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

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JG CLUB HOLDINGS, LLC, as assignee of TDK Holdings, LLC, Individually and derivatively on behalf of JACARANDA CLUB, LLC

Index No. 652246/10

Plaintiffs,

-against-

JACARANDA HOLDINGS, LLC, DAVID M. TALLA a/k/a MICHAEL TALLA and CLUB AT 60TH ST., INC.,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION TO COMPEL NON-PARTY DEPOSITIONS AND IN OPPOSITION TO MOTION TO INTERVENE

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Defendants, Jacaranda Holdings LLC ("Jacaranda Holdings"), David M. Talla ("Talla"), Club at 60th Street, Inc. ("Club at 60th" and together with Jacaranda Holdings and Talla, "Defendants") submit this memorandum of law in opposition to the motion of GRKS II LLC and DZ Ventures, LLC (the "Proposed Intervenors") to intervene in this action and appoint a temporary receiver and in support of Defendants' cross-motion to compel the Proposed Intervenors to produce their principals, Jack Constantine and Francis Moezinia for depositions in response to subpoenas.

Preliminary Statement

This is an action brought by Jeffrey Wasserman ("Wasserman"), derivatively on behalf of JG Club Holdings LLC ("JG Club"). JG Club is a minority member of Jacaranda Club LLC ("Jacaranda Club"), the limited liability company that operates The Sapphire Club, a gentlemen's club on East 60th Street. Wasserman claims to be the majority member of JG Club. Wasserman further contends that the Proposed Intervenors are minority members of JG Club. Jack Constantine is the purported principal of

proposed intervenor GRKS II LLC and Francis Moezinia is the purported principal of proposed intervenor DZ Ventures LLC.

In October 2011, Defendants served nonparty subpoenas on Messrs Constantine and Moezinia. Counsel for Messrs Constantine and Moezinia initially agreed to produce them for depositions, but on November 16, 2011, counsel for Messrs Constantine and Moezinia filed the intervention motion on behalf of the Proposed Intervenors. Thereafter Messrs Constantine and Moezinia changed their positions and refused to make themselves available for deposition until after the disposition of their intervention motion.

In their motion, the Proposed Intervenors claim that they have the right to intervene in this action because they don't favor the relief requested by the plaintiff. The Proposed Intervenors contend that Wasserman should have caused JG Club to seek to dissolve Jacaranda Club, the entity that operates the Sapphire Club, and should have asked this Court to appoint a temporary receiver during the pendency of this action.

As we show below, the Proposed Intervenors' position is utterly devoid of legal support. The Proposed Intervenors lack standing to seek the judicial dissolution of Jacaranda Club as they are not members of that company. They cannot bring a dissolution action derivatively on behalf of JG because they have not, and cannot, plead demand upon JG Club or demand futility. Even if the Proposed Intervenors had standing, Jacaranda Club should not be dissolved as the Proposed Intervenors cannot show facts close to meeting the strict standard for the judicial dissolution of a limited liability company.

Because the Proposed Intervenors lack standing, they cannot ask the Court to appoint a temporary receiver for Jacaranda Club. Even if the Proposed Intervenors had standing, they have not alleged a single fact (other than the totally unsupported claim of

"skimming") that would support the imposition of a temporary receiver, a remedy that courts strongly disfavor and impose only rarely, and then, only based upon an overwhelming factual showing of misconduct by the controlling member of the limited liability company. The Proposed Intervenors have not made such a showing. Accordingly, the Court should deny the Proposed Intervenors' motion in all respects.

Facts

The Proposed Intervenors allege they hold a combined 6.875% interest in plaintiff JG Club. Plaintiff JG Club holds a 48.9% interest in Jacaranda Club, LLC. The remainder of the interest in Jacaranda Club LLC (*i.e.* 51.1%) is owned by defendant Jacaranda Holdings, which as provided in Jacaranda Club's Operating Agreement is the managing member of Jacaranda Club. The Proposed Intervenors do not hold any interest in Jacaranda Club, LLC.[1]

On or about October 10, 2011, Defendants served Jack Constantine with a non-party subpoena in this action On October 24, 2010, Defendants served Francis Moezinia with a non-party subpoena. Both subpoenas demanded Messrs Constantine and Moezinia appear and testify on November 2, 2011.[2]

On November 1, 2011, counsel for the Proposed Intervenors asked to adjourn the depositions of Messrs Constantine and Moezinia and said they would provide new dates. On November 15, 2011 counsel for the Proposed Intervenors again promised to provide new dates for the depositions. On November 16, 2011, the Proposed Intervenors filed their intervention motion. The Proposed Intervenors' Proposed Intervenor Complaint,

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[1] An organizational chart that graphically depicts these relationships is attached as Exhibit A to the accompanying Affirmation of Jeffrey A. Kimmel, executed November __, 2011 ("Kimmel Aff."). A copy of the Operating Agreement of Jacaranda Club is attached to the Kimmel Aff. as Exhibit B.

[2] Copies of these subpoenas and their affidavits of service are attached as Exhibit C to the Kimmel Aff.

which is attached to the moving papers at Exhibit A, asserts a single cause of action for judicial dissolution of Jacaranda Club pursuant to Limited Liability Company Law § 702. After electronically filing their motion, the counsel for Proposed Intervenors then changed their position and refused to produce their principals for deposition until after the disposition of their intervention motion.[3]

Argument

I. The Proposed Intervenors lack standing to seek judicial dissolution of Jacaranda Club.

Limited Liability Company Law § 702 provides that a proceeding to dissolve a limited liability company may only be brought "by or for" a member of the limited liability company. The statute states in pertinent part:

> *On application by or for a member*, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.

Limited Liability Company Law § 702 (emphasis added.)

The Proposed Intervenors are not members of Jacaranda Club. Thus the Proposed Intervenor Complaint is not brought by a member of Jacaranda Club. The Proposed Intervenors suggest, but do not actually argue, that they can avoid the requirement of membership by bringing their proposed action, derivatively, on behalf of JG Club. According to the Proposed Intervenors, they have standing to bring their Proposed Intervenor Complaint derivatively because JG Club owns a minority interest in Jacaranda Club.

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[3] Copies of the emails that document the facts stated in this paragraph are attached to the Kimmel Aff. at Exhibit D.

In order to maintain an action derivatively, a plaintiff must allege that it either demanded the entity bring the action in its own name, or alternatively, that it would be futile to make such a demand and provide an explanation for such futility. *Marx v. Akers*, 88 N.Y.2d 189, 644 N.Y.S.2d 121 (1996); *Segal v. Cooper*, 49 A.D.2d 467, 468, 856 N.Y.S.2d 12 (1st Dep't 2008) (applying the demand futility rule to derivative actions brought against a limited liability company). In *Marx*, in the context of a derivative action brought against a corporation, the Court of Appeals held, demand is considered futile only if the complaint alleges with particularity that:

(1) a majority of the directors are interested in the transaction;

(2) the directors failed to inform themselves to a degree reasonably necessary about the transaction; or

(3) the directors failed to exercise their business judgment in approving the transaction.

Marx, 88 N.Y.2d at 198.

Here, the Proposed Intervenors utterly fail to plead that they demanded JG Club bring a proceeding to judicially dissolve Jacaranda Club or that such demand would be futile. Indeed, it is impossible for the Proposed Intervenors to allege demand futility. JG Club is actually bringing this action. Thus it cannot be alleged that Wasserman, the person claiming to control JG Club, has a personal interest that prevents him from initiating litigation against Jacaranda Club or that Wasserman failed to inform himself of the relevant facts. The simple fact is that Wasserman chose not to seek dissolution as a remedy in this case (probably because, as discussed below, he knew that there was no lawful basis for it). The Proposed Intervenors also present no reason to upset Wasserman's business judgment concerning the relief he sought in this action.

Accordingly, because the Proposed Intervenors did not – and cannot – allege demand is futile, the Proposed Intervenors lack standing to bring their proposed derivative action. As a result, the Court should deny their motion to intervene.[4]

II. Because Jacaranda Club can be managed by Jacaranda Holdings, as Jacaranda Club's Operating Agreement provides, there is no basis for judicial dissolution.

Even if the Proposed Intervenors had standing, they would not be entitled to judicially dissolve Jacaranda Club. As the recent Second Department case, *In re 1545 Ocean Ave., LLC*, 72 A.D.3d 121, 893 N.Y.S.2d 590 (2nd Dep't 2010) makes plain, there is no basis upon which a court may dissolve a limited liability company unless the party seeking dissolution establishes, "in the context of the terms of the operating agreement or articles of incorporation, that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible." *1545 Ocean Ave.*, 72 A.D.3d at 131.

There is no evidence that would support either branch of the *1545 Ocean Ave.* test. Jacaranda Club's Operating Agreement provides that Jacaranda Holdings is to be the managing member. There is no evidence that Jacaranda Holdings is failing to cause Jacaranda Club to manage and operate The Sapphire Club and there is no evidence that the business is financially unfeasible. Accordingly, the Court should deny the Proposed

[4] The Proposed Intervenors, in their Notice of Motion, claim the right to intervene under CPLR 1012(a)(2), which provides for intervention when "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." The Proposed Intervenors however make no attempt to explain how this statute applies to them. While the Proposed Intervenors may be *affected* by the judgment, that is no different than what happens in any litigation involving entities. The owners of the entities are always affected by the result of the litigation. That fact alone does not justify intervention and is *not* the same thing as being "bound" by the judgment, which requires a *res judicata* effect of the judgment. *Vantage Petroleum, Bay Isle Oil Co. v. Board of Assessment Review of Town of Babylon*, 61 N.Y.2d 695, 472 N.Y.S.2d 603 (1984). The Proposed Intervenors have also failed to explain why Wasserman is not adequately representing their interests as purported investors in JG Club. Indeed, the only thing that the Proposed Intervenors complain about is Wasserman's choice of remedy. Accordingly, the Proposed Intervenors fail the test of CPLR 1012(a)(2).

Intervenors' motion to intervene and need not reach the issue of whether to appoint a temporary receiver. Additionally, Proposed Intervenors essentially allege only (without basis) that Jacaranda Holdings is "skimming." Even if this were the case, and it is not, Proposed Intervenors' remedy would be to sue JG for damages. Wasserman has already caused JG Club to bring this claim.

III. The Proposed Intervenors cannot meet the high standard required for the appointment of a temporary receiver.

If the Court determines that the Proposed Intervenors may not intervene, it should not consider their request for a receiver. CPLR 6401 governs the appointment of temporary receivers. The statute provides in pertinent part:

> *Upon motion of a person having an apparent interest in property* which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, *where there is danger that the property will be removed from the state, or lost, materially injured or destroyed.*

Civil Practice Law and Rules 6401 (emphasis added).

Because, as established above, the Proposed Intervenors have no interest in Jacaranda Club they lack standing to seek the appointment of a temporary receiver.

Even if the Proposed Intervenors had standing, however, the Court should decline to appoint a temporary receiver. The appointment of a temporary receiver is a drastic, disfavored remedy. *See DiBona v. General Rayfin, Ltd.*, 45 A.D.2d 696, 357 N.Y.S.2d 71 (1st Dep't 1974) ("The drastic remedy of the appointment of a receiver is to be invoked only where necessary for the protection of the parties to the action and their interests.") As the First Department wrote in *Armienti v. Brooks*, 309 A.D.2d 659, 661, 767 N.Y.S.2d 2 (1st Dep't 2003):

> CPLR 6401(a) authorizes the appointment of a receiver where "there is danger that the property will be removed from the state, or lost, materially injured or destroyed." As this Court has had occasion to note, "The drastic remedy of the appointment of a receiver is to be invoked only where necessary for the protection of the parties.... 'There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established' "

Armienti v. Brooks, 309 A.D.2d at 661, quoting *DiBona* 45 A.D.2d at 696; *see also Hahn v. Garary*, 54 A.D.2d 629, 387 N.Y.S.2d 430 (1st Dep't 1976); *Varadaris Tech, Inc. v. Paleros Inc.*, 49 A.D.3d 631, 853 N.Y.S.2d 601 (2nd Dep't 2008).

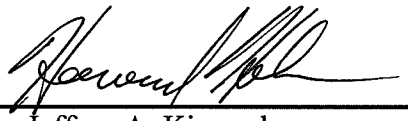
The Proposed Intervenors claim that defendants are "skimming" profits. But the defendants have not provided a scrap of evidence supporting this claim. And even if there was evidence of skimming, the remedy is to seek damages, not to dissolve the company. More important, the Proposed Intervenors have failed to present any evidence that there is a danger that property will be removed from the state, lost, materially injured or destroyed. Accordingly, the Proposed Intervenors have utterly failed to "clearly establish" this is a "proper case" for the appointment of a receiver and their motion should be denied.

Conclusion

For all the reasons set forth herein and in the other papers Defendants have submitted in opposition to this motion, the Court should not permit the proposed intervention and should not appoint a temporary receiver for Jacaranda Club. The Court should however, order that the Proposed Intervenors produce their principals, Jack Constantine and Francis Moezinia for nonparty depositions in this case.

Dated: New York, New York
November 30, 2011

MEISTER SEELIG & FEIN LLP



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Defendant.

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I, Ivonne Ramirez, being duly sworn, depose and state: I am over 18 years of age, am not a party to the foregoing action and reside in the County of Hudson, State of New Jersey.

On the 30th day of November 2011, I caused the within **Memorandum of Law** to be served by delivering a true copy thereof via Federal Express upon:

EISENBERG & CARTON
535 Broadhollow Road, Suite M105
Melville, New York 11747

Henry E. Rakowski, Esq.
2631 Merrick Road, Suite 201
Bellmore, New York 11710

Ivonne Ramirez

Sworn to before me this
30th day of November 2011

HOWARD S. KOH
Notary Public, State of New York
No. 02K04970615
Qualified in New York County
Commission Expires Sept. 26, 2014