delaware Chancery Court has held in other context with
10 a statute involving the words "the Delaware Chancery
11 Court may."

12 THE COURT: Do you have that case?

13 MS. MAC AVOY: It's Duff v. Innovative
14 Discovery.

15 THE COURT: May I have that case?

16 It would be odd for me to say that a Delaware
17 court would tell the world that, oh, yeah, any court
18 can resolve or decide this case, we are allowing that
19 to happen.

20 Let me see that. That's interesting that
21 they would say that. (Handing.)

22 MS. MAC AVOY: It held, your Honor, that the
23 word "may" --

24 THE COURT: I'll read it. Hang on a second.
25 Have a seat while I read this.

26 This case that I'm reading here says that the

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2 Court of Chancery has jurisdiction, subject matter
3 jurisdiction. It's not saying or expanding that
4 proposition to say all courts have subject matter
5 jurisdiction.

6 Does it say that?

7 MS. MAC AVOY: It goes on to say, if you
8 look at the sixth page of the printout, page *6, on the
9 right-hand column, third paragraph, --

10 THE COURT: That's where you highlighted.

11 Hang on a second.

12 MS. MAC AVOY: The third paragraph on the
13 right-hand side.

14 THE COURT: You're saying here that,
15 "Consequently, litigants such as Duff and Carp, who
16 state a claim under 6 Del.C 18-111 have a choice of
17 pursuing that claim in the Court of Chancery or in
18 another appropriate forum." That's where you are
19 saying that means that they can, that this LLC
20 dissolution petition is properly before me?

21 MS. MAC AVOY: Exactly, your Honor.

22 THE COURT: This is a lower court decision.

23 You have got a higher court saying that's
24 agreeable?

25 MS. MAC AVOY: We do not. As far as I'm
26 aware, it's not been addressed by the Delaware court,

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2 but we do have a Delaware Chancery Court decision
3 saying that "may" means that it is permissive to bring
4 the claim in Delaware Chancery, and that any other
5 appropriate forum is appropriate.

6 In looking at the New York cases which were
7 originally based on the internal affairs doctrine that
8 courts wouldn't involve themselves in the internal
9 affairs of a foreign entity, all of those cases, first,
10 were permissive. They weren't saying the court didn't
11 have subject matter jurisdiction. They were saying
12 that in the interest of comity, in the interest of the
13 preservation of judicial resources, the courts should
14 not. And more recent cases have made the distinction
15 that those Second and Third Department cases that were
16 based on the internal affairs doctrine have since been
17 abrogated, and that the courts have now said that
18 instead of using an internal affairs doctrine analysis,
19 the court should use a forum non conveniens analysis in
20 determining whether or not to hear a dissolution
21 proceeding or other proceeding involving the internal
22 affairs of a foreign corporation or entity.

23 THE COURT: You know, I just read something.
24 In reading this case and listening to your argument
25 here, 18-111, when they use the words "in another
26 appropriate forum," were they talking about a legal

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2 claim or an equitable claim?

3 MS. MAC AVOY: It wasn't clear. There was a
4 mix here between legal and equitable.5 THE COURT: If it's a legal claim, I would
6 tend to agree with you, that could be in any forum
7 because, as the respondents say, legal claims are okay
8 because we will get to that on the merits, but when you
9 talk about equitable claims, which a dissolution is an
10 equitable claim, the way this is phrased, and that was
11 part of the argument here in 18-111, is that, I'm
12 curious to see when the court said "appropriate forum,"
13 is he limiting that area to the legal argument or the
14 legal claims that are being asserted or is he saying
15 equitable claims are also appropriate?

16 MS. MAC AVOY: It's not clear.

17 THE COURT: I didn't think so. It's fast
18 reading on my part.19 MS. MAC AVOY: It is not clear, but I think
20 that there is no case law --

21 THE COURT: Exactly, I saw that.

22 MS. MAC AVOY: -- in the First Department to
23 suggest this court is without subject matter
24 jurisdiction.25 THE COURT: There is no case law that talks
26 about the equitable rights that we are talking about in

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2 a special proceeding, whether or not that should be
3 here or somewhere else or the forum in which the LLC is
4 created. There is no legal -- I looked. You're right,
5 there are no cases out there. But there is also, all
6 the cases cited by both sides, don't talk about the LLC
7 in the form I have now, don't talk about what happens
8 if it's a dissolution versus a legal claim. We don't
9 have any of that.

10 So that at this point I guess this is, I
11 guess, a matter of an issue of first impression in a
12 sense that, what do I have here? I have an LLC law
13 that clearly says the Court of Chancery may decree, and
14 then you're arguing, well, that "may" means it could be
15 in the Chancery Court, could be another forum, but that
16 also means if it involves equitable, it's not clear.
17 If it involves equitable, perhaps it's only limited or
18 the only place that can have that claim resolved is in
19 the Court of Chancery. If it's a legal claim they can
20 say, sure, you can do it anywhere, have it anywhere.

21 Do you follow that?

22 MS. MAC AVOY: Absolutely, your Honor.

23 THE COURT: It's not clear.

24 MS. MAC AVOY: It's an argument, but it's
25 not clear. There are no cases that would mandate
26 dismissal.

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2 THE COURT: I have this funny feeling that
3 this case is not going to end here. At some point we
4 will get final authority on this issue, but at this
5 point I'm not so sure that the case law I have, that I
6 look at, supports the argument that this case is
7 properly -- I have subject matter jurisdiction over
8 this case.

9 MS. MAC AVOY: There are three other cases.
10 There is Herskowitz which, as you noted, was decided in
11 1992, the same year as the LLC law was enacted, and
12 involved a New Jersey corporation.

13 THE COURT: The LLC law, exactly, was
14 enacted in that year, but nothing came out of it.
15 There were no cases that came out of it right away.

16 MS. MAC AVOY: In 1994 the court, First
17 Department, in the Dissolution of Hospital Diagnostics
18 case --

19 THE COURT: I looked at that case too.

20 MS. MAC AVOY: Again, dicta.

21 THE COURT: That's 205 A.D.2d 459.

22 Forgetting about dicta, I am looking it at in
23 the sense that it does not talk about the Delaware law.
24 It does not talk about 18-802. That's what I am
25 looking for. I am looking for something that talks
26 about that.

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2 MS. MAC AVOY: Neither do the other cases
3 they cite to suggest that there is no subject matter
4 jurisdiction. Those cases are long discredited.

5 THE COURT: None of the cases that I have
6 talk about 18-802. None of them talk about the new
7 developments we have in this day and age in terms of
8 what is going on.

9 The way I look at it, at the end of the day I
10 have to decide whether or not, you know, it should go
11 there or should be here. So that where I go next is
12 the forum selection clause. That's where I look at.

13 It's interesting what the forum selection
14 clause says. The forum selection clause says that
15 11 -- not 11, it's at 12.

16 MS. MAC AVOY: 12.16, your Honor.

17 THE COURT: Let me get to my notes here.

18 We have 12.04 that says the governing law is
19 the State of Delaware. It will be construed under the
20 laws of Delaware without regard to the conflicts of law
21 principles.

22 I then look at 12.16, venue.

23 Have a seat. This will take a minute.

24 "Each of the members consents to the
25 jurisdiction of any court located in New York County in
26 the State of New York for any action arising out of

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2 matters related to this agreement. Each of the members
3 waives the right to commence an action in connection
4 with this agreement in any court outside New York
5 County, New York."

6 It's interesting. You used the word
7 "action." They used the word in this Operating
8 Agreement as action. We know for a fact this can't be
9 argued. Dissolution is not an action. Dissolution is
10 not a legal remedy. Dissolution is an equitable
11 remedy. So that that's limiting it, 12.16 limits that,
12 what can be brought here.

13 MS. MAC AVOY: I don't think it limits
14 what --

15 THE COURT: So that's the tiebreaker. I am
16 thinking, where should the dissolution be, over there
17 or over here?

18 Tell me why that's not the case.

19 MS. MAC AVOY: It doesn't say --

20 THE COURT: Now you have to stand.

21 MS. MAC AVOY: It doesn't limit what can be
22 brought here to this action. It's saying with respect
23 to actions, it must be brought here. So I think you're
24 right, it doesn't limit where other actions, actions,
25 other petitions, could be brought.

26 THE COURT: Let's say legal versus

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2 equitable.

3 MS. MAC AVOY: I agree with you that with
4 respect to an equitable proceeding, it could be brought
5 in Delaware, but it should be brought here. First,
6 there is the evidence in the agreement that the parties
7 preferred forum is New York County. Secondly, the
8 property at issue here is in New York City. All of the
9 parties are in New York City. All of the documents are
10 in New York City. There are two related proceedings in
11 this court. One that has already been assigned to your
12 Honor, and one that most likely will be when an RJI is
13 filed. The entire nexus -- we're analyzing this under
14 forum non conveniens, and they do not dispute that
15 under a forum non conveniens analysis this should be
16 brought here.

17 The court also, aside from the statute, aside
18 from the Delaware statute, 18-802, aside from the New
19 York Statute, 702, this court also has the equitable
20 authority to, under common law, equitable ability to
21 dissolve the corporation, appoint a receiver. Those
22 are within the plenary jurisdiction of this court.

23 Under the forum non conveniens analysis every
24 single factor other than the happenstance that this is
25 a Delaware LLC, that Delaware law would be applied,
26 every other factor points to New York. As the courts

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2 of this state have repeatedly acknowledged,
3 particularly the Commercial Division, the courts of New
4 York determine issues of Delaware law all the time.

5 THE COURT: I'm not saying we don't. The
6 only question is that when it comes to a dissolution, I
7 don't have a case that says we will exercise subject
8 matter jurisdiction over a dissolution claim or
9 dissolution proceeding involving a Delaware LLC. I
10 don't have a decision that says that exactly on point.
11 This would be the first case that actually says that
12 one way or the other.

13 MS. MAC AVOY: There is no case that says
14 you do not have that authority either. Absent a
15 controlling case that says you don't have subject
16 matter jurisdiction, I think it's clear that you do
17 particularly given --

18 THE COURT: Doesn't that become forum
19 shopping on the part of the dissolver? Let's run to
20 New York because we think it will be better in New York
21 than Delaware in terms of dissolution. So, therefore,
22 that becomes -- that begs the question about whether or
23 not that's forum shopping then.

24 MS. MAC AVOY: I don't think so, your Honor,
25 because here every other factor points to New York. We
26 have the venue selection which states the preferred

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2 venue as New York. The property is in New York. The
3 parties are in New York. In every sense other than the
4 technical legal place of incorporation this is a New
5 York business. It's New York real property.

6 THE COURT: Why didn't you put in the
7 Operating Agreement that actions, any legal proceeding,
8 any legal proceeding, any proceeding or action shall be
9 in New York County? Why didn't they do that? Why did
10 they leave that out?

11 MS. MAC AVOY: I think they were not
12 carefully parsing, your Honor. But I think the issue
13 is, this is, again, permissive, not mandatory. So just
14 because it says that legal action should be brought
15 doesn't mean that precludes you from bringing another
16 action.

17 THE COURT: That's the respondent's position
18 that, you're right in a sense, that the only
19 restriction is that any legal action has to be brought
20 in New York. Anything else can be brought anywhere
21 else. Their position is that anywhere else should be
22 Delaware, not New York. That's their position.

23 Let me ask you this question: The Appell
24 case that seemed to be kicking around, Judge Moskowitz,
25 she dismissed that, she dismissed the eighth cause of
26 action and denied the application for a motion to

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2 replead that. That eighth cause of action was for
3 dissolution. The Appellate Division, although they
4 didn't say anything about it, they pretty much said at
5 the end of the day they have considered all the other
6 arguments and found them without merit, and they
7 affirmed it.

8 At the end of the day she dismissed two
9 things: She dismissed the eighth cause of action for
10 dissolution, and then she denied a repleading of that
11 saying that there was no subject matter jurisdiction
12 for the court to exercise over the dissolution.

13 MS. MAC AVOY: The interesting thing about
14 Appell is that the court didn't address it at all.
15 It's very interesting.

16 THE COURT: When you say "the court," which
17 court?

18 MS. MAC AVOY: The First Department did not
19 address the issue at all.

20 THE COURT: That was briefed. It was put in
21 the briefs.

22 MS. MAC AVOY: They said the plaintiffs, we
23 considered the plaintiff's additional arguments and
24 consider them without merit. It wasn't an argument
25 that the defendants raised. They did not say --

26 THE COURT: Not according to my notes on the

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2 record on appeal here. Hold on. The record on appeal,
3 as I see it here, the Brief for Plaintiff-Appellant --
4 I did my homework -- relax, have a seat -- the Brief
5 for Plaintiff-Appellant, that's who the plaintiff is,
6 raises that argument right here saying that, they talk
7 about the Limited Partnership Act, and they say, "The
8 IAS Court held without citation to any case law that
9 the court lacked subject matter jurisdiction to decree
10 dissolution of LAG Associates because it is a Delaware
11 limited partnership, and DRULPA 17-802 states that 'the
12 Court of Chancery may decree dissolution of a limited
13 partnership.' However, even the Insider Defendants did
14 not argue lack of subject matter jurisdiction. In
15 fact" -- then the Appellant goes on -- "In fact, modern
16 case law provides that the courts of New York" -- they
17 are arguing here before the First Department saying
18 that that was a mistake.

19 There was the opposition brief on appeal that
20 says, no, that wasn't a mistake. Then on reply it was
21 hammered home again. This time the Appellant was
22 arguing, "The Insider Defendants argue for the first
23 time on appeal that the IAS Court lacked subject matter
24 jurisdiction to dissolve LAG Associates because that
25 entity is chartered in Delaware."

26 That's all put before the First Department.

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2 MS. MAC AVOY: It was put before you for the
3 first time, but the First Department was completely
4 silent on the issue. When it ended its decision it
5 said, "We have considered plaintiff's other arguments
6 and find them unavailing."

7 THE COURT: That was plaintiff's argument.
8 That was plaintiff's argument. That's the opening
9 brief. Unless I am reading this, I got all my parties
10 mixed up, that's the plaintiff's opening brief that
11 says Judge Moskowitz made a mistake when she said lack
12 of subject matter jurisdiction.

13 Then they went back. There was a volley back
14 and forth. That's when the First Department said they
15 considered plaintiff's other arguments, plaintiff being
16 the appellant, making that argument about the eighth
17 cause of action.

18 There are two things that happened: It was
19 dismissed and there was a denial to replead. They say
20 we find them unavailing. That's affirmed so that they
21 couldn't go any further after that.

22 MS. MAC AVOY: Your Honor, they don't
23 address the issue directly at all.

24 THE COURT: There's lots of things they
25 don't address. You have to read between the lines. I
26 find that so hard sometimes except when I get reversed,

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2 then I know.

3 MS. MAC AVOY: I'm reading between the lines
4 wrong, of course.

5 But in another case, in the Dissolution of
6 Hospital Diagnostics, a 1994 First Department case,
7 there the First Department went out of its way to say,
8 "We considered the Attorney General's argument that we
9 lacked subject matter jurisdiction to dissolve the
10 foreign corporation and find it without merit." They
11 specifically went out of their way to say we reject
12 that argument.

13 I think the only two cases that actually
14 address this from the First Department are quite clear.

15 And then in 2013 Justice Singh of this
16 court --

17 THE COURT: I saw that too.

18 Let me also point out, in Hospital
19 Diagnostics, the Hospital Diagnostics case, they cite,
20 the First Department cites to Broida v. Bancroft, 103
21 A.D.2d 88, 90-92 for that proposition. When you read
22 Broida v. Bancroft there is no Operating Agreement and
23 no Delaware law discussion.

24 How much can you base that case -- how much
25 can you look at Hospital Diagnostic as being
26 controlling when they are citing a case that does not

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2 talk about the Operating Agreement because the Broida
3 case dealt with a shareholder derivative lawsuit? They
4 don't talk about an Operating Agreement. They don't
5 talk about the Delaware Limited Liability Company Act.
6 So that, again, I am left in sort of a state of where
7 are we at now?

8 MS. MAC AVOY: Broida is an excellent
9 example because what Broida talked about was the
10 abrogation of the internal affairs doctrine, and how in
11 the 1940s the courts had held that this internal
12 affairs doctrine said we should be virtually hands off
13 with respect to the internal affairs of foreign
14 corporations. By the '80s the Second Department in
15 Broida and lots of other cases that we cited in our
16 letter including the recent New York Stock Exchange
17 case, the Topps case, those collective cases, including
18 a U.S. Supreme Court case, have all said that that
19 internal affairs doctrine is an ancient doctrine that
20 really has been completely abrogated, and instead when
21 dealing with the internal affairs of a foreign
22 corporation the courts should undertake a forum non
23 conveniens analysis.

24 The Topps case, your Honor, --

25 THE COURT: That's true. These are all
26 dated cases. You can concede at this point that these

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2 are very old cases. These are not recent cases that
3 are coming down with pronouncements in changing
4 corporate laws. While that may be true, first of all,
5 Broida is a 1984 case. That's well before the LLC law
6 in Delaware got even enacted. I don't know how the
7 court would have addressed it, what the court would
8 address.

9 These are arguments that may not have been
10 raised. No one cites to these cases. These arguments
11 were never raised so the court never had an opportunity
12 to address these arguments. Now for the first time I'm
13 now being confronted with this issue so that, okay,
14 where are we at?

15 We go back to the Delaware case that you gave
16 me, the Chancery Court case that you gave me. One of
17 the problems I had when I read it, I said, okay, fine,
18 he said "other appropriate forum." Does that mean the
19 legal and equitable or does it mean the legal goes to
20 the other appropriate forum because if it's legal, the
21 defendants are hard-pressed to argue everything has to
22 be in Delaware. That's not a good argument. But in
23 terms of equitable, you, yourself, admit, it's hard to
24 figure out what exactly the vice-chancellor was saying.
25 Was he saying that, oh, well, yeah, both kinds of
26 claims can be anywhere? I'm not so sure he is saying

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2 that. That's not very clear.

3 MS. MAC AVOY: It's not very clear, but I
4 think the issue goes down to, the basic bedrock
5 question is, is there any case that holds that this
6 court does not have subject matter jurisdiction to
7 dissolve a Delaware LLC? And there isn't a single
8 case. You're right, you would be making completely new
9 law in saying this court lacks subject matter
10 jurisdiction over an important area of law based on an
11 ancient discredited doctrine that courts no longer rely
12 on.

13 THE COURT: Hang on a second. Have a seat
14 while I read this.

15 I am not so sure that this Chancery Court
16 case is that ambiguous. First of all, they are talking
17 about the first, count one, which is a breach of the
18 redemption agreement. Then they go on to say -- look
19 at what he says after he makes the quote about in
20 another appropriate forum. Vice-Chancellor Parsons
21 says interestingly, "I turn next to the second alleged
22 ambiguity in Section 18-111, that is, whether the
23 statute would cover count one of the complaint here.
24 As indicated by plaintiff, Section 18-702 explicitly
25 contemplates that redemption agreements may be entered
26 into by members or managers of an LLC as part of their

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2 internal dealings with the LLC. Accordingly, I
3 conclude that redemption agreements are agreements
4 contemplated by the LLC Act. Thus, Section 18-111
5 confers jurisdiction on this court to hear an 'action
6 to interpret, apply or enforce' the redemption
7 agreements at issue in this case. In that regard I
8 note that also the redemption agreements relate to the
9 duties and obligations of the LLC vis-a-vis certain of
10 its members."

11 It has nothing to do with dissolution. It
12 has everything to do with interpreting the contract.

13 MS. MAC AVOY: No, your Honor. I thought I
14 was clear. This was not interpreting the "may" in the
15 dissolution --

16 THE COURT: You are using this, you are
17 using this to analogize saying the "may" in the LLC Act
18 should be interpreted by me as saying it could either
19 be in Delaware or in another appropriate forum. That's
20 where you are using this chancellor's --

21 MS. MAC AVOY: Both "mays" are in the LLC
22 Act.

23 THE COURT: Exactly. What I am saying is
24 that I peeled back one layer saying, what does the
25 "may" mean? Does the "may" also mean equitable and
26 legal or just means equitable to the exclusion of

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2 legal? We don't know, at least at first blush we
3 didn't know until I read further.

4 And when I read further the "may" he is
5 talking about here seems to cover a breach of contract,
6 a legal remedy, an action at law, versus an equitable
7 remedy. It would be different if he used the word
8 "may" here in an appropriate forum, and then goes on to
9 say the redemption agreement talks about equitable
10 rights that the members had, blah, blah, blah, and I
11 have jurisdiction to hear over equitable rights. At
12 that point then I am more inclined to agree with you
13 that that "may" actually means it could be anywhere, it
14 doesn't have to be only in Delaware. But that's not
15 what he says here. After he talked about the "may," he
16 went and talked about the legal -- an action at law,
17 not an equitable claim. That's where he floated into.

18 So that's where -- I learned from law school
19 that you have the principle law and then you apply it
20 to the facts. That's what he did.

21 MS. MAC AVOY: If you look --

22 THE COURT: Did you follow that?

23 MS. MAC AVOY: Yeah, I did.

24 If you look at the prior page, he
25 specifically quotes Section 18-111 which quotes, it
26 goes on, "Any action to interpret," blah, blah, blah,

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2 "may be brought in the Court of Chancery." He is
3 quoting the exact same language. I don't think that he
4 is making the distinction here between the legal and
5 the equitable. He is saying that I can hear all, that
6 there are both legal and equitable claims in this
7 lawsuit.

8 THE COURT: That's the difference because
9 when you talk about "any action may be brought here,"
10 that's different than the LLC law that I have in front
11 of me that talks about specifically dissolution in the
12 Chancery Court, and that the Chancery Court may do
13 whatever it wants to do.

14 I mean, I am not so sure I am buying this
15 argument that you are giving me. Keep going.

16 MS. MAC AVOY: There is a second argument,
17 that you have the equitable power inherent in this
18 court's jurisdiction absent the statute, absent
19 Delaware's 18-802 or absent New York 702, you have the
20 inherent equitable power to order dissolution of this
21 hopelessly deadlocked LLC aside from the statutory
22 granting. That's clear.

23 THE COURT: You are also concerned that if I
24 punt this and decide you shouldn't be here for the
25 dissolution, you are going to say they are going to
26 move. If I bring a dissolution proceeding in Delaware,

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2 they will move to dismiss it because under the
3 Operating Agreement there is no voluntary -- a member
4 cannot trigger a voluntary dissolution. You're
5 basically -- it's worse than a marriage. You are stuck
6 for life. You can't get out of the marriage according
7 to this.

8 MS. MAC AVOY: That's quite easy. The
9 Delaware Chancery Court has absolutely addressed that
10 issue in a case called Lola Cars where it held that
11 where there are permissive dissolution provisions, the
12 court specifically says that cannot mean that there is
13 no access to a judicial dissolution. I am not worried
14 about that.

15 I am worried that they will go to Delaware,
16 and when they go to Delaware they will say, no, there
17 is an exclusive venue clause, this can only be brought
18 in New York. They have already said that.

19 THE COURT: What's your response to all of
20 that? Why shouldn't I let them stay here, dissolve
21 this thing, instead of going back and forth up and down
22 the turnpike?

23 MR. CRACO: Your Honor has focused on the
24 correct authority. Appell is the most recent First
25 Department articulation on this issue --

26 THE COURT: Virtually they are the same.

1 Proceedings

2 MR. CRACO: And the Hospital Diagnostics
3 case, which was 13 years earlier, is discussed in the
4 briefing to the First Department. The Broida case is
5 discussed --

6 THE COURT: I am not persuaded that in the
7 Appell case, the First Department briefing schedule,
8 this wasn't all put before the First Department. It
9 was all there. They had an opportunity, if they wanted
10 to, to pronounce new law. They did it in a very short
11 sentence.

12 MR. CRACO: There is more recent authority
13 out of the Second and Third Departments indicating that
14 New York doesn't have the authority to do this. This
15 is consistent with a long line of authority.

16 It is true that there has been some rolling
17 back of the internal affairs doctrine, but it has never
18 been drawn out to the point of holding that a New York
19 court may -- no New York court, as far as we can tell,
20 they have cited no cases, we found none, has ever
21 dissolved a Delaware LLC. They are asking you to
22 become the first judge to do that.

23 THE COURT: At least permitted to go
24 forward. I did not dissolve it yet.

25 MR. CRACO: Even in the Museum Partners case
26 in which Judge Singh apparently regarded Hospital

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2 Diagnostics as binding authority and indicated that he
3 believed he had subject matter jurisdiction, he did end
4 up exercising it because in that case the plaintiff
5 amended his complaint to change the cause of action
6 from dissolution to the return of his capital
7 contribution.

8 THE COURT: When I read Judge Singh, he
9 relied on the cases, but when you read all the cases,
10 my disagreement is that those cases he relied on, the
11 Hospitality case and also whatever the other case is
12 that he talked about, they just didn't tell me enough
13 about what I am standing or looking at right now in
14 terms of what I have.

15 The Chancery Court case I have does not give
16 me enough information to -- it gives me enough
17 information to tell me at this point I think this
18 dissolution proceeding should be in Delaware based on
19 what the vice-chancellor said. I am not here to -- I
20 am not an Appell authority with respect to what the
21 vice-chancellor said, but the door is open, it's not
22 closed, as far as who gets to hear this case at the end
23 of the day.

24 MR. CRACO: There is another reason wholly
25 apart from the jurisdictional issue that this petition
26 would have to be dismissed in this court which is that

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2 it is brought with the approval of 75 percent of the
3 membership interest. This LLC agreement says it must
4 be. They have waived.

5 As Delaware courts say they may, members to
6 an LLC agreement may waive, and here they have, waive
7 the right or condition the right to seek judicial
8 dissolution or to dissolve the corporation anyway on
9 the approval of 75 percent --

10 THE COURT: Where are you looking at that it
11 says it needs approval for judicial dissolution?

12 MR. CRACO: It doesn't specifically say
13 judicial dissolution, but --

14 THE COURT: 11.01? 11.01(b)?

15 MR. CRACO: Yes, your Honor, (b). "Except
16 as otherwise specifically provided in this agreement,
17 each member agrees that without consent of the other
18 members, any member may not withdraw or cause voluntary
19 dissolution of the company." Now, it doesn't
20 specifically use the word "judicial," but if any member
21 holding less than 75 percent can simply come into court
22 and bring about that result this language would be
23 nonsensical.

24 Moreover, your Honor, I would direct the
25 court's attention to a Delaware case, it's R&R Capital,
26 LLC v. Buck & Doe Run Valley Farms which --

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2 THE COURT: Do you have a copy of that case,
3 by any chance?

4 MR. CRACO: I believe we do.

5 We did address the "may" in 18-802, and it
6 discussed that being "may" as opposed to "shall," the
7 permissive versus the mandatory distinction, as being
8 intended to indicate that the right to seek judicial
9 dissolution was waivable.

10 THE COURT: This is back in 2008.

11 You are using this case to argue that even if
12 18-802, even if I say that 18-802 does not preclude
13 this dissolution proceeding, the fact of the matter is
14 that 11.01(b) hamstringing them because they have waived
15 their right to do it. They didn't waive their right to
16 do it, but they have a requirement, they need
17 75 percent to do it. If they can't get 75 percent to
18 do it, they are stuck with us.

19 MR. CRACO: That's right. They are allowed
20 to do that in Delaware law. There are good reasons why
21 they want to do that, as that case points out. It's
22 not uncommon, for example, that lenders require that
23 there be --

24 THE COURT: There must be a lot going on in
25 Delaware.

26 MR. CRACO: Lenders can, we believe in this

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2 case the loan facility, UBS, did make filing of a
3 judicial dissolution by a member an event of default.

4 There are reasons why parties to an LLC
5 agreement might rationally want to disable themselves
6 from doing that. That's what they want have done here.
7 They need 75 percent. They don't have it.

8 THE COURT: Does the mere filing of the
9 dissolution trigger an event of default in those loan
10 agreements?

11 MR. CRACO: We have not submitted them, but
12 as we read them they would.

13 THE COURT: The mere filing of this
14 dissolution proceeding may have triggered an event of
15 default already. It doesn't matter where it's at, at
16 that point.

17 We digress.

18 What's your response to that?

19 MR. CRACO: Your Honor, if I could read the
20 relevant portion of the loan agreement, I realize it's
21 not before the court, but it's says that "Neither
22 borrower nor any constituent party borrower," the term
23 "party borrower" would mean a member, "has sought or
24 will seek or affect the liquidation, dissolution,
25 winding up, consolidation or merger in whole or in part
26 of borrower. Any sale or other transfer of all or

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2 substantially all of its assets or sale agreement or
3 transfer outside the ordinary course of business."

4 MS. MAC AVOY: Your Honor, two responses.

5 First, the UBS loan essentially has been
6 bought by an facilitate of Activity Kuafu. It is no
7 longer --

8 THE COURT: You brought it back in-house?

9 MS. MAC AVOY: Brought it back in-house.

10 There will be no default based on our filing.

11 THE COURT: You wouldn't call yourself in
12 default.

13 MS. MAC AVOY: No. I make a representation
14 that that will not happen.

15 THE COURT: Stranger things have happened.

16 MS. MAC AVOY: We will not.

17 Secondly, the Delaware court a year after the
18 R&R Holdings that he mentioned, in Lola Cars, Court of
19 Chancery 2009, the court specifically looked at a very
20 similar type of dissolution proceeding where it
21 required certain members to approve a termination or
22 dissolution just like this LLC agreement does. The
23 court specifically says, "Each of the termination
24 provisions contained in the Operating Agreement is
25 permissive and may be triggered at a member's election.
26 Moreover, the Operating Agreement nowhere requires that

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2 a member terminate the Operating Agreement solely in
3 accord with its stipulated termination provisions.
4 Thus, the court cannot conclude that these terms are
5 exclusive. It simply cannot be true that a number of
6 non-exclusive permissive termination clauses in the
7 Operating Agreement can preclude judicial dissolution
8 as required, as provided in the Act."

9 It's referring to Section 18-802, this very
10 provision.

11 THE COURT: Can I take a look at that? Do
12 you have that case?

13 MS. MAC AVOY: Yes. (Handing.)

14 THE COURT: Have a seat while I look at this
15 real quick.

16 Okay. In the Lola case here with respect to
17 the Chancery Court's decision, that's whereunder the
18 Operating Agreement a non-breaching party must notify
19 the other party of its breach, as well as the
20 consequences to rectify the breach, and failure to
21 rectify the breach terminates, that that may terminate,
22 the non-breaching party may terminate the Operating
23 Agreement. That's what happened in this case.

24 MS. MAC AVOY: That's with respect to the
25 second complaint which the court -- there were two
26 complaints filed. One was for dissolution. One was

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2 for a breach which the parties terminated. The court
3 dismissed that second complaint saying that they had
4 not given the requisite notice. So the court was
5 addressing the first argument with respect to
6 dissolution.

7 THE COURT: They didn't say -- nothing in
8 the Operating Agreement talked about judicial
9 dissolution. Therefore, they could not bring this
10 dissolution proceeding in court.

11 MS. MAC AVOY: The Delaware Chancery Court
12 rejected that argument out of hand saying it cannot be
13 the case that having permissive provisions exactly like
14 you have here, permissive provisions for termination
15 meaning that there is no remedy for a judicial
16 resolution.

17 THE COURT: Why are you saying it's
18 permissive when it's saying you cannot dissolve unless
19 you have 75 percent?

20 So the court, the court in this case, in the
21 Lola case, says as long as it's mandatory, then it gets
22 around the problem. If it's permissive, then
23 dissolution, judicial dissolution should be allowed.

24 MS. MAC AVOY: Lola has an identical
25 provision. There was a provision that said the members
26 may, the company may be dissolved if. That's exactly

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2 what it says. The company shall be dissolved if the
3 members vote. That's what it was in Lola. Here it's
4 the same thing, shall be dissolved if A or B happens,
5 but that does not mean it can't also be dissolved if
6 other things happen as well.

7 The court in the footnote goes on in Lola
8 Cars, goes on to note that the statute specifically
9 provides that the judicial dissolution remedy is in
10 addition to other remedies available for dissolution of
11 an LLC.

12 THE COURT: You know, I hear what you are
13 saying. You are saying that it's permissive, but at
14 the end of the day the tag line is that there is a
15 prevention or preclusion here, there is a higher bar to
16 get dissolution because of what's at stake in this
17 Operating Agreement which is why you have that
18 paragraph in there that says "Except as otherwise
19 specifically provided in this agreement each member
20 agrees that without the consent of the other members
21 any member may not withdraw from or cause a voluntary
22 dissolution of the company. In the event any member
23 withdraws from or causes a voluntary dissolution of the
24 company in contravention of this agreement, such
25 withdrawal or causing a voluntary dissolution shall not
26 affect the member's liability or obligations to the

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2 company."

3 At bottom, the voluntary dissolution, that's
4 like a judicial dissolution. That's voluntary.

5 MS. MAC AVOY: It's completely involuntary.
6 They are fighting it kicking and screaming. It's
7 completely involuntary.

8 THE COURT: What? Do you have a response?

9 MR. CRACO: It's voluntary to them to
10 undertake the proceeding that brings it about.

11 THE COURT: It's involuntary to the guys who
12 are getting involved, of course, but it's voluntary to
13 the petitioner.

14 MR. CRACO: It's a voluntary action on their
15 part to cause the dissolution of the corporation.

16 I would also bring to the court's attention
17 Section 7.01 which is the general management provision.

18 THE COURT: Right, 75 percent, you have to
19 get 75 percent.

20 MR. CRACO: "The company shall act by means
21 of and through the managers. The managers shall act
22 jointly in all instances and all decisions and/or
23 determinations of the managers shall require the
24 affirmative vote or consent of at least 75 percent."

25 Clearly the spirit and arguably the letter of
26 that provision is that 75 percent of this company must

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1 reach consensus to do anything.

2
3 THE COURT: Putting that aside, with respect
4 to the voluntary dissolution part, look, you can have a
5 voluntary dissolution. You can go ahead and voluntary
6 dissolve this corporation by filing a petition of
7 dissolution, but you have to get 75 percent of us to
8 agree to do that. If you have less than 75 percent, we
9 are not dissolving it.

10 You are not contravening Lola. Lola says you
11 can't get a writ of judicial dissolution, that's always
12 going to be around, depending on how the Operating
13 Agreement is worded. But in your Operating Agreement
14 here it says voluntary dissolution, you can go ahead
15 and do it, but it's a high bar for to you do it because
16 we are not -- what's at stake in this Operating
17 Agreement is so high that we are going to be married to
18 the end of time unless something happens. And you have
19 to -- if you don't hit the 75 percent mark, no court
20 will help you because that's how we set this Operating
21 Agreement up at the end of the day.

22 MR. CRACO: That's correct.

23 MS. MAC AVOY: That's exactly what Lola
24 rejected.

25 THE COURT: That's not what Lola is saying.

26 MS. MAC AVOY: In Lola there were specific

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2 termination provisions. It said you must do this to
3 terminate, dissolve the company, and the court said
4 those are permissive and not exclusive.

5 THE COURT: Okay. That's why then perhaps
6 you should go back to the Delaware Chancery Court and
7 have them figure this out. That's where I am going.

8 Anything else?

9 I have heard enough.

10 Anything else here?

11 MR. CRACO: Not from us.

12 THE COURT: This is my decision and order
13 with respect to the motion to dismiss.

14 Having heard the arguments here today, I am
15 going to grant the motion to dismiss this petition. I
16 am not convinced and persuaded that there is legal
17 authority that exists out there that allows me to
18 retain this dissolution proceeding here in New York.
19 In this case, this petition, an equitable remedy is
20 being sought, and under the LLC law in Delaware to me
21 that kind of relief has to be or should be or must be
22 brought in Delaware.

23 I find that under the Operating Agreement
24 there are several reasons for that. One is that with
25 respect to the -- we will take it one step at a time.
26 With respect to the LLC law that talks about the "may"

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2 situation where it says "the Chancery Court may decree
3 dissolution," there's been the case that's been
4 submitted to me by the petitioner that says that the
5 "may" is interpreted by the Chancery Court, by the
6 Delaware Chancery Court as indicating that the "may"
7 includes the Court of Chancery or other appropriate
8 forum. When I am reading the case here, that's the
9 Duff case that was given to me, Duff v. Innovative
10 Discovery, that's from the Chancery Court of Delaware,
11 2012, Westlaw 6096586, when I am reading this case
12 here, and where the vice-chancellor talks about or
13 interprets the word "may" in the act that was before
14 him, it wasn't exactly the 18-802, but it's analogous
15 to what we have here, it's to me clear that he was
16 talking about legal remedies, and that when it's legal
17 remedies that can be brought in the Delaware Chancery
18 Court or can be brought in other appropriate forum. He
19 didn't talk about when it comes to an equitable remedy
20 as in a dissolution whether or not that has to be only
21 exclusively in the Chancery Court. That's not in this
22 case here. It doesn't say that.

23 So when he talked about the word "may," he's
24 limiting that or at least the way I looked at it or
25 read the case, he is talking about legal remedies. And
26 in that case there clearly I think he is right, legal

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2 remedies can be brought anywhere, they don't have to be
3 brought only in the Delaware Chancery Court. I am not
4 so certain or not so persuaded that equitable remedies
5 have the same analysis. So that's the distinction I
6 draw from the Chancery Court. When the word "may" is
7 used, it's talking about, you are talking about other
8 forums other than the Delaware Chancery Court. I am
9 thinking the way I interpret that is that it's talking
10 about legal remedies, actions at law, versus equitable
11 remedies.

12 Turning to the other issue with respect to
13 the Operating Agreement itself, it's clear to me that
14 this --

15 MS. MAC AVOY: If I may, the argument with
16 respect to the 75 percent was first raised in the reply
17 brief. We have not had an opportunity to address it.
18 And if your Honor lacks subject matter jurisdiction, it
19 would simply be an advisory opinion with respect to
20 interpreting the Operating Agreement at issue.

21 THE COURT: Your response to that.

22 MR. CRACO: Your Honor, most of their
23 arguments were first raised in the letter that was in
24 violation of Commercial Division Rule 18.

25 THE COURT: When you walk into my courtroom,
26 unless you have never been here before, I read

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2 everything, every argument. It's not dicta. I will
3 use it in my decision right now.

4 MS. MAC AVOY: We would like the opportunity
5 to brief the issue. It was first raised --

6 THE COURT: No. Thank you.

7 You know what? You will have the record
8 here. I fleshed it out. You had an opportunity to
9 talk about it. You gave me the case Lola to talk about
10 it. So we are all -- I am all set to go ahead with
11 this. You have that for the record.

12 With respect now to the Lola decision that
13 was given to me in talking about waiving the right to
14 judicial dissolution or waiving the right to
15 dissolution altogether, the Lola case is what it is,
16 but at the end of the day when you read the Lola case
17 and it talks about the Operating Agreement in front of
18 me, the Operating Agreement doesn't, it's not really a
19 waiver of the dissolution, voluntary, judicial or
20 whatever. There is no waiver here. What it does is it
21 puts a high bar to getting a dissolution. You need to
22 get 75 percent of the membership to agree to it or to
23 consent to have the dissolution. That's far from
24 saying there's been a waiver here.

25 So that at the end of the day although Lola
26 stands for the proposition, at least could stand for

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2 the proposition to say you can't waive judicial
3 dissolution if it's permissive and all that other
4 thing, judicial dissolution is possible, that's well
5 and fine. This Operating Agreement does not waive
6 judicial dissolution. This Operating Agreement just
7 makes it harder to get dissolution. That's not a
8 waiver. That means you have to -- there is more, there
9 is more that you need to do to get the dissolution
10 under this Operating Agreement, and 75 percent, that
11 happens to be the number.

12 So in terms of looking at the numbers, I am
13 not looking at 75 percent. I am looking at Lola in
14 terms of there can be no waiver of judicial
15 dissolution, and I agree in that sense that the
16 Delaware court is, I think, on the mark there. But
17 with this Operating Agreement, there is no waiver.
18 It's harder to get at the end of the day. So that
19 whatever percentage it is, there's been no waiver of
20 it.

21 This Operating Agreement basically says, you
22 want dissolution, you have to follow what we have here,
23 you have to get 75 percent. That was not done in this
24 case here. Clearly what I have here is a 50 percent
25 ownership by, I think, the petitioner, and a 50 percent
26 ownership by the respondent. It's 50/50, both sides.

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2 MR. CRACO: We are about 35 percent and the
3 Ludwick entities are another 17 percent.

4 THE COURT: That's where it's broken down in
5 that regard. Under those circumstances, therefore,
6 this dissolution proceeding, on the flip side of it,
7 can't go forward because at this point there's been no
8 satisfaction of getting this -- of complying with the
9 Operating Agreement.

10 And the last point I want to make is with
11 respect to whether or not I have subject matter
12 jurisdiction over this case. I am looking at the
13 Appell case. We talked about the Appell case. Judge
14 Moskowitz in her decision and order at the trial level
15 dismissed the eighth cause of action which was for
16 dissolution. She not only dismissed it, but she also
17 denied the motion to replead that eighth cause of
18 action.

19 That decision was addressed on appeal both in
20 the plaintiff-appellant's opening brief and the
21 respondent's opposing brief as well as in the
22 plaintiff-appellant's reply brief in terms of whether
23 subject matter jurisdiction existed for the dissolution
24 claim. It involved the Delaware corporation.

25 At the end of the day the First Department
26 chose to merely say that they have considered

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2 plaintiff's other arguments and find them unavailing.
3 So in that regard those arguments that were put forward
4 before the First Department with respect to the
5 dissolution claim vis-a-vis subject matter jurisdiction
6 was considered, and it was deemed unavailing, and the
7 First Department chose not to reverse Judge Moskowitz'
8 decision in that regard.

9 That gives me a little bit more insight into
10 whether or not I have subject matter jurisdiction over
11 this current dissolution claim. Having talked about
12 the LLC law in Delaware and how we looked at the word
13 "may," having the Appell case in front of me now, I
14 mean, I am more and more convinced this dissolution
15 proceeding must be handled or must be presented before
16 the Delaware Chancery Court. It's not appropriately
17 before this court.

18 I think that's it. That's my decision and
19 order.

20 I will grant the motion, the motion to
21 dismiss the petition on the ground that it's not
22 properly before this court. I lack subject matter
23 jurisdiction. Of course, that's without prejudice to
24 the petitioners to seek to commence a proceeding down
25 in Delaware with respect to dissolution of this LLC.

26 Having said that, that's my decision and

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2 order.

3 Counsel, yes, sir?

4 MR. CRACO: One other matter, your Honor.

5 We are entitled, in view of your Honor's
6 disposition, we are entitled to fees under Section
7 12.05.

8 THE COURT: Of the Delaware --

9 MR. CRACO: -- of the Operating Agreement.
10 There is an attorney's fees provision. "If the company
11 or any member obtains a judgment against any member by
12 reason of a breach or disagreement or failure to comply
13 with the terms hereof, reasonable attorney's fees and
14 costs as fixed by the court shall be included in the
15 judgment."

16 We would like to submit an application for
17 fees.

18 THE COURT: Your response.

19 MS. MAC AVOY: Your Honor, that's if they
20 obtain a judgment against any member. There is no
21 judgment here. It's a dissolution based on subject
22 matter jurisdiction -- a dismissal based on subject
23 matter jurisdiction of a dissolution provision. It's
24 not a judgment.

25 THE COURT: Right. What you have here is
26 not a decision on the merits. What you have here is

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2 what they call round one which is a technical -- a TKO
3 in the sense that I didn't have subject matter
4 jurisdiction. I didn't make any findings, or if I did
5 make any findings with respect to the meritoriousness
6 of whether or not dissolution should go forward, that
7 shouldn't be there. I think I merely made those
8 comments in this decision to just demonstrate to the
9 court, to the appellate court, that I lack subject
10 matter jurisdiction. I only used the facts that I have
11 in the record here to bolster and set forth the basis
12 for my decision.

13 There is no judgment here. What we have here
14 at the end of the day if, in fact, this case goes up on
15 appeal and it gets -- whatever happens on appeal, we
16 will see what happens there, or if it goes to Delaware,
17 we will see what happens there. Once it's tried on the
18 merits and handled on the merits, then your application
19 for attorney's fees becomes ripe at that point.

20 That application for attorney's fees is
21 denied without prejudice at this point.

22 Anything else?

23 MR. CRACO: Not from us.

24 MS. MAC AVOY: Thank you, your Honor.

25 THE COURT: Counsel, you're the moving
26 party. Please order the transcript and I will so order

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it for your review.

This is something in my mind that is very urgent that needs to be addressed. I will give you a gray sheet right now that will say "motion to dismiss granted for the reasons set forth in the decision" so that at least you can file, you will have your opportunity to consult right away to determine what you want to do for your next step.

Thank you for the argument, folks.

Have a good afternoon.

Hang around for one second. I will get it to you.

* * *

C E R T I F I C A T E

I, Terry-Ann Volberg, C.S.R., an official court reporter of the State of New York, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

Terry Ann Volberg
Terry-Ann Volberg, CSR, CRR
Official Court Reporter.