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

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| KIMBERLY SLAYTON, | : | Index No. 650099/2014 |
| Petitioner, | : | |
| -against- | : | |
| HIGHLINE STAGES, LLC and HS MERGER PARTNER, LLC, | : | |
| Respondents. | : | |

**PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS**

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**MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS**

Petitioner Kimberly Slayton ("Slayton" or "Petitioner") respectfully submits this memorandum of law in opposition to the motion to dismiss the Petition's first and second causes of action pursuant to CPLR 3211(a)(1) and (7) filed by respondent Highline Stages LLC ("Highline Stages" or "Respondent") purportedly formerly known as HS Merger Partner, LLC ("Merger Partner").[1]

**Preliminary Statement**

New York Limited Liability Company Law ("LLCL") § 1002 sets forth in very specific detail the steps that a limited liability company such as Highline Stages must follow if it wants to lawfully enter into a merger. Respondent concedes that it did not follow these procedures, and in

[1] In footnote one of its Memorandum of Law in support of the motion to dismiss ("Respondent's Memo"), Respondent asserts, by way of a "brief summary," that "Old Highline Stages" and Merger Partner merged on August 8, 2013 (the "Purported Merger"), that Merger Partner was the only surviving entity and immediately after the Purported Merger, that entity changed its name to Highline Stages, LLC, which Respondent defines as "New Highline Stages." Respondent further asserts that therefore "Old Highline Stages" has not existed as a legal entity since August 8, 2013, and the entities named in the Petition are both "confusing" and "possibly inaccurate." In doing so, Respondent plainly ignores the Petition's accurate allegation that "Old Highline Stages" was never lawfully merged out of existence, and therefore it, and Merger Partner (purportedly formerly "Highline Stages, LLC") are proper parties to this action. That said, and reserving all of her rights, Petitioner will endeavor to be as clear as possible when discussing the relevant entities herein.

particular the strict requirement that Highline Stages provide all voting members, which includes Slayton, with 20 days' notice of a meeting to vote on the "proposed" merger (see LLCL § 1002(c)) and an opportunity to dissent from the "proposed" merger prior to the meeting (see LLCL § 1002(e)). It is undisputed that Respondent did not give Slayton any notice, much less the required 20 days' notice, or the opportunity to dissent from the "proposed" merger prior to Respondent allegedly entering into the merger.

What Respondent did do was purportedly enter into the merger behind Slayton's back, then tell her about it after it was completed, and then offer her alleged "dissenter's rights" even though she never had a chance to become a dissenter prior to the proposed merger coming into effect as was her specific and fundamental right under the procedures expressly set forth in LLCL §§ 1002(c) and (e) as respects a "proposed merger." Respondent shamelessly claims that it had a right to engage in this sneaky conduct because, in its self-serving view, LLCL § 407 gives it an out from following the mandatory procedures set forth in LLCL § 1002. As detailed herein, Respondent is wrong.

Respondent asserts that this action should be a simple matter of adjudicating the fair market value of Slayton's shares in "Old Highline Stages," which was purportedly merged out of existence in August 2013. The problem with Respondent's argument, however, is that "Old Highline Stages" was not lawfully merged out of existence. Therefore the instant motion to dismiss the first and second causes of action, which respectively request that the Court issue a declaratory judgment that the "Purported Merger" (as defined herein and in the Petition, which is annexed to Respondent's "Affirmation of Benjamin K. Semel In Support of Motion to Dismiss"

as Exhibit 1) was ineffective and void and should be rescinded or set aside, and award Petitioner monetary damages as a result of the ineffective merger, should be denied in its entirety.[2]

As demonstrated below, the motion should be denied because what is plain on the face of § 1002 of the LLCL (the section on mergers) is that "dissenter's rights" under New York law are more than just a method for providing someone who objects to a proposed merger (or is going to be frozen out by a contemplated merger) to obtain the fair market value of that individual's membership interest if the contemplated merger does in fact take place and the party does not become a member of the merged entity. Rather, the LLCL specifically provides notice and opportunity to be heard before a merger takes place so that a party can exercise his or her dissenter's rights, and can present his or her views as to why the "proposed" merger should not take place, or should take place in a form different from the one being "proposed." The added protections of providing fair market valuation for the losing dissenter's shares is the second step that comes into play afterwards, and only if the dissenter has made, and lost, his or her arguments as to why the company should not merge in the first place.

By engaging in the underhanded conduct detailed herein and in the Petition, Respondent clearly violated LLCL § 1002(c) by not giving Slayton the 20 days' notice expressly required by the statute. The notice is mandatory and vital to the entire merger statutory scheme, and it is therefore not surprising that there is not a single case anywhere holding that the notice provisions specifically laid out in LLCL § 1002(c) do not have to be followed, much less strictly followed, with respect to a member with voting rights.

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[2] Respondent concedes that Slayton's alternative cause of action for appraisal rights and her cause of action for attorneys' fees under the LLCL are the proper subject of the Petition's third and fourth causes of action. Those causes of action are not the subject of Respondent's present motion to dismiss.

In fact, as further demonstrated below, LLCL § 1002(g)[3] was specifically designed to prevent such nefarious actions against an otherwise defenseless minority voting member. That subdivision prevents lawsuits attacking a merger in all instances except where the attack on the merger is that the merger failed to comply with the 20 days' notice provisions of subdivision (c). And that is exactly the claim that Slayton is asserting here – the merger was ineffective because Respondent failed to comply with the provisions of subdivision (c). Beyond any doubt, subdivision (g) was included in the LLCL to allow minority voting members like Slayton to make the very claim that she is making in this case.

In light of these substantive rights, Respondent's principal argument that LLCL § 407 should be read so broadly as to render LLCL §§ 1002(c), (e) and (g) meaningless, must be rejected. Simply put, the legislature did not design or intend LLCL § 407 to take away all of the specific protections that are contained in §§ 1002(c), (e) and (g). To hold otherwise would completely gut each of those subsections of the § 1002 merger provisions in one broad stroke.[4]

## FACTUAL BACKGROUND

The pertinent facts are set forth in the Petition, and the accompanying affidavit of Slayton, and are summarized here for the Court's convenience. Significantly, the pertinent facts are not disputed by Respondent.

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[3] Section 1002(g) of the LLCL states:

> A member of a domestic limited liability company who has a right under this chapter to demand payment for his or her membership interest shall not have any right at law or in equity under this chapter to attack the validity of the merger or consolidation or to have the merger or consolidation set aside or rescinded, except in an action or contest with respect to compliance with the provisions of the operating agreement or subdivision (c) of this section.

(emphasis added.)

[4] As discussed below, it is therefore not surprising that the Court of Appeals held in Appleton Acquisition, LLC v. National Housing Partnership, 10 N.Y.3d 250 (2008), a case construing a section of the Partnership Law that is virtually the same as to LLCL § 1002(c), that for the proponents of a partnership merger to avoid an attack on a purported merger, the 20 days' notice provision must be followed.

## The Purported Merger

Highline Stages is a successful studio business that operates in lower Manhattan. (Slayton Aff. ¶ 13.) As detailed in her accompanying affidavit, Slayton brought years of experience and many valuable clients to Highline Stages, and for years, until she was unceremoniously fired from her position on July 12, 2013, without any prior warning, by a "super-majority of the members" of Highline Stages, Slayton provided valuable services to the company, acting as general manager of the company in charge of client relations and logistics. (Slayton Aff. Ex.12.)

Slayton's business partners are Gary Kline ("Kline"), Alessandra C. Lundry ("Lundry") and Peter J. Triolo, Jr. ("Triolo"). Upon information and belief, Kline holds 60% of the voting shares of Highline Stages, and each of Lundry and Triolo hold a little more than 13.3% of the voting shares, all of which totals 86.67% of the membership interest in Highline Stages. Upon further information and belief, Kline, Lundry and Triolo also were the holders of a 100% interest in Merger Partner, and purported to adopt certain resolutions by written consent dated August 7, 2013, approving the merger of Highline Stages with and into Merger Partner, with Merger Partner being the surviving entity in the merger. (Petition ¶ 4)

From the date of her termination from the company, and continuing until the present day, Slayton has taken no action that could reasonably be construed as adverse to the company or her business partners. And certainly in the month following her termination, she was spending time with her family and trying to determine what she would do next professionally in light of her sudden termination. (Slayton Aff. ¶ 16.)

Then, on August 7, 2013, immediately following the Purported Merger, Highline Stages sent Slayton written notice of the Purported Merger. (A copy of the notice of merger is annexed

to the Petition as Exhibit A.) It is undisputed that the neither the notice of merger nor any other document ever gave Slayton the mandatory 20 days' notice under LLCL § 1002(c). It also is undisputed that Highline Stages failed to comply with LLCL § 1002(e) by depriving Slayton of her right "prior to that time of meeting in which such merger" "is to be voted on" to file with the LLC "written notice of dissent from the proposed merger". And as discussed herein, pursuant to the plain language of § 1002(g), based on the failure to comply with subdivision (c), Slayton is afforded a right to "attack the validity of the merger" or to have the merger "set aside or rescinded."

The August 7, 2013 Notice of Merger (Petition Ex. A, p. 2) incorrectly informed Petitioner that under the LLCL and the Business Corporation Law, she had 20 days from the date of the notice to file a written notice of dissent. While the notice misstated the law in this regard, in an exercise of caution and to ensure that her rights were protected, Slayton filed the Notice of Election to Dissent on August 23, 2013. (Slayton Aff. ¶ 20.) The Notice of Election to Dissent stated that Petitioner had elected to dissent from the Purported Merger, and demanded the payment of the fair value of her membership interest in Highline Stages.

Significantly, however, the Notice of Election to Dissent specifically stated:

> This notice is sent without waiver of any of the undersigned's rights, all of which are expressly reserved.

A copy of the Notice of Election to Dissent is annexed to the Petition as Exhibit B.

**The Offer**

Petitioner received a letter dated August 28, 2013, addressed to her from Highline Stages offering to pay $50,000 for her 13.33 percent membership interest in Highline Stages (the "Offer"). A copy of the Offer is annexed to the Petition as Exhibit C.

Because the $50,000 amount did not represent the fair value of Slayton's membership interest as of August 6, 2013, which is the day prior to the alleged effective date of the Purported Merger and the operative date for such valuation under LLCL § 1002(f), by letter dated September 6, 2013, Petitioner rejected the Offer (the "September 6 Letter"). A copy of the September 6 Letter is annexed to the Petition as Exhibit D.

Pertinent to the instant motion, and consistent with the Notice of Election to Dissent, the September 6 Letter explicitly stated that:

> This letter is sent without waiver of any of the undersigned's rights, all of which are expressly reserved.

**The Petition**

Petitioner exercised her rights under LLCL § 1005(b) and Business Company Law ("BCL") § 623(h) by commencing this special proceeding. As discussed, the Petition asserts the first cause of action requesting a declaratory judgment that the Purported Merger be declared ineffective and void and set aside or rescinded pursuant to LLCL § 1002(g), and the second cause of action for monetary damages based on the ineffective merger. These are the causes of action that are the subject of the instant motion to dismiss.

Petitioner also asserted a third alternative cause of action for the determination of fair value of her shares. As was made clear by the Petition (¶ 24), however, and consistent with her position in both the Notice of Election to Dissent and the September 6 Letter, under the third alternative cause of action Slayton asked the Court determine the fair value of her membership interest in Highline Stages as of the date prior to the effective date of the Purported Merger only "[i]f the Court determines that the Purported Merger was effective.[5]

[5] Slayton also asserted a fourth cause of action under BCL § 623(h)(7) based on the allegation that respondent Highline Stages is and was aware that the fair market value of Petitioner's membership interest in Highline Stages materially exceeded the amount of the Offer. This cause of action is not the subject of the instant motion.

## ARGUMENT

It is well settled under New York law that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." Leon v. Martinez, 84 N.Y.2d 83, 87 (1994). See also CPLR 3026 ("Pleadings shall be liberally construed..."). In considering this motion, the Court must "accept the facts as alleged in the complaint as true, accord [petitioner] the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable theory." Leon, supra, 84 N.Y.2d at 87-88.

Further, "[u]nder CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon, supra, 84 N.Y.2d at 88 (emphasis added); Goshen v. Mut. Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002) (a motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations...").

Although Respondent argues that "the exhibits attached to the Petition by Petitioner require dismissal of the first and second causes of action" (Respondent's Memo, page 5), in fact those exhibits require judgment in favor of Petitioner, because they prove that Slayton was not given any notice of a "proposed" merger, much less the 20 days' notice mandated by LLCL § 1002(c). In any event, under settled standards, the motion must be denied.

## POINT I

### THE MOTION TO DISMISS SHOULD BE DENIED BECAUSE RESPONDENT HAS FAILED TO COMPLY WITH THE PROVISIONS OF LLCL SECTION 1002 (c)

Because Highline Stages does not have an executed operating agreement, the provisions of the LLCL fully control with respect to Respondent's efforts to enter into a merger. The Purported Merger was invalid and should be set aside or rescinded pursuant to LLCL §1002 (g)

because Respondent failed to provide Slayton the requisite 20 days' notice under LLCL §1002 (c). Again, the lack of notice is undisputed.

By giving Petitioner notice of the Purported Merger only after it had been purportedly effectuated, Highline Stages disregarded its obligations to provide the minimum 20 days' notice of the proposed merger meeting under § 1002(c) and thereby deprived Slayton of her statutory right to file her dissent from the Merger with company as provided by § 1002(e) prior to the time of the meeting at which such merger or consolidation is to be voted on, and thereby possibly affect its outcome. As further proof of the entire lack of merit in Respondent's argument that LLCL § 407 permits it give no notice of a "proposed' merger to Slayton, we draw the Court's attention to the fact that LLCL § 1002(c) does not even permit the members themselves to provide for less than a 20 days' notice period in their operating agreement. The statute provides for "a meeting on twenty days' notice or such greater notice as the operating agreement may provide." (Emphasis added.) Simply put, if all of the members of a limited liability company are statutorily barred from agreeing in their operating agreement on a procedure that would give less than 20 days' notice of a proposed merger, it simply cannot be the law that a majority group of members can nevertheless choose to provide no notice of a proposed merger to a minority member who they have secretly decided to get rid of.

Specifically, in purporting to effectuate the Purported Merger, Highline Stages failed to comply with the notice provisions of LLCL § 1002(c) which requires that:

> [t]he agreement of merger or consolidation shall be submitted to the members of each domestic limited liability company who are entitled to vote with respect to a merger or consolidation at a meeting called on twenty days' notice or such greater notice as the operating agreement may provide.

(Emphasis added.)

By failing to give Slayton the required notice of meeting and opportunity to be heard, Highline Stages also failed to comply with LLCL § 1002(e), which provides that:

> [a]ny member that is a party to a proposed merger or consolidation who is entitled to vote with respect to such merger or consolidation may, prior to that time of the meeting at which such merger or consolidation is to be voted on, file with the domestic limited liability company written notice of dissent from the proposed merger or consolidation.

(Emphasis added).

By depriving Petitioner of her right to notice and keeping her uninformed and in the dark, Respondent's actions denied Petitioner of her fundamental right as a voting member of an LLC to render her opinion on the most important question that can be brought before a voting member – i.e., whether to end the very existence of the company, in this case by merging into another entity, and wiping out Slayton's investment without her ever getting the chance to object. The clandestine maneuvering by the other voting members took away any and all opportunity for her to voice her dissent, and deprived her of her right as a voting member to try to convince her fellow members that the merger was not in the best interest of the company.

And this is not all that they did. Because they presented the merger to Slayton as a fait accompli, Slayton never got to become a "dissenting member" as provided for in LLCL § 1002(e). Then, after depriving Slayton of her right to file a pre-meeting notice of dissent and possibly gain some traction in staving off the merger, again based on Respondent's tortured reading of the LLCL, Respondent argues that it should be permitted to also deprive Slayton of her right under § 1002(g) to attack the merger based on the very fact that Respondent failed to comply with subdivision (c) of § 1002 in the first place, a fact which is undisputed.

Specifically, LLCL § 1002(g) states that:

> A member of a domestic limited liability company who has a right under this chapter to demand payment for his or her membership interest shall not have any

> right at law or in equity under this chapter to attack the validity of the merger or consolidation or to have the merger or consolidation set aside or rescinded, except in an action or contest with respect to compliance with the provisions of the operating agreement or subdivision (c) of this section.

(Emphasis added.)

Again, this is precisely what Slayton is doing here – she has commenced a lawsuit under LLCL § 1002 (g) attacking the validity of the Purported Merger and seeking to have it set aside or rescinded based on her contesting Respondent's undisputed failure to comply with the provisions of subdivision (c) of LLCL § 1002.

Of course, it is black letter law that statutory interpretation begins with the plain language of the statute. "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." Majewski v. Broadalbin–Perth Cent. School Dist., 91 N.Y.2d 577, 583 (1998). Based on the language of LLCL § 1002, Slayton's right to attack the Purported Merger based on Respondent's wrongful disregarding of Slayton's fundamental notice rights could not be clearer.

In view of this plainly accurate reading of the LLCL, Respondent rather startlingly argues that LLCL § 407 ("Action by members without a meeting") should be read so broadly as to vitiate the substantive rights afforded Slayton under LLCL §§ 1002(c), (e) and (g), despite that § 407 makes no reference to the rights afforded dissenters under § 1002, and in fact is utterly silent on this point.

Petitioner respectfully requests that the Court consider the following question: Why would the legislature have enacted LLCL § 1002(g), which specifically provides that the sole basis for a non-consenting member to attack or set aside a merger is to allege that the company failed to follow the notice provisions of § 1002(c), if § 407 can be read to provide that those very

provisions § 1002(c) do not have to be followed? Such an interpretation of the two statutes runs contrary to common sense as well as "...the principle of statutory construction which dictates that where a general statute and a specific statute pertaining to the same subject appear to be in conflict, the specific statute should govern over the general." Williamson v 16 West 57th Street Co., 683 N.Y.S.2d 548, 551 (2d Dep't 1998).

Moreover, the meeting required by § 1002(c) is not an ordinary meeting of the voting members. Rather, this type of meeting concerns merging an entity out of existence.[6] This is not just a case about valuation, this is a case about whether the Respondent's tortured reading of the LLCL, which if accepted would result in the deprivation of a fundamental right of dissent, should be accepted. Petitioner respectfully submits that it should not, and that the motion should be denied in all respects.

Underscoring the weakness of Respondent's position here is that the principal case it relies on is an unreported decision, Stulman v. John Dory LLC (Mem. Decision, Index no. 602365/99 (Sup. Ct. N.Y. County Sept. 10, 2010)), that is off point and easily distinguishable. Unlike here, Stulman involved a non-voting member of a LLC. Moreover, the Stulman court was not asked to decide, and therefore did not even consider, the applicability of LLCL § 1002(c) in deciding the issues raised in that case.

In Stulman, the plaintiff and the two individual defendants were each 20% managing members of John Dory LLC ("John Dory") which operated a restaurant in Greenwich Village. The remaining 40% was divided among nine other, non-voting members. Following a dispute with his co-managers, in March 2008, Stulman resigned as a managing member and retained a 20% non-voting interest. Subsequently John Dory sent Stulman a notice that a merger had been

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[6] See N.Y. Jur. 2d. Business Relationships § 2180, "Under Section 1002(c) of the Act, an LLC must give notice to interest holders and provide for a vote on a proposed conversion."

effectuated between it and John Dory Merger LLC ("John Dory Merger"), with John Dory Merger the surviving entity. The merger resulted in the termination of Stulman's interest and only entitled him to receive cash in exchange for his interest in John Dory. Stulman, who was not given advance notice of the merger, rejected the offer and brought a lawsuit alleging causes of action for breach of contract, conversion, declaratory judgment, and rescission.

John Dory and the individual defendants (the "John Dory defendants") moved for partial summary judgment declaring that the merger was effective, arguing in relevant part that all of the voting members had approved the merger and that pursuant to LLCL § 407(a) a meeting of the members upon advance notice to approve the merger was not required. The court agreed, finding that "LLCL § 407(a) clearly provides that no notice is required if the consent of all the voting members is obtained." (emphasis added)

Stulman argued that he was entitled to notice of the proposed merger under the BCL and the Partnership Law, neither of which applied to John Dory, a limited liability company. Thus, the court observed that:

> Stulman's arguments that notice of the merger was required are based only on the Business Corporation Law and the Partnership Law, neither of which applies to John Dory, a limited liability company.

Therefore, because it was not presented with the issues raised in the present case, the Stulman court did not consider the relevant arguments that Slayton is raising here under §§ 1002(c) (e), and (f). And, it bears repeating that a key ground for the John Dory defendants' prevailing argument in that case was that advance notice of the meeting to discuss the merger was not required there because the written consent to the merger of all the voting members had been obtained. That is not the situation here.

In short, Stulman does not address the important issues presented here by a voting member of an LLC under LLC §§ 1002(c), (e) and (g), and therefore that case is plainly inapplicable to this case.[7]

On the other hand, the Court of Appeals' decision in Appleton Acquisition, LLC v. National Housing Partnership, 10 N.Y.3d 250 (2008), a case in the analogous New York partnership law context, is instructive on the issues raised in this special proceeding. Appleton involved allegations of breach of fiduciary duty, breach of contract, fraud and negligent misrepresentation by former limited partners against the former general partner and its parent corporation in connection with the limited partnership's merger with another entity. In the context of its discussion on the proper scope of an appraisal proceeding and what rights a partner has in the merger context under Partnership Law 121-1102(d), and directly in line with Slayton's arguments here, the Court of Appeals held as follows:

> Aside from the ability to request a judicial appraisal, Partnership Law § 121–1102(d) specifies that a limited partner:
>
> "shall not have any right at law or in equity under this article to attack the validity of the merger ..., or to have the merger ... set aside or rescinded, except in an action ... [to contest] compliance with the provisions of the partnership agreement or [the notice provisions of section 121–1102(a) ]."

10 N.Y.3d 250, 255 (Emphasis added; brackets in original.)

The Appleton Court then went on to state that "[t]his language reveals a directive by the Legislature to make an appraisal proceeding the sole remedy of a limited partner to attack the

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[7] Respondent also incorrectly asserts that ALF Naman Real Estate Advisors, LLC v Capsag Harbor Management, LLC, No. 100868/12, 2012 N.Y. Misc. LEXIS 4818 (Sup. Ct. Oct. 3, 2012), aff'd in part, 113 A.D.3d 525, 978 N.Y.S.2d 844 (1st Dep't 2014) supports its extreme position. Simply put, the issues raised in the Petition in this case were not raised or decided in that case.

validity of a merger.'" Id., quoting Rich, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 38, Partnership Law art 8–A, 2008 Pocket Part, at 61.

By explicitly pointing to the 20 days' notice provision of Partnership Law § 121-1102(a) on the right to attack the validity of the merger as set forth in § 121-1102(d) – provisions that are substantively exactly the same as LLCL §§ 1002(c) and (g)[8] – the Court of Appeals made crystal clear that the proper interpretation of these statutes is that the 20 days' meeting notice requirement must be met under § 1002(c), and if it is not met, as it was not here, the purported merger is subject to attack as being invalid under § 1002(g). To hold otherwise (as Respondent requests in this case) would deprive a non-consenting partner or, as here, a non-consenting LLC member, of the sole basis on which to "attack the validity of the merger" based on the very

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[8] Section 121-1102(a) of the Partnership Law ("Procedure for merger or consolidation") states in relevant part:

> The agreement shall be submitted to the partners of each constituent limited partnership at a regular or special meeting called on twenty days' notice or such greater notice as the partnership agreement may provide.
>
> As set forth above, § 1002(c) of the LLCP substantively states the same thing in relevant part:
>
> [t]he agreement of merger or consolidation shall be submitted to the members of each domestic limited liability company who are entitled to vote with respect to a merger or consolidation at a meeting called on twenty days' notice or such greater notice as the operating agreement may provide.

(Emphasis added in both.)

Section 121-1102(d) of the Partnership Law states in relevant part:

(d) A limited partner of a constituent limited partnership who has a right under this article to demand payment for his partnership interest shall not have any right at law or in equity under this article to attack the validity of the merger or consolidation, or to have the merger or consolidation set aside or rescinded, except in an action or contest with respect to compliance with the provisions of the partnership agreement or subdivision (a) of this section.

Again as set forth above, Section 1002(g) of the LLCP substantively states the same thing in relevant part:

A member of a domestic limited liability company who has a right under this chapter to demand payment for his or her membership interest shall not have any right at law or in equity under this chapter to attack the validity of the merger or consolidation or to have the merger or consolidation set aside or rescinded, except in an action or contest with respect to compliance with the provisions of the operating agreement or subdivision (c) of this section.

(Emphasis added in both.)

default of the LLC or its manager in failing to provide the requisite notice in the first instance. This is completely nonsensical, and should be rejected as such.

Indeed, Appleton is replete with holdings by the Court of Appeal that reinforce and make this unassailable conclusion all the more certain. For example, again in discussing limiting the scope of relief to an appraisal, the Court held that:

> Consequently, in the absence of a violation of the partnership agreement or inadequate notice of the proposed merger (*see* Partnership Law § 121–1102[d]), the statute prohibits limited partners from relying on any form of relief other than a judicial appraisal ...

10 N.Y.3d at 256.

Likewise, the Appleton Court held that:

> "[t]he statutory exception to the exclusivity of the appraisal proceeding is limited to civil actions that challenge a merger on the grounds that it was not effectuated in compliance with . . . the notice requirements of section 121–1102(a)."

The Appleton Court further:

> "conclude[ed] that the exception to section 121–1102(d) pertains only to civil actions that seek to rescind or attack the validity of a merger on the grounds that there was a violation of the procedures specified in a partnership agreement for effectuating a merger or that there was a failure to comply with the notice requirements of subdivision (a) of the statute."

Id. at 258, 258-59.

Here, Slayton was not provided with any prior notice of a meeting to vote on the merger despite that she was clearly entitled to the same under LLCL § 1002(c). Therefore, because Respondent failed to comply with the notice requirements of subdivision (c) of the statute, Petitioner has a right, as set forth in the first cause of action, to attack the validity of the Purported Merger pursuant to LLCL § 1002(g), and to pursue the monetary damages sought in the second cause of action.

## POINT II

## PETITIONER NEITHER WAIVED HER DISSENTER'S RIGHTS NOR ACQUIESCED WITH RESPECT TO THE PURPORTED MERGER

Despite the express reservation of rights language contained in both Slayton's Notice of Election to Dissent and the September 6 Letter, and despite the fact that the third cause of action seeking appraisal rights is pleaded in the alternative, Respondent nevertheless argues that by having demanded payment for the fair value of her membership interest, Petitioner has no right under LLCL § 1002(g) to attack or seek to set aside or rescind the Purported Merger. This argument is completely meritless.

As discussed above, at all times Petitioner reserved her rights to assert her dissenter's rights (see Petition, Exs. B and D.) Moreover, particularly in light of the fact that it was Respondent which intentionally sought to deprive Petitioner of her dissenter's rights in the first place, the Court should not abide Respondent's attempts to place Petitioner in the untenable position of having to choose to either waive her right to attack the validity of the Purported Merger, or waive her appraisal rights, where the statutory scheme was set up to afford her both of those rights under the undisputed facts here.

Finally, Petitioner anticipates that Respondent will argue Petitioner's objections to the Purported Merger are futile because Slayton could not have affected the outcome of the Purported Merger. New York law holds otherwise. Longstanding case law has been consistent and clear that the right of a voting shareholder to notice of a proposed action or election is fundamental and "[i]t is no answer to say that the result will be the same upon another election." Matter of Keller, 116 A.D. 58, 60 (3rd Dep't 1906). See also, Matter of Goldfield Corp. v General Host Corp., 29 N.Y.2d 264, 269 (1971) ("failure to give notice in accord with the statute and the corporate by-laws would have rendered the election void, and, if void, a new election

would have been required even without a showing that the results of the election would, or might have been different."); Collins v Telcoa Intl. Corp., 283 A.D.2d 128, 132 (2d Dep't 2001) (court declared sale of companies' assets null and void because plaintiff was not informed of the shareholder meeting at which sale was approved, despite the fact that plaintiff's opposition would have been futile).

Moreover, while Slayton need not make a showing that the results of a new vote would or could have been different, there is at least a question of fact that Slayton's dissent would not have been futile. Among other possible concerns Slayton could have raised had she been given a chance, was warning Lundry and Triolo that they too might be frozen out of the business by Kline at some point, and if Lundry and Triolo sided with Petitioner regarding the merger, Kline might have been forced to abandon it because he does not have the necessary experience to operate Highline Stages without them. (Slayton Aff. ¶ 18.)

Additionally, if in the future Slayton's rights as a voting member of Highline Stages are respected and the procedures of LLCL § 1002 are followed, even if a merger is the result, the effective date of such a merger would under the statutory scheme provide a new appraisal date which would lead to a different valuation from the August 6, 2013 appraisal date that Respondent is now claiming. Accordingly, under no circumstances would granting Slayton her rights under the law be futile.

## CONCLUSION

For the foregoing reasons, and the reasons set forth in the accompanying Slayton affidavit, Petitioner respectfully requests that this Court deny the motion to dismiss in its entirety.

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