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

-- X

JPS PARTNERS in its own right, and derivatively in the right of BINN and PARTNERS, LLC,

Index No.: 650430/2012

Plaintiffs,

Motion Sequence # 7

-against-

Part 45, Hon. Melvin L. Schweitzer

MORETON BINN, an individual,

Defendant, and

BINN and PARTNERS LLC,

Nominal Defendant.

-- X

MORETON BINN and BINN AND PARTNERS, LLC's MEMORANDUM OF LAW IN OPPOSITION TO JPS PARTNERS' ORDER TO SHOW CAUSE

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Defendants Moreton Binn ("Binn") and Binn and Partners, LLC ("Binn and Partners" or the "LLC") respectfully submit this memorandum of law, together with the supporting affidavits of Moreton Binn and Mark Beidel, in opposition to the application by which Plaintiffs JPS Partners ("JPS" or "Plaintiffs") seek (for the second time) an order directing the dissolution of Binn and Partners, along with various other forms of relief.

PRELIMINARY STATEMENT

Plaintiffs' effort to seek dissolution of Binn and Partners is an improper and premature attempt to squeeze liquidity from an illiquid long-term investment. Over the last thirteen years, JPS Partners, along with other investors, contributed capital to a business venture intended to develop, build, and promote the growth of spas in major airports. To obtain an interest in this venture and reap the potential rewards that the eventual sale of the business might bring, JPS invested approximately $500,000 in the Binn and Partners limited liability company. As Plaintiffs were well aware at the time of their investment, the operating agreement governing the LLC provides Moreton Binn with substantial control over the direction, operations, and strategic plans of the business. By contrast, Plaintiffs – along with the other members of the LLC – were to be passive investors who, contingent upon the growth and success of the airport spa business, would profit upon that business' eventual sale.

Now, despite the plain terms of the LLC's Third Amended Operating Agreement (Ex. A, the "Operating Agreement" or "OA") and the ongoing efforts of Moreton Binn and others to build and develop the airport spa business with an eye towards an eventual sale – and despite the lack support from their fellow investors – Plaintiffs seek to distort the Operating Agreement and secure an early exit from their investment. They argue that the structure of a relatively routine plan to infuse much-needed cash into the business, thereby promoting its ultimate opportunity for success, actually resulted in the dissolution of Binn and Partners. More specifically, the first step in the effort to satisfy the demands of the company's secured lender and raise operating cash for the business involved the contribution of Binn and Partners' spa assets to a holding company, XpresSpa Holdings, LLC (hereinafter "XpresSpa"), that was a wholly owned subsidiary of Binn and Partners. Although Plaintiffs' real objection is to the second step of the transaction, in which a private equity company purchased a minority interest in XpresSpa for $23,800,000, thereby providing the spa business with the cash it needed, the Operating Agreement provides Plaintiffs with no basis to challenge that part of the transaction. Instead, Plaintiffs have seized upon the contribution of assets into the subsidiary, illogically latching onto a single phrase in the Binn and Partners Operating Agreement that provides for Binn and Partners' dissolution upon "[t]he Transfer of substantially all of the assets of the Company." They now attempt to use this provision to argue that Binn and Partners somehow dissolved by readying itself for the very transaction that was designed to keep the business afloat.

That the Operating Agreement does not provide for an "event of dissolution" under these circumstances is perhaps best demonstrated by Plaintiffs' own convoluted and internally inconsistent theories of liability and relief. Plaintiffs rely on Binn and Partners' contribution of its assets to its subsidiary as the sole basis for their claim that the LLC has necessarily dissolved, yet ask the Court to ignore that very transaction in order to provide them a meaningful remedy. Specifically, so they can obtain the liquidity they seek through this lawsuit, Plaintiffs request an order clawing back the very assets that were placed in the subsidiary, undoing the action that supposedly gave rise to dissolution.

Plaintiffs are forced to adopt this inconsistent, nonsensical position because the asset that Binn and Partners now possesses is its interest in XpresSpa – an interest that, much like the

Plaintiffs' original investment, is both illiquid and non-transferable. (Ex. B, Amendment to the OA) But Plaintiffs cannot have their cake and eat it too. The contribution of assets to XpresSpa cannot be so significant as to trigger dissolution, yet at the same time be of no meaningful consequence when it gets in the way of Plaintiffs' efforts to shut down the business and extract liquidity. Neither the Operating Agreement nor New York law supports Plaintiffs' theory of dissolution under these circumstances.

Binn and Partners should not be liquidated because, under a proper reading of the Operating Agreement, it has not dissolved. Plaintiffs base their cash grab on the provision in the Operating Agreement defining an event of dissolution to include the "Transfer of substantially all of the assets of the Company." However, their insistence that this phrase unambiguously requires Binn and Partners' dissolution based on the contribution of its assets to XpresSpa ignores the fact that the phrase "[t]ransfer of substantially all of the assets" of a limited liability company is a term of art under New York law, limited to the liquidation or sale of the company's business. This commonly-accepted meaning of the single provision upon which Plaintiffs rely makes plain that the events here did not give rise to Binn and Partners' dissolution.

In any event, even if this Court were to find that an event of dissolution has in fact occurred, a lawful amendment to the Operating Agreement permits Binn and Partners to continue operations notwithstanding the transfer of its assets to XpresSpa, until such time as its interest in XpresSpa has itself been sold or otherwise disposed of. Plaintiffs try to void this amendment, claiming it was "adverse" to them, and thus required their consent. But outside of a few circular and conclusory arguments, Plaintiffs have not and cannot proffer any *evidence* that the amendment was in fact "adverse" to them. Indeed, Plaintiffs cannot even show that the amendment varied the terms of the Operating Agreement in the first place, because it merely clarified that liquidation of the business requires actual liquidity. Moreover, to the extent the amendment is deemed to vary the pre-existing provisions governing dissolution, the evidence plainly demonstrates that the amendment was neither factually nor legally adverse to Plaintiffs, whose economic interests, like the interests of all other members of the LLC, lay in the continued operation of the spa business and not in its premature liquidation.

FACTUAL BACKGROUND

A. The Formation and Purpose of Binn and Partners

Binn and Partners was founded on September 21, 2000, opening its first XpresSpa airport spa location in February 2004. (Ex. 1, Affidavit of Moreton Binn, dated December 19, 2013, at ¶ 6 (hereinafter, "Binn Aff. Dec. 19, 2013"); Felicello Ex. M.)[1] Over the next ten years, the company expanded to more than 45 XpresSpa locations in 20 airports, both in the United States and abroad. (Felicello Ex. M.) Moreton Binn and his wife, Marisol Binn, directly or indirectly own approximately 55% of the company, with ten other investors or investor groups, including JPS, holding the remainder. (Ex. 3, Amended Complaint ¶¶ 16-17 (hereinafter, "Am. Compl.").) Binn and Partners operated through the ownership of subsidiaries. (Ex. 3, Am. Compl. ¶ 8; Ex. 1, Binn Aff. Dec. 19, 2013, at ¶ 5) As the Plaintiffs acknowledge, investors in the LLC, including Plaintiffs, "understood that their investment was not liquid" and that they would need to be "prepared to maintain their position in the spa business for the long term." (*Id.* at ¶ 2.) Members also understood that the long-term plan was to grow the company until it was an attractive purchase for a buyer, thus generating a return on investment for its members. (Ex. 1, Binn Aff. Dec. 19, 2013 at ¶ 3) To ensure that liquidity generated by such a sale would be returned to members, the Operating Agreement provides for the liquidation and distribution of

[1] References herein to numbered exhibits refer to exhibits to the Affirmation of Robert Modica, dated December 20, 2013. References herein to lettered exhibits refer to exhibits to the Affidavit of Moreton Binn, dated December 19, 2013, which is appended as Ex. 1 to the Affirmation of Robert Modica.

assets to members (after payments to creditors and establishment of reserves) following such a sale. (Ex A, OA §§ 8.01-8.02.)

The liquidation provisions of the Operating Agreement contemplate distribution of cash, based on a distribution "waterfall" that provides first for the payment to all outside creditors; second, the payment of loans made or guaranteed by any member; third, for the establishment of reasonable reserves; fourth, the payment to any class B unit holder to the extent necessary to achieve the "Full Return"; fifth, the payment to each member with a positive capital account, after adjustments for profits or losses incurred to the date of dissolution; and sixth, the payment to the members pro rata to their respective shares. (Ex. A, OA § 8.02.) Accordingly, upon liquidation, passive investors such as Plaintiffs receive nothing until after creditors and guaranteed debts are first repaid and reasonable reserves established, at which point they receive their investment principal, followed by any return on investment.

B. Moreton Binn's Personal Guarantee of Binn and Partners' Credit Facility, and the Company's Need for Additional Outside Capital

In August 2008, in service of the company's growth and long-term plan for sale, Mr. Binn acted for the benefit of all members when he personally guaranteed a three-year, $15 million credit facility for the company. (Ex. 3, Am. Compl. ¶ 34.) When the credit facility was renewed in 2011, Mr. Binn and his wife again personally guaranteed half of the company's debt, and another investor provided a personal guarantee for the remainder. (*Id.* at ¶ 42; Am. Compl. at Ex. F.)

Notwithstanding these substantial guarantees, Binn and Partners' institutional lender, Bank of America, demanded that the company obtain a "substantial capital infusion" in 2011. (Ex. C, Binn Aff. June 19, 2013 at ¶ 9.) In fact, Bank of America informed Binn and Partners that, without such an infusion, the credit facility would not be renewed. (Ex. 3, Am. Compl. at

Ex. J; Ex. C). In order to prevent the imminent corporate demise that would have resulted if the line of credit were withdrawn, and to ensure that Binn and Partners would "remain a viable and active company," the company retained Guggenheim Securities ("Guggenheim") to search for a potential investor. (Ex. C, Binn Aff. June 19, 2013 ¶¶ 3-4.) After Guggenheim performed substantial due diligence and vetted more than 50 lenders, it was determined that Mistral Capital Management ("Mistral") would provide the necessary capital. (*Id.* ¶ 5; Ex. 3, Am. Compl. at Ex. J.)

C. <u>The Formation of XpresSpa, Securing the Necessary Capital Infusion, and the Issuance of the Clarifying Amendment to the Operating Agreement</u>

In order to secure the necessary capital infusion and thereby protect the investment of all of its members, Binn and Partners first contributed its assets to a wholly owned subsidiary, XpresSpa. Mistral then purchased a 42% interest in XpresSpa for $23,800,000. (Felicello Ex. M at 7, n. 1.A.) Although not obligated to do so under the Operating Agreement, Moreton Binn sought the consent of Binn and Partners members prior to entering into the Mistral transaction. Plaintiffs were the only members who voted against the proposal.

In a further abundance of caution, Mr. Binn, as he was empowered to do, amended the Operating Agreement to clarify that the process facilitating the Mistral investment would not be misconstrued as an event requiring the distribution of Binn and Partners' assets. (Ex. C, Binn Aff. June 19, 2013, at ¶ 8; Ex. 1, Binn Aff. Dec. 19, 2013, at ¶ 11). The amendment provided in relevant part that, if at the time of dissolution, the company held material assets that were illiquid or non-transferable, it would continue to operate until those assets could be disposed of. (Ex. B, Amendment to OA.) This amendment was meant to clarify that, until the spa business was sold, generating the return on investment sought by investors from the inception, a recapitalization such as that involving Mistral could not be construed as an event requiring the premature liquidation of the business. In other words, the amendment confirmed that, so long as Binn and Partners held substantial illiquid investments, the company would "continue with its stated purpose of 'engaging in spa services'" after a recapitalization. (Ex. C, Binn Aff. June 19, 2013, at ¶ 12; Ex. 1, Binn Aff. Dec. 19, 2013, ¶¶ 11, 20.); *see also* Part I.B *infra*.

D. <u>Events Following the Mistral Investment, and the P-3 Transaction</u>

In or around October 2013, XpresSpa initiated a capital raise so that it could comply with covenants to its primary lender and for planned capital expansion. The opportunity to participate in the capital raise (the "P-3 funding") was offered to all XpresSpa members pro rata, including Binn and Partners. Because no funds were available at the Binn and Partners level, Mr. Binn offered to each Binn and Partner member the opportunity to participate individually in the Binn and Partners' share of the P-3 capital raise. Of the 14 members or member groups, 12 elected to participate either directly or indirectly through their members. (Ex. 1, Binn Aff. Dec. 19, 2013, ¶ 24.)

<u>PROCEDURAL HISTORY</u>

Plaintiffs sought a TRO and Preliminary Injunction to prevent Binn and Partners from holding a special meeting to allow its members to vote on the recapitalization on February 15, 2012. (Felicello Aff. Ex. A.) After oral argument, this Court denied Plaintiffs' application, finding they had not shown "irreparable harm that damages cannot compensate" and that the balance of the equities favored Binn and Partners. (Felicello Aff. Ex. B.) After Plaintiffs amended their complaint, Binn and Partners moved to dismiss. This Court granted the motion in part, dismissing Plaintiffs' claims for breach of contract and judicial dissolution. (Felicello Aff. Ex. E).

On May 17, 2013, Plaintiffs moved for partial summary judgment. Defendants Moreton Binn and Binn and Partners filed their opposition on June 19, 2013, and Plaintiffs filed their reply on July 1, 2013. Plaintiffs' present Order to Show Cause, but for one minor argument, is a retread of the same meritless arguments and assertions already pending on summary judgment.

LEGAL STANDARD

Here, although proceeding by way of an order to show cause, Plaintiffs' application seeks the same relief sought in their complaint, as well as in their fully-briefed and still-pending motion for partial summary judgment – namely, an order finding that, as a matter of law, Binn and Partners has experienced an event of dissolution and must therefore be liquidated. Plaintiffs retain the burden of proof to make a prima facie showing that the Operating Agreement was breached – the same burden they bear and have failed to meet in their briefing upon summary judgment. *In re Abady*, 22 A.D.3d 71, 85-86 (1st Dep't 2005) ("order to show cause, despite its language, does not shift the burden of proof to the non-movant") (internal citation omitted).

"[S]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue." *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978). To prevail on summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

ARGUMENT

I. The Contribution of Binn and Partners' Assets to its Subsidiary, XpresSpa, Did Not Constitute an Event of Dissolution

A. Under New York Law, Placement of the LLC's Assets Into a Subsidiary was Not a "Transfer of Substantially All of the Assets" of the Company

In seeking the immediate and premature dissolution and liquidation of Binn and Partners, Plaintiffs rely entirely on the Operating Agreement provision by which an "event of dissolution" is deemed to include "[t]he Transfer of substantially all of the assets of the Company." (Ex. A, OA § 8.01(b).) Specifically, Plaintiffs argue that Binn and Partners' contribution of its assets to a subsidiary that would remain in the business of operating airport spas, and in which Binn and Partners would continue to hold a majority stake, constituted the "[t]ransfer of substantially all of the assets of the Company," thereby warranting an order of dissolution. This argument suffers from a critical and fatal flaw: It ignores that under New York law, the phrase "transfer of all or substantially all of the assets of [a] limited liability company" is a narrowly defined term of art, the specialized meaning of which is inconsistent with that urged by Plaintiffs.

Language relating to the transfer or disposition of "all or substantially all of the assets" of a company is present in both the Limited Liability Company Law (hereinafter, "LLC Law") and the Business Corporation Law (hereinafter, "BCL"). The LLC Law provides that, except as otherwise set forth in an LLC's operating agreement, "the sale, exchange, lease, mortgage, pledge or other *transfer of all or substantially all of the assets of the limited liability company*" requires the vote of at least a majority in interest of the members entitled to vote thereon. LLC Law § 402(d)(2) (emphasis added). The analogous provision of the BCL sets forth the procedures to be followed for a "sale, lease, exchange or other disposition of *all or substantially* *all the assets of a corporation*," when such disposition of the assets is not in the "usual or regular course of the business." BCL § 909(a) (emphasis added).

Although the case law interpreting LLC Law § 402(d) is sparse, the question of what constitutes a transfer of "substantially all of the assets of" an entity has been litigated extensively under BCL § 909(a). Courts may look to the BCL in interpreting the LLC Law. *See, e.g., In re Hausman*, 13 N.Y.3d 408, 412 (2009) ("[t]he statutory schemes of the Business Corporation Law and the Limited Liability Company Law are very similar," and applying BCL concepts to a limited liability company); *Mobilevision Med. Imaging Svcs., LLC v. Sinai Diagnostic & Interventional Radiology, P.C.*, 66 A.D.3d 685, 686 (2d Dep't 2009) (examining "[r]elevant case law" regarding a BCL provision in interpreting an analogous provision under the LLC Law).

Courts that have examined whether specific transactions involve "all or substantially all of the assets" of a corporation have held that the relevant test is not based upon "the dollar amount of the assets involved in the transfer . . . [but rather] whether the sale was made in the regular course of the business actually conducted by the corporation in furtherance of the objects of its existence, or something outside of its normal and regular course of business." *See, e.g., Kingston v. Breslin*, 56 A.D.3d 430, 431 (2d Dep't 2008). In assessing the nature of a transaction, courts have thus looked to whether the corporation in question has continued to "engage[] in the same business as it had prior to" a sale, *Dukas v. Davis Aircraft Prods. Co.*, 131 A.D.2d 720, 720 (2d Dep't 1987), or whether the sale resulted in the liquidation of the business, *Kingston*, 56 A.D.3d at 431 (holding that a scaffolding company's sale of its scaffolding business did involve the transfer of "all or substantially all of the assets" of the business under BCL §909, because the sale "ultimately resulted in the liquidation of the scaffolding business, whose operations were effectively assumed by" a third party). Only in the latter case – when the company has liquidated its business operations and ceased to operate the business in which it had been engaged – does New York law deem that a disposition of "all or substantially all" of a corporation or limited liability company's assets has occurred. *See, e.g., TIC Holdings LLC v. HR Software Acquisition Grp., Inc.,* 194 Misc.2d 106, 109 (Sup. Ct., NY County 2002), *aff'd* 301 A.D.2d 414 (1st Dep't 2003) (holding that sale by an LLC constituted a transfer of substantially all of the LLC's assets under LLC Law §402(d) where, inter alia, "transfer would have constituted the effective abandonment, or elimination, of the sole express purpose for which [the LLC] had been formed").

Crucially, the transfer of assets to a subsidiary that does not result in a liquidation of the corporation's business – such as the very transaction that occurred here – is *not* a disposition of "all or substantially all of the assets" of a corporation under New York law. For example, in *Resnick v. Karmax Camp Corp.,* 149 A.D.2d 709, 710 (2d Dep't 2009), the Second Department held that "the formation of two subsidiaries, both wholly owned by the respondent Karmax Camp Corp., and the transfer of the camping operations and its buses to the subsidiaries d[id] not fall within the purview of Business Corporation Law §§ 909 and 910." 149 A.D.2d at. It reached this conclusion because "quite simply . . . these transactions did not result in a liquidation, in whole or in part, of the camp business operated by the respondent . . . ." *Id.*

In sum, the transfer of "all or substantially all" of the assets of a corporation or limited liability company has a very particular meaning under New York law. The phrase refers only to those transfers that result in a company ceasing to operate in the business in which it was engaged – in other words, the transfer must not have been in furtherance of the object of the company's existence, and must result in the termination of previous business operations. In interpreting contracts, including operating agreements, "words are generally assigned their ordinary meaning, [but] where a word has attained the status of a term of art and is used in a technical context . . . the technical meaning is preferred over the common or ordinary meaning[.]" *Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC,* 30 A.D.3d 1, 8 (1st Dep't 2006). Here, although Plaintiffs have assumed that the transfer of Binn and Partners' assets to XpresSpa necessarily involved the transfer of "all or substantially all" of the company's assets and thereby constituted an "event of dissolution," Plaintiffs have offered no argument, evidence, or support for the notion that, under New York law, the transfer in this case constitutes the type of transaction that requires dissolution.

Indeed, Plaintiffs cannot offer any support for their conclusory and incorrect assertion because Binn and Partners placed its assets into a subsidiary company for the very purpose of *continuing,* not terminating, its business of operating airport spas. The members of Binn and Partners, including the Plaintiffs, maintained a controlling interest in the subsidiary XpresSpa, and Binn and Partners has continued to engage in its primary business – "the business of building and operating spa facilities in airport terminals" (Felicello Aff. Ex. L, at 8) – through that subsidiary. (Ex. 1, Binn Aff. Dec. 19, 2013, at ¶ 20.)

Moreover, *Barasch v. Williams Real Estate Co.*, 33 Misc.3d 1219(A), 2011 N.Y. Slip Op. 51979(U) (Sup. Ct., NY County 2011), the sole case on this issue cited by Plaintiffs, provides them with no support. As the *Barasch* court described in an earlier opinion, the defendant company informed its shareholders that it intended to dispose of "substantially all" of its assets, and then proceeded to do so by transferring those assets "to a newly formed operating company, merg[ing] various [of its] entities together, and s[elling] a 65% interest in this consolidated entity to a subsidiary" of a third-party. *Barasch v. Williams,* 2009 WL 6038617 (N.Y. Sup. Ct. Oct. 27, 2009). Upon reviewing these transactions, the court determined that the transactions "changed [the defendant] from a full-service commercial real estate company that conducted its business directly, and through various subsidiaries and affiliates, to a company that, at best, holds an indirect minority interest in" its old operation. *Barasch,* 2011 N.Y. Slip Op. 51979(U), at *6.

Here, by contrast, Binn and Partners' contribution of its assets to XpresSpa did not alter the nature of the Binn and Partners business, which had historically operated its spas through a series of subsidiaries. (Ex. 1, Binn Aff. Dec. 19, 2013, at ¶ 5). In fact, the initial step of the transaction that Plaintiffs claim resulted in an event of dissolution consisted of the contribution of Binn and Partners' assets to a wholly-owned subsidiary, such that, even after the contribution, Binn and Partners retained ownership over the assets. Moreover, even after Mistral subsequently acquired an interest in XpresSpa, Binn and Partners has remained XpresSpa's majority owner. Finally, through XpresSpa, Binn and Partners has plainly continued to do what it has always done – build, operate and promote airport spas through its subsidiaries. (Ex. 1, Binn Aff. Dec. 19, at ¶ 20.) Thus, although the operating structure of the XpresSpa brand may have undergone changes in form, the substance, continuity, and character of its business was unaffected. Accordingly, under New York law and the plain language of the Operating Agreement, an event of dissolution simply has not occurred.

B. <u>Even if the Operating Agreement's Reference to the "Transfer of Substantially All of the Assets of the Company" is Ambiguous, Parol Evidence Plainly Demonstrates that the Operating Agreement Did Not Contemplate Dissolution Without a Liquidity-Generating Event</u>

1. <u>To the Extent the Provision of the Operating Agreement Referring to the "Transfer of Substantially All of the Assets of the Company" is Not Clearly Defined Under New York Law, the Term is Ambiguous</u>

To the extent the Court finds that New York law does not clearly define the language in this crucial provision of the Operating Agreement, then the term "transfer of substantially all of the assets of the Company" is ambiguous and subject to interpretation only through parol evidence. "The terms of a contract are clear and unambiguous when the language used has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion." *Fernandez v. Price*, 63 A.D.3d 672, 675 (2d Dep't 2009). "Conversely, contract language is ambiguous when it is reasonably susceptible of more than one interpretation." *Id.* (internal quotation marks omitted).

Here, Plaintiffs provide no support for their conclusory assertion that the Operating Agreement clearly and unambiguously meant for Binn and Partners to dissolve upon an event that did not result in liquidity, did not separate the members of Binn and Partners from the assets of the company (indeed, Binn and Partners always operated through subsidiaries), and did not result in the cessation of the company's core business purpose. Nor can they in light of the above-cited case law establishing that under the LLC Law and the BCL the transaction at issue was not an event of dissolution. Thus, even if Plaintiffs' interpretation is to be accorded any weight, it cannot be the sole reasonable analysis of the language in question. At most, Plaintiffs' argument rests upon an analysis of a contract term that "is susceptible to more than one reasonable interpretation." *Brad H. v. City of New York,* 17 N.Y.3d 180, 186 (2011).

2. <u>**Parol Evidence Demonstrates that the Operating Agreement Contemplated Dissolution Only Upon a Liquidity-Generating Event**</u>

To the extent reliance upon parol evidence is necessary to interpret the meaning of Section 8.01(b), the evidence available here demonstrates that the parties did not intend for dissolution to be triggered by a transaction that served the sole purpose of keeping Binn and Partners afloat, did not change the nature of the its business, and did not create liquidity.

In particular, in an affidavit that accompanies this memorandum of law, Moreton Binn indicates that that Section 8.01(b) contemplates the dissolution of Binn and Partners only when the company liquidates by transferring all of its assets to an unrelated entity, not a wholly owned subsidiary. (Ex. 1, Binn Aff., Dec. 19, 2013, at ¶¶ 7-8). *See also Dykeman v. Heht*, 52 A.D.3d 767, 769 (2d Dep't 2008) ("[I]n deciding such a [summary judgment] motion, the facts alleged by the nonmovant and inferences that may be drawn therefrom must be accepted as true."). Section 8.01(b) was intended to ensure that when the company was sold, the proceeds would be distributed and not retained or invested in another venture. (Ex. 1, Binn Aff., Dec.19, 2013, at ¶¶ 3, 11) In other words, the language in Section 8.01(b) was not intended to permit an investor to achieve what Plaintiffs attempt here – the forced dissolution and liquidation of the company, against the wishes of all other investors, simply to squeeze cash from what was always understood to be an illiquid long-term investment.

For the foregoing reasons, Plaintiffs' claim that an event of dissolution has occurred is fatally flawed in multiple respects, and their repeated efforts to obtain the dissolution of Binn and Partners should be denied.

II. Even if the Contribution of Binn and Partners' Assets to its Subsidiary Constituted an "Event of Dissolution" Under the Original Terms of the Operating Agreement, a Duly-Authorized Clarifying Amendment Permits the Company's Continued Operations and Forecloses Plaintiffs' Attempt at Forced Liquidation

Even if this Court were to find that a dissolution event had occurred under the Operating Agreement, the February 1, 2012 amendment to the Operating Agreement allows the company to continue to operate without liquidating. In an attempt to avoid this result Plaintiffs assert that the amendment is "adverse" to them and thus required their approval. Yet they have not and cannot show the required adversity to set aside the amendment. Outside of bare tautologies, Plaintiffs offer no evidence that the amendment was adverse to them as a matter of law. Indeed, Plaintiffs have failed to show that the amendment even varied the terms of the Operating Agreement, rather than simply clarifying that the company would not liquidate upon a "transfer" of its assets that did not generate liquidity or change the nature of the company's business. Moreover, to the extent the amendment altered the circumstances under which liquidation would occur, the evidence nonetheless demonstrates that a liquidation of Binn and Partners' shares in XpresSpa would have generated only a fraction of the company's value as a going concern, and the amendment thus advanced the economic interests of all members of the company, including those of the Plaintiffs. (Ex. C, Binn Aff. June 19, 2013 ¶¶10-12) Accordingly, even if this Court finds an event of dissolution has occurred, Plaintiffs' request for liquidation must still be denied.

A. <u>Mr. Binn Had Broad Authority to Issue a Clarifying Amendment to the Operating Agreement Without Member Consent</u>

Section 9.07 of the Operating Agreement empowers Mr. Binn, as Manager, to amend the Operating Agreement at his sole discretion. The only limitation on this authority is a narrow exception for amendments that "vary" the terms of Article VIII (Dissolution); Article V (Capital Accounts and Contributions); Article VI (Profit, Loss, and Distributions); and Article VII (Transfers). Amendments that vary those provisions, and that are "adverse" to the interests of a member, require the affected member's consent.

As a threshold matter, before notions of adversity even come into play, Plaintiffs must first show that the amendment varied the dissolution provisions of Article VIII. They cannot meet this burden. Article VIII provides that upon dissolution, members shall proceed with reasonable promptness to liquidate the company's assets, and sets forth a distribution waterfall that assumes liquidity. Article VIII does not address what occurs upon dissolution when the company's assets are "illiquid" or may not be immediately transferred. The amendment fills in this blank, making clear that liquidation in those circumstances must wait until the company can maximize liquidity from its illiquid and non-transferable assets so that the distribution waterfall can be satisfied. Thus, rather than "modifying" or "varying" the terms of the Operating

Agreement, the amendment merely clarifies a circumstance not covered by the original terms of the Operating Agreement. Mr. Binn had authority to execute a clarifying amendment of this sort without the consent of any member. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 790 (2d Dep't 2013) (because oral agreement "was a separate additional agreement addressing a situation not covered by the terms of the operating agreement," and did not modify the operating agreements terms, it was not barred by provision prohibiting oral modifications); *Gerard v. Cahill*, 66 A.D.3d 957, 959 (2d Dep't 2009) (same).

B. <u>Even if the Amendment Varied the Dissolution Provisions, the Variance Was Not "Adverse" to Plaintiffs' Interests and Did Not Require Their Consent</u>

Even if the Amendment varied Article VIII such that the consent of adversely affected members was required, Plaintiffs were not adversely affected by the Amendment. Although Plaintiffs' resort to the dictionary definition of "adverse" to construct a circular argument that because they opposed the amendment, it must in turn be adverse to them, the LLC Law, rather than Webster's Dictionary, provides the framework for defining "adversity." Under the LLC Law, an adverse event requires concrete economic harm in the form of increased financial obligations or diminished returns. Specifically, Section 417 provides that, except as otherwise specified by an LLC's operating agreement, amendments may not be made "without the written consent of each member *adversely affected thereby*" to any provision that

> (i) increases the obligations of any member to make contributions, (ii) alters the allocation for tax purposes of any items of income, gain, loss, deduction or credit, (iii) alters the manner of computing the distributions of any member or (iv) allows the obligation of a member to make a contribution to be compromised by consent of less than all the members.

LLC Law § 417(2) (emphasis added). While these provisions may not constitute the totality of an "adverse" action under the LLC Law, parties "are presumed to contract in reference to the law of this State," *Tiger Sec. Group, Inc. v. State*, 17 Misc.3d 1129(A), 2007 N.Y. Slip Op.

52190(U), at *14 (N.Y. Ct. Claims 2007), and the LLC Law's provisions on this topic plainly bear on what Plaintiffs must prove to invalidate an amendment based on their failure to consent. *See also* Ribstein and Keatinge on Limited Liability Companies § 4.16 (2d ed.) (noting that "the written consent of adversely affected members is required to change members' financial rights" and citing Section 417(b)).

Indeed, Binn and Partners' Operating Agreement – which indisputably provides Mr. Binn with broad authority to operate the company and amend the agreement's terms – merely incorporates those limitations on modifying the operating agreement that are set forth in the LLC Law, and does not expand upon them. (Ex. A, OA). The limitations on Mr. Binn's unilateral authority to amend correspond directly to the Section 417 limitations. The Operating Agreement requires consent for "adverse" amendments to Articles V and VI, which like Section 417(2), covers contributions, profit and loss distributions, and allocations. It also requires consent for "adverse" amendments of Articles VII and VIII, both of which address distribution rights, as does Section 417(2)(iii). Thus, for example, an amendment changing the distribution waterfall that increases the economic rights of one class of investors over another would require the consent of the investors whose financial rights were negatively affected. By contrast, an amendment such as that at issue here, which merely allows a company to continue to function pending liquidity – thus increasing the chances for member profit rather than locking in certain loss – does not adversely affect any member's concrete economic interest, and so does not require consent under the LLC Law or the Operating Agreement.

Furthermore, Plaintiffs' argument that the Amendment is adverse to them because it "eliminated their pre-existing right to dissolution of the Company upon the transfer of the substantially all of the Company's assets to another entity" (JPS Partners' Memorandum of Law in Support of Their Order to Show Cause, at 6 ((hereinafter, "Plaintiffs' Mem. of Law")) falls far short of establishing the type of concrete economic harm necessary to require their consent. As an initial matter, under Plaintiffs' expansive definition of the word "adverse," any change which they did not like would require their approval, giving them veto power over each and every potential amendment. But Section 9.07 clearly contemplates Mr. Binn's authority to make amendments – including amendments to Article VIII – without member consent. Plaintiffs' argument would render Section 9.07 null, for if Plaintiffs' disagreement with Mr. Binn were sufficient to establish adversity, then permission would always be required. Because "a court should not read a contract so as to render any term, phrase, or provision meaningless or superfluous," *Givati v. Air Techniques, Inc.*, 104 A.D.3d 644, 645 (2d Dep't 2013), Plaintiffs must show more than mere disagreement to establish "adversity" requiring their consent.

This they have failed to do. The amendment in no sense "eliminates" any right to dissolution; it merely ensures that distribution of assets post-dissolution occurs when those assets can be liquidated so as to allow the waterfall to be satisfied and thus maximize, rather than destroy, the members' investment return. Binn and Partners now holds only an illiquid not immediately transferable interest in XpresSpa. (Ex. 1, Binn Aff., Dec.19, 2013, at ¶¶ 12-13). Thus, if Plaintiffs are correct that dissolution is required as a result of the contribution of the Binn and Partners assets to XpresSpa, the only assets Binn and Partners could possibly "distribute" are illiquid shares in an illiquid company. Such a distribution would *itself* be adverse to Plaintiffs. Indeed, as the affidavit of Moreton Binn establishes, there is no ready market for Binn and Partners' interest in XpresSpa, and as such, units of Binn and Partners are "worth substantially less to a purchaser than the amount that Binn and Partners would receive upon the sale of XpresSpa Holdings and the subsequent distribution of sale proceeds pursuant to the terms of the Operating Agreement." (Ex. 1, Binn Aff., Dec. 19, 2013, at ¶ 15.) Put differently, if an event of dissolution has in fact occurred, it is the amendment itself that prevents Plaintiffs from experiencing the adverse consequence of a "fire sale" of their assets, just as it was the infusion of Mistral's capital that prevented the collapse of the company in the first place. (*Id.* at ¶ 17; Ex. C, Binn Aff. June 19, 2013, at ¶ 12.) If this record does not preclude Plaintiffs from establishing adversity, at the very least it raises a material fact as to whether the amendment was adverse to their interests.

III. PLAINTIFFS' REQUEST TO AMEND THE COMPLAINT MUST BE DENIED

Plaintiffs commenced this action by filing a summons and complaint on or about February 15, 2012. (Ex. 2, Compl.) They filed an amended complaint on or about July 26, 2012. (Ex. 3, Am. Compl.) Having already amended their complaint, Plaintiffs cannot further amend as of right under CPLR §3024(a), and therefore they appear to seek leave to amend pursuant to CPLR §3025(b).

Plaintiffs do not satisfy the requirements for leave to amend under CPLR §3025(b). In fact, Plaintiffs make no effort to do so. Specifically, Plaintiffs fail to attach a proposed amended complaint as directed by the plain language of the statute, which requires that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Such defect, in and of itself, requires denial of the request to amend the complaint. *See Clemente Latham Concrete v Integrity Masonry, Inc.*, 2013 N.Y. Misc. LEXIS 3842 (Sup Ct, Albany County, Aug. 28, 2013); *Fernandez v. HICO Corp.*, 24 A.D.3d 110 (1st Dep't 2005); *Gell-Tejada v Macy's Retail Holding Inc.*, 2012 NY Slip Op 32179(U), 2012 N.Y. Misc. LEXIS 4013, 6 (Sup Ct, Rockland County, Aug. 14, 2012); *see also Russell v Town of Brookhaven*, 2013 N.Y. Misc.

LEXIS 2470, 14 (Sup Ct, Suffolk County, June 7, 2013) (plaintiff's request to amend must be denied where plaintiff failed to include proposed amended complaint with request to replead or amend, and failed to provide affidavit setting forth additional transactions or occurrences in support of the request). Accordingly, Plaintiffs' request to amend the complaint must be denied.

In addition, Plaintiffs' motion to amend should be denied because it is palpably insufficient. Plaintiffs' proposal to add additional causes of action pursuant to New York Debtor and Creditor Law §§ 273(A), 274, and 276 is predicated on their assertion that there has been a "flipping" of "Binn and Partners LLC from the parent company position to a subsidiary position of XpresSpa Holdings LLC." (*See* Plaintiffs' Mem. of Law, at 14.) Plaintiffs rely exclusively for this proposition upon incorrect extrapolation from the caption of a pro forma consolidated balance sheet headed: "XpresSpa Holdings, LLC and Subsidiaries, Formerly Binn and Partners, LLC and Subsidiaries Consolidated Balance Sheet." (Ex. 4, Affidavit of Mark Beidel, hereinafter "Beidel Aff. December 19, 2012".) Contrary to Plaintiffs' assertion that the two entities have flipped, Binn and Partners is not (and never has been) a subsidiary of XpresSpa. (*Id.* at ¶6) Rather, Binn and Partners is a member of XpresSpa and continues to own a majority interest in XpresSpa. (*Id.* at ¶ 6) The consolidated balance sheet relied upon by Plaintiffs to support their erroneous contention that the companies have "flipped" was prepared for one of XpresSpa's lenders, Bank of America, and was captioned consistent with the bank's requirements to permit comparison between the prior and current borrowers. (*Id.* at ¶¶ 3, 4, 6, 7.) Thus, the premise for which Plaintiffs attempt to assert additional causes of action is incorrect and is flatly contradicted by the only evidence in the record.

Lastly, Plaintiffs' application to amend should be denied because Plaintiffs have failed to show that their proposed amendment has merit. *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74

A.D.3d 499 (1st Dep't 2010); *A.L. Eastmond & Sons, Inc. v Keevily, Spero-Whitelaw, Inc.*, 107 A.D.3d 503 (1st Dep't 2013); *Bencivenga & Co., CPAs, P. C. v. Phyfe*, 1994 N.Y. App. Div. LEXIS 12230 (1st Dep't 1994) (denying plaintiffs motion to amend its complaint where proposed causes of action based on fraud were palpably insufficient).

IV. PLAINTIFFS' REQUEST FOR AN ACCOUNTING MUST BE DENIED

Plaintiffs' requests that Defendants be required to show cause "[w]hy judgment should not enter compelling Moreton Binn to account to the Company for its funds he expended for his sole and personal benefit," should also be denied. Although Plaintiffs' request such relief in their Order to Show Cause, they fail to address (or even mention) this request in the papers supporting their application. (*See* Plaintiffs' Mem. of Law.)

Moreover, Plaintiffs' request should be denied because they set forth no evidence that Mr. Binn used Binn and Partners funds "for his sole and personal benefit." (*See* Order to Show Cause p.3, ¶ 4.) Rather, Plaintiffs seek to impermissibly shift the burden of proof onto Mr. Binn to prove that he did not use funds for his personal benefit, without first establishing any basis for its request. It is well settled that a party seeking an accounting must demonstrate: (1) the existence of a confidential or fiduciary relationship, (2) a breach of the duty imposed by that relationship, (3) respecting property in which the party seeking the accounting has an interest, and (4) in some cases, a demand for an accounting and a refusal. *Palazzo v Palazzo*, 121 A.D.2d 261, 265, (1st Dep't 1986); *Adam v. Cutner & Rathkopf*, 238 A.D.2d 234 (1st Dep't 1997); *Unitel Telecard Distrib. Corp. v Nunez*, 90 A.D.3d 568 (1st Dep't 2011); *Grossman v. Laurence Handprints-N.J.*, 90 A.D.2d 95 (2d Dep't 1982); *Kastle v. Steibel*, 120 A.D.2d 868, 869 (3rd Dep't 1986); *Blaustein v. Lazar Borck & Mensch*, 161 A.D.2d 507 (1st Dep't 1990). Inasmuch as Plaintiffs make no mention of this burden, let alone attempt to satisfy it, their motion for an accounting should be denied.

V. <u>PLAINTIFFS' REQUEST TO STAY THE P-3 TRANSACTION MUST BE DENIED</u>

Plaintiffs' request for a stay of the P-3 transaction demonstrates a fundamental misunderstanding of the transaction itself. First, Plaintiffs seek relief from the wrong parties. In this regard, the purpose of the P-3 transaction was to raise capital for XpresSpa, to satisfy its loan covenants and fund its expansion plans. (Ex. 1, Binn Aff. December 19, 2013 at ¶ 21). The capital raise was conducted by XpresSpa Holdings, LLC, not Binn and Partners or Moreton Binn. (*Id*. at ¶ 21.) In fact, Binn and Partners did not even participate in the transaction. (*Id*. at ¶ 24.)

Further evidence that this was not a Binn and Partners transaction can be seen in the fact that the opportunity to participate in the P-3 transaction was first offered to Binn and Partners. (*Id*. at ¶ 24.) However, because Binn and Partners had no cash by which to participate, Mr. Binn offered each *individual* member of Binn and Partners the chance to participate individually and pro rata in the transaction. (*Id*. at ¶ 23.) Thus, Plaintiffs' request for a stay of the transaction in this litigation is improperly aimed at Binn and Partners, thereby warranting denial of the instant application.

Further, it should be noted that the P-3 transaction is not mentioned in the amended complaint, which is based on occurrences prior to <u>February 24, 2012</u>. (Ex. 3, Am. Compl.) The P-3 financing memorandum advising members of Binn and Partners of the transaction was sent on or about October 21, 2013, and thus falls outside the time period of the amended complaint. (Ex. 5, October 21, 2003 P-3 Financing Memorandum.) Therefore, Plaintiffs' attempt to obtain affirmative relief on a subject not contained within the four corners of the amended complaint is improper and must be denied. *See* CPLR §3025(b) (stating that a party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences); *Mallory Factor, Inc. v. Schwartz*, 146 A.D.2d 465 (1st Dep't 1989); *see also JEM Transp. Corp. v Blennau,* 37 Misc. 3d 787 (N.Y. Dist. Ct. 2012) (holding that under procedural rules which apply to civil actions generally, leave of court must be sought in cases where a plaintiff seeks to expand its complaint to include allegations respecting additional or subsequent transactions or occurrences). Otherwise, to allow Plaintiffs to do so, would give them the opportunity to continuously change and/or assert new allegations at any time, thereby significantly hindering the Defendants' ability to defend themselves in the instant litigation.

Plaintiffs also fail to meet the requirements for a preliminary injunction. To obtain a preliminary injunction, the moving party must demonstrate: 1) a likelihood of success on the merits; 2) irreparable harm absent the relief sought; and 3) the balance of equities in its favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990). Plaintiffs ignore the first and third requirements altogether, and their only effort to establish harm of any sort is their unsupported assertion that their interest in the spa business will be "further destroyed" by the P-3 transaction. Even if true, such harm is purely economic and does not rise to the level of irreparable harm. (*see, e.g*., Felicello Ex. B (denying Plaintiffs' previous request for an injunction).); *see also Matter of Rice,* 105 A.D.3d 962, 963 (2d Dep't 2013) (economic loss, which is compensable by money damages, does not constitute irreparable harm). At best, Plaintiffs' argument is that the P-3 funding creates additional obligations for the spa business which must be satisfied before the members of Binn and Partners receive distributions upon dissolution and liquidation of Binn and Partners. Nothing in the Binn and Partners or XpresSpa operating agreements limits the ability of those companies to raise capital or take on additional obligations

Moreover, Plaintiffs ignore the fact the P-3 transaction was required to prevent Bank of America from calling its outstanding note to XpresSpa. (Ex. 1, Binn Aff. December 19, 2013 at ¶ 21). Thus, rather than diluting Plaintiffs' interest in the spa business, the P-3 transaction did just the opposite, preserving Plaintiffs' ultimate interest in the spa business. (*Id* at ¶ 25).

Finally, because the first phase of funding for the P-3 transaction is complete, Plaintiff's request to stay the P-3 transaction is moot. (*Id* at ¶ 26.) Accordingly, for the reasons set forth herein, Plaintiffs' motion for a stay of the P-3 transaction should be denied.

WHEREFORE, Moreton Binn and Binn and Partners, LLC respectfully requests that this Court issue an order (1) denying Plaintiff's Order to Show Cause (2) providing such other relief as this Court deems just and proper.

Dated: New York, New York
December 20, 2013

Yours, etc.,

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