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

In the Matter of the Application of ACTIVITY KUAFU HUDSON YARDS LLC, a New York Limited Liability Company, Petitioner, For the Dissolution of REEDROCK KAUFU 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.	Index No. 650599/2015 Part 48 (Oing, J.) Motion Sequence No. 002

RESPONDENT SIRAS PARTNERS LLC'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE VERIFIED PETITION FOR LACK OF SUBJECT MATTER JURISDICTION

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Respondent Siras Partners LLC ("Respondent"), by its undersigned counsel, Allegaert Berger & Vogel LLP, respectfully submits this reply memorandum of law in further support of its March 13, 2015 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" or the "Company"), a limited liability company organized, registered and existing under the laws of the State of Delaware.

PRELIMINARY STATEMENT

Petitioner's perfunctory opposition to this motion to dismiss, filed on March 23, 2015, demonstrates that its dissolution Petition was filed in bad faith, to advance Petitioner's scheme to damage the Company's business in order to buy out Respondent at a bargain-basement price, rather than in a genuine effort to resolve the purported "deadlock" between the Managers of the Company. Through the expedient of a special proceeding and its foreshortened schedule, Petitioner sought to alarm the Company's creditors by publicly imperiling the Company's future existence, and to raise questions in the marketplace about both Respondent and the viability of the Company's project, a $600 million property development in the Hudson Yards area of Manhattan, even though ample funding exists to continue Respondent's work to advance the Company's collective goals.

Indeed, in its somewhat haphazard and slapdash selection of arguments, Petitioner's opposition does not appear to be briefing the motion actually before this Court, and seems to agree with Respondent on critical points. For example, Petitioner does not expressly disagree with the controlling appellate precedents that Respondent cited in support of this

motion, which hold that New York state courts lack subject matter jurisdiction to dissolve a Delaware limited liability company. Rather than attempting to distinguish all these authorities, Petitioner's opposition brief fixates on one of them, insisting that Respondent's undersigned counsel was also counsel in a controlling 2007 First Department case cited by Respondent mandating dismissal of this action, *Appell v. LAG Corp.*, 41 A.D.3d 277 (1st Dep't 2007), and complaining that Respondent's motion was a "cut and paste job" of the briefs filed in that action. Opp. Br. at 1-2. We are baffled by this assertion, and hereby confirm to the Court that this firm did not appear in, or have any other role with respect to, the *Appell* action, and this firm did not copy or "paste" the briefs from that action (which we downloaded from the Westlaw legal database) in this motion. To alleviate Petitioner's apparent confusion, we note that Respondent attached the briefs from the *Appell* appeal to its motion papers to demonstrate that, in affirming Justice Moskowitz's subject matter jurisdiction dismissal in *Appell*, the First Department considered and expressly embraced the Supreme Court's holding in that regard.

Similarly, Petitioner begins its opposition by asserting that Respondent's "moving papers offer an irrelevant recitation of portions of the New York Business Corporation Law," Opp. Br. at 1, but Respondent's moving papers nowhere cite, or even refer to, the New York Business Corporation Law. Based on Respondent's opening brief and Petitioner's opposition brief, the parties appear to agree that Delaware substantive law controls the issues before this Court. The parties also appear to agree that New York is a convenient forum for this dispute, given the location of witnesses and documents here, and Respondent agrees with Petitioner that the doctrine of forum non conveniens is not "germane" to this motion. Opp. Br. at 9.

Most importantly, the parties actually appear to agree on the argument that is the centerpiece of Petitioner's opposition to this motion: the fact that Reedrock's Operating

Agreement contains a forum selection clause choosing a New York forum for resolution of the parties' disputes. Petitioner correctly points out that, consistent with the Operating Agreement, Respondent filed a plenary complaint in this Court on March 19, 2015, pursuant to the forum selection clause, seeking money damages against Petitioner and other defendants as a result of their unlawful scheme to "boot" Respondent from the Hudson Yards project. Those claims could only be filed in this forum, and Respondent agrees that relevant witnesses and documents are located in New York County. As Respondent noted in its opening brief, however, parties cannot, through forum selection clauses in their agreements, confer subject matter jurisdiction on this Court that the Court does not have.

In its opposition to this motion, Petitioner does not identify a single case where a New York state court has issued an order dissolving a Delaware limited liability company (or any other Delaware entity) — and Respondent's research has not identified any such cases, either. Simply put, the plenary action that Respondent filed, seeking money damages for Petitioner's wrongful conduct, is properly before the Court, but this special dissolution proceeding is not. The Petition should be dismissed.

ARGUMENT

The Petition seeks judicial dissolution of Reedrock and appointment of a receiver, both pursuant to 6 Del. C. § 18-802. (Petition at 13.) As set forth in Respondent's March 23, 2015 Verified Answer to the Petition (NYSCEF Doc. No. 25), no basis exists on the merits to dissolve Reedrock here, particularly given that Delaware courts routinely hold that judicial dissolution is an "extreme remedy" that should only be granted "sparingly." *In re Arrow Inv. Advisors, LLC*, Civ. A. No. 4091-VCS, 2009 WL 1101682, at *2 (Del. Ch. Apr. 23, 2009). Even

without reaching the merits of the Petition (or lack thereof), however, nothing in Petitioner's brief prevents dismissal of the Petition for lack of subject matter jurisdiction.

I. PETITIONER DOES NOT ADDRESS CONTROLLING APPELLATE AUTHORITY HOLDING THAT NEW YORK COURTS ARE WITHOUT JURISDICTION TO DISSOLVE DELAWARE LIMITED LIABILITY COMPANIES.

In its opening brief, Respondent established that substantial controlling precedent holds 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); *Tosi v. Pastene & Co.*, 34 A.D.2d 520, 520 (1st Dep't 1970); *Mook v. Berger*, 26 A.D.2d 925, 925 (1st Dep't 1966), *lv. granted*, 19 N.Y.2d 581 (1967). *See generally* Memorandum of Law in Support of Respondent's Motion to Dismiss, dated Mar. 13, 2015 ("Br."), at 2-3 (collecting cases).

Petitioner does not even cite, much less try to distinguish, the foregoing cases, which mandate dismissal of the Petition here. Instead, Petitioner selects one case cited by Respondent — the First Department's holding in *Appell v. LAG Corp.*, 41 A.D.3d 277 (1st Dep't 2007)[1] — and feebly argues that the First Department's decision is not on point because it

[1] Although the First Department's opinion did not expressly address Supreme Court's holding that this Court "lacks subject matter jurisdiction" over a claim to dissolve a Delaware entity, Respondent showed in its opening papers that both parties briefed this issue to the First Department. *See* Affirmation of Louis A. Craco, Jr. in Support of Respondent's Motion to Dismiss, dated Mar. 13, 2015 (NYSCEF Doc. No. 18) ("Craco Aff."), ¶¶ 5-7 & Exs. C (*Appell v. LAG Corp*, Brief of Plaintiff-Appellant), at *58-*61; D (*Appell v. LAG Corp.*, Brief of Defendant-Respondent), at *39-*41; E (*Appell v. LAG Corp.*, Reply Brief of Plaintiff-Appellant), at *19-*24. (NYSCEF Doc. Nos. 18, 21-23.) Thus, the First Department's affirmance of the Supreme Court's decision, holding Plaintiff-

involved a Delaware limited partnership, rather than a limited liability company. The Court need not tarry long over this issue. Delaware courts have long recognized that, given the relative novelty of limited liability company legislation, courts dealing with Delaware limited liability companies should be guided by jurisprudence in the Delaware limited-partnership context. *See, e.g.*, *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 290 (Del. 1999) (noting that the Delaware Limited Liability Company "Act has been modeled on the popular Delaware LP Act. In fact, its architecture and much of its wording is almost identical to that of the Delaware LP Act. Under the Act, a member of an LLC is treated much like a limited partner under the LP Act."); *cf. Tzolis v. Wolff*, 10 N.Y.3d 100, 104-05 (2008) (analyzing legislative history of New York Limited Liability Company Law and noting analogy to limited partnership law). Thus, *Appell*, which held that this Court lacks subject matter jurisdiction to dissolve a Delaware limited partnership, is controlling authority with respect to Delaware limited liability companies (and other similar Delaware-registered entities). Moreover, both *MHS Venture Mgmt. Corp. v. Utilisave, LLC*, 63 A.D.3d 840, 841 (2d Dep't 2009) and *Rimawi v. Atkins*, 42 A.D.3d 799 (3d Dep't 2007), cited by Respondent in its opening brief (at 2-3), expressly held that New York courts lack subject matter jurisdiction to dissolve Delaware limited liability companies, and, even if *Appell* were not controlling here, those Second and Third Department Appellate Division cases would require that this Court dismiss the Petition. *See, e.g.*, *D'Allessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dep't 2014) ("where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals") (citations omitted).

Appellant's arguments to be "unavailing," is controlling precedent. In its opposition, Petitioner does not address, much less contest, this point.

Without attempting to distinguish the foregoing cases, Petitioner instead makes a statutory construction argument. Petitioner notes that the language of the relevant Delaware statute, 6 Del. C. § 18-802, provides, "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." Focusing on the word "may," Petitioner argues, "Simply because the Court of Chancery *may* dissolve a Delaware LLC, that does not mean that this court is without jurisdiction in this case" (emphasis in original, Opp. Br. at 8). The problem with this novel argument is that Petitioner cites no case or other authority — in New York, Delaware or otherwise— adopting Petitioner's view of this Delaware statute.

A more natural reading of the statute is that it leaves the granting of a judicial decree of dissolution to the sound discretion of the Delaware Chancery Court; in other words, the statute's permissive language makes clear that, regardless of whether it is "reasonably practicable to carry on the business," the Chancery Court is not mandated to grant dissolution. And that is exactly how the Delaware Court of Chancery has interpreted this language. *See, e.g.*, *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, Civ. A. No. 3803-CC, 2008 WL 3846318, at *6 (Del. Ch. Aug. 19, 2008) (noting that the language of 6 Del. C. 18-802 is "permissive rather than mandatory," and on that ground holding that parties may waive the right to judicial dissolution in a limited liability company operating agreement). The statute's permissive language in no way vests New York's (or any other state's) courts with subject matter jurisdiction to dissolve Delaware limited liability companies.

Accordingly, the Petition should be dismissed because this Court "has not jurisdiction of the subject matter of the cause of action." CPLR 3211(a)(2).

II. THE COMPANY'S OPERATING AGREEMENT ACTUALLY BARS THIS ACTION, AND ITS FORUM SELECTION PROVISION DOES NOT AND CANNOT CONFER SUBJECT MATTER JURISDICTION UPON THIS COURT.

The gravamen of Petitioner's opposition is that the Company's Operating Agreement contains a forum selection clause, under which "[e]ach 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." Craco Aff. Ex. B § 12.16. Petitioner contends that, because the parties agreed that this forum should have exclusive jurisdiction over any disputes in connection with the Company's Operating Agreement, this Court must therefore have subject matter jurisdiction to dissolve the Company, even though it is a Delaware LLC.

As Petitioner apparently recognizes, Respondent agrees with Petitioner that this provision requires that actions in connection with the Company's Operating Agreement be filed in New York. On March 19, 2015, Respondent filed a plenary direct and derivative action in this Court, seeking money damages against Petitioner and others for their unlawful scheme to destroy the Company and garner its profits for themselves. *See* Affirmation of Thomas P. Mohen in Opposition to Motion to Dismiss, dated Mar. 19, 2015, Ex. B (NYSCEF Doc. No. 54). That action, which arises in part from Petitioner's and others' breaches of the Company's Operating Agreement, is clearly within the subject matter jurisdiction of this Court.

This apparent agreement about the existence and enforceability of the Operating Agreement's forum selection clause does not change the fact that the dissolution petition should be dismissed. As set forth in Respondent's opening brief (at 5), parties cannot create subject matter jurisdiction in this Court, even by consent or agreement, if the Court is otherwise lacking in such jurisdiction. *See In re Dissolution of Chris Kole Enters.*, 188 Misc. 2d 207, 207 (Sup. Ct. N.Y. County 2001) (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).

Petitioner's argument ignores the difference between a plenary action seeking money damages, such as Respondent's March 19, 2015 complaint, and a petition commencing a special proceeding for dissolution. The latter proceeding, which is narrowly focused on a specific statutory remedy beyond the power of this Court, should be dismissed, even though the plenary action is properly venued here. (To be clear, insofar as Respondent has filed its plenary complaint in this Court and manifestly agrees that New York is a convenient forum, Respondent agrees with Petitioner that Petitioner's discussion of the forum non conveniens doctrine is not "germane" here, Opp. Br. at 9.)

Petitioner's citation of the Delaware Supreme Court's decision in *Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286 (1999) ("*Elf Atochem*"), and of its Delaware progeny, is not to the contrary, and actually confirms the correctness of Respondent's position in this motion. In *Elf Atochem*, the Delaware Supreme Court held that a California forum selection provision in a Delaware limited liability company's operating agreement was enforceable. 727 A.2d at 287. In *Elf Atochem*, the plaintiff sued an LLC manager directly and derivatively for breaching his fiduciary duties to the LLC, pushing the LLC to the brink of insolvency by withdrawing funds for personal use, interfering with business opportunities, failing to make disclosures to plaintiff, and threatening other breaches of the LLC's operating agreement. *See id.* at 289. The plaintiff in *Elf Atochem* did not seek dissolution of the LLC; instead, as Respondent did here in its March 19, 2015 complaint, the plaintiff directly and derivatively sought monetary and equitable remedies against the LLC manager for these breaches. The Delaware Supreme

Court held that, because the LLC operating agreement contained a forum selection and arbitration provision specifying arbitration in California, those claims needed to be brought in the forum selected by the parties' operating agreement. *See* 727 A.2d at 296. *Elf Atochem* does not mention judicial dissolution, and it nowhere states that any court other than the Delaware Court of Chancery can issue an order dissolving a Delaware LLC. None of the Delaware cases cited by Petitioner, upholding forum selection clauses in Delaware LLC operating agreements, bear upon dissolution either, and Petitioner does not even attempt to argue otherwise.

In its opposition, Petitioner speculates, "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." Opp. Br. at 5. That speculation may prove true, but it is of no moment. The Operating Agreement specifically bars voluntary dissolution of the Company "without the consent of the other Members," Craco Aff. Ex. B § 11.01, and a Delaware court would likely enforce that bar. *See, e.g.*, *Huatuco v. Satellite Healthcare*, Civ. A. No. 8465-VCG, 2013 WL 6460898, at *5 (Del. Ch. Dec. 9, 2013) ("Permitting waiver of a contractual right to judicial dissolution, or enabling opting out of the statutory right altogether, is consistent with the broad policy of freedom of contract underlying the [Delaware] LLC Act, and comports with the Act's approach of supplying default provisions around which members may contract if they so choose."), *aff'd*, 9 A.3d 654, 2014 WL 2566155 (Del. 2014); *R & R Capital*, 2008 WL 3846318, at *3 (dismissing dissolution petition on this ground). The fact that this Court lacks subject matter jurisdiction over the Petition, and that the Delaware Court of Chancery, which might otherwise have subject matter jurisdiction, might not grant dissolution under the terms of the Operating Agreement (among other reasons), does not work any unfairness against Petitioner, because Petitioner

expressly agreed to the bar on voluntary dissolution and the forum selection clause when it signed the Operating Agreement. *See Huatuco*, 2013 WL 6460898, at *5 ("Sophisticated parties entering unambiguous LLC agreements are presumed to understand the consequences of the language they have chosen, and are bound thereby, lest contract rights be subject to endless second-guessing and opportunistic revision."). Petitioner appears to agree. *See* Opp. Br. at 5-6 ("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.") (citations omitted).

In sum, although the Operating Agreement's forum selection provision clearly mandates a New York forum for plenary derivative and direct actions arising from the Operating Agreement — such as the action filed by Respondent in this Court on March 19 — that forum selection provision does not, and cannot, vest this Court with subject matter jurisdiction over the instant Petition seeking judicial dissolution of the Company. Because the other remedies sought in the Petition — appointment of Petitioner as Liquidating Member, and an injunction against Respondent — are expressly and exclusively conditioned on the Delaware dissolution statute, 6 Del. C. § 18-802, which this Court lacks jurisdiction to enforce, the Petition should be dismissed in its entirety.

CONCLUSION

For the foregoing reasons and the reasons stated in Respondent's March 13, 2015 opening brief, 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 29, 2015

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