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

KIMBERLY SLAYTON,

Petitioner,

-against-

HIGHLINE STAGES, LLC and HS MERGER PARTNER, LLC,

Respondents.

Index No. 650099/2014

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS PURSUANT TO CPLR 3211(a)(1) and (7)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(s)**

STATUTES

CASES **PAGE(s)**

TREATISE

Respondent Highline Stages, LLC, formerly known as HS Merger Partners, LLC,[1] respectfully submits this memorandum of law in support of its Motion to Dismiss the first and second causes of action asserted by Petitioner Kimberly Slayton ("Petitioner" or "Slayton") pursuant to CPLR 3211(a)(1) and (7).

PRELIMINARY STATEMENT

This action should be a simple matter of adjudicating the fair market value of Petitioner's shares in Old Highline Stages, a company that was lawfully merged out of existence in August 2013. Despite that Petitioner has made a demand for payment of her pro rata share in Old Highline Stages by asserting her appraisal rights under the New York Limited Liability Company Law ("LLCL"), Petitioner has added plainly improper causes of action asking the Court to retroactively void the Merger in a transparent attempt to use frivolous legal threats to extract a higher buy-out price.

The Merger was authorized by a written consent executed by 86.7% of all of the voting and ownership interests in Old Highline Stages, significantly more votes than the simple majority required under the law to effectuate this Merger. Moreover, Petitioner admits that she was sent notice of the action and Merger, as well as notice of her dissenter's rights, which she exercised and which were recognized.

[1] HS Merger Partners, LLC changed its name to Highline Stages, LLC on August 8, 2013. A detailed background of the entities involved in this action is in the Statement of Facts below, but a brief summary is as follows: A company called Highline Stages, LLC ("Old Highline Stages") and a company called HS Merger Partner, LLC merged on August 8, 2013 (the "Merger"). HS Merger Partner, LLC was the only surviving entity. Thus, Old Highline Stages has not existed as a legal entity since August 8, 2013. However, immediately after the Merger, HS Merger Partner changed its name to Highline Stages, LLC ("New Highline Stages"). The entities named as Respondents in the Petition are thus confusing, if not simply inaccurate. The Petition names "Highline Stages, LLC" as a Respondent, but describes this entity in its allegations as Old Highline Stages, which no longer exists. The Petition also names "HS Merger Partner, LLC" as a Respondent, but that entity changed its legal name to "Highline Stages, LLC" months before the Petition was filed.

Petitioner does not claim that the written consent was forged; indeed, she admits that the Merger was authorized by written consent of members with 86.7% of the interests. Rather, Petitioner now asks this Court to retroactively void the lawful Merger by arguing that although the supermajority signed a written consent authorizing and effectuating the Merger pursuant to Section 407 of the LLCL, the Merger should nonetheless be unwound by this Court because no meeting on notice was held for a vote.

However, it is axiomatic that Section 407 of the LLCL -- expressly entitled **"Action by members without a meeting"** -- specifically provides that *any* action which requires a vote of members "*may be taken without a meeting, without prior notice and without a vote,*" if members with a sufficient number of votes sign a written consent to the action: this is exactly what was done in this case and which fact Petitioner does not dispute. Petitioner's first two causes of action are thus nothing less than an improper request that this Court re-write the New York Limited Liability Company Law and thus eliminate the fundamental statutory right of LLCs and their members to take action on written consent in lieu of a meeting.

Moreover, as shown below, Petitioner's precise legal attack was advanced in similar cases before this Court -- and explicitly rejected. This Court has repeatedly validated the explicit statutory language of Section 407 that allows the process utilized by Respondents in this action. Thus, the first two causes of action in the Petition by which Petitioner asks this Court to retroactively undo and void the Merger by re-writing and invalidating Section 407 of the LLCL should be dismissed with prejudice.

STATEMENT OF FACTS

The facts set forth below are drawn solely from the Petition, and the documents attached to and made part of the Petition by Petitioner. The Petition and all the documents attached thereto are annexed to the accompanying Affirmation of Benjamin K. Semel ("Semel Aff.").

The Merger of Old Highline Stages and HS Merger Partner

On August 7, 2013, Old Highline Stages and HS Merger Partner, LLC ("HS Merger Partner") entered into an "Agreement and Plan of Merger" (the "Merger Agreement") effectuating the merger of Old Highline Stages into HS Merger Partner, with HS Merger Partner remaining as the surviving entity. Semel Aff. Ex. 1-A.

Pursuant to Section 407 of the LLCL, the Merger was authorized by Old Highline Stages and HS Merger Partner through an executed written consent in lieu of a meeting. *Id.* Holders of 86.7 percent of all of the voting and ownership member interests in Old Highline Stages and holders of 100 percent of all of the voting and ownership member interests of HS Merger Partner executed, and entered into, an agreement entitled "Written Consent of the Members of Highline Stages, LLC and HS Merger Partner, LLC" (the "Written Consent"). *Id.* Under its terms, the Written Consent adopted resolutions permitting the parties to enter into the Merger Agreement. *Id.*

Petitioner was owner of a 13.3 percent membership interest in Old Highline Stages and did not execute the Written Consent. Semel Aff. Ex. 1, ¶1; Ex. 1-A.

The Notice of Merger and Slayton's Notice of Election to Dissent

On the same day -- August 7, 2013 -- Old Highline Stages sent Petitioner by registered mail a document entitled "Notice of Action in Lieu of Meeting – Notice of Merger – Notice of Dissenters' Rights" (the "Merger Notice"). *Id.* The Merger Notice informed Petitioner that,

pursuant to LLCL 407 and LLCL 1002, Old Highline Stages and HS Merger Partner had adopted resolutions by written consent approving and authorizing the execution of the Merger Agreement. *Id.* The Merger Notice also informed Petitioner that she would receive $50,000 as consideration for her pro rata membership interest in Old Highline Stages. *Id.* Petitioner was further advised of her right to file a written notice of dissent from the Merger within twenty days of the Merger Notice. *Id.*

On August 8, 2013, HS Merger Partner changed its name to Highline Stages, LLC ("New Highline Stages"). *See* Semel Aff., Ex. 2.

On August 23, 2013, Petitioner served a "Notice of Election to Dissent" (the "Notice of Election to Dissent") by certified mail and hand delivery. Ex. 1-B. Petitioner's Notice of Election to Dissent stated that Petitioner had elected to dissent to and from the Merger and demanded payment of the fair value for her membership interest in Old Highline Stages. *Id.*

In response, New Highline Stages sent Petitioner a letter titled "Offer of Fair Value of Membership Interests" on August 28, 2013 (the "Offer Letter"). The Offer Letter acknowledged receipt of the Notice of Election to Dissent and offered to pay Petitioner $50,000 for her 13.33 percent interest in Old Highline Stages (the "Offer"). Semel Aff., Ex. 1-C. It also advised Petitioner of the fact that HS Merger Partner had changed its name to Highline Stages, LLC. *Id.* By letter dated September 6, 2013, Petitioner rejected the Offer. Semel Aff., Ex. 1-D.

Slayton's Petition Against Respondents

On January 13, 2014, Petitioner filed her Petition against Respondents in connection with the Merger. Semel Aff., Ex. 1. The first and second causes of action are based upon an allegation that the Merger was "ineffective and void." The first cause of action seeks a

declaratory judgment declaring the Merger be set aside or rescinded pursuant to LLCL 1002(g). *Id.* ¶¶ 8-12. The second cause of action seeks unspecified monetary damages. *Id.* ¶¶ 13-15.

The third and fourth causes of action relate to the appraisal of the fair market value of Petitioner's shares in Old Highline Stages, which Petitioner has demanded, and are not the direct subject of this motion.[2]

ARGUMENT

I. Legal Standard on Motion

CPLR Rule 3211(a)(7) provides that, "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the pleading fails to state a cause of action." A cause of action must be dismissed pursuant to CPLR 3211(a)(7) where the Court, after looking "[with]in the four corners of the complaint," finds that it fails to "state any cognizable cause of action." *Mensah v. Kalkoran*, No. 102406/09, 2009 N.Y. Misc. LEXIS 5897, at **4 (Sup. Ct. N.Y. Co. June 23, 2009) (citing *Scott v. Bell Atl. Corp.*, 282 A.D.2d 180, 183, 726 N.Y.S.2d 60, 63 (1st Dep't 2001), *aff'd in part, modified on other grounds*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) (other citations omitted).

CPLR 3211(a)(1) provides that a party may move for a judgment dismissing one or more causes of action where the defense is based on documentary evidence. In this case, the exhibits attached to the Petition by Petitioner require dismissal of the first and second causes of action. *See Montefiore v. Soja*, 292 A.D.2d 241, 242, 738 N.Y.S.2d 839 (1st Dep't 2002) (dismissal proper where allegations "flatly contradicted by the documentary evidence submitted by plaintiff as exhibits to the complaint.") A motion to dismiss based on documentary evidence should be

[2] Respondent intends to serve its Counterclaims and Answer to the remaining claims upon resolution of this motion. *Lax v Design Quest N.Y., Ltd.*, 2013 N.Y. Misc. LEXIS 3679 (Sup. Ct. Aug. 14, 2013) (motion to dismiss a cause of action extends the time to respond to all causes of action) (citing *Chagnon v. Tyson*, 11 A.D.3d 325, 783 N.Y.S.2d 29 (1st Dep't 2004) and *De Falco v. JRS Confectionary*, 118 A.D.2d 752, 500 N.Y.S.2d 143 (2d Dep't 1996)).

granted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 865 (2002). *See also Snyder v. Voris, Martini & Moore, LLC*, 52 A.D.3d 811, 812, 860 N.Y.S.2d 622, 624 (2d Dep't 2008) (action seeking a declaratory judgment dismissed based on documentary evidence).

II. The First And Second Causes Of Action Should Be Dismissed

The Petition does not plead facts on which the Merger can be voided. On the contrary, the Petition itself, along with the exhibits attached thereto, establishes that the Merger was valid as a matter of law.

A. Petitioner Admits A Valid Written Consent Authorizing The Merger Was Executed

Petitioner admits that she received Exhibit A to the Petition on August 7, 2013. *See* Semel Aff., Exhibit 1 (the "Petition") at ¶ 5. This Notice explicitly references Section 407, and contains the "Written Consent of the Members" holding 86.7 percent of all of the voting and ownership interests in Old Highline Stages (the "Written Consent"). Petitioner admits the central facts -- that she owned only 13.3 percent of Old Highline Stages, and that the other members who signed the written consent owned the remaining 86.7 percent of all of the voting and ownership rights and interests therein. *See* Petition at ¶¶ 4, 18.

Petitioner also admits that Old Highline Stages had no operating agreement. *Id*. at ¶ 6. Where no operating agreement exists, the statutory law is clear and unambiguous; in the absence of an operating agreement, the voting requirements are controlled by the statute, i.e., the LLCL. § 402(d) of the LLCL states that, "[e]xcept as provided in the operating agreement… the vote of at least a majority in interest of the members entitled to vote thereon shall be required to… approve a merger or consolidation of the limited liability company with or into another limited

liability company…" LLCL § 1002(c) reiterates this "majority in interest" requirement in the specific context of mergers, stating that, "the agreement shall be approved on behalf of each domestic limited liability company (i) by such voting interests of the members as shall be required by the operating agreement, or (ii) if no provision is made, by the members representing at least a majority in interest of the members." Thus, Exhibit A itself establishes that the requirement of Section 407(a) was met and that the Written Consent was signed by members holding a sufficient percentage of interests to authorize the Merger.

The Petition also clearly and unambiguously establishes and admits that the other two requirements for a valid merger under Section 407 were met. First, the single Written Consent was signed by all three of the voting members holding 86.7% of the voting and ownership interests, thus fulfilling the requirement of Section 407(b) that all necessary voting members execute the consent within 60 days of each other. *See* Petition, Ex. A.

Second, the Petition clearly establishes and admits that Petitioner was sent notice of the action by Written Consent the very same day that it occurred; accordingly, the Statute's requirement of "prompt notice of the taking of the action without a meeting by less than unanimous written consent" was given to Petitioner, thereby fulfilling the last requirement of Section 407(c). *See* Petition, ¶ 5. Accordingly, the Petition's own allegations and exhibits clearly establish that the Merger was validly effectuated as a matter of law.

B. <u>Written Consent In Lieu of A Meeting Is Authorized By Statute And Precedent</u>

Petitioner now petitions this Court to void the Merger by asking this Court to invalidate and re-write Section 407 of the LLCL. Petitioner argues that the decision by a supermajority of Old Highline Stages to act by their Written Consent under Section 407, instead of holding a meeting on notice, renders this Merger (and thus all similar mergers) void. Petitioner's legal

theory is predicated upon a facile and erroneous interpretation of Section 1002(c) of the LLCL, which states in part 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." Petitioner's selective interpretation of Section 1002(c) of the LLCL would have this Court read Section 407(a) right out of the Statute.

However, LLCL § 407, entitled "**Action by members without a meeting"** expressly provides at Section 407(a) that:

> **Whenever under this chapter members of a limited liability company are required or permitted to take any action by vote**, except as provided in the operating agreement, **such action may be taken without a meeting, without prior notice and without a vote**, **if a consent or consents in writing**, setting forth the action so taken **shall be signed by the members who hold the voting interests** having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all of the members entitled to vote therein were present and voted . . . (emphases added)

Thus, Section 407, a central right and procedure in the operation of New York LLCs, makes it explicitly clear that it applies to every part of the LLCL, which of course includes Section 1002(c). There is no legal authority to suggest that Section 1002(c) overrides Section 407; to the contrary, Section 407 explicitly and expressly applies whenever under the LLCL members are "required" or "permitted" to take any action by vote. LLCL Section 407 applies to everything "under this **chapter**," and LLCL Section 101 explains that, "[t]his **chapter** shall be known as the 'New York Limited Liability Company Law.'" (emphases added). There is no ambiguity here.

Not surprisingly, this Court has already had an opportunity to consider – and flatly reject -- the very same arguments which Petitioner advances by way of her Petition. In *Stulman v. John Dory LLC*, Index No. 602365/09, 2010 N.Y. Misc. LEXIS 6938 (Sup. Ct. Sept. 10, 2010), a

courtesy copy of which is annexed to the Semel Aff., this Court denied the attempt by a member to challenge the validity of a freeze out merger where, as here, the merger was "effectuated by the written consent" of sufficient voting members. *Id*. at p. 2. Like Petitioner here, Stulman brought an action to void the freeze out merger, arguing that notice pursuant to a meeting and vote was not provided, and cited to LLCL Section 1002. This Court wholly rejected the argument, quoting Section 407 and holding in pertinent part that:

> At issue in this action is the freeze-out merger between John Dory and JD Merger effectuated by the written consent of… the two voting members of John Dory… Stulman counters that the merger was invalid because notice of the merger was required and not provided… The Defendants argue that their merger was in compliance with the procedures set forth in the Limited Liability Company Law. This Court agrees.
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> *** *** ***
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> Furthermore, this Court has previously ruled that "[m]embers of a limited liability corporation may provide written consent in order to take action in lieu of an actual vote, unless the operating agreement provides otherwise." [*Madison Hudson Assoc., LLC v Neumann*, 8 Misc. 3d 1025A (Sup. Ct. N.Y. Co. 2005)]. Stulman has not alleged that any provision of the Operating Agreement limits the members' ability to act with written consent in lieu of an actual vote.
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> The record demonstrates that the majority voting interests obtained the written consent, as required by LLCL § 407(a), and thus, John Dory was under no obligation thereunder, to provide notice to Stulman prior to the merger…
> The merger of John Dory is clearly within the scope of the Limited Liability Company Law, which provides default procedures for limited liability companies that apply in limited liability company proceedings, unless the operating agreement applies otherwise. [*Overhoff v Scarp, Inc.,* 12 Misc 3d 350, 359 (Sup. Ct. Erie Co., 2005)]
>
> Stulman is barred in law and equity from challenging the validity of the merger or seeking rescission of the merger, pursuant to LLCL § 1002, because the merger was approved by more than a majority of members,(LLCL § 1002 [c], [g]).

Id. at pp. 2-5.

Furthermore, this Court's Decision in *Stulman* is further supported by McKinney's Practice Commentaries, which advise the very same procedure which was followed here by Respondents:

> Although [LLCL] Section 1002(c) refers to meetings of members, the members should be able to act upon the combination transaction by written consent in accordance with Section 407, subject to the operating agreement not containing restrictions or prohibitions on the consent procedure.

McKinney's Practice Commentaries, 32A Limited Liability Company Law, Section 10.2, Pocket Part, p. 83 (Rich, 2014).

Of course, as there is no operating agreement on the facts before this Court, there is no restriction on the application of Section 407. The propriety of using Section 407 as done by Respondents here is further supported by yet another case before this Court involving a similar merger on written consent, *ALF Naman Real Estate Advisors, LLC v Capsag Harbor Mgt., 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).

In *ALF Naman*, this Court upheld the validity of a similar freeze-out merger where no vote at a meeting on notice was held, but rather where the merger was effectuated, as here, by written consent and the members then sent "a document entitled 'notice of action in lieu of meeting - notice of merger - notice of dissenters' rights' that detailed Cape Sag Developers' decision to merge Capnam Sag with Capsag, and to maintain Capsag as the surviving entity (the Capsag merger notice)." *Id*. at *5. As Exhibit A to the Petition evidences, the procedure in *ALF Naman* is exactly the same procedure used by Respondents here to effectuate this Merger, where Petitioner likewise received a "Notice of Action In Lieu of Meeting – Notice of Merger – Notice of Dissenters' Rights."

C. Section 1002(e) Provides Petitioner No Basis For Relief

Petitioner offers a perplexing and untenable "allegation" in the Petition, that she somehow was "deprived… of her statutory right to dissent from the Merger" under Section 1002(e). Petition, ¶ 7. This "allegation," an erroneous legal conclusion, cannot be the basis for relief for two independent reasons.

First, Section 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.

Petitioner is plainly demanding payment for her membership interest, and thus under Section 1002(g), Petitioner "shall not have any right at law or in equity" to challenge the Merger except with respect to compliance with the operating agreement (which does not exist) or subdivision (c) (which as discussed in the previous section was satisfied by Respondent's action under Section 407(a)). Thus, pursuant to the LLCL, subdivision (e) cannot be a basis under the Petition for challenging the Merger. Indeed, by having exercised her statutory rights to demand payment under the LLCL, Petitioner has no right under § 1002(g) of the same Statute to attack, set aside or rescind the very same Merger under which she demands payment.

Furthermore, Petitioner's erroneous conclusion of law is rebutted by the Petition itself. As explained above, and as established by the very exhibits to the Petition, Petitioner admits she *was* provided a Notice of Dissenters' Rights, and she admits that *exercised* those dissenter rights by sending a Notice of Election to Dissent, and Petitioner further admits that her election to dissent was *recognized*. *See* Petition, Exs. A-C. Moreover, the Respondent's Offer of Fair Value sent to Petitioner, and annexed to the Petition, states in part that, "[i]t is our understanding

that you have exercised, pursuant to Section 1002(e) of the [LLLC], the right to dissent from the merger." *Id*. at Ex. C.

Petitioner cannot have been deprived of the right to dissent under Section 1002(e) when she *in fact did* elect to dissent under Section 1002(e). This is just another sham allegation (for which Respondents should be awarded reasonable attorneys' fees) to prop up her frivolous causes of action to void the Merger, all of which are part of Petitioner's improper attempts to increase the price of a buy out for her shares of Old Highline Stages, which was merged out of existence on August 7, 2013.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court grant their Motion to Dismiss the first and second causes of action asserted in the Petition and award Respondents such other and further relief as is just and proper.

Dated: New York, New York
April 22, 2014

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