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

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DANIEL KOCH and DEREK KOCH,

Petitioners,

-against-

HC HOSPITALITY PARTNERS, LLC PCG DGHP, LLC, and DUAL GROUPE HOSPITALITY, LLC (nominally),

Respondents.

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Index No. 650519/2014

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS VERIFIED PETITION FOR JUDICIAL DISSOLUTION AND APPOINTMENT OF A RECEIVER

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

DEREK KOCH, being duly sworn, deposes and says:

1. I, along with my brother, Daniel Koch ("Daniel"), are the petitioners herein. I have personal knowledge of the facts and circumstances described herein.

2. By way of our petition, which was filed with this Court on February 17, 2014, and which we both duly verified as being true and correct to the best of our knowledge and belief (the "Petition", a copy of which is attached hereto as *Exhibit "A"*), Daniel and I seek the judicial dissolution and the appointment of a receiver concerning Dual Groupe Hospitality, LLC (the "Company"). As more fully discussed herein, Daniel and I hold a combined 50% ownership interest in the Company. The allegations set forth in the Petition are incorporated in this affidavit by reference and as if set forth at length herein.

3. I respectfully submit this affidavit in opposition to the motion (the "Motion") of respondents HC Hospitality Partners, LLC ("HC"), PCG DGHP, LLC ("PCG") and the Company (together, "Respondents") seeking to dismiss the Petition based upon Respondents' incorrect

assertions that the Petition lacks evidentiary support and allegedly fails to sufficiently state a valid claim for judicial dissolution of the Company. I have reviewed the pleadings submitted by Respondents in support of the Motion including, without limitation, the Affidavit of Michael Wainstein, dated March 12, 2014 (the "Wainstein Aff."), and the exhibits attached thereto.

A. General Background Concerning the Company, its Formation and its Intended Purpose

4. As reflected in the "Operating Agreement of Dual Groupe Hospitality LLC" which was entered into by HC, PCG, Daniel and I on or about October 12, 2012(the "Operating Agreement") (See Wainstein Aff., Ex. A), the Company was formed by the members for the purpose of operating and developing hospitality-related ventures such as restaurants, bars and/or nightlife venues. As more fully set forth in Paragraph 10 of the Petition, Section 2.5.1 of the Operating Agreement specifically refers to the "Business" of the Company being:

(a) the Company's production of a "brunch series named 'Day and Night at Highline Ballroom'" (the "Brunch") pursuant to the terms of a certain Management Agreement dated September 21, 2012;

(b) the ownership of the trademark "Day & Night", which is registered for use under the goods and services categories "Special event planning" and "Special event planning consultation (the "Trademark"); and

(c) the Company's ownership and operation (through a subsidiary entity) of a restaurant named "Chateau" which is located at 47 West 20th Street, New York, New York ("Chateau").

5. As further reflected in the introductory paragraphs of the Operating Agreement, the Company's ownership structure and initial capitalization resulted from the execution of a certain "Agreement of Contribution", dated as of October 12, 2012 (the "Contribution

Agreement"), by Dual Groupe LLC (an entity which was jointly owned by Michael Wainstein ("Michael"), Daniel and I), Private Capital Group Realty, LLC (an entity owned/controlled by Michael), HC (an entity owned/controlled by Andreas Huber ("Andreas")) and Michael, Daniel and I individually. Copies of the Contribution Agreement, along with Schedule 4 thereof, are attached hereto as *Exhibit "B"*. Specifically, pursuant to the Contribution Agreement, and as more fully set forth therein as well as in the introductory paragraphs of the Operating Agreement, the Company (named as the "JV Entity", *i.e.*, joint venture entity, therein) was to be capitalized by:

(a) a contribution by Dual Groupe LLC and PCG (an entity owned/controlled by Michael) of certain "Acquired Assets" valued at $1,100,000.00 and consisting primarily of certain of the former assets of Dual Groupe LLC such as the Management Agreement to produce the Brunch, the rights to the Trademark and the ownership/operation of Chateau; and

(b) a $180,000.00 cash contribution made by HC.

6. As set forth in Section 1.3 of the Contribution Agreement, as part of the transaction, the Company assumed and agreed to "pay, perform and discharge all trade accounts payable of Dual Group [LLC] as of the Closing Date, as listed on Schedule 4 attached to this Agreement (collectively, the "Assumed Liabilities")." As reflected in Schedule 4 to the Contribution Agreement, the "Assumed Liabilities" totaled $105,638.78 as of October 19, 2012 and consisted of unpaid salaries, payroll taxes, rent, vendor invoices and other accrued debts of Dual Groupe LLC. As more fully discussed below, although Daniel and I do not have access to the Company's books and records (such books and records being in the possession, custody or control of the "Managers" – Michael and Andreas), we believe that only a fraction of the "Assumed Liabilities" have been satisfied by the Company as of the date hereof.

7. As a result of the foregoing transactions, and as reflected in Exhibit A to the Operating Agreement: (a) Daniel and I each hold 25% of the membership interests of the Company (*i.e.*, a total of 50% of the outstanding membership interests); (b) PCG (*i.e.*, Michael) holds 30% of the membership interests of the Company; and (c) the remaining 20% of the membership interest of the Company are held by HC (*i.e.*, Andreas). In keeping with the substantially equal distribution of its membership interests among its four members, the Company was intended to be a collaborative effort and was to be operated with the active involvement of all of the members (*i.e.*, there were no "passive" members, no members who were mere "stakeholders" and no members who held only nominal/*de minimis* membership interests). When the Company was formed, it was ultimately agreed that Michael and Andreas would initially be designated as the "Managers" of the Company under the Operating Agreement (although neither Michael nor Andreas has any real history or experience in managing hospitality-related ventures), with Daniel and I being permitted to actively participate in the Company's ongoing operations, decision making, business development, etc. (which we did until recently). Also in keeping with our mutual understanding that the Company was to be a "group effort", the Operating Agreement sets forth certain enumerated "Major Decisions" which require prior approval of *all of the members*, and not just the consent or authority of the Managers.

8. Consistent with the foregoing, and contemporaneously with the execution of the Operating Agreement on or about October 12, 2012, Andreas, Daniel, Worth Capital LLC (an entity owned/controlled by Michael) and I entered into separate "Consulting Agreements" with the Company concerning our collaborative operation of the Company as "independent contractors" thereof (together, the "Consulting Agreements"). (See Wainstein Aff. at Exs. A and B) Section 1.2

of each Consulting Agreement sets forth the designated "Consultant's" specific duties with regard to the Company's affairs. Specifically:

- Michael's duties were described in his Consulting Agreement as "providing services to DG in connection with overseeing, managing and conducting all matters relating to the negotiation of DG contracts, oversight of strategic growth of DG, management and strategic relations, overseeing certain of DG's operations and employees at the request of DG, and providing information and feedback to DG on marketing opportunities, growth opportunities, product quality, customer service, and team development...";

- Andreas' duties were described in his Consulting Agreement as "providing services to DG in connection with overseeing, managing and conducting all matters relating to brand development and the partnering of DG and other company brands, strategic planning, sourcing and structuring of DG and DG subsidiary brands, overseeing certain of DG's operations and employees at the request of DG, and providing information and feedback to DG on marketing opportunities, growth opportunities, product quality, customer service, and team development..."

- Daniel's duties were described in his Consulting Agreement as "providing services to DG in connection with overseeing, managing and conducting all matters relating to booking entertainment, public relations, advertising and marketing of the business of DG, overseeing certain of DG's operations and employees at the request of DG, and providing information and feedback to DG on marketing opportunities, growth opportunities, product quality, customer service, and team development..."

- My duties were described in my Consulting Agreement as "providing services to DG in connection with overseeing, managing and conducting all matters relating to staffing and operations of the various subsidiaries of the business of DG, overseeing certain of DG's operations

and employees at the request of DG, and providing information and feedback to DG on marketing opportunities, growth opportunities, product quality, customer service, and team development..."

B. Irreconcilable Disputes and Distrust Among the Members, the Members' Parting of Ways and the Commencement of Litigation Among the Members

9. Unfortunately, following the formation of the Company, it became apparent that the "Managers" of the Company viewed Daniel and I more like employees than 50% co-owners of the Company. Additionally, and although our Consulting Agreements expressly provided that, in exchange for the services rendered to the Company under the Consulting Agreement, Daniel and I were each to receive $1,750.00 per week on "the first of each month", neither I nor Daniel received any payments under the Consulting Agreements from October 21, 2012 through September 9, 2013 (*i.e.*, a period of 47 weeks). The Company's inability and/or unwillingness to pay us even a portion of the amounts owed to us for our substantial services weighed heavily upon Daniel and I and resulted in tense relations among the two ownership groups. Daniel and I also became increasingly frustrated with, among other things, the Company's apparent inability and/or unwillingness to generally pay its obligations (as discussed at length below), its unprofitability and lack of any real prospects of financial improvement, its overall mismanagement by Michael and Andreas and Michael's attempt to exert complete control over the Company. The infighting and multiple disputes between my brother and I on one side and Michael and Andreas on the other, and each group holding a combined 50% ownership interest in the Company, came to a head in September 2013.

10. In this regard, and by letters dated September 6, 2013, HC (*i.e.*, Andreas) and Worth Capital, LLC (*i.e.*, Michael) made demands on the Company for repayment of amounts totaling $27,466.56 in connection with certain "promissory notes" allegedly executed by the Company in January, 2013 in favor of HC and Worth Capital, LLC. Copies of those letters are

attached hereto as *Exhibit "C"*. However, even though we own 50% of the Company, neither Daniel nor I were previously aware of the execution or existence of any such "promissory notes" and, to date, we have never been provided with copies thereof. We were also unaware of any loans having been made to the Company which would give rise to any "promissory notes" or how any monies allegedly loaned by HC or Worth Capital, LLC thereunder were used by the Company. At the time that these demands were made, neither Daniel nor I were being paid what was owed to us by the Company.

11. By letter dated September 13, 2013, a copy of which is attached hereto as *Exhibit "D"*, our counsel responded to the letters sent by HC and Worth Capital, LLC advising, among other things, that Daniel and I, as members of the Company:

- Considered the amounts demanded by HC and Worth Capital, LLC from the Company to not be due or payable and instructed that such amounts not be paid from any assets of the Company;
- Demanded that the Company immediately pay and distribute to Daniel and I our rightful share of the assets of the Company;
- Considered the Company to have breached the Operating Agreement and, thus, Daniel and I were not bound by, among other provisions, any restrictive covenants contained therein;
- Considered the restrictive covenants contained in the Operating Agreement to be unenforceable due to a lack of independent consideration; and
- Considered the Company to have breached our Consulting Agreements, demanded payment of all amounts owed to us by the Company thereunder and provided notice of our termination of our Consulting Agreements.

12. As a result of the foregoing events (among many, many other events arising over the past several years), it became more than clear that irreconcilable differences existed between the two equal ownership groups, as a result of which the Company could not continue to operate in the manner intended by the members. Daniel and I were left with no choice but to part ways with Michael and Andreas, insisting all along that, in keeping with their fiduciary duties as Managers, Michael and Andreas cause the Company to distribute to us our rightful 50% share of the Company's assets.

13. In response, and on October 22, 2013, Respondents, individually, and the Company, by Respondents, commenced an action against Daniel and I (among others) with this Court titled *Dual Groupe Hospitality, LLC, HC Hospitality Partners, LLC and PCG DGHP, LLC v. Daniel Koch, Derek Koch, and Day & Night Entertainment, LLC, Index No. 653653/2013* (the "Action"), alleging that Daniel and I breached the Operating Agreement and/or our Consulting Agreements. (Petition at Ex. A) The Action seeks money damages, as well as a permanent injunction restraining Daniel and I from engaging in business activities competing with the Company (but essentially seeking to preclude us from any activities in hospitality-related ventures, whether competing or not competing with the Company).[1]

14. Not surprisingly, the commencement of the Action by Respondents was improper. Specifically, by way of his affidavit submitted in support of the Motion, Michael does not dispute the allegations set forth in Paragraph 14 of the Petition that the commencement of the Action constituted an enumerated "Major Decision" requiring prior approval of *all of the members* as provided in Section 4.5 of the Operating Agreement. Rather, in an attempt to do an "end run"

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1 The allegations made and the relief sought by Respondents in the Action further evidences that the rift between the "50/50" ownership groups of the Company has become so wide that dissolution of the Company is the only appropriate outcome.

around this provision, Michael simply states that the Action was commenced with the "unanimous consent of both Managers of the Company – myself and Andreas Huber" and without having made "any demand on Daniel Koch and Derek Koch..." (Wainstein Aff. at ¶¶15 and 16)

15. Under Section 4.5 of the Operating Agreement, in circumstances where a "Major Decision" is proposed to, but not approved by, all of the members, certain agreed upon "Deadlock" protocols are triggered. Yet the Respondents now claim that they did not have to seek our approval of the commencement of the Action at all since we would have, presumably, voted against commencing the Action against ourselves. This logic renders the agreed upon "Major Decisions" provision and the corresponding "Deadlock" procedures provided for in the Operating Agreement superfluous. The "blind eye" turned by Respondents to these provisions and their unilateral commencement of the Action against Daniel and I undoubtedly constituted a breach of the Operating Agreement. As discussed in the Motion, Daniel and I have filed a motion seeking to dismiss the Action on this basis and which motion has not been decided as of the date hereof.[2]

16. Additionally, the existence of any promissory notes (if they in fact exist) as referenced in the September 6, 2013 demand letters sent to the Company by HC and Worth Capital, LLC constitutes yet another breach of the Operating Agreement by Respondents. Specifically, among the "Major Decisions" enumerated under Section 4.5 of the Operating Agreement requiring the approval of all of the members are "...causing or permitting any Member to make one or more Member Loans to the Company..." and "engaging in any transactions with any Member or any of its Affiliates". No such approval was ever sought from Daniel or from me with regard to any transactions between the Company and HC or Worth Capital, LLC of the kind described in their

2 Respondents' knowledge of their having breached the Operating Agreement by improperly commencing the Action is further evidenced by their having filed an amended complaint in the Action, in response to our motion to dismiss, re-couching their complaint as a "derivative" action rather than an action by the Company.

demand letters. Daniel and I are not aware as to whether the Company has paid the amounts demanded by HC or Worth Capital, LLC or, if paid, where the funds to make such payments came from. It is apparent that Michael and Andreas believe that the Operating Agreement (which they themselves breached in commencing the Action) and the Consulting Agreements (which the Company repeatedly defaulted under by not paying Daniel and I the amounts required thereunder) only apply when it would suit their own, self-serving purposes.

17. It became apparent to Daniel and I that Respondents were attempting to wrest full control of the Company away from Daniel and I without giving a second thought to their fiduciary duties to Daniel and I as 50% co-owners of the Company. Accordingly, and in consultation with counsel, Daniel and I commenced this special proceeding by filing the Petition with this Court on February 17, 2014 seeking the judicial dissolution of the Company and the appointment of a receiver to protect the interests of *all* members of the Company.

C. Financial Unfeasibility of the Company and Mismanagement by the Managers

18. In addition to the foregoing, Michael and Andreas have so mismanaged the Company's affairs as its Managers that it is evident that the intended purpose of the Company cannot be realized and that continuing the Company is not financially feasible.[3] Unfortunately, our names and reputations are tied to this "albatross" of a Company. In this regard, and among other things, the Managers have generally failed to cause the Company to pay its debts as they come due and the Company has never operated profitably (nor will it in the future).[4]

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3 Respectfully, examples of Michael and Andreas' mismanagement are too numerous to list in a single affidavit or pleading. As such, the specific instances referred to herein are provided merely to illustrate same and should not be considered to include all such instances. Both Daniel and I stand ready to testify to such matters if given the opportunity to do so by this Court.

4 Indicative of the Company's inability to generate revenues sufficient to meet its obligations is Michael's disclosure in his affidavit that Andreas recently made a capital contribution of $7,500 to the Company. (Wainstein Aff. at ¶24) As evidenced by the e-mails attached hereto as *Exhibit "E"*, such contributions from the members (both in the form of cash

19. At the outset, the Court should note that, as the Managers of the Company, Michael and Andreas are solely in possession, custody and control of all of the Company's books and records, financial statements, documents and the like concerning its financial affairs and have refused to share those records with us. As such, Daniel and I are not presently able to definitively state what the Company's outstanding liabilities and assets are, or what the Company's operating revenues have been used for, but rather we have been forced to rely on the limited documents that we have in our personal possession and those that we have been able to obtain from third-party sources such as former employees, vendors, and the like.[5]

20. In Paragraph 17 of the Petition, and as an example of the Company's apparent unprofitability/insolvency, Daniel and I asserted (upon information and belief) that the Company's debts currently amount to not less than $182,000.00, a fact which Michael denies in his affidavit. (Wainstein Aff. at ¶25) However, Daniel and I, alone, are owed $82,250.00 *each* under our respective Consulting Agreements with the Company (*i.e.*, $1,750.00 per week for 47 weeks). Moreover, Daniel and I do not believe that the Company made regular payments with regard to its Consulting Agreements with Andreas and/or Worth Capital LLC. Additionally, and as more fully discussed below, the Company is believed to owe substantial amounts to former employees and vendors. As such, it is highly likely that the Company's liabilities total at least $182,000.00 as alleged in the Petition.

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infusions, corporate expenses paid by personal credit cards/personal checks, and the like) and infighting among the members concerning the payment of debts and expenses were routine. The Company is simply not making enough money to pay its ongoing obligations.

5 By way of his Affidavit, Michael asserts that the Company is paying its debts and that Daniel and I did not correctly state the Company's estimated assets or liabilities in the Petition. (Wainstein Aff. at ¶¶23 and 25) However, despite being in possession of the Company's books and records, Michael fails to state or offer any guidance whatsoever beyond his general denials as to what the Company's assets and liabilities currently are and further fails to explain why loans and capital contributions need to be made to the Company just to keep it afloat. A receiver is needed in order to prepare a proper accounting of the Company's affairs so as to protect the interests of all of the members.

21. As further evidence of the Company's poor financial condition and inability to operate as intended, in Paragraph 17 of the Petition (again, upon information and belief) Daniel and I referred to certain former employees and vendors of the Company whom the Managers have either simply refused to pay out of the Company's operating revenues and/or who have not been paid because the Company does not have sufficient operating revenues. Attached hereto as *Exhibit "F"* are copies of various invoices and communications from former employees with regard to amounts owed to them by the Company which, respectfully, speak for themselves. Briefly, and by way of example only:

- On July 30, 2013, a former employee named Kylia Parker e-mailed me stating:

> Hello Mr. Lies, Fairy Tales, and Fallacies,
>
> I have been so patient with you and your company. This is ridiculous. Others have gone to a lawyer and are pursuing a class act[ion] against the whole dual groupe. I am not trying to take it to that level. I just want what[']s owed to me. Why haven't you or any one in authority contacted me about my pay checks? I came to your office last week, you were not there. I would really like to see you and whom ever else is responsible for paying me my money face to face. I[']m not going to let up about this issue. You owe me!!! [T]ill you pay me, you will keep receiving emails, pop ups, or phone calls.

The following day, I received another e-mail from Ms. Parker advising: "I didn't get paid for the [three] weeks I worked. Which was December 10, 2012 – January 3, 2013. Plus over time hours." I responded as follows:

> Again, please keep Michael [Wainstein] on the email GOING FORWARD (send to "reply all"). He can help you, not me. Also, I do believe we had an agreement to settle you out at 1k. Did we not? Please Advise.

Ms. Parker responded as follows:

> Yes we did agree to 1k at the end of April 2013. We are now in August 2013. 4 months later still no pay. A lousy 1k. You guys are

> winning. I'm still waiting. You guys drink 1k by the hour. I'm not trying to sue you guys its not worth it. Just pay me and I'm gone forever.

Upon information and belief, the Managers of the Company have still not paid Ms. Parker the amounts owed to her.

- Michelle Rosenblum (a longtime employee whose most recent title with the Company was Director of Events) was repeatedly not paid for her work or reimbursed for certain expenses she incurred on behalf of the Company. At one time, she was not paid for seven consecutive weeks and was owed amounts totaling in excess of $5,000.00. On or about September 3, 2013, Ms. Rosenblum wrote to Michael advising, in pertinent part:

> I have been a loyal and dedicated employee of Dual Groupe for nearly three years. During that time, I have consistently received excellent performance reviews from my superiors and was recently promoted to Director of Events, a position allowing me to supplement my income with commissions from event sales. However, promotions and salary increases mean very little when my wages aren't paid, something I have repeatedly experienced over the past three years. But the latest chapter was the final straw, one no employee should ever be expected to endure. I am now owed thirteen weeks' salary from the restaurant [i.e., Chateau] and three weeks from Dual Groupe – more than $4,000. As a result, I have been forced to borrow money from my family to cover my living expenses, which is degrading and humiliating.
>
> Because of this intolerable situation, I hereby submit my resignation. While ordinarily I would extend the courtesy of two weeks' notice before leaving; these are anything but ordinary circumstances. So unless I am immediately paid all outstanding wages and paid in advance for remaining another two weeks, my resignation is effective immediately.

Upon information and belief, the Managers of the Company subsequently paid some, but not all, of the amounts owed to Ms. Rosenblum and have refused to pay the balance of such amounts.

- On January 17, 2014, Melkisede Morrobel (the former chef at Chateau) e-mailed Daniel advising, in pertinent part:

> ...I know you guys didn[']t have anything to do with the fact that we were not being paid. I[']m sorry I didn't find that out earlier. I have no hard feelings toward you guys and wish you nothing but the best. I am sending you the totals that were owed to the staff until my last day of work which was August 16, 2014. I do know that Geovanny, Cesar, Juan and Ludy are owed more money because they were not paid properly after myself and you guys were let go...Here go the totals I have but like I said some of the guys are owed more I just don't know that total.
>
> Melki - $1,200
> Cesar - $2,550
> Juan - $2,550
> Geovanny - $2,292
> Clyde - $1,343
> Stanley $333
> Lewis - $682
> Duncan - $1,257

Upon information and belief, most if not all of the amounts referenced above remain unpaid.

- Other employee-related e-mails and invoices attached hereto concern (among others): (a) amounts believed to total at least $3,578.71 owed to Stephen McGee (upon information and belief, Mr. McGee commenced a lawsuit to collect these amounts); (b) amounts believed to total at least $2,631.51 owed to Maina Guenet (who obtained a small claims court judgment on account of these amounts and whose claims were included in the "Assumed Liabilities" under the Contribution Agreement); (c) amounts believed to total at least $600.00 owed to Chris Beninati; (d) amounts believed to total at least $1,200.00 owed to Allison Ullo; and (e) amounts believed to total at least $2,800.00 owed to Paul Hamilton.[6]

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6 While certain of the amounts believed to be owed by the Company to its former employees and trade creditors referenced herein may appear to be relatively small in amount, a large number of such claims is believed to exist and all of which are believed to be substantially aged. The Court should further note that many of these amounts (including those discussed below as unpaid "vendors" of the Company) are owed to individuals who rely on being paid for their

22. In fact, under the stewardship of Michael and Andreas, three separate actions were commenced against (or involving) the Company in the United States District Court for the Southern District of New York alleging various violations of federal and state labor laws in connection with the Chateau as follows:

- *Victor Barbosa v. Chateau 20th Street LLC d/b/a Chateau Cherbuliez, Dual Groupe, LLC and Dual Groupe Hospitality, LLC*, Case No. 13-cv-3528 (commenced May 24, 2013);
- *Fermo Meloni, Morena Almeida, Jonathan Franco, Asia Gagnon, Stephen C. Loving-Cortes and Erik Salas v. Michael Wainstein, Derek Koch, Daniel Koch, Phillipe Olivier Bondon, Chateau 20th Street, LLC, Dual Group Entertainment, LLC, and Dual Group, LLC*, Case No.13-cv-8439 (commenced November 26, 2013);[7] and
- *Mohammad Afjol, Jacqueline Aviles, Nina Boutry, Aref Muhammad, Ismael Ndiaye, Ievgen Nepomniaschyi, Tuan Phu, Shekh Rahman, and Abdoul S. Sow, individually and on behalf of all persons similarly situated v. Chateau 20th Street LLC, Dual Groupe, LLC, Philippe O. Bondon, Daniel Koch, Derek Koch, Peter Stiler, and Michael Wainstein, jointly and severally*, Case No. 14-cv-1522 (commenced March 5, 2014).

Copies of the complaints with regard to said actions are attached hereto as *Exhibit "G"*.

23. Furthermore, attached to the Wainstein Aff. as Exhibit E are affidavits submitted by *current* employees Dasha Van Heertum (who assumed Michelle Rosenblum's former position in October 2013 and at which time Daniel and I were not involved with the Company's

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services in order to make ends meet. The Company, under Michael and Andreas' management, is simply unable or unwilling to pay them.

7 Tellingly, Paragraph 52 of the Complaint filed in this action alleges: "In addition to the above, some or all of plaintiffs worked special events such as parties at the Restaurant. These special events were often promoted by the defendants quite apart from any Restaurant business. For example, some of plaintiffs worked at a birthday party given by Wainstein for his son. Wainstein personally promised to pay wages and tips to the plaintiffs for working this party, but he failed to do so."

operations) and Gery Santana (the Company's Chief Technology Officer since October 2012) for the purposes of rebutting the allegations in the Petition concerning the Company's non-payment of its employees. Each affidavit states that these current employees "always received payment" of their respective salaries from the Company. However, artfully omitted is any sworn statement from these current employees that their wages were always *timely paid* by the Company. Upon information and belief, payment of Mr. Santana's salary was often in arrears during the time that Daniel and I were involved with the Company's operations.

24. Additionally, it is believed that both Greg Guillebaut (Director of VIP Services) and Philippe Bondon (Chateau Managing Partner) are also currently employed by the Company. Attached hereto as *Exhibit "H"* are copies of: (a) an e-mail from Mr. Guillebaut sent to Michael and I on December 6, 2012 stating: "Can you be sure my 3 weeks paycheck will be ready HLB on [S]aturday please…Sorry to disturb you for that…; and (b) an e-mail from Mr. Bondon sent to Michael (Daniel and I were copied thereon) on August 27, 2013 stating: "Hi Michael, They going to shutdown my account at TD [B]ank. Can you please cut me a check today. I didn't get any 2 weeks ago. And I am obviously finding myself in a really problematic situation. I just need to know if you are able to cut me [$]1200 today. Please come back to me. Thank you." Tellingly, no affidavits from Messrs. Guillebaut or Bondon were submitted by Respondents in support of their contention that all employees were timely paid.

25. Similarly, attached hereto as *Exhibit "I"* are copies of various invoices and communications from vendors and trade creditors of the Company with regard to amounts owed to them by the Company which, respectfully, speak for themselves. Briefly, and by way of example only:

- Among the "Assumed Liabilities" under the Contribution Agreement were amounts owed to Eric Marx. On November 16, 2012, and after being advised by Michael that the Company was not able to pay Mr. Marx and that "[w]e are waiting on some monies to come into Dual", Mr. Marx sent an e-mail to Michael (copying Daniel and I) stating, in relevant part:

> Thanks for the prompt reply but [I] can't help but think that this email is indicative of our partnership history thus far. I know that Dual Groupe operates and has expenses that are paid regularly. As a business owner myself, [I] can[']t help but compare your lack of willingness to remit payment to your value of my services and my relationship both personal and professionally with your company.
>
> At this point it is not about the minor amount of money that is due to me, it is about the decency given to a contemporary within the industry.
> I can't continue to spend my time asking for this money and it doesn't serve anyone on this email to discuss this any further.
>
> Please let me know when you will have a check ready for me and [I] will schedule accordingly.

- Also among the "Assumed Liabilities" under the Contribution Agreement were amounts owed to Stephen Seguin. On September 17, 2012, Mr. Seguin sent an e-mail to Michael, Daniel and I stating, in relevant part:

> ...The summer has come and gone and fall is soon upon us. I think I've been more than patient awaiting for payment, it[']s been 9 months guys, just 3 months short of a year. Can someone please [l]et me know how or when we can all get this sorted. I would really appreciate it. Thanks guys.

Upon information and belief, the Managers of the Company have still not paid Mr. Seguin the amounts believed to total at least $4,700.00 owed to him.

- Also among the "Assumed Liabilities" under the Contribution Agreement were amounts owed to Total Entertainment (listed as "Total Talent"). On June 18, 2012, Jeffrey Siber sent an e-mail to Michael and I (among others) stating, in relevant part:

> I have looked into this event and have spent way too much time on this. We provided eight 60 inch [televisions] for 2 days for this event. We needed to rent trucks for the 2 days and sent staff and technicians to set up and run the event. We would normally charge $5000 to $6000 for an event like this. Instead, we charged you $1200 cost in hopes of doing future business with your group as stated by Derek Koch. Not only have we not received any additional business, but we also can not get paid after numerous attempts.
>
> I spoke with Michael Wainstein on Thursday and was told that we do not have a signed contract so he doesn't have to pay us. After the conversation, I had Julie who was the team leader from our group on this event, go back into her e mails and guess what? Not only did she find a signed contract e- mailed from Gery Santana, but she found at least 20 e mails of conversation going back and forth from Gery, Derek with Michael copied on all…

Upon information and belief, the Managers of the Company have still not paid Total Entertainment the $1,200.00 owed.

- Other vendor/trade-related e-mails and invoices attached hereto concern (among others): (a) amounts believed to total at least $7,035 owed to Manuel Cabral for graphic design services; (b) amounts believed to total at least $4,400.00 owed to Daily Front Row, Inc. for advertising fees; (c) amounts believed to total at least $4,350.0 owed to The Runaway Group for promotional services; (d) amounts believed to total at least $3,500.00 owed to Niche Media Collections for advertising services; and (e) amounts believed to total at least $2,000.00 owed to Courtney Paris for graphic design services.

26. The Managers' disregard for the Company's financial affairs is further evidenced by their failure to maintain adequate insurance concerning the Company's operations. Specifically, the Managers failed to cause the Company to pay the premiums associated with the

commercial insurance policy covering Chateau's restaurant premises, assets and operations. As a result, and as evidenced by the documents attached hereto as *Exhibit "J"*, the insurance policy was cancelled thereby exposing the Company to potentially uninsured losses in the event of an accident, fire or other insured loss event at Chateau.

27. Also, in Paragraph 17 of the Petition, and as an additional example of the Company's financial unfeasibility, Daniel and I had stated that, according to the Company's 2012 tax return, the Company's assets consisted entirely of $8,320 in cash. By way of the Motion, Respondents assert that the Daniel and I should have submitted a copy of said tax return in support of the Petition. (See Memorandum of Law in Support at p. 4) However, a copy of the tax return was not attached to the Petition because, although it was prepared and finalized by the Company's accountant (*i.e.*, Lester C. Caesar, CPA), *the return was never signed/filed because the Company never paid the accountant for his services*. Although Respondents are undoubtedly aware of this fact, they failed to advise thereof in connection with their Motion. Nevertheless, a copy of the unsigned 2012 tax return is attached hereto as Exhibit *"K"*.

D. Unsupported and Irrelevant Allegations of "Bad Acts"

28. Finally, by way of his affidavit, Michael makes a series of allegations to the effect that Daniel and I allegedly engaged in certain "bad acts" in violation of the Operating Agreement and our Consulting Agreements with the Company. Such allegations (including those made in Michael's affidavit submitted in connection with our motion to dismiss the complaint in the Action which is attached as Exhibit C to his affidavit in support of the Motion) are entirely irrelevant to the Motion and appear to have been made solely to distract this Court's attention from the facts

and issues that it should rightfully consider in this case.[8] As such, Daniel and I will not dignify Michael's (misleading and largely false) allegations by providing a comprehensive response thereto. Suffice it to say that Daniel and I vehemently deny any past or ongoing wrongdoing of any kind.

29. Briefly, Michael's statement that alleged actions by Daniel and/or by me were the cause of the Company's alleged inability to pay its debts is simply outrageous. The sole alleged instance alleged by Michael in support of this statement is that I allegedly retained "roughly between $2,800 and $4,700" for myself from certain amounts paid by a client of the Company. (Wainstein Aff. at ¶22 and Exhibit C at ¶27) Even if this were true (which it is not), it is unfathomable that such a *de minimis* amount would have any effect upon the Company's financial situation. Similarly without merit are Michael's unsupported allegations that Daniel and I, through our newly formed company (named "Koch Enterprises, LLC"), are engaging in enterprises which compete with the Company. Daniel and I have not produced a single brunch event of any kind such as to compete with the "Day & Night at Highline Ballroom" brunch series produced by the Company nor are we operating or associated with any restaurant such as to compete with Chateau. Again, Michael's allegations do not warrant a comprehensive response as they are not relevant to the Court's consideration of the Motion. However, the foregoing brief response is provided merely to illustrate that, like always, there are two sides to every story and that Michael's allegations are largely false and misleading. The existence of these disputed material issues between the members of the Company further evidences that dissolution of the Company is warranted under the circumstances.

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8 Michael is, himself, the subject of several pending lawsuits including those listed and described in *Exhibit "L"* hereto.

WHEREFORE, Petitioners respectfully request that the Motion be denied and that the Court enter an Order: (a) decreeing that the Company be dissolved; (b) appointing a receiver to wind up the affairs of the Company; and (c) granting such other and further relief as may be just and proper.

DEREK KOCH

Sworn to be before me this
31st day of March 2014

ERIC C. ZABICKI
Notary Public, State of New York
No. 02ZA6078736
Qualified in New York County
Commission Expires August 5, 2014