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SUPREME COURT OF THE STATE OF NEW YORK.
COUNTY OF NEW YORK - CIVIL TERM - PART 53

-----X

TAI HUANG and LING LIAN HUANG,

Plaintiffs,

-against-

NORTHERN STAR MANAGEMENT LLC and GOLD
EAGLE REAL ESTATE LLC,

Defendants.

-----X

Index # 652357/2016
MOTION

60 Centre Street
New York, New York 10007
June 6, 2016

B E F O R E:

HONORABLE CHARLES E. RAMOS,
Justice.

A P P E A R A N C E S:

KLEIN & SOLOMON, LLP
275 Madison Avenue - 11th Floor
New York, New York 10016
BY: JAY B. SOLOMON, ESQ.
Attorneys for Plaintiffs

CERTILMAN BALIN ADLER & HYMAN, LLP
90 Merrick Avenue - 9th Floor
East Meadow, New York 11554
BY: THOMAS J. McNAMARA, ESQ.
Attorneys for Northern Star

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WOLF HALDENSTEIN ADLER FREEMAN & HERZ, LLP
270 Madison Avenue
New York, New York 10016
BY: BENJAMIN Y. KAUFMAN, ESQ.
Attorneys for

BORAH GOLDSTEIN ALTSCHULER NAHINS & GOIDEL, P.C.
377 Broadway
New York, New York 10013
BY: ANNA GUILIANO, ESQ.
Attorneys for

ALDORINE WALKER, RPR
Official Court Reporter

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2 THE COURT: I know we have had some discussions
3 about this case before, but this is about an alleged
4 violation of the Operating Agreement?

5 MR. SOLOMON: That is correct. One of these
6 freeze-out mergers. And while we are not --

7 THE COURT: The parties are members of an LLC that
8 own real estate out in Queens. They had some litigation
9 involving other property in Queens. Some of them did
10 anyway, but this is a separate entity.

11 And how many members of the LLC are there?

12 MR. SOLOMON: There are seven members. I believe
13 seven members. There is four in the majority; two
14 essentially in the minority, and one, I understand, is not
15 competent, whom we have not really heard from.

16 THE COURT: What percentage does he or she owns?

17 MR. McNAMARA: Five and a half, Your Honor.

18 THE COURT: And you've got the minority?

19 MR. SOLOMON: Yes.

20 THE COURT: Your objection is that they are
21 freezing you out and selling it without your consent?

22 MR. SOLOMON: Right. We understand the juris
23 prudence. Your case and John Dory, another one called
24 Stalworth, I believe, which said that the validity of the
25 LLC statute itself on a freeze-out merger has been approved
26 by the courts. We are not attacking that part of it. What

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1
2 we are attacking is their authority to do the original
3 merger of the majority members into Gold Eagle Real Estate
4 LLC, the entity that they used to accomplish the merger.

5 So, essentially, our main argument has to do with
6 the fact --

7 THE COURT: The transfer of the LLC interest was in
8 violation of the Operating Agreement?

9 MR. SOLOMON: Of the Operating Agreement, correct.

10 As Your Honor pointed out, there is a history of an
11 adversarial relationship between the parties. In essence,
12 we had settled the New World matter on December 1st, at a
13 twelve-and-a-half hour closing at JAMS, with the help of
14 Judge Helen Friedman. I believe we had, I think 12
15 mediation sessions with her. It was a huge undertaking.

16 And then, essentially, on the morning after, Mr.
17 Lee, who is the controlling member of Northern Star,
18 orchestrated his next move against them, and that is to
19 force the buyout of their interest in other property right
20 on Main Street in the heart of Flushing, which is probably
21 one of the higher priced communities in the City right now.
22 It's the highest percentage of Chinese, non-pats living
23 outside of China in the world right now, more than San
24 Francisco Chinatown, more than New York's Chinatown. Yeah,
25 it's an incredible land space in the Asian community.

26 Our argument here under the Operating Agreement is

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1
2 twofold. First, the Operating Agreement on itself states in
3 Section 9.3 --

4 THE COURT: Which exhibit is that? Exhibit A to
5 the merger?

6 MR. SOLOMON: Exhibit A to the order to show cause.

7 THE COURT: Okay. Got it. Paragraph?

8 MR. SOLOMON: Now, Article 9 itself has to do with
9 preemptive rights of family members, existing members as
10 well as admission and withdrawal of a member to the LLC.

11 THE COURT: Hang on. Article 9?

12 MR. SOLOMON: Yes.

13 THE COURT: Section -- well, all of them, I guess?

14 MR. SOLOMON: Right. And just very briefly, 9.1
15 talked about interfamily transfer. They don't require any
16 type of approval. 9.2 talked about the fact that a member
17 could freely transfer to other members within the
18 organization without approval. But in 9.3, they make a
19 distinction where you are transferring a membership interest
20 to a third-party entity or somebody unrelated to the LLC.
21 And there, it could only be done with the prior majority
22 consent of the other members, either in writing or at a
23 meeting called for such purposes.

24 Our first argument is in interpreting other
25 members, we look to the Business Corporation Law which
26 talked about who are interested members and who should be

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1
2 disqualified from a transaction. And the Business
3 Corporation Law under 713, which talk about director, which
4 is an analogous situation here with these types of members.

5 THE COURT: The sentence that we are talking about
6 here, "A member may transfer his interest on the LLC to
7 another person or entity, except the first, second and third
8 preferred due members as outlined in 9.1, 9.2?"

9 MR. SOLOMON: Right. So, in that phrase, it is
10 excluding a transfer to a family member or a related party.

11 THE COURT: "Only with the prior majority consent
12 of the other members in writing or at a meeting called. If
13 the majority members do not approve of the transfer, the
14 transferee shall have no right to participate in that as
15 well."

16 So, that's the sentence then, that first one,
17 right?

18 MR. SOLOMON: Right. An improper transfer doesn't
19 have to do with what he has transferred himself, but it's
20 technically a different class of membership where you have
21 no voting rights or no management rights. So, there is a
22 built-in remedy here where we are not asking the Court to
23 undo the assignment, because the assignment goes through,
24 right? It's just that Gold Eagle then has no voting
25 authority and no management and, therefore, can't construct
26 the merger. So, if the assignment is to Gold Eagle to

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2 transfer the membership --

3 THE COURT: So, you are saying the number of voting
4 members is now reduced to those who did not violate or did
5 not receive membership in violation of this provision --

6 MR. SOLOMON: That's right.

7 THE COURT: -- then your minority members become?

8 MR. SOLOMON: The operating managers.

9 THE COURT: I see.

10 MR. SOLOMON: And, therefore, they are the only
11 ones who have authority to authorize the merger transaction.
12 And there is actually a two-prong analysis of this
13 paragraph. One is the fact that when we look at the
14 Business Corporation Law, an interested director and who
15 shouldn't be voting, anybody that's involved in the
16 transaction is considered interested and, essentially, is
17 disqualified from voting. We use that analogy to say each
18 of these members. This was a simultaneous transaction.
19 They did it under one document called an Exchange Agreement.
20 The agreement itself has a merger clause. It says there is
21 no prior understanding, no prior writing. This document
22 represents the complete deal. And that's it. It's one
23 single action.

24 So, our initial argument is, number one, they can't
25 cross-authorize each other in this transaction because they
26 are all doing the transaction simultaneously; they are all

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1
2 disqualified.

3 Then we move to the second argument, and that's the
4 end of that sentence where it says that this approval has to
5 be either in writing or at a meeting called for such
6 purposes. Now, the majority here -- the defendants concede
7 there's no meeting. This was all done on notice of
8 elections without meeting. Our clients had no knowledge of
9 this until they received a notice of dissenter's right in
10 the mail weeks after the transaction. So, no meeting was
11 called. Nobody is arguing meeting.

12 So, then you say, where is the writing from the
13 majority prior to the transfer? This is not authorized
14 unless there is a consent in writing prior to the
15 transaction. They had no such writing. They didn't even
16 properly bring it to a vote among themselves much less the
17 minority members. So, they didn't even pass the meeting
18 condition authorizing them to do the assignment. So, the
19 assignment is not an authorized assignment under 9.3 because
20 it wasn't approved by the disinterested members. And number
21 two, they didn't even go through the proper mechanics to
22 prove it anyway. So, even if you were to buy their argument
23 that, well, we can cross-authorize each other; there is four
24 of us in this transaction, so A and B could approve C; and B
25 and C could approve A, we don't buy that because this was a
26 simultaneous transaction. But even if you could get past

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2 that point, they never properly approved it by a majority in
3 writing prior to the transaction.

4 THE COURT: I get it. Let me hear now from your
5 adversary, and we will go back and forth.

6 MR. McNAMARA: Good morning, Your Honor. Thomas
7 McNamara. Attorney for Northern Star.

8 First, I would like to point out that this argument
9 about Section 713 of the Business Corporation Law appears
10 nowhere in their papers. We are not dealing with --

11 THE COURT: He is just making an analogy. It's
12 similar in concept to that.

13 MR. McNAMARA: No. Your Honor, it's not. It's an
14 inept analogy. And the reason is that -- I have not had a
15 chance to review 713, but it relates to directors. Here, we
16 are dealing with members.

17 THE COURT: Like shareholders.

18 MR. McNAMARA: Like shareholders.

19 THE COURT: Who have the right to vote their
20 interest.

21 MR. McNAMARA: They have a right to vote. And, of
22 course, they are always interested, Your Honor. So, they
23 have taken the concept that applies to directors, not to
24 equity holders.

25 THE COURT: Good point.

26 MR. McNAMARA: Which doesn't apply.

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2 So, Your Honor, here, what we have is a cashout
3 merger, which the legislature has permitted, upon a majority
4 vote unless a different percentage is otherwise specified in
5 the operating agreement. Here, the Operating Agreement
6 specifies 65 percent. We have 67 percent. So, they cannot
7 stop a cashout merger.

8 THE COURT: Except, they are saying that your part
9 of your 67 percent can't vote.

10 MR. McNAMARA: Your Honor, I would ask Your Honor
11 to take a look at our opposing affidavit, Paragraph 7, and
12 we have a chart that explains this.

13 THE COURT: Paragraph 7, right?

14 MR. McNAMARA: Of the opposition, yes, Your Honor.
15 It's also in our memo.

16 THE COURT: I got it.

17 MR. McNAMARA: So, Your Honor, the first thing I
18 have to point out is that in their papers they said that the
19 Operating Agreement require the consent of the majority of
20 disinterested members. The word "disinterested" appears
21 nowhere in the Operating Agreement.

22 THE COURT: It says "other."

23 MR. McNAMARA: Exactly. So, Your Honor, with
24 regard to the 67 percent, even if you exclude the percentage
25 held by the transferor, we still have more than their 33
26 percent and therefore a majority of the other members. And

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2 this is set forth on Page 4 of our affidavit with regard to
3 Xiao Jing Qu. She owned 18.5 percent.

4 THE COURT: Is there any disagreement with the
5 numbers being set forth in this table?

6 MR. SOLOMON: No.

7 THE COURT: Okay.

8 MR. McNAMARA: So, Your Honor, in each case, we had
9 the members holding 48.5 percent.

10 THE COURT: Hang on. Which are the allegedly
11 wrongfully transferring members?

12 MR. McNAMARA: These four.

13 THE COURT: All of them on the chart?

14 MR. McNAMARA: These four. So, Your Honor, what
15 they have done is aggregate four transfers. What was
16 transferred was the interest of Xiao Jing Qu, and New
17 Sunrise, Xien Huang and Jian Jin, each of whom are members.
18 And if you look at with regard to the transfer of --

19 THE COURT: Each one of these separately?

20 MR. McNAMARA: Yes, Your Honor. These are separate
21 transfers. They each had a separate membership interest.
22 And what they did is they -- Your Honor, their argument
23 makes no sense. What they are saying is that
24 notwithstanding the limited liability --

25 THE COURT: What you are saying is that on day one
26 Xiao could have made the transfer because he would have

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2 gotten consent of the other members?

3 MR. McNAMARA: 48.5, which is more than their 33.
4 With regard to New Sunrise, 46, which is greater than the
5 33. With regard to Xien Huang, 51 percent, which is greater
6 than 33. And with regard to --

7 THE COURT: Do we have the majority consent of your
8 other members?

9 MR. McNAMARA: Yes, Your Honor, we do.

10 THE COURT: Which exhibit? Where?

11 MR. McNAMARA: Yes, Exhibit D of our papers.

12 THE COURT: Exhibit what?

13 MR. McNAMARA: Exhibit D of our papers.

14 THE COURT: With the consent of the other members.

15 MR. SOLOMON: That's as to the merger.

16 MR. McNAMARA: I'm sorry, Your Honor, Exhibit B.

17 THE COURT: B as in boy?

18 MR. McNAMARA: Exhibit B.

19 THE COURT: Exchange Agreement?

20 MR. McNAMARA: Yes. And each of the members signed
21 that agreement, and thereby they all consented to the
22 transfer. Your Honor, if their argument were correct, it
23 would mean that you could never effect the cashout merger
24 because you would need the consent of the minority.

25 THE COURT: This is a specific provision in this
26 LLC's Operating Agreement.

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2 MR. McNAMARA: Right.

3 THE COURT: Plaintiff, what's the difference
4 between this Exchange Agreement and having four Exchange
5 Agreements all signed by the majority interest?6 MR. SOLOMON: Your Honor, number one, of course, we
7 have the issue that requires prior written consent of the
8 majority, which there is no prior written consent. Here,
9 this agreement, there is no reflection of any consent. The
10 entire transfer is in a four-line provision called Exchange
11 121. The rest of it is all miscellaneous provisions, which
12 has nothing to do with the structure of the transaction.
13 Here, this is a simultaneous transaction done at the same
14 time. They are all interested in it; they are all doing it
15 at the same time and, therefore, they are all disqualified
16 from voting.17 Now, if there had been prior written consent from
18 the other members and then an agreement done, perhaps it
19 might have passed the scrutiny of the provision, but we
20 think the other members and other in the Operating Agreement
21 was designed to disqualify those who were involved in the
22 transaction. That's our argument. But even if you can get
23 past that, they have to authorize -- there has to be a prior
24 writing authorizing the transfer before it can be done.
25 That wasn't done here. It was just a simultaneous transfer.
26 There is no reflection at all, even in this agreement that

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2 there was consent given for the transfer. All it says is we
3 hereby transfer. Period. So, in a sense what they did is
4 they ignored 9.3.

5 THE COURT: Wait a minute. It says each of the
6 members and G-E-R-E hereby agree that the respective MSM
7 membership interests are exchanged for the G-E-R-E
8 membership interest. So, they are consenting to the
9 exchange.

10 MR. SOLOMON: They are consenting to their own
11 exchange. There is nothing in here saying that any one of
12 them are consenting to any of the other member's exchange.

13 THE COURT: But the interests are set forth in --

14 MR. SOLOMON: Well, it says as a result of the
15 foregoing, Gold Eagle --

16 THE COURT: I'm getting the impression that this is
17 almost like counting the number of angels dancing on the
18 head of a pin. You are raising the kind of objections that,
19 even if they were valid, could be simply cured by a new
20 document. The fact is they still have the 67 percent.

21 MR. SOLOMON: Well, that's only if you can get past
22 the first circle, and that is, aren't these all interested
23 members transferring together? And I will even go back one,
24 they can't undo this. They have transferred their
25 membership interest to Gold Eagle. Gold Eagle is now the
26 member. Gold Eagle can't transfer anything out without the

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2 majority consent of the disinterested members. So, they
3 can't undo this and do this over again. It was precluded by
4 the Operating Agreement.

5 THE COURT: You are right. But Gold Eagle can
6 always do what it wants to do with it?

7 MR. SOLOMON: Well, not really, because they lost
8 the voting rights. It can't manage the LLC. So, frankly,
9 they are stuck in a transfer that because they didn't do it
10 correctly, they are stuck with a non-operating, non-voting
11 entity holding their shares. I mean, they do have the value
12 of their investments. They have not lost anything there.
13 They just can't manage the LLC anymore.

14 MR. McNAMARA: Your Honor, may I respond to that?

15 THE COURT: Sure.

16 MR. McNAMARA: Exhibit B represents the consent of
17 each of them to the transfer. If what Mr. Solomon is saying
18 is correct, you could not effect the cashout merger because
19 you would always need the consent of the minority which
20 would require consent --

21 THE COURT: Is there an exhibit attached to the
22 agreement?

23 MR. McNAMARA: Yes. If you look at Exhibit A --

24 THE COURT: That sets forth their interest?

25 MR. McNAMARA: Yes. But that shows that they each
26 consented. They have cited no authority for the proposition

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2 that four transfers should be aggregated and counted as one
3 for this purpose, Your Honor. The membership interests were
4 held by each of those four members. And what they have done
5 is consolidate it to one and say, what you are doing is
6 transferring the 67 percent interest, you need the consent
7 of the minority, that you could never do it without our
8 consent. Such a construction would run afoul of the
9 statute. And, Your Honor, this is statute which appears in
10 Limited Liability Company Law, Limited Partnership Law on
11 which it is patterned. BCL has a similar provision.

12 THE COURT: In the first instance, we have to look
13 at the Operating Agreement because that trumps the LLC Law.

14 MR. McNAMARA: Correct, Your Honor. But the
15 construction would, in effect, include a cashout merger,
16 which makes no sense. And that's why I believe that this
17 motion --

18 THE COURT: No, there could be cashout mergers even
19 with this contract. It depends on who the ownership
20 interests are.

21 MR. SOLOMON: That's right.

22 THE COURT: There is no requirement that an LLC
23 agreement, the Operating Agreement permit a cashout merger,
24 which if it does prohibit, we can't go forward.

25 MR. McNAMARA: Your Honor --

26 THE COURT: There is no requirement under the law

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2 that a cashout merger be possible.

3 MR. McNAMARA: Unless otherwise provided. Here,
4 the agreement provides 65 percent.

5 THE COURT: Let me cogitate on this for a second.

6 (Pause in the proceedings.)

7 THE COURT: Hold on one second. New Sunrise
8 America, LLC owns 21 percent of NSM, right, or did own?

9 MR. McNAMARA: Correct.

10 THE COURT: If you take that 21 percent and deduct
11 that from the 67 percent, you end up with 46 percent, right?

12 MR. McNAMARA: Correct.

13 MR. SOLOMON: That's math.

14 THE COURT: How do they get -- then they'll get 46
15 percent left. Plaintiffs, what percentage do you have of
16 the entire entity?

17 MR. McNAMARA: 33.

18 THE COURT: Well, their 33 is more than half of the
19 46.

20 MR. McNAMARA: No, Your Honor. It's the 33 and the
21 46. So, they have the majority.

22 THE COURT: We have to break this agreement down.
23 Maybe my math is wrong.

24 MR. McNAMARA: Your Honor --

25 THE COURT: Let's say that the 18, 16 and 11
26 percent all wanted to transfer their interests, okay. The

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1
2 other members that would have to consent would be the
3 plaintiffs plus New Sunrise America, LLC, correct?

4 MR. McNAMARA: No. Three of the other four in each
5 instance. So, what you have is the three --

6 THE COURT: Each one of these individual members, I
7 have to construe as consenting to all of the other
8 transfers.

9 MR. McNAMARA: Yes. Exactly, Your Honor.

10 THE COURT: And that means one has to consent to
11 the three, right?

12 MR. McNAMARA: Exactly.

13 THE COURT: Well, one is New Sunrise America who is
14 21 percent, right?

15 MR. McNAMARA: Yes.

16 THE COURT: That 21 percent added to the 33 percent
17 that the plaintiffs have would give a number that the 33
18 percent could control.

19 MR. McNAMARA: No, Your Honor. 46 is greater than
20 33. The other three would hold 67 percent.

21 THE COURT: No, no. It's 21 versus 33.

22 MR. McNAMARA: Your Honor --

23 THE COURT: I think. Is my reasoning off? Maybe
24 it is. This idea came up just now as I'm looking at the
25 papers.

26 MR. McNAMARA: Your Honor, this chart on Page 4 in

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2 bold would be the percentage of members consenting if you
3 exclude the transferor. So, the first one --

4 THE COURT: Yes, if you look the column which has
5 New Sunrise, it shows 46 percent.

6 MR. McNAMARA: Which is greater than 33. So, Your
7 Honor, it's 46 over 79.

8 THE COURT: Oh, it's 46 total?

9 MR. McNAMARA: Yes. The 46 would be the majority.
10 In each case, the other three members of the majority, the
11 total of these exceeds 33 percent.

12 THE COURT: Hold on.

13 MR. SOLOMON: Your Honor, if I may, I think it is
14 even more complicated than that, though. Because as each
15 one transfer, they transfer to Gold Eagle. They are not
16 left to vote on the other ones. Gold Eagle certainly can't
17 vote. Even if they didn't follow the procedures of the
18 operating law correctly and get the prior written consent
19 for the transfers but did it simultaneously --

20 THE COURT: You fellows have not found any caselaw
21 on this, have you?

22 MR. SOLOMON: The only analogy I have is under the
23 BCL. And I told you --

24 THE COURT: Here we are talking about membership
25 interest.

26 MR. SOLOMON: I know. They are all operating

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1
2 members. They have no more control than passive
3 shareholders.

4 THE COURT: They are allowed to vote their
5 interest.

6 MR. SOLOMON: But it becomes much more complicated,
7 Judge. There is one transfer to Gold Eagle. They are not
8 technically around to vote for the other ones. It's not as
9 simple as this chart.

10 THE COURT: I agree.

11 MR. SOLOMON: And that can all mean --

12 THE COURT: Would that be elevating form over
13 substance?

14 MR. SOLOMON: Well, again, if you don't follow the
15 Operating Agreement correctly, then the transfer doesn't
16 pass management authority. Yes, you transferred your
17 interest, fine. You are all being held under Gold Eagle,
18 but Gold Eagle has no authority to go forward with a merger.
19 And Gold Eagle has no authority to manage the operating
20 affairs of the LLC any longer.

21 THE COURT: In a way, I suppose what the plaintiffs
22 are saying is that if you read Section 9.3 as reading: "A
23 member or members may transfer their interest." If we then
24 treat it all the members transfer as a unit, they would have
25 to have the consent.

26 MR. McNAMARA: That's what they are saying. But if

1 Proceedings

2 would you exclude the transferor in each instance and only
3 count the percentages of the other six members in each
4 instance, the defendants, the majority have more than the 33
5 percent held by the minority. And, Your Honor, this is a
6 motion for a preliminary injunction where they have to show
7 strong likelihood of success on the merits. The statute
8 permits -- even if any got this set aside and then there was
9 this merger, which is what the relief sought in the
10 complaint, and it was done differently, I'm sure they
11 complained about bad manners as well, but they have an
12 adequate remedy at law in an appraisal proceeding for money
13 damages and we have 67 percent; we have the right to cashout
14 the minority. And the issue is how much the majority owes
15 the minority. And the consent of the majority, greater than
16 the 33 percent held by the plaintiffs, was obtained in each
17 instances.

18 THE COURT: I hate it when you each present cogent
19 arguments.

20 MR. SOLOMON: I would like to comment on a couple
21 of points.

22 THE COURT: Sure.

23 MR. SOLOMON: Number one, as far as us bringing the
24 BCL citations, I would also give you two case citations.
25 One is very general, Marks v. Acker, Court of Appeals 1996,
26 which talks about if you are in for a penny, you are in for

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1
2 a pound. They are interested directors --

3 THE COURT: But they are not directors.

4 MR. SOLOMON: I know.

5 THE COURT: The directors owe a duty to the
6 corporation, not to their own ownership interest. That's
7 different.

8 MR. SOLOMON: Right, but members in an LLC owe a
9 duty to each other. But under the Operating Agreement, they
10 owe a duty to the other members.

11 THE COURT: But the duties are defined by the
12 Operating Agreement as well.

13 MR. SOLOMON: And our position is they have
14 breached it here.

15 THE COURT: Look, members of an LLC are entitled to
16 have different interests. They don't owe a duty to the LLC.
17 They don't owe a duty to each other, except, honestly, to
18 abide by the terms of the Operating Agreement. Essentially,
19 they are partners. You can't disqualify a partner for
20 making a partnership decision.

21 MR. SOLOMON: You can if they are interested in
22 that decision. And the Operating Agreement makes a
23 distinction between who could vote and who can't.

24 THE COURT: Their argument is that they are just
25 following the LLC agreement.

26 MR. SOLOMON: But they weren't. They never got the

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1
2 prior written consent of any of the majority before they did
3 this. They just went ahead and did this, assuming that they
4 could do it.

5 THE COURT: Is your argument as simple as they
6 should have had an agreement amongst themselves consenting
7 on day one, consenting to the Exchange Agreement that could
8 be on day two?

9 MR. SOLOMON: That's our second argument. Our
10 first argument, though, is they are all disqualified from
11 voting for each other, period.

12 My second argument is, well, even if you wouldn't
13 go that far, they still had to follow the procedure. And
14 the procedure required a meeting. And a meeting is
15 important here. Because if they had called a meeting, then
16 our minority interest could participate, they could be
17 there, they would know about it.

18 THE COURT: The point is, and is it a cogent point,
19 if your client was one 67 percent owner, that one 67 percent
20 owner could not have transferred his interest, his voting
21 interest to another person or entity without the consent of
22 the 33 percent?

23 MR. SOLOMON: If they are doing at 9.3, correct.

24 THE COURT: Because that would require the other
25 members to consent, and that would be the 33 percent. What
26 their argument is, because it's not one owner but four of

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1
2 them, they could do it.

3 MR. SOLOMON: And our argument is that you can't do
4 it because you are all interested. But even if you could do
5 it, you have got to follow the procedures in the Operating
6 Agreement, and that means either give us a meeting so we
7 have an opportunity to discuss it. Maybe we would have
8 bought out some of the other minority interest if we had
9 known about it.

10 THE COURT: Or have the agreement in writing.

11 MR. SOLOMON: Or do it with a prior written
12 consent. And we have not seen any prior written consent.

13 MR. McNAMARA: Your Honor, with regard to the
14 requirement of the meeting, that's already been decided by
15 Your Honor in Stulman against John Dory. That's under
16 Section 407. Any action that can be taken in a meeting can
17 be taken by consent. But what we are dealing with here with
18 regard to the consent of the transfer, we are not dealing
19 with the LLC statute. What we are dealing with is the
20 contractual right. It's only contractual, because there is
21 no definition in the LLC Law of, quote, other members.
22 Other members is contractual. It's obvious, if you look at
23 Exhibit B, that members comprise 67 percent, consented even
24 if you exclude the transferor. In each instance, the other
25 three who were excluded have more than the minority.

26 And, Your Honor, the idea they can't vote because

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2 they are interested, then shareholders could never vote,
3 because they are always going to be interested in a
4 proposition, whether it's a merger or an election. So, he
5 is taking a provision that deals with fiduciaries that are
6 directors and trying to transmute it into an obligation on
7 the part of the equity owner, which is not the case, Your
8 Honor. And they have cited -- and I do agree with Your
9 Honor that if there was one member who owns 67 percent, that
10 under 9.3 it would require prior consent of the minority
11 members, but that's not what we are dealing with, Your
12 Honor. And that points out exactly the flaw in their
13 argument, which is that they have consolidated it all,
14 accumulated it all into one transfer of the 67 percent
15 interest. If you look at the schedule, which is annexed to
16 Exhibit B, the Exchange Agreement, you will see it was four
17 transfers. You will see the percentages that were held
18 immediately before and immediately after.

19 We would request that the motion be denied, Your
20 Honor. They have adequate remedy at law, an appraisal
21 proceeding --

22 THE COURT: What would be required by way of
23 majority interest to terminate or liquidate the LLC?

24 MR. SOLOMON: It's either --

25 THE COURT: We can have a situation where it's one
26 percent -- it could be a 99 percent or one percent, and the

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2 99 percent want to do a freeze-out merger, I think you are
3 telling me that the one percent could stop the freeze-out
4 merger. That does seem a little odd. But if a certain
5 percentage could, in fact, terminate the Operating Agreement
6 or liquidate or dissolve the LLC --

7 MR. SOLOMON: It looks like under 11.1 it's the
8 majority of the interest of the members to consent to
9 terminate or dissolve. The real flaw in defendants'
10 argument --

11 THE COURT: I'm trying to reconcile the two.
12 Because if a majority could dissolve the LLC, then why
13 shouldn't the majority be able to transfer their interest?
14 Do you follow?

15 The defendants in this case have the majority of
16 the interest in the LLC. They could have, under article --
17 I'm looking at Article 11, they could have dissolved the
18 LLC. They could have. So, what's the rationale in saying,
19 well, they could resolve the LLC but they can't transfer?
20 There shouldn't be such a conflict between the two articles.
21 Do you follow?

22 MR. SOLOMON: First of all, I would submit to you
23 that nobody ever thought that through in putting together
24 the termination provision of the agreement; how does this
25 relate to a transfer. So, you are pulling abstract
26 concepts, Your Honor.

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2 THE COURT: I'm trying to understand what is being
3 protected here. What's the interest that they are trying to
4 protect in Article 9? And if Article 11 makes your argument
5 into a non sequitur, then maybe you are not interpreting
6 Article 9 correctly.

7 MR. SOLOMON: Well, the real interest in 9.3 is we
8 have a group together who is interested in making
9 investment. We have a valuable piece of property. You can
10 freely transfer amongst your family and other members, but
11 we don't want you to bring in a third party who may not --

12 THE COURT: Unless the majority consent to it.

13 MR. SOLOMON: Right.

14 MR. McNAMARA: Your Honor, I think you put your
15 finger on it. The purpose of that provision is so that you
16 don't become partners with somebody you don't want to become
17 partners with. But that's not happening here. Here, they
18 are being cashed out and they are being paid their fair
19 value, which would be determined in an appraisal proceeding.
20 So, that provision is really where somebody is transferring
21 to somebody else that they don't want and they don't want
22 them to participate and the business is going to continue.
23 And in that case, yeah, you shouldn't be made to be partners
24 with somebody --

25 THE COURT: Let me ask you a question off the
26 record. Close the record for a second.

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(Whereupon, a discussion was held off the record.)

THE COURT: Back on the record.

Marked submitted. Thank you very much. Good argument. Interesting issue.

Close the record. Back on the record.

Is there something so pressing?

MR. SOLOMON: There is no pressing, but I just want to make sure there is no ambiguity. It's pressing that the TRO continue because there is a very limited time left for exercising the dissent rights. It's like a Yellowstone Injunction. We have to take action.

MR. McNAMARA: They have 20 days to dissent. And it was told on the 19th day. So, they have an additional day. So, Your Honor, I understand if you have not rendered a decision that you would want that told continue and not make your decision as to whether --

THE COURT: So, why are we talking about prejudice income rights?

MR. SOLOMON: No. They filed the merger documents. They have done everything they were going to do.

MR. McNAMARA: I would just point out that this TRO has been in effect for over a month. It's been adjourned.

MR. SOLOMON: It's not preventing them from doing anything.

THE COURT: I don't want to have a guilt attack

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because I'm destroying somebody's right to sell the property, developers. All right, go away.

MR. SOLOMON: So, it's continued?

MR. McNAMARA: Thank you, Your Honor.

THE COURT: Thank you.

It is hereby certified that the foregoing is a true and accurate transcript of the proceedings.

ALDORINE WALKER
Senior Court Reporter

SO
ORDERED
Q
JSL
7/20/15