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Respondent Siras Partners LLC (“Respondent”), by its undersigned counsel, Allegaert Berger & Vogel LLP, respectfully submits this memorandum of law in support of its motion to dismiss the Verified Petition (the “Petition”) of Petitioner Activity Kuafu Hudson Yards LLC (“Petitioner”), pursuant to CPLR 406 and 3211(a)(2), on the ground that this Court does not have jurisdiction over the subject matter of this special proceeding, which seeks judicial dissolution of Respondent Reedrock Kuafu Development Company LLC (“Reedrock”), a limited liability company organized, registered and existing under the laws of the State of Delaware.

PRELIMINARY STATEMENT

The Petition has been filed as a part of Petitioner’s unlawful scheme to acquire Respondent’s equity in Reedrock at a fire-sale price, and its central allegation – that a “deadlock” among Reedrock’s managers exists and requires Reedrock’s dissolution – is pretextual and false. Respondent’s Answer, Defenses and Objections in Point of Law, which will be filed imminently, will demonstrate that the Petition fails on the merits and does not come close to meeting the stringent standards Delaware courts set for judicial dissolution of a limited liability company.

But this Court should not even reach those issues, because it lacks jurisdiction over the subject matter of this special proceeding. The Petition, by its very terms, seeks dissolution “pursuant to Section 18-802 of the Delaware Limited Liability Company Act.” (Petition ¶ 2.)¹ That Delaware statute provides that “the Court of Chancery may decree dissolution of a limited liability company” organized under Delaware law, and does not provide for judicial dissolution by any other court in any other state. As a creature of Delaware law, Reedrock cannot be dissolved by judicial decree except by the Delaware Court of Chancery.

¹ The Verified Petition in this action is attached as Exhibit A to the Affirmation of Louis A. Craco, Jr. in Support of Respondents’ Motion to Dismiss, dated March 13, 2015 (“Craco Aff.”), submitted herewith.

Precedents of the New York Court of Appeals and three departments of the Appellate Division support this conclusion. Because it is without subject matter jurisdiction, this Court should dismiss the Petition.

ARGUMENT

The Petition seeks judicial dissolution of Reedrock and appointment of a receiver, both pursuant to 6 Del. C. § 18-802. (Petition at 13.) Because this Court cannot grant dissolution of a Delaware entity, that relief, as well as the provisional – and extraordinary – remedies sought in the Petition (the appointment of Petitioner as Liquidating Trustee or, alternatively, the appointment of a receiver), cannot be awarded and therefore the entire Petition must be dismissed.

I. NEW YORK COURTS ARE WITHOUT JURISDICTION TO DISSOLVE DELAWARE LIMITED LIABILITY COMPANIES.

An entity organized under the laws of Delaware “may be dissolved only by order of a Delaware court.” *Sokol v. Ventures Educ. Sys. Corp.*, No. 602856/2002, 10 Misc. 3d 1055(A), 2005 N.Y. Slip Op. 51963(U), at *3 (Sup. Ct. N.Y. County June 27, 2005); *see also In re Dissolution of Chris Kole Enters.*, 188 Misc. 2d 207, 207 (Sup. Ct. N.Y. County 2001) (holding that “a New York court may not dissolve a foreign corporation, even if the corporation’s principal place of business is New York” and dismissing proceeding to dissolve Delaware corporation *sua sponte* for lack of subject matter jurisdiction) (citing *Langfelder v. Universal Labs., Inc.*, 293 N.Y. 200 (1944)). Accordingly, overwhelming precedent establishes that this Court is without subject matter jurisdiction over the Petition. *See, e.g., MHS Venture Mgmt. Corp. v. Utilisave, LLC*, 63 A.D.3d 840, 841 (2d Dep’t 2009) (“A claim for dissolution of

a foreign limited liability company is one over which the New York courts lack subject matter jurisdiction.”) (citations omitted); *Rimawi v. Atkins*, 42 A.D.3d 799 (3d Dep’t 2007) (dismissing claim for dissolution of Delaware LLC and holding that “plaintiffs’ claim for dissolution and an ancillary accounting is one over which the New York courts lack subject matter jurisdiction”) (citations omitted); *Porciello v. Sound Moves, Inc.*, 253 A.D.2d 467, 467 (2d Dep’t 1998) (same); *Tosi v. Pastene & Co.*, 34 A.D.2d 520, 520 (1st Dep’t 1970) (denying motion to dismiss complaint seeking various forms of relief for “alleged corporate mismanagement and alleged wrongful acts of the individual defendants,” but holding that “such allegations . . . may not entitle the court to direct a dissolution of the foreign corporation involved”) (citations omitted); *Mook v. Berger*, 26 A.D.2d 925, 925 (1st Dep’t 1966) (dismissing action because relief sought “would result in the dissolution” of Connecticut corporation), *lv. granted*, 19 N.Y.2d 581 (1967).

The First Department’s holding in *Appell v. LAG Corp.*, 41 A.D.3d 277 (1st Dep’t 2007), is fully dispositive of the Petition here. In *Appell*, Justice Karla Moskowitz (then of this Court) dismissed various claims in the complaint and amended complaint, including claims for dissolution of a Delaware limited partnership and appointment of a liquidating trustee. *See Appell v. LAG Corp.*, No. 602846/2005, 2006 N.Y. Slip Op. 30602(U) (Sup. Ct. N.Y. County Dec. 20, 2006). The Court *sua sponte* dismissed the cause of action for dissolution and appointment because “only the Court of Chancery may decree the dissolution” and held, “This court lacks subject matter jurisdiction over” the claims. *Id.* at *8-*9. On appeal, the parties squarely presented this question of subject matter jurisdiction to the First Department. *See Craco Aff. Ex. C (Appell v. LAG Corp.*, Brief of Plaintiff-Appellant), at *58-*61; *Ex. D (Appell v. LAG Corp.*, Brief of Defendant-Respondent), at *39-*41; *Ex. E (Appell v. LAG Corp.*, Reply Brief of Plaintiff-Appellant), at *19-*24. Although it modified other aspects of Justice Moskowitz’s

order, the First Department considered the parties' arguments on subject matter jurisdiction over the dissolution claims, and affirmed this Court's holding in that regard, finding plaintiff's arguments "unavailing." 41 A.D.3d at 278.²

In sum, although this Court is clearly able to exercise jurisdiction over a plenary action seeking other relief among the parties, it may not grant judicial dissolution of Reedrock, a Delaware limited liability company, or appoint a liquidating trustee or receiver under the authority of the Delaware Limited Liability Company Act, as the Petition requests. Because the Petition commenced this special proceeding in order to seek judicial dissolution, a remedy that only the Delaware Court of Chancery could possibly provide (and only then if, contrary to fact, Petitioner had alleged proper grounds for such a dissolution under Delaware law), this action must be dismissed.

II. THE FORUM SELECTION PROVISION IN THE OPERATING AGREEMENT DOES NOT VEST THIS COURT WITH SUBJECT MATTER JURISDICTION.

The "Venue" provision in Reedrock's Amended and Restated Limited Liability Company Operating Agreement, dated as of June 25, 2014 (the "Operating Agreement"),

² Two earlier opinions of the First Department contain statements to the contrary. In *Herskowitz v. Tompkins*, 184 A.D.2d 402 (1st Dep't 1992), the First Department held that this Court had jurisdiction to order the dissolution of a New Jersey corporation and appoint a receiver, in the context of a plenary dispute regarding the parties' rights to that corporation's sole asset, which was real property located in New York. By contrast to the instant action, that opinion did not address any New Jersey statutory scheme requiring dissolution actions to be brought in that state. In *In re Dissolution of Hospital Diagnostic Equipment Corp.*, 205 A.D.2d 459 (1st Dep't 1994), the First Department affirmed this Court's dismissal of a proceeding to dissolve a Delaware corporation, holding that "the matter should be litigated in Delaware" on *forum non conveniens* grounds. *Id.* The First Department then noted, "We have considered the litigants' remaining arguments, including the Attorney General's that the courts of New York lack subject matter jurisdiction to dissolve a foreign corporation, and find them to be without merit," *id.*, but that statement, which did not attempt to distinguish the First Department's or Court of Appeals' contrary decisions, was not necessary to the First Department's actual holding, and was therefore non-controlling *obiter dicta*. See, e.g., 28 N.Y. JUR. 2D *Courts and Judges* § 213 (2015) ("Any statement, explanation, rationale, or observation not directly related or necessary to the outcome of a particular dispute before the court is not binding precedent."). But see *Museum Partners L.P. v. Edelman*, No. 650950/2011, 2013 WL 435449, at *3 (Sup. Ct. N.Y. County Jan. 31, 2013) (Singh, J.) (describing *Hospital Diagnostics* as "binding appellate authority" and denying motion to dismiss cause of action for dissolution of Delaware limited partnership).

provides, “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 Agreement.” C Aff. Ex. B § 12.16. That provision does not change the fact that this Court is without subject matter jurisdiction over this Petition seeking Reedrock’s judicial dissolution, for at least three reasons.

First, it is well settled that parties cannot create subject matter jurisdiction in this Court, even by consent or agreement, if the Court is otherwise lacking in such jurisdiction:

Since a court's jurisdiction over the subject matter of an action is prescribed by the New York State Constitution and the statutes passed under it, jurisdiction of the subject matter generally may not be obtained by the consent or stipulation of the parties; if the court has no jurisdiction of the subject matter of the action, it has no power to entertain an action even though the defendant was personally served within the state, and in such case, the appearance of the defendant or even the stipulation of the parties that the court may hear and determine the differences between them, being equivalent only to personal service, gives the court no jurisdiction to render a valid decision or judgment in the cause.

29 N.Y. JUR. 2D *Courts and Judges* § 580 (2015) (footnotes and citations omitted); *see also* 15A N.Y. JUR. 2D *Business Relationships* § 1352 (2015). Accordingly, the Operating Agreement’s venue provision does not vest this Court with subject matter jurisdiction over this dissolution action, and cannot prevent dismissal of the Petition. *See In re Chris Kole Enters.*, 188 Misc. 2d at 207 (dismissing dissolution petition for lack of subject matter jurisdiction and rejecting contrary provision in Delaware corporation’s shareholder agreement, and holding, “The parties may not consent to give this court a power the law does not give it, and so may not consent to the court’s dissolving a Delaware corporation.”) (citations omitted).

Second, this is not a plenary action seeking relief under the Operating Agreement. Section 11.01 of the Operating Agreement sets forth specific substantive requirements for

dissolution of Reedrock. Under that section, only the “sale, condemnation or other disposition of all Company assets and the receipt of all consideration therefor” or the “written determination of at least 75% of the Managers” could provide the basis for dissolution. (*Id.*) Moreover, section 11.01 specifically recites that no Member may “cause a voluntary dissolution of the Company” except as provided in the Operating Agreement. (*Id.*) Neither basis for dissolution has been shown, or even alleged, in the Petition. Therefore, by filing the Petition “in contravention of this Agreement” (*id.*), Petitioner has breached the Operating Agreement, and the Petition does not “arise out of” the Operating Agreement for purposes of the Operating Agreement’s venue provision.

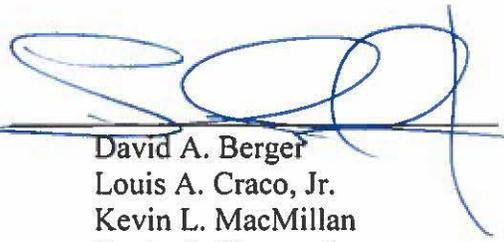
Third, by its terms, the Operating Agreement “shall be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to its conflicts of law principles.” (Craco Aff. Ex. B § 12.04.) As noted above, Section 18-802 of the Delaware Limited Liability Company Act specifically provides that only the Delaware “Court of Chancery may decree dissolution of a limited liability company.” 6 Del. C. § 18-802. Thus, the substantive law expressly governing the Operating Agreement prevents this Court from granting the relief sought by the Petition, and the Operating Agreement’s venue provision cannot, and does not, change that.

CONCLUSION

For the foregoing reasons, the Petition should be dismissed for lack of subject matter jurisdiction, and the Court should grant such other and further relief as it deems just and proper.

Dated: New York, New York
March 13, 2015

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