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

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DANIEL KOCH and DEREK KOCH, Index No.: 650519/2014

Petitioners,

-against-

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

Respondents.

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# MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS THE VERIFIED PETITION

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## PRELIMINARY STATEMENT

Respondents, HC Hospitality Partners, LLC and PCG DGHP, LLP, and Dual Groupe Hospitality, LLC (the "Respondents") submit this memorandum of law in support of their motion to dismiss the verified petition for a judicial dissolution (the "Petition") of Petitioners Daniel Koch and Derek Koch (the "Petitioners") pursuant to CPLR 404(a) and 3211(a)(7).

As set forth in detail below, Respondents' motion to dismiss should be granted because: 1) the Petition for dissolution is devoid of any factual evidence such that it fails to state a cause of action; and 2) even if the facts stated in the Petition are deemed to be true, Petitioners fail to meet their burden to obtain the severe remedy of a judicial dissolution. In the event that the Court denies the present motion, Respondents request an opportunity to submit an answer pursuant to CPLR 404(a).

## STATEMENT OF FACTS

Dual Groupe Hospitality, LLC ("DG" or the "Company") was formed in October 10, 2012 for the purpose of developing, managing, marketing, owning, and operating certain restaurants, bars, and/or nightlife venues, including but not limited to: producing a brunch series named "Day and Night at Highline Ballroom"; owning the trademark rights in and to "Day & Night" Registration No. 4,164,872; and, owning interest and operating the restaurant Chateau 20th Street LLC d/b/a Chateau Restaurant NY (hereinafter "Chateau" or the "restaurant Chateau") located at 47 West 20th Street, New York, New York. (Wainstein Aff. ¶6.)[1]

The Operating Agreement of DG (hereinafter the "Operating Agreement") was executed on October 12, 2012 by Respondents HC Hospitality Partners, LLC and PCG DGHP, LLP and Petitioners Daniel Koch and Derek Koch. Section 1.1 identifies individuals Michael Wainstein

[1] References to Wainstein Aff. refer to the Affidavit of Michael Wainstein submitted in support to Respondents' motion to dismiss the Petition dated March 12, 2014.

and Andreas Huber as Managers of DG and identifies PCG DGHP, LLP, Daniel Koch, Derek Koch, and HC Hospitality Partners, LLC as DG's Members. (Wainstein Aff. Ex. A, ¶1.1.)

Under Section 4.4 of the Operating Agreement, the management and control of the business and affairs of the Company are vested exclusively in the Managers, Michael Wainstein and Andreas Huber, and all actions taken by the Managers are binding upon all of the Members and the Company. (Wainstein Aff., ¶9.)

On October 12, 2012 Defendants Daniel Koch and Derek Koch each entered into a Consulting Agreement (hereinafter the "Consulting Agreements") with DG for the purposes of 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. Further, under Section 1.2(ii) of the Consulting Agreements, DG's Managers are the sole arbitrators on the issues of Petitioners' Derek Koch and Daniel Koch's satisfactory performance of their duties. (Wainstein Aff. ¶10.)

Petitioners engaged in a series of bad acts which are in violation of their obligations as DG Members and in violation of their duties under the Consulting Agreements. Respondents respectfully refer the Court to the accompanying Affidavit of Michael Wainstein, Exhibit C, for a detailed account of Petitioners' acts constituting a breach of the DG Operating Agreement and the Consulting Agreements. On or around October 3, 2013, Petitioners formed a competing company named Day & Night Entertainment LLC with the purpose of engaging in direct competition with DG. (Wainstein Aff. ¶13.)

On October 22, 2013, HC Hospitality Partners, LLC, PCG DGHP, LLP, and DG brought an action against Petitioners Derek Koch, Daniel Koch, and their newly created competing venture Koch Enterprises LLC f/k/a Day & Night Entertainment LLC asserting three causes of action for: a) breach of the Operating Agreement, b) breach of the Consulting Agreements, and c) permanent injunctive relief. Following Defendants' filing of their motion to dismiss the complaint, Plaintiffs in the October 22, 2013 action amended their complaint to institute a derivative action by HC Hospitality Partners, LLC and PCG DGHP, LLP individually and on behalf of DG. Additionally, Plaintiffs cross-moved for preliminary injunctive relief. Defendants' motion to dismiss and Plaintiffs' cross-motion are currently pending before the Honorable Ellen M. Coin in New York County's Supreme Court, Civil Branch. (Wainstein Aff. ¶17.)

On or around December 2, 2013 Petitioners changed the name of Day & Night Entertainment to Koch Enterprises LLC and continue to engage in business in direct competition with the Company. DG's Managers continue the normal operation of the Company and DG is meeting its financial obligations. (Wainstein Aff. ¶21-26.)

On or around February 20, 2014, Daniel Koch and Derek Koch filed a Verified Petition for Judicial Dissolution and Appointment of a Receiver.

## ARGUMENT

### Point I

### THE PETITION LACKS ANY FACTUAL EVIDENCE

The Petition's insufficient factual allegations are fatal to Petitioners' request for the extreme remedy of a judicial dissolution of the Company in a special proceeding. "Unlike a complaint in a plenary action, a petition in a special proceeding must be accompanied by competent evidence raising a material issue of fact." *Matter of Trustco Bank, N.A. v. Strong*, 261

A.D.2d 25, 27 (3d Dept. 1999). The Petition before this Court contains no such competent evidence.

Seemingly, Petitioners rely on the conclusory and unsubstantiated facts stated in a single paragraph of the Petition as the basis to obtain a judicial dissolution. The Petition did not annex any documentary evidence or even an affidavit by a person with factual knowledge to substantiate the allegations stated in the Petition. No actual evidence is proffered showing that Respondents have failed to pay $182,000 of debt, much less "intentionally" so. Even if, for the sake of argument, that amount of debt is in fact outstanding, the Petition fails to establish that the Company is not financially viable. Petitioners fail to annex the so called "2012 Partnership Return" reflecting assets consisting of $8,320. Again, the Petition fails to establish that such amount of total assets renders the Company unable to continue as a viable business. Finally, Petitioners fail to identify the former employees and vendors who are "begging for payment," the amount allegedly owed, or how these alleged debts prevents the Company to continue operating in accordance with the terms of the Operating Agreement. As such, the Petition does not meet the higher standard of an instrument that will serve as the sole basis of adjudication and fails to state a cause of action. *See Matter of Jahron S.*, 79 N.Y.2d 632, 640 (1992) ("Thus, a much lower standard is applicable when determining the legal sufficiency of complaints, which, unlike informations and petitions, do not serve as the sole instrument of prosecution and adjudication.") Thus, the Petition should be dismissed pursuant to CPLR 3211(a)(7).

**Point II**

**PETITIONERS FAIL TO MEET THE STANDARD TO OBTAIN THE SEVERE RELIEF OF A JUDICIAL DISSOLUTION**

In addition to the evidentiary deficiencies in the Petition, even if the facts stated in paragraph 17 of the Petition could be proven to be true, such facts would be insufficient to meet

the known standards to grant a judicial dissolution of a limited liability company. *In re 1545 Ocean Ave., LLC*, 72 A.D.3d 121 (2d Dept. 2010) is the leading case establishing the standard courts should follow in granting a judicial dissolution under LLCL 702. "The dissolution of a limited liability company under LLCL 702 is initially a contract-based analysis" and the rights of the parties should be determined by the terms of DG's Operating Agreement. *Id.* at 128. Thus, even if this Court deems that the sole paragraph of unsubstantiated facts is a sufficient basis to institute this proceeding, the terms of the Operating Agreement further preclude dissolution of the Company.

The drastic remedy of judicial dissolution is only available when a party can show that: "(1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible." *Id.* at 131. More importantly, these elements must be established by the petitioning member "in the context of the terms of the operating agreement or articles of incorporation[.]" *Id.* Under section 4.4, the management of the Company is exclusively vested on Michael Wainstein and Andreas Huber, who continue operating the Company according to its purpose as stated in Section 2.5 of the Operating Agreement. (Weinstein Aff. ¶6.) Additionally, the Company has been meeting its financial obligations and although it has some outstanding debts – largely created by Petitioners' breach of the Operating Agreement and Consulting Agreements - none of them are sufficiently large to threaten the viability of the Company as an ongoing venture. 72 A.D.3d at 132 ("[T]he test is whether it is 'reasonably practicable' to carry on the business of the LLC, and not whether it is impossible.") (Internal quotations omitted.)

Moreover, courts have rejected that the systematic exclusion of a member of an LLC in the company's operation and affairs can be the basis for a judicial dissolution. *Doyle v. Icon,*

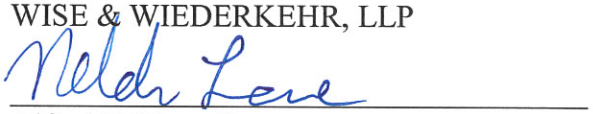
*LLC*, 103 A.D.3d 440, 440 (1st Dept. 2013) ("Plaintiff's allegations that he has been systematically excluded from the operation and affairs of the company by defendants are insufficient to establish that it is no longer "reasonably practicable" for the company to carry on its business, as required for judicial dissolution under Limited Liability Company Law § 702.") That is more evident in the present situation where: a) Petitioners' excluded themselves from the operation of the company by creating a new venture that competes directly with DG in violation of the terms of the Operating Agreement and Consulting Agreements; and b) where the express terms of the Operating Agreement exclusively vest the management of the Company on two individuals other than Daniel Koch and Derek Koch. The allegations contained in the Petition, even if deemed true, are insufficient to meet Petitioners' burden to obtain the extreme remedy of an involuntary judicial dissolution.

**CONCLUSION**

For the reasons set forth above, Respondents respectfully request the Court issue an Order: 1) dismissing the Petition for judicial dissolution in its entirety; and 2) providing for such other and further relief as the Court deems appropriate. If the Court finds that dismissal is not appropriate at this time, Respondents request permission to file an answer pursuant to CPLR 404(a).

Dated: White Plains, New York
March 13, 2014

DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP



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