Reply Brief of Plaintiff-Appellant

Respondents make three points in opposition to this Appeal. None of these arguments is sufficient to preclude reversal of the Judgment appealed from.

First, Respondents argue that the Company's Managers have the power to sell the Company's sole asset whether or not such sale is - or is not - in the regular course of the Company's business. (Respondents' Brief at 11-15)

Second, Respondents argue that the Operating Agreement is "silent" on the issue of whether and, if so, how, the Company may sell its sole asset and, thus, the Members and Managers - *i.e.* Respondents themselves - were free to resort to the Limited Liability Company Law (the "Act") as a default statute to obtain from the Act a power they expressly do not have under their Operating Agreement. (Respondents' Brief at 16-18)

Third, recognizing that the Operating Agreement does specify a method by which the Members may authorize the sale of the Company's sole asset (other than by unanimous consent of the Members), Respondents argue that even though the sale of the sole asset will necessarily terminate the Company's existence (an act which requires unanimous consent of the Members), a majority of Members nevertheless may authorize a majority of Managers to do an act which neither the

Members nor the Managers are authorized to do under the Operating Agreement. (Respondents' Brief at 18-19)

As will be demonstrated herein, Respondents are wrong in each respect.

I. The Managers Have No Power to Sell the Property Where that Sale is Outside the Company's Regular Course of Business

Respondents argue that general language in §3.1 of the Operating Agreement, which states the Company's Purpose, affords the Members the power to do an act which is not given to them in any express provision of the Operating Agreement. (Respondent's Brief at 12-13)

Section 3.1 states that the Company's Purpose is:

> To own and operate the Property and to engage in any lawful act or activity for which limited liability companies may be formed under the Act, and to engage in any and all activities necessary, advisable or incidental thereto.

(R.41) But §3.1 merely states that the Company - whose purpose is to own and operate one specified piece of real property - may also engage in acts lawful under the Act. Respondents' reliance on §10.2 of the Operating Agreement is similarly insufficient. Section 10.2 provides that:

> The majority of the Managing Members shall have the right, power and authority, in the management of the

> business and affairs of the Company, to do or cause to be done any and all acts, at the expense of the Company, deemed by the Managing Members to be necessary or appropriate to effectuate the business, purposes and objectives of the Company. [Emphasis added.]

(R.49) Respondents apparently (*see* Respondents' Brief at 12) rely on the highlighted portion of §10.2 as support for their argument that the Managers may do anything in pursuance of the Company's Purpose, and they consider the Company's purpose to be anything that is legal. Such an interpretation of the "Purpose" clause is far too broad, and would eviscerate the stated Purpose for which the Company was formed - the ownership and operation of one parcel of Property - and would ignore both (1) the provisions of the Operating Agreement which provide that Managers may only bind the Company to an act that is in the regular course of the Company's business (R.49, §§10.1(a), 10.2); and (2) settled law that the sale of the sole asset is outside the regular course of the Company's business, and thus outside the Managers' authority.

Respondents argue that because the Company can sell its sole asset, the Managers must have the "inherent power and authority to" sell the Company's sole asset. (Respondents' Brief at 13).[1]

Respondents also argue that the Act does not distinguish between conduct which is within or outside the regular course of a limited liability company's business (*id*., at 14) - a contention that is flatly contrary to §§10.1(a) and 10.2 - and, therefore, that the Company's Managers may do anything - because "the distinction whether the act being performed is within or without the Company's regular course of business <u>becomes meaningless</u>." (Respondents' Brief at 14, emphasis added.)

Respondents' argument proves too much: it is unsupported by the Operating Agreement and law, and it is contrary to decades of settled judicial authority. This Court should follow settled judicial authority applicable to both corporations and partnerships.[2] And settled law recognizes that there are limits on the authority of

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[1] Respondents now contend that the Managers must have the inherent authority to sell the Company's sole asset and to bring about the termination of the Company. But that is inconsistent with their argument that the Managers were authorized by the Members to sell the Property, and it disregards the express provisions of the provisions of the Operating Agreement that the Members may only exercise such rights or powers as are granted to them by "the express terms of this Agreement." (R.48, §9.1)

[2] *See e.g.* 32A <u>Limited Liability Company Act, McKinney's Consolidated Laws, Practice Commentaries</u> (at 175) ("An LLC can be considered a successful cross-breeding of the corporate form and the partnership form"). "The [Act's] provisions governing duties and liabilities of managers, including fiduciary duties, conflicts of interest and limitations on

partners, officers, directors, managers and members: they can only act within their authority, and there is no judicial or statutory authority to support Respondents' argument that a Manager has inherent authority to act outside the Company's stated Purpose, without regard to whether such act is within or outside the Company's regular course of business, and without regard to whether such act is or is not permitted under the Operating Agreement.

Respondents do not dispute that, under settled law, the Company's transfer of its sole asset is outside the Company's regular course of business as a matter of law. LaConti v. Urban, 309 A.D.2d 735, 765 N.Y.S.2d 634 (2nd Dep't 2003); Bouton v. Thomas Bros. Sales Corp., 179 A.D.2d 612, 578 N.Y.S.2d 232 (2nd Dep't 1992); Vig v. Deka Realty Corp., 143 A.D.2d 185, 531 N.Y.S.2d 633 (2nd Dep't 1988). (*See* Appellant's Brief, at 17-18) There is no basis on which a different rule could or should be applied to the acts and authority of a manager of a

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liability, follow corporate concepts for directors and almost word-for-word track the borrowed BCL provisions....While the case decisions, legislative history and commentator analysis should provide some precedents in understanding the [Act's] governance provisions, it is possible that the interpretation of the [Act's] provisions could diverge on the theory that the relationship of the managers to members is different from that of directors to shareholders. In a member-managed LLC, the relationship of the member-managers, among themselves is analogous to that of partners in a partnership (citations omitted)." *Id.*, at 201.

Respondents, however, without pointing to any authority for their position, argue that the law applicable to a limited liability company "is significantly different from the law as it relates to corporations...or to partnerships." (Respondents' Brief at 14, n.4) Respondents are wrong.

limited liability company organized under the Act. *See* Dukas v. Davis Aircraft Product, Inc., 131 A.D.2d 720, 516 N.Y.S.2d 781 (2nd Dep't 1987).

Nor do Respondents contend that the Managers have the power to authorize an act which would terminate the Company's existence. Plainly, such an act is not within the regular course of the Company's business, precisely because it terminates the Company and its business. *See* Bouton, *supra*; Vig, *supra*.

Respondents' argument is flawed for another, even more fundamental reason: Respondents claim that the Managers obtained their authority to sell the Property by a vote of a majority of the Members. (R.21) But a majority of the Members has no authority, under the Operating Agreement, to direct the Managers (or even a majority of them) to contract to sell the Property - the Company's sole asset. (R.50, §10.5; *see* Appellant's Main Brief at 16)

The Operating Agreement expressly provides that the only acts of the Managers that can bind the Company are those undertaken "in accordance with this agreement." (R.49, §10(a)) Actions - such as those by Respondents in this case - purportedly taken by the Managers in reliance on authority given to them by the Members (who had no such authority to give) are not binding on the Company.

Under the Operating Agreement, only the unanimous vote of all Members can achieve what a majority of the Members claim to have authorized a majority of the Managers done in this case.

II. The Operating Agreement is Not Silent, and Resort to the Act is Improper under these Circumstances

The Operating Agreement is not silent on the question of how the Company may act to bring about the sale of its sole asset. The Operating Agreement provides that such a sale, and certainly an act that will dissolve the Company, requires unanimous consent of the Members, and not a bare majority of the Members. (R.52-53, §12.1)

Respondents argue that the Operating Agreement - which their counsel drafted - is somehow silent on the question of how the Company may sell its sole asset. But that is not true. The Operating Agreement provides a means by which the Property can be sold, and by which the Company can be terminated - with the unanimous consent of all the Members. (*Id*.)

The Operating Agreement contains another limitation on Respondents' attempt to reach out to the Act for the authority that is denied them in the Operating Agreement: The Operating Agreement expressly provides that the Members only have such rights as they are given under the Agreement. The Members may only exercise such rights or powers as are granted to them by "the

express terms of this Agreement." (R.48, §9.1) There is no "express" provision in the Operating Agreement which gives a majority (or less than all) of the Members the right or power to authorize a majority of the Managers to sell the Company's sole asset (R.31, ¶23; R. 62, 21) or to do an act which will necessarily terminate the Company's existence.[3] Respondents' attempt to resort to the Act to confer on a bare majority of the Members a power or right that is plainly denied them in the Operating Agreement would be a violent and improper interpretation of the Operating Agreement. (*See* Appellants' Main Brief, at 14-15)

III. Unanimous Consent of All Members is Required for an act that will Dispose of the Sole Asset or Terminate the Company

Section 12.1(1) of the Operating Agreement expressly provides that the Company shall be terminated upon the sale of the Property. Section 12.1(iii) provides that termination shall occur with the written consent of all Members. Termination of the Company - prior to its expiration or a judicial decree of

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[3] Section 9.1 of the Operating agreement provides: "Except as otherwise specifically provided by this Agreement or required by the Act, no Member other than the Managing Members...shall have the power to act for or on behalf of, or bind, the Company." (R 48) the Operating Agreement does not otherwise make reference to the Act as a source of any power or authority for the Members or the Managing Members.

The Act does not require that the Members - and certainly not a bare majority of them - must have the power to authorize the Managers to do an act that they do not have the power to do under the Operating Agreement.

dissolution - requires the unanimous consent of all Members. This is so whether the termination occurs directly or indirectly. (*See* Appellant's Main Brief, at 23)

Respondents argue that nothing in §12 addresses how the Company may sell its sole asset and, therefore, the Members may resort to the Act. Respondents are wrong. The Operating Agreement provides that it is the entire agreement of the parties. (R.58, §17.3) this integration clause is sufficient to except the Operating Agreement from the provisions of §402 of the Act.

Because the sale of its sole asset necessarily results in the Company's termination, §12 must be read, in light of and consistent with all other provisions of the Operating Agreement, to require that a sale of the Property requires unanimous consent of the Members, and not the vote of a bare majority of Members or Managers - neither of which otherwise has the power under the Operating Agreement to bind the Company to a sale of its sole asset and to its demise.

Section 10.1(b) expressly provides that "an act of the Managing Member that is not apparently for carrying on the Company's business in the ordinary course shall not bind the Company." Respondents simply may not refer to the Act as a source of authority for acts which they expressly may not validly perform under the Operating Agreement.

Conclusion

Respondents' arguments ignore the language of the Operating Agreement. Respondents seek a power under the Act which they are denied under the Operating Agreement. The Operating Agreement drafted by their own counsel states that it is the parties' entire agreement. Respondents may not resort to the Act to circumvent the Operating Agreement and usurp a power which the Operating Agreement reserves to the Members acting unanimously.

The Judgment should be vacated and Supreme Court should be directed to enter judgment declaring that Respondents are not authorized to sell the Company's Property absent unanimous consent of all Members.

Dated: March 12, 2008 **BENOWICH LAW, LLP**

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