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

JEREMY CASILLI, JON FOSTER, DIANE ROSENCRANTZ, DC YORK RESTAURANT, LLC, MICHAEL MORRIS and 268 WEST BROADWAY, LLC,

Plaintiff,

Index No.: 652545/2017

-against-

SHAUL NATAN, and NADOV COHEN

Defendant,

PLAINTIFFS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF INJUNCTIVE RELIEF

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PRELIMINARY STATEMENT

Plaintiffs, Jeremy Casilli, Jon Foster, Diane Rosencrantz, Michael Morris, DC York Restaurant, LLC and 268 West Broadway, LLC, (collectively, "Plaintiffs"), by their undersigned attorneys, respectfully submit this Memorandum of Law in further support of their Order to Show Cause, seeking to convert the Temporary Restraining Order granted by the Court on April 26, 2018 to Permanent Injunctive Relief. Plaintiffs seek an order restraining Defendants from:

a. Calling an emergency or any general member meeting of 268 West Broadway, LLC under the authority of the Board of Managers with an agenda calling for a vote in order for 268 West Broadway to file a Chapter 11 petition and initiate member buy outs;
b. Contacting any of the employees of 268 West Broadway, LLC; and
c. Filing a Chapter 11 bankruptcy case on behalf of 268 West Broadway, LLC; and
d. Any other relief as this Court may deem fair and equitable.

For the reasons set forth below and Plaintiffs' previous submissions, the Permanent Injunctive Relief should be granted.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Plaintiffs, Jeremy Casilli, (hereinafter referred to as "Casilli"), Jon Foster, (hereinafter referred to as "Foster"), Diane Rosencrantz, (hereinafter referred to as "Rosencrantz"), Michael Morris, (hereinafter referred to as "Morris"), and DC York Restaurant, LLC (hereinafter referred to as "DC"), are members and co-owners of co-Plaintiff, 268 West Broadway, LLC, (hereinafter referred to as "268") in conjunction with Defendants, Shaul Natan, (hereinafter referred to as

"Natan") and Nadov Cohen, (hereinafter referred to as "Cohen"). The Court is familiar with the factual background here, and the companion matters, involving the parties.

For the sake of brevity, the present brief will focus on Defendants' actions that lead to the filing of Plaintiff's Order to Show cause and the question presented as a result of the oral argument on May 3, 2018, regarding Plaintiffs' request to convert the temporary restraints to permanent injunctive relief. On April 24, 2018, Plaintiff, Foster, received a Notice of Emergency Member Meeting, (*See* Exhibit "**F**" annexed to the Affidavit of Jeremy Casilli, NYSCEF doc. 145). The Defendants called this meeting "pursuant to Article VII of the Operating Agreement governing the affairs of [268] dated August ____ 2011, ("the Operating Agreement")" under their authority "as the majority of the Board of Managers…" (268's Operating Agreement annexed hereto as Exhibit "**A**").

Plaintiffs filed an Order to Show Cause on April 25, 2018. Oral argument was held on April 26, 2018, and the Court granted Plaintiffs' Order to Show Cause with Temporary Restraints. On April 27, 2018, Defendants issued an Amended Notice of Emergency Member Meeting sent via Federal Express to four (4) of the Plaintiffs, the address of Plaintiff Jeremy Casilli is still incorrect, by their attorney, Kevin Nash, Esq. (NYSCEF doc. 152).

After oral argument on May 3, 2018, the Court presented the following questions for briefing by counsel:

(1) Whether the Notice of Emergency Meeting and subsequent Amended Notice of Emergency Meeting issued by the Defendants were defective under the provisions of 268's Operating Agreement;

(2) In the alternative, if 268's Operating Agreement did not provide a mechanism for the issuance of the Notice of Emergency Meeting was there an alternative mechanism to

be found under the New York Limited Liability Act (hereinafter referred to as the "Act").

ARGUMENT

I. THE NOTICE OF EMERGENCY MEETING ISSUED BY DEFENDANTS IS DEFECTIVE UNDER 268'S OPERATING AGREEMENT

The Defendants issued both Notices of Emergency Meetings "pursuant to Article VII of the Operating Agreement governing the affairs of [268] dated August ____ 2011, ("the Operating Agreement")" under their authority "as the majority of the Board of Managers..." (*See* Exhibit "**F**" annexed to the Affidavit of Jeremy Casilli, NYSCEF doc. 145; *see also,* NYSCEF doc. 152). Under Article VIII of the Operating Agreement, entitled Voting, Quorum, and Meeting of Members, Section 8.2 Voting and Approval Rights reads:

> The only matters to be submitted to the Members shall be matters expressly required to be submitted to the Members pursuant to this Agreement and the provisions of the Act; provided, however, that the matters set forth on Schedule 8.2 must be (i) recommended by the Board and (ii) approved, in writing, if there are any Class B Members, by Class B Members holding a majority of the Class B Units, approved, in writing, if there are any Class C Members, by Class C Members holding a majority of the Class C Units and approved, in writing, if there are any Class D Members, by Class D Members holding a majority of the Class D Units, in writing, if there are any Class E Members, by Class E Members holding a majority of the Class E Units.

Schedule 8.2 (vi), in turn, lists both involuntary and voluntary bankruptcy proceedings as a matter that must be submitted to a vote of all classes of membership. However, as per Section 8.2, above, prior to a member wide vote, "...the matters set forth on Schedule 8.2 **must be** (*bolding added*) recommended by the Board..." Thus, prior to even issuing a notice of meeting

to the general membership with a recommendation, there are steps that the Board of Managers must take first on its own. Here, the Board did not take those prerequisite steps.

Looking to the Operating Agreement, the Board is defined as "Board of Managers as described in Section 3.1 of this Operating Agreement." (Exhibit "A" at pg. 5). As per Section 3.1 (c) entitled Composition: Removal and Vacancies:

> The Board shall consist of three (3) members, each of whom is referred to as a Manager and all of whom are appointed by Class A Members. The Managers shall be Jeremy Casilli, Shaul Natan, and Nadov Cohen...

In order for the Board to transact business, or say, present a recommendation to the remaining members of 268, there must be a quorum of all Managers present at a meeting of the Board. Section 3.1 (g) entitled Quorum and Voting states:

> The presence of all of the appointed Managers shall constitute a quorum for the transaction of business at a meeting of the Board. All action by the Board must be authorized by a majority of the Managers, provided, however, that Managers may grant proxies to other Managers to vote on their behalf.

Here, if there was a meeting of the Board of Managers there was not a quorum present because Casilli was not present. It is irrelevant that Natan and Cohen, self-interested managers, hold the majority of the Board *but for* a quorum being present at a duly noticed meeting the Defendants' majority of the Board cannot act unilaterally on behalf of 268.

Therefore, under the above facts the Board of Managers could not issue the notices of meetings to the members as they themselves did not have a meeting with a quorum present. Further, no meeting of the Board of Managers was noticed by the Defendants as per Section 3.1 (e) entitled Notice. Casilli did not waive notice of a meeting (See Exhibit "A" at Section 3.1 (e)) or submit a proxy to a duly authorized representative to act on his behalf at the meeting. As per Section 3.1 (h) entitled Action Without a Meeting Casilli did not, in concert with the

Defendants, consent, in writing, to the submission of the agenda on the Notices of Emergency Meetings issued by the Defendants. Since the actions listed on Schedule 8.2 must be recommended by a majority of the Board, such recommendation being the result of a meeting of the Board where a quorum is present or via unanimous written consent of the Board, prior to the submission to the members for a vote, the Defendants' notices of meetings are fundamentally defective under the Operating Agreement.

But for the above, the Operating Agreement is silent as to any further mechanisms that would enable a member vote on the items on Schedule 8.2. Additionally, there is nothing in Operating Agreement that can force either a Manager or a Member to attend any meeting. Under the provisions of the 2011 Operating Agreement, a stalemate is essentially presented.

II. THE NEW YORK CONSOLIDATED LAWS LIMITIED LIABILITY COMPANY LAW DEFERS TO A COMPANY'S OPERATING AGREEMENT AS TO THE ISSUES PRESENTED HERE

In cases where an operating agreement's provisions result in a stalemate or are silent, Courts look to the New York Consolidated Laws, Limited Liability Company Law for guidance. (*see* Overhoff v Scarp, Inc., 12 Misc. 3d 350, 359, 812 NYS2d 809 [2005]; *see also*, Matter of Spires v Lighthouse Solutions, LLC, 4 Misc 3d 428, 435, 778 NYS2d 259 [2004]; Rich, Practice Commentaries, McKinney's Cons Laws of NY, Book 32A, 1[A], at 176) The New York Consolidated Laws, Limited Liability Company Law, in turn, shows an immense deference for the operating agreement of limited liability companies organized under the laws of the State of New York. For example, for guidance on meetings for the company, we look to §403 entitled Meetings of Members of the Act:

> **Except as provided in the operating agreement,** (*bolding added*) a limited liability company shall hold meetings of members annually. Meetings of members may be held at a place, either within or outside this state, as may be fixed by or in accordance with the operating agreement, or if not so fixed, at the office of the limited liability company. **Except as provided in the operating agreement**, (*bolding added*) members of a limited liability company may participate in a meeting by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other. Such participation shall constitute presence in person at the meeting.

This section does not clarify the issues presented here. Turning now to §405 entitled Notice of Meetings of Members:

> (a) **Except as provided in the operating agreement,** (*bolding added*) whenever under the provisions of this chapter members are required or permitted to take any action by vote at a meeting, written notice shall be given stating the place, date and hour of the meeting, indicating that it is being issued by or at the direction of the person or persons calling the meeting and, in the case of a special meeting, stating the purpose or purposes for which the meeting is called.
>
> (b) **Except as provided in the operating agreement**, (*bolding added*) a copy of the notice of any meeting shall be given, personally or by first class mail, not less than ten or more than sixty days before the date of the meeting, provided, however, that a copy of such notice may be given by third class mail not less than twenty-four nor more than sixty days before the date of the meeting, to each member entitled to vote at such meeting. If mailed, such notice is given when deposited in the United States mail, with postage thereon prepaid, directed to the member at his or her address as it appears in the records of the limited liability company. An affidavit of a manager, if any, or other person giving the notice that the notice required by this section has been given shall, in the absence of fraud, be prima facie evidence of the facts therein stated.
>
> (c) **Except as provided in the operating agreement,** (*bolding added*) when a meeting is adjourned to another time or place, it shall not be necessary to give any notice of the adjourned meeting if the time and place to which the meeting is adjourned are announced at the meeting at which the adjournment is taken, and at

> the adjourned meeting any business may be transacted that might have been transacted at the original date of the meeting.

This language does not provide clarity on the issues presented. The Operating Agreement does provide a procedure to submit items on Schedule 8.2 to the general membership- the Board of Managers must meet and a quorum must be present. But nothing in the New York Consolidated Laws, Limited Liability Company Law or the Operating Agreement speaks on what happens if there is never a quorum of the Board of Managers present.

Neither §401 Management of the Limited Liability Company by the Members, §402 Voting Rights of the Members, §404 Quorum of Members, §407 Action by Members without a Meeting, § 418 Classes and voting by Members, nor §419 Classes and Voting by Managers speak directly to the issues presented here as the operating agreement sets for a procedure in order for the issues listed on Schedule 8.2 to be submitted to the members. All of the above sections defer to the Operating Agreement of the company in question, and the language in the above sections is mimicked closely by the language in 268's Operating Agreement.

It may very well be that the issues presented here are that of first impression.

III. PLAINTIFFS ARE ENTITLED TO A PERMANENT INJUNCTION AS TO THE RELIEF REQUESTED

Plaintiffs represent the majority of Classes A, B, C, and D of the membership interest of 268, with Cohen being the only holder of Class E membership interest. Essentially, a majority of four out of five classes of membership interest, representing 57% interest in 268 asks that the Court issues permanent restraints as to the relief requested above due to all of the reasons stated in our previous submissions as well as this brief. Since the moment the Defendants locked the Plaintiffs out of 268 in 2013 not a single notice of meeting was issued by the Defendants. Not a single shred of financial, legal or business related information was released by the Defendants to the

Plaintiffs, though same was repeatedly requested. Plaintiffs respectfully ask that the Court look to the history of 268 as the history provides crystal clear context as to the motives behind Defendants' actions now- Defendants want to take back control of the operation and management of 268 plain and simple.

For the purposes of further clarity, on the issue of this Court being able to issue an Order preventing the Defendants from filing a Chapter 11 Petition, Defendants' submitted case law in their prior legal brief, namely In re Orchards Village Investments, LLC, 405 B.R. 341 (Bankr. D. Oregon 2009) and In re Corporate and Leisure Event Productions, Inc. , 351 B.R. 724. (Bankr. D. Ariz. 2006) supporting their position that the Defendants could file a Chapter 11 petition as placement of a receiver by state court is preempted by debtor's rights under federal law. An examination of those cases shows that both are subject to negative treatment from subsequently issued case law.

For example, in El Torero Licores v. Raile (In re El Torero Licores), 2013 U.S. Dist. (LEXIS 179953, 2013 WL 6834609) the Court found, " In the absence of federal incorporation, state law determines whether an entity has the authority to file a bankruptcy petition on behalf of a corporation. Price v. Gurney, 324 U.S. 100, 106-107, 65 S. Ct. 513, 89 L. Ed. 776 (1945) ("In absence of federal incorporation, [the authority to file a bankruptcy petition on behalf of a corporation] finds its source in local law."). "A bankruptcy petition for a partnership or other artificial entity may be filed by those who, under state law, have the authority to manage the entity." In re Monterey Equities-Hillside, 73 B.R. 749, 752 (Bankr. N.D. Cal. 1987). "If the District Court finds that those who purport to act on behalf of the corporation have not been granted authority by local law to institute the proceedings, it has no alternative but to dismiss the

petition." Price, 324 U.S. at 106. "State law includes the decisions of state courts." Tenneco West, Inc. v. Marathon Oil Co., 756 F.2d 769, 771 (9th Cir. 1985)."

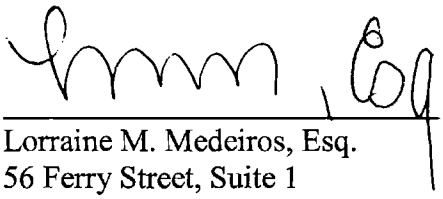
The Court in the above matter went on to state that " Like the Bankruptcy Court, this Court does not find the court's reasoning in Orchards Village convincing. In that case, the court concluded that "a state court receivership proceeding cannot be used to preclude a debtor from seeking federal bankruptcy protection, in spite of the broad authority granted to receivers in their appointment orders." The Receivership Order, however, does not divest Debtor from the its power to seek bankruptcy protection; rather, the order identifies *who* has the power to file the bankruptcy petition on behalf of Debtor. As the Supreme Court stated in Price, "nowhere is there any indication that Congress bestowed on the bankruptcy court jurisdiction to determine that those who in fact do not have the authority to speak for the corporation as a matter of local law are entitled to be given such authority and therefore should be empowered to file a petition on behalf of the corporation." Price. 324 U.S. at 107. Thus, the Receivership Order does not run contrary to Congress's right to enact uniform laws of bankruptcy or change the application of bankruptcy laws to debtors." *Id.* at 139

Accordingly, this Court does have the power to issue an Order granting the sole ability to file a Chapter 11 petition to the Receiver, Jeffrey H. Zegen, Esq., which Plaintiffs have maintained is in fact what the receivership order provides. By issuing said Order and restraining Defendants from filing a Chapter 11 petition, the Court would ensure that no self-interested parties would act against the best interests of 268.

CONCLUSION

For the foregoing reasons, and those set forth in Plaintiffs' prior submissions, the Court is respectfully asked to grant Plaintiffs' application.

Dated: New York City, New York
May 11, 2018



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