SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 654054/2016
TUNGSTEN PARTNERS LLC
vs.
ACE GROUP INTERNATIONAL LLC
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE 7/12/17
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 15-21
Answering Affidavits — Exhibits _____ | No(s). 23-30, 35-38
Replying Affidavits _____ | No(s). 31-34

Upon the foregoing papers, it is ordered that this ~~motion is~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/20/17

SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE
☒ Cross-Motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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TUNGSTEN PARTNERS LLC, Index No.: 654054/2016

Plaintiff, **DECISION & ORDER**

-against-

ACE GROUP INTERNATIONAL LLC,
ECOPLACE LLC, and STEFANOS ECONOMOU,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Ace Group International LLC (the Company), Ecoplace LLC (Ecoplace), and Stefanos Economou move to dismiss the complaint. Plaintiff Tungsten Partners LLC (Tungsten) opposes and cross-moves for summary judgment. For the reasons that follow, defendants' motion is granted in part and denied in part, and plaintiff's cross-motion is granted.

Unless otherwise indicated, the following facts, which are drawn from the complaint (Dkt. 2)[1] and the documentary evidence, are undisputed.

This is one of three cases[2] before the court concerning disagreements over the membership, control, and economic rights of the Company's equity stakeholders. The Company, founded by the late Alexander Calderwood (Alex), is a Delaware LLC that owns the rights and intellectual property of the Ace hospitality brand of hotels. The events giving rise to the subject disputes – Alex's untimely passing in 2013 (which shifted control of the Company from Alex to Economou) – and the Company's operating agreement (the Operating Agreement) (Dkt. 17) are discussed at length in the court's February 29, 2016 and February 10, 2017 written opinions in

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[2] The other two are (1) *Estate of Calderwood v Ace Group Int'l LLC*, Index No. 650150/2015 (the Calderwood Action); and (2) *Estate of Calderwood v Wilson*, Index No. 655471/2016.

the Calderwood Action. *See Estate of Calderwood v Ace Group Int'l LLC*, 2016 WL 792779 (Sup Ct, NY County 2016) (*Calderwood I*) (holding Estate is Withdrawing Member of Company);[3] *Estate of Calderwood v Ace Group Int'l LLC*, 2017 WL 543354 (Sup Ct, NY County 2017) (*Calderwood II*) (holding Estate does not have Full Call Right). Familiarity with these decisions is assumed, and all capitalized terms not defined herein have the same meaning as in these decisions.

Briefly, Alex opened the first Ace hotel in 1999. In a letter agreement dated April 11, 2006, Tungsten was issued a 3% equity stake in the Company's predecessor entity in consideration for services it provided. *See* Dkt. 38 (the 2006 Agreement).[4] In 2011, Alex and Tungsten bought out the other equity holders in the Company's predecessor entity. To that end, in August 2011, a new entity – the Company – was formed. The buyout of the other equity holders was funded with a $10 million investment by Economou's company, Ecoplace. The Operating Agreement, which was dated as of September 16, 2011, provides that the Company began with two Members, Alex and Ecoplace, who, respectively, received 66.67% and 33.33% equity stakes. Members are defined as Alex and Ecoplace "and any other Person admitted to the

[3] That the Estate is not a Member was not dispositive of its right to review the Company's books and records for reasons not applicable to Tungsten, and, thus, the fact that the Estate is currently being provided with financial discovery is not relevant to Tungsten's books and records rights. *See Calderwood I*, 2016 WL 792779, at *11 ("the question of whether the Estate has the right to inspect [the Company's] records does not turn on whether the Estate is a Member ... [because in order for] the Estate [to] value its assets in the probate action, it must be given sufficient information to do so."). Moreover, the question of whether the Estate and/or Tungsten have the right under the implied duty of good faith and fair dealing (which, under Delaware law, cannot be disclaimed, but cannot be construed inconsistently with the express terms of the Operating Agreement) to review the Company's books and records to determine if and when they are entitled to distributions (i.e., after Ecoplace gets the first $10 million pursuant to section 4.1 of the Operating Agreement) [*see Calderwood II*, 2017 WL 543354, at *4] is not an argument currently before the court.

[4] The 2006 Agreement also governs fees owed to Tungsten, which are irrelevant to this case.

Company pursuant to this Agreement." Dkt. 17 at 92. While the Operating Agreement contains myriad restrictions on Members transferring their interests [*see id.* at 49-51], section 9.5 specifically contemplates Alex transferring "Management Interests" to certain high level employees and to Tungsten. *See id.* at 54. Section 9.5(a) provides that "[a]ny individual who is awarded such Management Interest shall be referred to as a 'Management Member.'"[5] *See id.* Section 9.5(b) further provides:

> The issuance of Management Interests shall dilute only the Percentage Interest and amounts distributable hereunder to [Alex] and not the Percentage Interest or amounts distributable hereunder to [Ecoplace]. In no event shall the Management Interests issued pursuant to this Section 9.5 exceed, in the aggregate, Interests which would dilute [Alex's] Percentage Interest in the Company below 50.1%. To the extent any Management Interests are forfeited, all rights to receive Distributions in respect of such Management Interests shall revert back to [Alex].

Dkt. 17 at 54.

On August 3, 2016, Tungsten commenced this action by filing a complaint seeking a declaratory judgment that it has the right under section 6.1 of the Operating Agreement to inspect the Company's books and records. The complaint also asserts a cause of action seeking an order compelling the Company to provide it books and records access, and a cause of action for attorneys' fees under section 12.12(b) of the Operating Agreement, which is an applicable prevailing party clause. Dkt. 17 at 70. Defendants filed the instant motion to dismiss on October 21, 2016, Tungsten cross-moved for summary judgment on November 9, 2016, and the court reserved on the motions after oral argument. *See* Dkt. 39 (4/28/17 Tr.).[6]

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[5] Management Member is not given another definition in Exhibit B to the Operating Agreement; Exhibit B states that it "shall have the meaning provided in Section 9.5(a)." *See* Dkt. 17 at 92.

[6] The issue of whether Ecoplace (the Company's current controlling Member) and Economou (Ecoplace's managing member) are proper defendants does not warrant meaningful discussion. As they correctly contend, and as this court held in *Calderwood II*, 2017 WL 543354, at *2, they are not necessary or proper parties and are dismissed from this case.

As an initial matter, Tungsten now concedes that, even if it is a Member, it would have fewer rights than Ecoplace (e.g., control). *See* Dkt. 29 at 6. Nonetheless, Tungsten contends that a review of the history of its receipt of equity in the Company and the prior governing agreements make it clear that it has books and records rights as a Member. The Company disagrees and maintains that the Operating Agreement does not provide it such rights.[7] Despite their disagreement, both parties take the position that the Operating Agreement is unambiguous on this issue. *See* Dkt. 31 at 7 ("Defendants agree with Tungsten on one fundamental point: The relevant documents in this case are dispositive of the outcome of the dispute between Tungsten and Defendants.").

The Company is a Delaware entity and as such is governed by Delaware law. *See Culligan Soft Water Co. v Dubilier & Rice LLC*, 118 AD3d 422 (1st Dept 2014). Delaware, like New York, gives effect to the intent of the parties by enforcing the plain meaning of the words in a contract. *i/mx Info. Mgmt. Solutions, Inc. v Multiplan, Inc.*, 2014 WL 1255944, at *5 (Del Ch 2014). However, unlike New York, the Delaware courts will interpret a contract in accordance with "what a reasonable person in the position of the parties would have thought the language of the contract meant." *Id.* Thus, on a motion for summary judgment, when faced with conflicting theories of interpretation, the Delaware court will determine the superior interpretation by determining which interpretation better comports with the contents of the document. *Id.* But, as in New York, when a contract provision is ambiguous, extrinsic evidence is used to implement the intent of the parties. *Appriva S'holder Lit. Co. v EV3, Inc.*, 937 A2d 1275, 1291 (Del 2007).[8]

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[7] *See* 6 *Del C* § 18-305(g) ("The rights of a member or manager to obtain information as provided in this section may be restricted in an original limited liability company agreement.")

[8] Delaware's rules of contractual interpretation are addressed further in *Calderwood I*, 2016 WL 792779, at *8.

The relevant section of the Operating Agreement is section 6.1, which provides, in pertinent part, that:

> all such books and records (and the dealings and other affairs of the Company and the Subsidiaries) shall be available **to any Member** at such location for review, investigation, audit and copying, **at such Member's** sole cost and expense, during normal business hours on at least twenty-four (24) hours prior notice. In connection with such review, investigation or audit, **such Member** (and its Managers and agents) shall have the unfettered right to meet and consult with any and all employees and officers of the Company or any of the Subsidiaries and to attend meetings and independently meet and consult with any and all third parties (including, without limitation, governmental agencies and/or lenders) having dealings or any other relationship with the Company or any of the Subsidiaries.

Dkt. 17 at 19-20 (emphasis added).

In its complaint, Tungsten recognizes that its status as a Member is a necessary predicate to its books and records rights, as it seeks a declaratory judgment that it "is a **Member** of [the Company] and is entitled **to all rights flowing therefrom**." Complaint ¶ 88 (emphasis added). Likewise, it states that "Defendants are obligated to furnish current information regarding [the Company's] finances, future deals, the status of negotiations with other hotel owners or potential buyers to Tungsten and to afford Tungsten all other rights given to Members." ¶ 91. Ergo, Tungsten, correctly, frames the issues of its books and records rights as being derivative of its status as a Member.

The parties' briefing, however, somewhat confuses this issue. Rather than exclusively focusing on whether Tungsten is a Member, there is much discussion of Tungsten's history with the Company and the nature of its services. This, among other asides (e.g., the tax status of a Management Interest), is irrelevant. The Operating Agreement clearly distinguishes between myriad types of equity holders in the Company, including Members, Withdrawing Members, and Management Members. The word "Member", nominally as part of the defined terms

"Withdrawing Member" and "Management Member", does not mean that such equity holders have full-fledged Membership rights. On the contrary, as discussed in *Calderwood I*, 2016 WL 792779, at *9, section 9.7(b) expressly provides that Withdrawing Members lack the full array of rights belonging to Members. A Management Member also does not inherently have full Membership rights (i.e., voting and control rights), despite the word "Member" being a part of its nomenclature. Nothing in the Operating Agreement suggests otherwise.

The only type of interest holder section 6.1 permits to have books and records access is a Member. Importantly, section 9.6, discussed below, makes it clear that a Management Interest holder does not necessarily becomes a Member until certain prerequisites are fulfilled, and specifically contemplates a situation where a Management Interest holder does not attain full Member status. That said, Tungsten became a Member.

While section 9.5(a) generally governs how Alex may issue Management Member Interests, section 9.5(f) provides that Ecoplace expressly approves of Alex issuing Tungsten a Management Interest. *See id.* at 56. Pursuant to an Award Agreement dated November 16, 2011, Alex issued Tungsten a 4% Management Interest [*see* Dkt. 19 (the Award Agreement)], which provides that the terms of its Management Interest are subject to the terms of the Operating Agreement. *See id.* at 2-3. Critically, in the Award Agreement, Tungsten's signature is below the following affirmation: "I hereby accept the Award described in this Award Agreement, and **I agree to be bound by the terms of this Award Agreement and the Plan and the [Operating] Agreement**, as applicable."[9] *Id.* at 6 (emphasis added). Moreover, section

[9] The court rejects defendants' argument that the "as applicable" coda is material. Certainly, not all portions of the Operating Agreement are pertinent to Tungsten (e.g., it has no control rights). Defendants' interpretation of "as applicable" to mean that Tungsten did not actually agree to be bound by the Operating Agreement within the meaning of section 9.6 is inferior to an

1(c) of the Award Agreement begins with the preface "If the **Members** (other than any Grantee [Tungsten]) (the "Initiating Members"),"[10] thereby indicating that Tungsten was, in addition to gaining a Management Interest, becoming a Member. *See id.* at 2. Similarly, section 13 of the Award Agreement refers to the parties (including Tungsten) as "Members". *See id.* at 5; *see also id.* at 11 (same).

Tungsten's agreement to be bound by the Operating Agreement as a condition of becoming a Member is consistent with section 9.6 of the Operating Agreement. Section 9.6 governs the "Admission of Transferees", and sets forth conditions precedent to a transferee (such as a Management Member) becoming a full-fledged Member. *See* Dkt. 17 at 56. Section 9.6(a) states that "unless a transferee of a Member's Interest is admitted as a Member under this Section, it shall have none of the powers of a Member hereunder and shall only have such rights of an assignee under applicable law as are consistent with the other terms and provisions of this Agreement. If a transferee of a Member's Interest is not admitted as a Member under this Section, the transferor shall retain all non-economic rights of a Member." *Id.* Consistent with section 3.7,[11] section 9.6(a) provides that a "transferee may become a Member if (i) **such transferee executes and agrees to be bound by this Agreement**, (ii) the transferor and/or transferee pays all reasonable legal and other fees and expenses incurred by the Company in

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interpretation to the contrary. The court rejects that interpretation on this summary judgment motion.

[10] The same language can be found in section 2(c) of the Management Incentive Program. *See* Dkt. 19 at 8.

[11] The court need not decide if section 3.7(c) applies to Tungsten because its requirement that the recipient of a New Interest "agree in writing to be bound by the terms of this Agreement by becoming a party hereto and deliver such additional documentation as the Board and the Members shall require to so admit such new Member to the Company" is consistent with the requirements of section 9.6(a). *See* Dkt. 17 at 13.

connection with such assignment and substitution and (iii) the transferor and transferee execute such documents and deliver such certificates to the Company and the remaining Members as may be required by applicable Law or otherwise advisable by the Board." *Id.* (emphasis added). Here, as noted above, Tungsten met the first requirement by agreeing to be bound by the Operating Agreement. Defendants did not submit any proof that Tungsten failed to meet the other two requirements.[12]

Based on the foregoing, there is no question of fact that Tungsten is a Member of the Company with the right to inspect the Company's books and records in accordance with section 6.1 of the Operating Agreement.[13] Tungsten, therefore, is granted summary judgment on this

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[12] For instance, defendants do not claim that the Company incurred legal expenses "in connection with such assignment" or that Tungsten refused its demand for payment of such expenses. Since this is a summary judgment motion, defendants' failure to lay bare their proof of such issues (for which they do not need discovery because, for instance, evidence of such expenses would be in their possession) constitutes a waiver of their right to raise them. *See Genger v Genger*, 123 AD3d 445, 447 (1st Dept 2014).

[13] While the court will not address the myriad irrelevant collateral matters raised by parties (e.g., tax treatment and the relative benefit of Tungsten's services), a few issues warrant brief attention. First, Delaware's policy of abhorring involuntary association with LLC members is not implicated here because Tungsten, admittedly, has no control rights. *Calderwood I*, 2016 WL 792779, at *10 n.14. Defendants cite no case holding that this policy is implicated when the membership interest merely comes with the rights to books and records access and distributions. Indeed, such rights logically exist in tandem in this case. As the Company correctly avers, Tungsten's right to distributions is subject to Ecoplace's entitlement to the first $10 million of distributions. Yet, Tungsten cannot possibly know when Ecoplace has gotten that $10 million without being able to keep tabs on the Company's performance by reviewing the Company's books and records. It makes sense for Tungsten to be able to protect its interest in this manner. Given the parties' acrimonious relationship and the allegations of malfeasance in the Calderwood Action (the merits of which are beyond the scope of this action), it is understandable why Tungsten does not want to rely on Ecoplace's say-so regarding Tungsten's right to distributions. Tungsten having books and records access is a relatively minimal burden on the Company and serves to deter malfeasance (due to the knowledge that another investor is keeping tabs).

issue.[14] Accordingly, it is

ORDERED that defendants' motion to dismiss is granted only to the extent of dismissing the claims against Ecoplace and Economou, and the motion is otherwise denied; and it is further

ORDERED that Tungsten's cross-motion for summary judgment is granted against the Company, and a judgment declaring its rights as a Member to books and records is issued along with this decision; and it is further

ORDERED that that the Company shall provide Tungsten with the level of books and records access required by section 6.1 of the Operating Agreement within three weeks of the entry of this order on NYSCEF; and it is further

ORDERED that Tungsten's claim to recover its reasonable attorneys' fees in this action under section 12.12(b) of the Operating Agreement is severed, shall continue, and is referred to a Special Referee to hear and report (unless the parties consent to a hear and determine reference); and it is further

ORDERED that within 3 days of the entry of this order on NYSCEF, plaintiff shall serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special

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[14] Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Referee Clerk at spref-nyef@nycourts.gov, who is respectfully directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date.

Dated: September 20, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C