SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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In the Matter of the Application of
ACTIVITY KUAFU HUDSON YARDS LLC,
a New York Limited Liability Company,

Petitioner,

Index No.: 650599/2015

Part 48 (Oing, J.)

For the Dissolution of REEDROCK KUAFU DEVELOPMENT COMPANY LLC, a Delaware Limited Liability Company, pursuant to Section 18-802 of the Delaware Limited Liability Company Act,

- against -

REEDROCK KUAFU DEVELOPMENT COMPANY LLC, SIRAS PARTNERS LLC and LUDWICK CHINA LLC,

Respondents.
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MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT SIRAS PARNTERS LLC'S MOTION TO DISMISS THE VERIFIED PETITION

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STATUTES

Petitioner ACTIVITY KUAFU DEVELOPMENT COMPANY LLC YARDS LLC, a New York limited liability company ("Activity Kuafu" or "Petitioner") submits this Memorandum of Law in opposition to the motion by Respondent Siras Partners LLC ("Siras" or Respondent") seeking to dismiss Petitioner's Verified Petition brought pursuant to Section 18-802 of the Delaware Limited Liability Company Act seeking the judicial dissolution of REEDROCK KUAFU DEVELOPMENT COMPANY LLC, a Delaware limited liability company ("Reedrock" or "the Company").

PRELIMINARY STATEMENT

Respondent Siras' argument is based on the premise that Delaware courts have exclusive jurisdiction to handle dissolutions of Delaware limited liability companies. They are wrong. The case law and statutes they cite do not pertain to LLC law, and there is neither statutory nor case law to support their proposition.

Although Siras' has filed its Answer, Defenses and Objections in Point of Law to the instant Verified Petition, Siras nonetheless strains judicial economy by bringing on the instant motion. The instant motion is without merit and should be denied.

Siras' moving papers offer an irrelevant recitation of portions of the New York Business Corporation Law and a handful of cases holding that c*orporations* are subject to jurisdiction for dissolution within their domicile jurisdiction. They twist that proposition into unfounded arguments. Siras' counsel postures about an eight-year old case wherein they represented a limited partnership (inappropriately offering as exhibits copies of their briefs in *Appell v. LAG Corp*, 41 A.D.3d 277 (1st Dept. 2007)). Their flawed argument asks this Court to endorse the arguments they made in their *Appell* briefs. In fact, *Appell* is distinguishable, and the law

involved therein was made before the LLC laws of either New York or Delaware were developed.

Respondent Siras' instant moving papers are little more than a cut and paste job of whole sections of its counsel's *Appell* briefs, and they are wrongly presented as controlling on issues of this case even though such matters were not at issue in *Appell*. Siras' jurisdictional claims were not addressed by the First Department, and *Appell* is not on point for the jurisdictional issues of this case.

For the reasons more fully discussed below, exclusive venue and jurisdiction for this matter lie solely in the courts located in New York County, New York State. Siras' motion to dismiss should be denied in all respects.

STATEMENT OF RELEVANT FACTS

This special proceeding arises out of an irreconcilable deadlock among the 50/50 member-owners and their respective designated managers of Reedrock. This deadlock exists due to the failure of Siras and its appointed managers to comply with their obligations and honor their fiduciary responsibilities to Reedrock's members under the Amended and Restated Limited Liability Company Operating Agreement of Reedrock Kuafu Development Company LLC dated June 25, 2014 (hereinafter "the Operating Agreement")[1]. The complete deadlock renders it impossible to effect the purposes for which Reedrock was formed, and dissolution is necessary to protect all Reedrock members' interests.

Petitioner commenced the within proceeding on February 27, 2015. Respondent Siras filed its motion to dismiss the petition on March 13, 2015 (despite its answer and opposition to

[1] A copy of the Amended and Restated Limited Liability Company Operating Agreement of Reedrock Kuafu Development Company LLC dated June 25, 2014 is annexed to the Affirmation of Thomas P. Mohen sworn to March 23, 2015 as Exhibit "A."

the petition are due to be filed March 23, 2015). On March 18, 2015, Respondent and Reedrock member Sean Ludwick filed a Summons and Complaint in the Supreme Court of the State of New York, County of New York against Siras and its two principals involving, *inter alia*, the business of Reedrock ("the Ludwick Complaint").[2] On March 19, 2015, Respondent and Reedrock member Siras filed a Summons and Complaint in the Supreme Court of the State of New York, County of New York against Petitioner, its principals, attorneys and the Company involving, *inter alia*, claims under the Operating Agreement of Reedrock ("the Siras Complaint").[3]

The Operating Agreement is Definitive as to Jurisdiction.

All parties involved in this case are also parties in either of the Ludwick Complaint or the Siras Complaint, all parties are sophisticated and experienced professionals, and all Reedrock members are located in the City and State of New York. (See Verified Petition at ¶¶ 5-7.) Reedrock, directly and/or indirectly, acquired and manages real property located in the City and State of New York, and Reedrock conducts all of its principal business in the City and State of New York. (See Verified Petition at ¶¶ 14-16). Although Reedrock is a Delaware Limited Liability Company, the Operating Agreement has four key provisions relevant to the inquiry at hand:

1. Section 12.16 provides that: "Each of the Members consents to the jurisdiction of any court located in New York County in the State of New York for any action arising out of matters related to this [Operating] Agreement." *See* Exhibit "A" §12.16. It further provides that, "Each

[2] A copy of the Summons and Complaint of Sean Ludwick v. Ashwin Verma, Saif Sumaida and Siras Partners LLC, dated March 18, 2015 and bearing Index No. 650851/2015 in the Supreme Court of the State of New York, County of New York in annexed to the Affirmation of Thomas P. Mohen sworn to March 23, 2015 as Exhibit "C."

[3] A copy of the Summons and Complaint of Siras Partners LLC v. Activity Kuafu Hudson Yard LLC, et als., filed March 19, 2015 and bearing Index No. 650868/2015 in the Supreme Court of the State of New York, County of New York in annexed to the Affirmation of Thomas P. Mohen sworn to March 23, 2015 as Exhibit "B."

of the Members waives the right to commence an action in connection with this Agreement in any court outside of New York County, New York. *Id.* [Emphasis ours.]

2. What is a matter related to this Agreement? Certainly dissolution, discussed in the entirety of Article XI of the Operating Agreement, is such a matter. Section 11.01 provides that, "[T]he Company shall be dissolved and its business wound up upon the earliest to occur of any of the following events, unless at least 75% of the Managers vote to continue the life of the Company upon the occurrence of such an event." *See* Exhibit "A" §11.01. Why is dissolution essential? Because Reedrock cannot operate, and neither its Members nor Managers can achieve a quorum to effectively operate or take any necessary action.

3. Section 7.01 provides, in relevant part, that ... "[t]he Company shall act by means of and through the Managers. The Managers shall act jointly in all instances and all decisions and/or determinations of the Managers shall require the affirmative vote or consent of at least 75% of all the Managers." *See* Exhibit "A" §7.01.

4. Section 3.03 provides, in relevant part, that ... "[t]the presence of Members holding not less than 75% of the Percentage Interests ... shall constitute a quorum at any meeting of the Members. *See* Exhibit "A" §3.03

The undisputed fact is that a quorum is impossible for Reedrock to transact business; whether of the Members or of Managers. Not only have the sophisticated parties made a clear choice of venue and jurisdiction in New York, but they have very clearly agreed to a specific bar precluding any party from bringing any action in connection with the Operating Agreement in any court outside of New York County, New York. *See* Exhibit "A" §12.16.

Deadlock is a fact. Reedrock cannot function. Hundreds of millions of dollars, many jobs and extensive interests hang in the balance. Siras continues to violate the Operating

Agreement, fails to offer any resolution outside of deadlock, wastes judicial resources by an unnecessary and inappropriate motion (in the face of its contemporaneous opposition to the petition), yet simultaneously invokes the jurisdiction of this Court to embroil the parties in other litigation relating to the Operating Agreement. It seems likely that if this action were discontinued and a Delaware action were commenced, Siras would likely move to dismiss the Delaware proceeding based on the preclusion bar at Section 12.16 of the Operating Agreement.

ARGUMENT

I. An LLC is a Creature of Contract

The instant motion fails to recognize fundamental differences between corporations, partnerships and limited liability companies and, in so doing, it misapplies the law. LLC's are creatures of contract. Siras' reliance on *Appell v. LAG Corp*, supra, is misplaced. Finally, the *Appell* court considered only a limited partnership, and not an LLC. *Appell* involved an appeal of a trial courts determination involving a limited partnership, and not an LLC. The question before the First Department was unrelated to the issue of subject matter jurisdiction over a foreign LLC. Even the trial court decision was unrelated to the facts herein. *Appell* did not involve a contractual jurisdiction and venue provision in an operating agreement. As noted above, exclusive jurisdiction and venue provisions are at the heart of the matter in this case since they are contained in the parties Operating Agreement, which also contains a bar to any action outside of New York. Respondent dramatically presents exhibits "C" "D" and "E" even though they were never considered by the First Department and are inapplicable to this matter.

Limited Liability Companies are unlike corporations in that they are statutory creations of pure contract. The Court of Chancery of Delaware has noted that limited liability companies are creatures of contract, designed to afford the maximum amount of freedom of contract, private

ordering and flexibility to the parties involved. *TravelCenters of Am., LLC v. Brog,* C.A. No. 3516-CC, WL 1746987 (Del.Ch. Apr.3, 2008). Delaware's LLC Act leaves to the members of a limited liability company the task of arranging a manager governance relationship; the Act generally provides defaults that can be modified by contract. *See* Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies,* 32 DEL. J. CORP. L. 1, 5 (2007).

The purpose of the LLC law was to enable parties to choose the exact terms of their business relationships, and both New York and Delaware law afford great weight to a plaintiff's choice of forum. The Act explicitly provides that it is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements. See 6 *Del. C.* § 18-1101(b). It is this flexibility that gives "uncorporate" entities like limited liability companies their allure; a principle attraction of the LLC form of entity is the statutory freedom granted to members to shape, by contract, their own approach to common business 'relationship' problems. See *Haley v. Talcott,* 864 A.2d 86, 88 (Del.Ch.2004).

The LLC Act provides members with the broadest possible discretion in drafting their LLC agreements and assures that once [members] exercise their contractual freedom in their LLC agreement, the [members] have a great deal of certainty that their [LLC] agreement will be enforced in accordance with its terms; flexibility lies at the core of the DLLC Act. *Elf Atochem N. Am., Inc. v. Jaffari,* 727 A.2d 286, 291 (Del.1999). Rather than imposing a host of immutable rules, the statute generally allows parties to order their affairs, contractually, as they deem appropriate. *See In re Grupo Dos Chiles, LLC,* C.A. No. 1447-N, 2006 WL 668443 (Del. Ch. Mar. 10, 2006); *see also Elf Atochem N. Am., Inc. v. Jaffari,* 727 A.2d 286, 290 (Del.1999) ("The

[LLC] Act can be characterized as a 'flexible statute' because it generally permits members to engage in private ordering with substantial freedom of contract to govern their relationship, provided they do not contravene any mandatory provisions of the Act."); *Bernstein v. Tractmanager, Inc.*, C.A. No. 2763-VCL, 2007 WL 4179088 (Del. Ch. Nov. 20, 2007) ("Limited liability companies and corporations differ in important ways").

The members of Reedrock availed themselves of such flexibility in the Operating Agreement, particularly in the jurisdiction, venue and governance provisions referred to above. Only extraordinary circumstance can supersede a plaintiff's right to select its choice of forum, and Delaware courts will enforce clear choice of forum provisions presented in an operating agreement of an LLC which designate a choice of forum outside of Delaware. Delaware courts will traditionally dismiss a matter when the contract (operating agreement) underlying the dispute contains an explicit forum selection clause or when, applying the doctrine of *forum non conveniens*, Delaware is clearly not the appropriate forum for litigation. *See Lefkowitz v. HWF Holdings, LLC*, WL 3806299 (Del. Ch. Nov. 13, 2009). Delaware courts defer to forum selection clauses and grant motions to dismiss "where the parties use express language clearly indicating that the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action. *Scanbuy, Inc. v. Neomedia Tech., Inc.*, 5500245 (2014); *Ashall Homes Ltd. v. ROK Entm't Grp. Inc.*, 992 A.2d 1239, 1245 (Del. CH. 2010); *Troy Corp v. Schoon*, WL 949441 (Del. Ch. Mar. 26, 2007).

II. Language of Delaware Code § 18-802

The principal of statutory construction requires the Court to give meaning to every word. *See Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994). "Words in a statute should not be construed as surplusage if there is a reasonable construction which will give

them meaning." *Id.* The language of the Delaware statute does not say that *only* the Court of Chancery may decree dissolution of a limited liability company. Rather, the statutes states: "On application by or for a member or manager the Court of Chancery *may* decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement." *See* Del. Code § 18-802. Furthermore, the Delaware legislature has made the Delaware Code perfectly clear and unambiguous when an action may *only* be brought before the Court of Chancery. e.g., Del Code § 18-305(f), "Any action to enforce any right arising under this section ***shall*** be brought in the Court of Chancery." (Emphasis added). To wit, express limitation of dissolution provisions for a Delaware LLC in the Chancery Court do not exist anywhere in the Delaware Code. The operative word "may" is not a shall, as Respondent asserts. Simply because the Court of Chancery *may* dissolve a Delaware LLC, that does not mean that this court is without jurisdiction in this case. *See* Del. Code § 18-802.

III. Forum Selection Clause

"It is well-accepted policy that forum-selection clauses are *prima facie* valid, and that in order to set aside such a clause, a party must show that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court" *British W. Indies Guar. Trust Co. v. Banque Internationale A Luxembourg,* 172 A.D.2d 234 (1st Dept. 1991); *Fear & Fear, Inc. v N.I.I. Brokerage, L.L.C.*, 50 AD3d 185 (4th Dept 2008).

Indeed, the same holds true in Delaware Courts which "afford great weight to a plaintiff's choice of forum. Only extraordinary circumstance can supersede a plaintiff's right to select its

choice of forum." *Eisenbud v. Omnitech Corporate Solutions, Inc.*, 1996 WL 162245, at *1 (Del. Ch. Mar. 21, 1996). One circumstance Delaware courts routinely defer is a contractual forum selection clause. In fact, under Court of Chancery Rule 12(b)(3), a court will grant a motion to dismiss based upon a forum selection clause where the parties "use express language clearly indicating that the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action." *See Ashall Homes Ltd. v. ROK Entm't Gp. Inc.*, 992 A.2d 1239, 1245 (Del. CH. 2010).

The Delaware legislature's rationale for so doing is "to effectuate the parties' intent" by adhering to "the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation." *See Prestancia Mgmt. Gp., Inc. v. Va. Heritage Found. II, LLC*, 2005 WL 1364616 (Del. Ch. 2005). See also *Duff v. Innovative Discovery LLC*, WL 6096586 (2012); Puig *v. Seminole Night Club, LLC*, WL 3275948 (2011); *Green Isle Partners, Ltd. v. Ritz-Carlton Hotel Co. L.L.C.*, WL 1788655 (2000).

Here, the jurisdiction and forum selection clause of the Operating Agreement are clear that the sole jurisdiction is in the County and State of New York and that any right to commence an action outside of this jurisdiction is waived. Given the absence of federal diversity jurisdiction (due to the fact that all parties and affairs are located in the City of New York), the only place to bring this action is the Supreme Court of the State of New York in the County of New York.

IV. Guidance From Analogous *Forum Non Conveniens* Cases Support Jurisdiction in New York

Although not germane, some guidance for consideration of the appropriate forum can be gleaned from Delaware courts considering the interests of the litigants and the court. *See*

Sinochem Intern Co. Ltd. v. Malaysia Intern. Shipping Corp., 549 U.S. 422 (2007); *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 552 (Del. CH. 1999). In Delaware, *forum non conveniens factors* are referred to as the "Cryo-maid factors" and are: (1) the applicability of Delaware law, (2) the relative ease of access to proof, (3) the availability of compulsory process for witness, (4) the pendency or non-pendency of a similar action or actions in another jurisdiction, (5) the possibility of a need to view the premises, and (6) all other practical considerations that would make the trial easy, expeditious, and inexpensive. *See Taylor v. LSI Logic Corp*, 689 A.2d 1196, 1200 (Del. 1997); *Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 135 (Del. 2006).

All the factors of *forum non conveniens* test demonstrate in this case that: (1) Delaware law easily is applied in New York; (2) the access to all proof and all materials is in here in New York County; (3) all witnesses have domicile and residence in New York, and none are in Delaware; (4) no party can claim that New York County is a burden (particularly as Respondents including Siras recently commenced other actions involving Reedrock and the Operating Agreement in New York County); and (5) the premises, offices, persons, and all books, documents, records, are within the County of New York.

CONCLUSION

For the reasons set forth herein, the Petitioner respectfully requests that the Court deny Respondent Siras' motion to dismiss the Petition for Dissolution.

Dated: March 23, 2015

Respectfully submitted,

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