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

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JOSEPH LEHEY, individually and as a Member of FSJ, LLC, a Delaware Limited Liability Company, on behalf of himself and all other members of FSJ, LLC similarly situated and in the right of FSJ, LLC,

Index No. 112623/10

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.

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PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO RENEW MOTION FOR APPOINTMENT OF TEMPORARY RECEIVER AND OTHER RELIEF

Submitted by:

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted on behalf of Plaintiff Joseph Lehey ("Lehey" or "Plaintiff") in support of his urgent, good faith motion for:

i. Installing Plaintiff Joseph Lehey as manager of FSJ, LLC (the "Company") and removing Defendant Tim Goldburt as manager of the Company;

ii. Alternatively, granting Plaintiff leave to renew his prior application for appointment of a temporary receiver of the Company, and upon renewal appointing a temporary receiver of the Company;

iii. Appointing a temporary receiver of FSJ Imports, LLC; and

iv. Directing Defendants to produce to Plaintiff's forensic accountants, Mark Paneth & Shron, CPAs, all of the Company's books, records, and documentation required to complete the audit of the Company ordered by the Court on November 9, 2010.[1]

PRIOR PROCEEDING

Plaintiff's prior motion for appointment of a temporary receiver, a preliminary injunction directing Defendants to deliver all the Company's books and records to Plaintiff, and other relief

[1] The schedule of records and backup documentation Defendants should be ordered to deliver immediately is set forth at Exhibit "11" to the moving affirmation of Plaintiff's counsel, Jules A. Epstein ("Epstein Affirmation").

relating to the Company's books and records, was returnable before this Court on November 9, 2010. (See, transcript of November 9, 2010 proceeding - Epstein Affirmation, Exhibit "1".)

The record demonstrates that Defendants Ram Phosphorix, FSJ Imports, Goldburt and Sandy[2] have not complied with the Court's direction on November 9, 2010, have not cooperated with Plaintiff's forensic accountants Marks Paneth & Shron, CPAs ("MPS"), and have not delivered all of the Company's books and records MPS requires to complete the Company's audit the Court directed on November 9, 2010.

The books, bank statements and tax returns Defendants have thus far delivered to MPS reveal that Defendants may have embezzled, or have not accounted for, or wasted millions of dollars of Lehey's investment in the Company.

Plaintiff owns over 67% of the member interests[3] of the Company and contributed all of the Company's $7,500,000 capital investment. Despite this, in a truly nightmare scenario, Plaintiff has been frozen out entirely from the Company's business and operations and his investment by Goldburt and Sandy.

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[2] All Defendants other than David Perillo ("Perillo"), Francis Massie ("Massie") and AMJG, LLC ("AMJG"). Perillo, Massie and AMJG have not appeared or answered in this action. In any event, Defendants Goldburt and Sandy and their alter egos Ram Phosphorix, LLC, General Phosphorix and FSJ Imports, LLC, are the culpable parties. Goldburt and Sandy are in possession and control the Company's books, records, property and assets.

[3] Plaintiff initially owned a 10% interest. The interests of Massie, Perillo and AMJG have been assigned to Plaintiff, and Plaintiff now owns over 67% of the Company.

Defendants should be ordered to produce all financial records required by MPS immediately. Plaintiff as manager, or a temporary receiver, should be put in control of Plaintiff's multi-million dollar investment in the Company. Goldburt and Sandy should be removed from any management or control position on account of their mismanagement, misconduct and outright embezzlement.

STATEMENT OF FACTS

As the Court may recall, the Company's business is the production, development and sale of Medea Vodka known as the "message on a bottle".[4] Lehey brings this action individually and derivatively on behalf on the Company. Notably, Lehey invested $7,500,000 of cash in the Company. The Defendants invested no money in the Company.

The complaint (Exhibit "4" to Epstein Affirmation) alleges various causes of action against the Defendants for (i) fraud, breach of contract, breach of fiduciary duty and embezzlement relating to Company assets (i.e., my investment in the Company); (ii) declaratory judgment to remove Defendant Tim Goldburt ("Goldburt") as co-manager of the Company; (iii) declaratory judgment that the Company's books, records and tax returns be made available for Plaintiff's inspection and photocopying (as is

[4]The product bottles are of a unique design and incorporate an L.E.D messaging system.

Plaintiff's contractual right as a member of the Company); (iv) an accounting of the Company's affairs; (v) damages for aiding and abetting breach of fiduciary duty; (vi) setting aside various conveyances or transferring of the Company's funds and assets as fraudulent; (vii) awarding the attorneys fees and expenses; and (viii) alternatively, rescinding Plaintiff's subscription agreement to invest in the Company and returning his capital investment on account of Defendant's fraud.

DEFENDANTS HAVE NOT COMPLIED WITH THE COURT'S RULING ON NOVEMBER 9, 2010 TO FULLY COOPERATE WITH PLAINTIFF'S ACCOUNTANTS AND DELIVER BACKUP DOCUMENTATION AND INVOICES

Plaintiff previous motion for appointment of a temporary receiver[5] and other relief related to inspection of the Company's books and records was returnable November 9, 2010. Plaintiff engaged the national accounting firm of Marks Paneth & Shron, CPAs ("MPS") to analysis and audit the Company's financial affairs.

On November 9, 2010 the Court directed Defendants to make full disclosure of all the Company's financial affairs and make available all Company books and records and backup documentation as required by Plaintiff's accountants to audit the Company. See, Exhibit "1" - November 9, 2010 hearing transcript, pages 35-36.

[5] Perillo had resigned as co-manager, and Sandy and Massie were never managers. Perillo's resignation left Goldburt alone in control of the Company and acting in concert with Sandy, who should have no management role but has assumed a management role anyway. As Lehey's October 5, 2010 affidavit demonstrates, the members removed Goldburt as co-manager in July 2010 due to his misconduct.

Indeed, the Court denied Plaintiff's motion for appointment of a receiver on condition and in the expectation that Defendants will fully cooperate and provide full documentation of the Company's financial dealings. The Court warned Defendants that there will be "dire consequences if things are not turned over".

Defendants' turned over only selective portions of the documents MPS requires despite the Court's directive. Repeated demands were made on Defendants to fully comply with the November 9, 2010 ruling. For example, a schedule of documents required by MPS and consistent with the Court's ruling was delivered to Defendants' counsel on December 23, 2010. See, Epstein Affirmation - Exhibit "9". Defendants ignored this and every other demand and none of the documents on the schedule were produced.

On January 14, 2011, Sareena M. Sawhney, MPS's Director of Litigation and Corporation Financial Advisory Services, requested that Defendants' accountant, Richard Hodor, furnish the supporting work papers for FSJ's partnership tax returns. See, Epstein Affirmation - Exhibit "10". While Mr. Hodor promised to get the information to Ms. Sawhney, it was never provided.

Plaintiff made another, final demand on Defendants to furnish Company records and backup documentation to MPS on January 14, 2011. See, Epstein Affirmation - Exhibit "11".

Defendants did not produce these records. On the contrary, Defendants' continue to dispute Plaintiff's entitlement to have

these records examined and a thorough audit conducted by MPS, and contumaciously ignore the Court's clear and explicit direction on November 9, 2010. Importantly, the very backup documentation and invoices the Court ordered Defendants to give Plaintiff's accountants comprise the vast bulk of the documents Defendants refused to give to MPS.

In light of Defendants' defiance, on January 25, 2011 Plaintiff submitted a proposed order to enforce the Court's November 9, 2010 ruling that Defendants produce all of the records required by and fully cooperate with. See, Epstein Affirmation - Exhibit "12".[6]

THE FORENSIC ANALYSIS THUS FAR REVEALS DEFENDANTS HAVE LOOTED MILLIONS OF DOLLARS

Some bank records, tax returns and other materials were delivered to MPS. See, Sawhney Affidavit; MPS' summaries of analysis - Exhibit "14".[7]

In addition to Plaintiff's $7,500,000 capital investment, the Company apparently had approximately $1,321,000 of product sales and other unexplained deposits.[8]

[6]Defendants submitted a counter-proposed order. See, Epstein Affirmation - Exhibit "13". Upon information and belief, as of this writing the Court has not entered an order.

[7]The full analysis is voluminous but can be produced for the Court.

[8]MPS' analysis shows total receipts of some $8,945,000 including Lehey's investment, necessarily meaning that over $1,000,000 of sales were generated. (The reason why total deposits reflect $10,945,00 is a $2,000,000 wire

MPS' results thus far are extremely disturbing, to the point that Goldburt's and Sandy's embezzlement may rise to a level of criminal misconduct. Millions of dollars are accounted for or have been expended for unknown reasons and/or to unknown payees or vendors, or have simply been paid to Defendants, to Defendants' family members, or to their alter egos.

The highlights of MPS's analysis reveal at least the following embezzlement, unanswered questions or waste of Plaintiff's investment:

- Company funds totaling approximately $770,000 were paid as purported salaries to Defendants Tim Goldburt, Sandy Massie and David Perillo. These salaries were not authorized by the Company, or its by-laws or Operating Agreement.

- Purported business expenses of another $429,000 were reimbursed to Defendants Sandy and Goldburt. These expenses have not been documented or explained.

- Undocumented personal expenses of some $198,000 were paid to Goldburt and Sandy from Company funds, including a check of $102,000 was paid to Goldburt's wife, Tatiana Goldburt.

- Approximately $63,000 was transferred by the Company to Defendant RAM Phosphorix, LLC[9] to cover interest and principal on a loan account secured with Lehey's money but without his authorization.

- Approximately $172,000 of Company funds were transferred to an unknown savings account.

- Approximately $5,900,000 of Company funds were disbursed for unknown expenses, including a $2,000,000 domestic

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transfer appears to be double counted. Thus, the true amount of deposits is $8,945,000.)

[9]Owned by Goldburt.

wire transfer to an unknown recipient. Approximately $1,528,000 of such funds may be for business related expenses, but insufficient backup documentation has been provided to MPS to confirm the nature of these expenditures.[10] Even if $1,528,000 of these potential business related expenses are documented, in excess of $2,900,000 of fund transfers remain unexplained.

- Current sales and expenses are undocumented to MPS, though there is reason to believe Company sales of approximately $1,100,000 are also unaccounted for.

- Approximately $309,000 of American Express charges were paid for with Company funds. The charges include such personal items such as travel expenses for Goldburt's family members, unexplained trips to Paris, France and Aruba, all manner of personal expenses for luxury travel, meals and personal items, and expenses for life insurance and health insurance premiums for Tim Goldburt and Matt Sandy that were unauthorized by the Company.

Not only may Defendants have embezzled a considerable portion of Lehey's $7,500,000 capital investment, they even grabbed the tax benefits of claiming the ordinary losses of Lehey's investment on their personal income tax returns.

Although Lehey's investment was, or should have been, expended on production, product development, marketing and other business expenses (even the unauthorized salaries to Defendants!), none of these expenses show up on the Company's tax returns. For his $7,500,000, Lehey's K-1's report losses totaling only $50,000. See, Exhibit "15"; Sawhney Affidavit.

Instead, through accounting sleight-of-hand, Defendants shifted these expenses to their alter-egos General Phosphorix, Ram

[10]Defendants' refusal to produce backup documentation and invoices leads to the presumption that these expenses were improper and cannot be justified by Defendants.

Phosphorix and FSJ Imports LLC. All entities Plaintiff has no interest in. Goldburt, Sandy and Rubin[11] control those entities, and likely claimed the ordinary losses, that should have been reported on the Company's tax returns, on their own tax returns by means of General Phosphorix's K-1's reported to Defendants.

FSJ's tax returns report "investment" balances of $3,864,000 in Ram Phosphorix and $907,125 in FSJ Imports - a total of $4,771,725. See Exhibit "16".

Ram Phosphorix[12] is a wholly-owned subsidiary of General Phosphorix. General Phosphorix is wholly owned and controlled by Goldburt, Rubin and their cronies. (The General Phosphorix tax returns report Ram as a pass through entity.)

There was no apparent business reason for the Company to "invest" in Ram Phosphorix (its own member!).[13] This "investment" was Lehey's money, but the ordinary losses arising from this so-called "investment" were probably claimed by Goldburt, Rubin and their cronies on their own income tax returns through General Phosphorix's K-1's.

General Phosphorix returns report no sales or revenues. See, Exhibit "17". In all likelihood the expenditures for which General Phosphorix claimed ordinary losses were the funds Plaintiff

[11]Rubin, though ostensibly the Company's attorney, holds a previously undisclosed interest in General Phosphorix.

[12]100% owned by Goldburt and a 27% member of the Company.

[13]This entity filed no tax returns.

invested in FSJ and that Defendants wrongfully transferred to Ram Phosphorix, LLC ("Ram").

Even Defendant Joseph Rubin, ostensibly the Company's attorney, helped himself to Lehey's investment in this fashion.

The General Phosphorix K-1's reported that Defendants took the following distributions of the money Plaintiff invested in the Company:

	2009
Goldburt	$ 103,281
Sandy	30,326
Rubin	52,465

The General Phosphorix K-1's also show Defendants probably helped themselves to ordinary losses on their personal income tax returns. The losses Defendants reported from General Phosphorix K-1's are:

	2007	2008	2009
Goldburt	272,204	1,633,488	2,295,965
Sandy	6,901	42,443	58,258
Rubin	11,949	71,709	100,788

It was not enough for Goldburt and Sandy to embezzle Lehey's money entrusted to them. Their unbounded greed and arrogance even led them to plunder the tax benefits of Lehey's investment for themselves.

Defendants cannot be allowed to remain in control of the Company's products, assets, accounts and funds. Defendants have a sordid history of helping themselves to Plaintiff's money for their

personal use and enjoyment, failing to account to Plaintiff for his investment, abusing their fiduciary duties owed to Plaintiff, and engaging in dubious tax accounting practices to further enrich themselves at Lehey's expense.

The Court also observed that the intellectual property (trademarks, patents and pending patent applications) relating to the "message on a bottle" design and LED systems should be owned by the Company, not by Goldburt and Sandy. See, transcript - Exhibit "1". Indeed, Defendants' Private Placement Memoranda (PPM) disseminated to would-be investors represents that the Company owns its intellectual property.[14] See, Exhibit "18". Yet, ownership of the intellectual property remains with Goldburt and Sandy and has not been assigned to he Company.

Goldburt and Sandy have thumbed their noses at Plaintiff:

i. We take your money and give ourselves whatever we want as "salary" until no money is left;

ii. We don't account for the money - just take our word for how it is spent;

iii. We don't account for product sales or inventory;

iv. We keep the intellectual property as our own, thereby rendering the Company and Plaintiff's investment essentially worthless beyond its inventory value; and

v. We get the tax benefits from losing or spending your money.

[14]See, pages 10-11 - Exhibit "18".

Lehey has nothing to show for his $7,500,000 investment and super majority ownership of the Company. Through dubious accounting techniques, Defendants shifted millions of dollars Plaintiff invested into their alter-egos Imports, RAM and General Phosphorix.

If the Court believes this is fair and what Plaintiff's investment agreement calls for, then the Court should deny this motion. If not (and of course this is not what Plaintiff's investment agreement calls for and Defendants' position is patently unconscionable), then Plaintiff should be granted all the relief demanded.

Defendants should be ordered to immediately turn over all remaining business records required by to MPS and should be removed from management and control of the Company. Plaintiff himself is perfectly capable of managing the Company and attempting to salvage his own multi-million dollar investment. See, Lehey Affidavit.

POINT I

MOTION FOR LEAVE TO RENEW MOTION FOR APPOINTMENT OF TEMPORARY RECEIVER

CPLR 2221 authorizes a party to move for leave to renew a prior motion where the renewal motion is based upon new facts not offered on the prior motion that would change the prior determination and based on a reasonable justification for failure

to present such facts on the prior motion. See, CPLR 2221(e)(2) and (3).

Here, Plaintiff meets the requirements to renew his motion for installation as manager of the Company or appointment of a temporary receiver.

The Court ordered Defendants to fully cooperate with Plaintiff's forensic accountants, MPS, and ordered full transparency of the Company's financial dealings. The Court warned Defendants of dire consequences, including the appointment of a temporary receiver, if there was not full transparency and full cooperation.

There has not been full transparency, there has not been full cooperation and Defendants have stonewalled delivering backup documentation and invoices to MPS despite the Court's order that Defendants do so immediately.

Quite obviously, Defendants disobedience of the Court's direction on November 9, 2010 was not a fact in existence on the prior motion.

Moreover, the bank statements, tax returns and records Defendants have produced clearly evidence Defendants' self-dealing, mismanagement and embezzlement of Plaintiff's investment.

These facts too were not known at the time of the prior motion because the records were delivered after November 9, 2010.

Accordingly, Plaintiff satisfies the standard for a renewal motion standards. Indeed, on November 9, 2010 this Court authorized Plaintiff to renew his motion in the event of Defendants' non-cooperation.

POINT II

APPOINTMENT OF TEMPORARY RECEIVER

CPLR 6401 provides that the Court may appoint a temporary receiver where property that is the subject of litigation is in danger of being removed from the state, lost, or materially destroyed, or injured. A party may be appointed as temporary receiver. Rose v. Rose, 305 AD2d 578; Border v. Broudarge, 38 NYS282, Gadamski v. Gadamski, 256 AD2d 675, and Bobeal v. Bobeal, 196 AD2d 471.

New York courts have not hesitated to appoint temporary receivers in similar context. See, Gimbel v. Reibaum, 78 AD2d 897 (temporary receiver appointed where Plaintiff's interest in property established and evidence established defendants co-mingled funds); Chaline Estates v. Furcraft Associates, 278 AD2d 141 (temporary receiver appointed where management manifested a pre-disposition to take unilateral action in disregard of Plaintiff's rights thereby demonstrating a danger of material injury to property); Somerville House Management v. American Television Syndication Company, 100 AD2d 821 (temporary receiver appointed where an investment but then diverted).

See also, Dolgoff v. Projectavision, 235 AD2d 311 (1st Dept., 1997); Singh v. Brunswick Hospital Center, 2 AD3d 433 (2nd Dept., 2003).

POINT III

RENEWAL OF MOTION FOR APPOINTMENT OF TEMPORARY RECEIVER

Plaintiff has no information about products sales or expenses, even though Plaintiff owns over 67% of the Company and provided all its capital.

The Company's assets are, or should be (i) an inventory of approximately 500,000-600,000 bottles of finished products; (ii) $1,000,000 or more of sales receipts; and (iii) intellectual property (trademark, patents, and patent applications) relating to the products unique bottle design and LED message system).

In order to avert complete destruction of Plaintiff's investment at Defendants' hands, Plaintiff or a temporary receiver must be put in control of the Company immediately.

Lehey has received assignment of the member interests of Defendants Massie, Perillo and AMJG and owns and controls over 67% of the member interests of the Company.[15]

[15]The Court may recall that three (3%) percent of the member interests were not issued and were not outstanding on November 9, 2010. See, transcript - Exhibit "1", page 7. Subsequently, and as a further measure of their arrogance, Goldburt purportedly issued that remaining three (3%) percent member interest to Sandy. Goldburt had no right to do so and his purported issuance of additional three (3%) percent member interest to Sandy was unauthorized and invalid.

Lehey issued a notice that a meeting of the Company members to be held on January 13, 2011 for the stated purpose of appointing Lehey manager of the Company.

All of the Company members, Lehey, Goldburt (representing Ram Phosphorix, LLC) and Sandy were present at the meeting.

Lehey was nominated as manager of the Company by 67.04% of the member interests.[16] See, minutes - Exhibit "20".

Lehey demanded, again, that Defendants make available to him the Company's books, records, premises, products, inventory, etc. as the Company manager. See, Exhibit "11". Defendants ignored this demand, as though Lehey didn't even exist.

The Company is currently controlled and operated by Goldburt and Sandy. They have embezzled hundreds of thousands, if not millions, of dollars without Lehey's authorization and without any legal or contractual right to the money. They have incurred hundreds of thousands of dollars of undocumented personal expenses, including through use of credit cards paid for with Lehey's money.

Goldburt and Sandy refuse to account to Lehey for current product sales that may exceed $1,100,000 and another $200,000 or more of unidentified deposits.

Goldburt and Sandy have denied Lehey access to the Company's inventory, books and records.

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[16]The managers were originally Perillo and Goldburt. Lehey's prior affidavit notes that Perillo resigned as a manager and Goldburt was removed as a co-manager at a members meeting held on July, 2010.

Sandy is not and never was manager of the Company. Sandy was never authorized to be an employee, officer or director of the Company. Nonetheless, he has assumed those roles for himself.

Goldburt is guilty of fraud and looting the Company's funds and was removed as a co-manager months ago. Nonetheless he refuses to step down as manager and continues to freeze Lehey out from Company affairs while at the same time looting Lehey's money invested in the Company.

On the other hand, Lehey owns over 2/3 of the Company's member interests and contributed all of the Company's capital investment of $7,500,000. Lehey has taken concrete steps to rescue the Company and his investment from Defendants' sticky hands. See, Lehey Affidavit. We reiterate that Goldburt and Sandy contributed not one dime to the Company.

Lehey should be installed as manager in an effort to salvage what remains of his multi-million dollar investment. Goldburt and Sandy should be removed from any management positions and ordered to turn over all the Company's property to Lehey.

Alternatively, a temporary receiver of the Company should be appointed for any one or more of the following reasons:

i. Defendants refuse to account for current sales and expenses of Company products;

ii. Defendants disobeyed the Court's order directing them to make full disclosure to Plaintiff's forensic accountants and make the Company's affairs fully transparent;

iii. The financial records thus far produced demonstrate that Defendants paid themselves millions of dollars without Lehey written consent as required by the Company's Operating Agreement and Letter of Intent.

iv. Defendants have not accounted for millions of dollars of Lehey's investment, apparently expended on undocumented business expenses or reimbursement of alleged expenses to Goldburt and Sandy.

v. Defendants have also refused to turnover the intellectual property relating to the Company's "message on a bottle" products, even though the private placement memoranda Defendants themselves have prepared and disseminated represent the Company owns the intellectual property. (Of course, Defendants represented to Plaintiff when he made his investment that the Company would own the intellectual property it seeks to exploit.)

It is difficult to imagine a more appropriate case for installation of a receiver than this case.

POINT IV

RECEIVER FOR FSJ IMPORTS, LLC

Defendants scheme includes transferring substantial funds to FSJ Imports, LLC ("Imports"), Sandy's alter ego, and Imports paid out millions of dollars Plaintiff invested in the Company.

Upon information and belief, Defendants place all product sales through Imports and Imports receives the sales receipts. However, Imports filed no tax return and Defendants refuse to account to Plaintiff for Imports' expenses[17] and sales.

A temporary receiver of Imports should also be appointed to prevent further diversion of assets and sales receipts.

CONCLUSION

An order should be made directing Defendants' to immediately deliver to Marks Paneth & Shron, CPAs all backup documentation and invoices required to complete the audit of FSJ, LLC as set forth in the scheduled documents dated January 13, 2011. Defendant Goldburt should be removed as manager of FSJ, LLC and Plaintiff installed as manager of FSJ, LLC. Alternatively, a temporary receiver of FSJ, LLC should be appointed by the Court. A temporary receiver of FSJ Imports, LLC should also be appointed by the Court.

Dated: Garden City, New York
February 25, 2011

Respectfully submitted,

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[17]All expenses being paid with Plaintiff's investment funds.