

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

JOSEPH LEHEY, individually and as a member of  
FSJ LLC, Delaware limited liability company, on behalf  
himself and all other members of FSJ, LLC similarly  
situated and in the right of FSJ, LLC,

Plaintiff,

-against-

TIM GOLDBURT, MATT SANDY, DAVID PERILLO,  
FSJ IMPORTS, LLC, RAM PHOSPHORIX, LLC,  
GENERAL PHOSPHORIX LLC, JOSEPH RUBIN,  
KEVIN MULLINS, AMJG LLC and FRANCIS MASSIE,

Defendants.

Index No. 112623/10

Hon. Charles E. Ramos

Motion Seq. No. 5

**DEFENDANTS' TIM GOLDBURT, MATT SANDY, FSJ IMPORTS, LLC,  
RAM PHOSPHORIX LLC, JOSEPH RUBIN, AND KEVIN MULLINS  
MEMORANDUM OF LAW IN OPPOSITION TO ORDER TO SHOW CAUSE  
SEEKING APPOINTMENT OF TEMPORARY RECEIVER AND OTHER RELIEF**

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## **PRELIMINARY STATEMENT**

This Memorandum of Law is submitted on behalf of Defendants Tim Goldburt, Matt Sandy, FSJ Imports, LLC, Ram Phosphorix, LLC, Joseph Rubin, and Kevin Mullins ("Defendants") in opposition to Plaintiff Joseph Lehey's ("Plaintiff") Order to Show Cause seeking multiple reliefs.

A branch of Plaintiff's application seeking appointment of a temporary receiver for FSJ, LLC ("FSJ" or "Company") should be denied for failure to meet the required burden. The appointment of a temporary receiver is both a drastic and an extreme remedy and should only be carried out where opposing party presents an immediate threat of destroying the property in which a movant claims vested interest.

Here, Plaintiff failed to offer clear and convincing evidence which would prove that Defendants, the members of FSJ, have attempted to materially injure FSJ's property, or plan to do so at a later date. Therefore, the appointment of a temporary receiver is unwarranted.

Plaintiff's claim of fraud by Defendants is based solely on speculation. As such, this Order to Show cause is simply a regurgitation of Plaintiff's previous motion. Even with additional documents at his disposal, Plaintiff has failed to make the proper evidentiary showing for the appointment of a temporary receiver.

In addition, contrary to Plaintiff's allegations, in compliance with the Court's Order, Defendants have produced over virtually every document which was requested by Plaintiff an available to Defendants. There are no objective reasons to allow Plaintiff to renew his previously denied application on the grounds of alleged noncompliance in respect to discovery demands.

## **STATEMENT OF FACTS**

FSJ is a Delaware limited liability company, which was formed to utilize Defendant Tim Goldburt's invention of an interactive bottle design that incorporates cutting edge display technologies for marketing of a vodka brand.

In 2007, Plaintiff, a person with no experience in the spirits industry or computer technology, expressed a desire to join FSJ by investing into the Company.

Thereafter, Plaintiff executed Subscription Agreement, in which he committed to invest \$10,000,000 in FSJ.

In addition, to confirm Plaintiff's commitment to invest \$10,000,000 in FSJ, Plaintiff and FSJ executed the Operating Agreement, which made his membership interest contingent upon full payment.

The Operating Agreement specified that Lehey's investment was to be funded with an initial contribution of \$2,500,000 at the signing of the Operating Agreement, and that the remainder of his \$10,000,000 subscription obligation was to be paid at the rate of \$2,500,000 every six months

commencing on the date of the Operating Agreement, and was required to be fully funded by December, 2008.

From June 2007 until November 2008, Plaintiff paid \$7,500,000 of his \$10,000,000 investment commitment without adhering to the investment schedule set forth in the Operating Agreement.

After defaulting on the remaining \$2.5 million, Plaintiff commenced this action, alleging, inter alia, fraud and mismanagement by Defendants.

In November 2010, Plaintiff's motion for appointment of a temporary receiver was denied by this Court.

Thereafter, in accordance with instructions of the Court, Defendants turned over thousand of records to Plaintiff and met with his accountants to explain FSJ's operations and recordkeeping.

In addition, on March 11, 2011, Defendants produced documents pursuant to Plaintiff's supplemental demand, which has been attached to Plaintiff's moving papers as Exhibit "11".

Important to note that Plaintiff's forensic accountants have found no conclusive evidence of wrongdoing by Defendants.

### ARGUMENT

#### PLAINTIFF'S ORDER TO SHOW CAUSE SHOULD BE DENIED

##### A. PLAINTIFF HAS NOT PLEADED THE FACTS NECESSARY TO MEET THE STANDARD IN APPOINTING A TEMPORARY RECEIVER.

Plaintiff is not entitled to the appointment of a temporary receiver. Plaintiff's motion papers make numerous conclusory allegations insufficient to overcome the extremely high standard set forth by applicable law.

CPLR 6401 permits the Court to exercise its discretion in granting a motion to appoint a temporary receiver of the business and assets of a corporation. The appointment of a temporary receiver has the power to take and withhold possession of property from a party without adjudication on the merits. *S.Z.B. Corporation v. Jacob Ruth*, 14 AD2d 678 (1<sup>st</sup> Dep't 1961), *Glassner v. Kaufman*, 19 AD 2d 885 (1<sup>st</sup> Dep't 1963). Often, "such an appointment only adds to the cost of litigation" and is a remedy only to be invoked where necessary for the protection of a party's interests. *S.Z.B. Corporation*.

To justify the "drastic remedy of appointment of a temporary receiver", a movant must "demonstrate by clear and convincing evidence that there was a danger the property would be 'materially injured or destroyed.'" CPLR 6401 [a]; *Somerville House Mgt. v. American Tel. Syndication Co.*, 100 A.D.2d 821 (1<sup>st</sup> Dep't 1984), *Gimbel v. Reibman*, 78 A.D.2d 897 (2<sup>nd</sup> Dep't 1980), *Wong v. Wong*, 161 A.D.2d 710, 711, 555 N.Y.S.2d 847 (2<sup>nd</sup> Dep't 1990), *Shapiro v. Ostrow*, 46 AD 2d 859 (1<sup>st</sup> Dep't 1974).



Absent clear and convincing evidence that there was a danger to company's property and it would be otherwise "materially injured or destroyed", the appointment of a temporary receiver is improper. *Ficus Investment, Inc. v. Private Capital Management, LLC*, 61 A.D.3d (1<sup>st</sup> Dep't 2009)

The court's decision to appoint a temporary receiver also depends on plaintiff's role within the business in question. A plaintiff's role as only an investor, rather than operator of the company, weighs against granting plaintiff the appointment of a temporary receiver. *Hahn v. Garay*, 54 AD2d 629 (1<sup>st</sup> Dep't 1976), *Gifford v. Harley*, 62 A.D.2d 5(3<sup>rd</sup> Dept. 1978)

In *Hahn*, the plaintiff investor failed to demonstrate that the property and assets in question were in danger of dissipation, and "in view of the nature of the business involved" the court held that a receiver would not be able to continue the operation of the business effectively. *Id.*

Plaintiff has failed to demonstrate that the FSJ's assets were in danger of being destroyed or materially injured. Instead, a complete different picture is unraveling before the Court. As a result of Plaintiff's failure to live up to his contractual obligation, Defendants have been forced to cover a lack of funds out of their own pockets.

Considering the fact that the two principals of FSJ have not been paid in 18 months, any suggestion by Plaintiff that Defendants threaten FSJ's property is ludicrous. Such a decision would amount to financial suicide and erase what has become of Defendants' intellectual, physical, and monetary investments and sacrifices made for FSJ's wellbeing.

There is absolutely no evidence of Defendants wishing to destroy Plaintiff's investment. In fact, the majority of all money put into in the business is reflected in the 500,000 vodka bottles ready to be sold and being stored in a New Jersey warehouse. Moreover, FSJ has generated sales directly from the movement of those bottles. The high volume of tangible merchandise remains stored in New Jersey at this time, is capable of being assigned a value, and thus available to both Plaintiff, his counsel, and accountants for inspection.

In the alternative, Plaintiff argues that he himself should be appointed receiver and manager of FSJ, LLC. Plaintiff goes so far as to claim that he "should be installed as manager in an effort to salvage what remains of his multi-million dollar investment." (Plaintiff's Memorandum of Law at 17).

Plaintiff's plea for such relief is contradictory to his central argument that FSJ is not performing efficiently under the direction of Defendants. In reality, Plaintiff has no background in computer technology, either academically or through work-related experience, and is all too unfamiliar with the intricacies and knowledge required to efficiently build and move such high-tech product.

On the other hand, Defendant Goldburt, an experienced businessman in "start-up" companies, owns over 50 patents and displays a level of expertise in product development and computer science that

is unmatched by anyone else. The Company's management under Plaintiff would be vastly inferior to the progress made under the direction of Defendant Goldburt.

B. DEFENDANT HAS FULLY COMPLIED WITH PLAINTIFF'S DISCOVERY REQUESTS.

Defendant has fully complied with both the demands of this Court and Plaintiff's discovery requests. Defendants have produced to Plaintiff's counsel and forensic accountants all of FSJ's books, records, and documentation necessary to complete the audit of the FSJ's affairs.

Plaintiff is now in possession of a cache of over 4,000 documents that account for all expenses paid by Defendants in connection with their involvement in the Company. As of March 11, Defendants have fulfilled their entire obligation in regards to discovery. As such, Plaintiff's forensic accountants have concluded their audit of the Company and have found no indication of "fraud", "looting", "embezzling", "self-dealing" or any sign of Plaintiff's other baseless accusations against Defendants. (Affidavit of Sareena M. Sawhney, ¶29).

Plaintiff attempts to cite the Court's past appointments of temporary receivers in what he erroneously believes are similar contexts to this case. Plaintiff's legal authority includes situations that saw the co-mingling of company funds with that of the defendant or, a situation where a plan of investment was suddenly diverted. (Plaintiff's Memorandum of Law at 14).

This is not the case of co-mingling of corporate assets or sudden change of company's plans. Plaintiff's forensic accountants have found neither, conclusive nor convincing evidence of any such wrongdoing at the hands of Defendants. Therefore, the legal authority cited by Plaintiff is both flawed and misguided.

Like in *Hahn*, Plaintiff solely serves as an investor and is not involved with the operation of FSJ. Furthermore, the operation of FSJ is highly complex and is of a scientific nature that is foreign and completely unfamiliar to Plaintiff. There is no chance Plaintiff would succeed in operating or managing the company.

C. PLAINTIFF'S APPLICATION FOR APPOINTMENT OF A TEMPORARY RECEIVER OVER FSJ IMPORTS, LLC MUST BE DENIED SINCE PLAINTIFF HAS NO VESTED INTEREST IN THAT CORPORATION

Plaintiff cannot move for appointment of temporary receiver of FSJ Imports, LLC because he does not possess any legitimate ownership interest in this entity.

A temporary receiver may be appointed "upon motion of a person having an apparent interest in property which is the subject of the [the] action." CPLR 6401[a]. The moving party must make a clear evidentiary showing of the necessity to conserve *his* interest in that property. (emphasis added).

Plaintiff has never expressly nor impliedly claimed any interest in FSJ Imports, LLC until his motion for appointment of temporary receiver. In fact, nowhere in Plaintiff's affidavit does he mention any ownership interest in FSJ Imports, LLC, or at the very least display any knowledge regarding the functioning and operation of FSJ Imports, LLC. (Affidavit of Joseph Lehey).

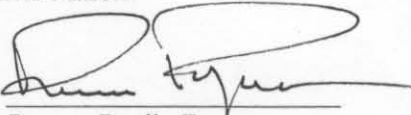
Plaintiff has never and does not currently own any interest in FSJ Imports, LLC. There is neither justification in law or in fact to conclude otherwise.

### CONCLUSION

For all the foregoing reasons, Plaintiff's motion should be denied in its entirety.

Dated: New York, New York  
March 25, 2011

Respectfully submitted,  
Law Office of Roman Popik, P.C.  
Attorney for all Defendants, except  
David Perillo, AMJG, LLC and  
Francis Massie

By:   
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