SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

Hon. Margaret A. Chan, J.S.C.

VISION BIOBANC HOLDINGS, LLC,

Index No. 651706/2024

Plaintiff,

-against-

DEREK TALLER,

Defendant.

(Motion Sequence No. 002)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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Dated: May 10, 2024

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Defendant Derek Taller ("Taller" or "Defendant") through its attorneys, Walters & Walters, respectfully submit this Memorandum of Law in opposition to the instant order to show cause (Motion Seq. 002)(the "Motion") by Plaintiff Vision BioBanc Holdings, LLC ("Plaintiff" or "Vision" or the "Company") seeking preliminary restraints enjoining Defendant from contesting the managerial authority over the Company by Barry Saxe, Donald Garlikov, Stormy Adams, Joseph Taussig, and Ruben Neftali Gety Rodriguez (collectively, the "Saxe Board").

I. PRELIMINARY STATEMENT

This matter arises out of a dispute concerning whether the members of the Saxe Board were properly appointed as the board of managers of the Company (the "Board") or whether Defendant Derek Taller remains the chairperson of the Board along with the other board members, Max Arella and John Phillip Szabo, (collectively the "Taller Board"), because the members of the Saxe Board failed to follow the strictures of the Company's operating agreement (the "Operating Agreement")(NYSCEF Doc. 11, a copy of which is annexed to the Affidavit of Barry Saxe dated April 12, 2024 [the "Saxe Aff."][NYSCEF Doc. 10) when they ostensibly ousted the Taller Board and installed themselves as members of the Board.

Animated by the Saxe Board, the Company moves for a pre-answer injunction that, in essence, declares that the Saxe Board is the legitimate Board for the foreseeable future. Put differently, the Saxe Board asks the Court to grant it the ultimate relief it seeks in this declaratory action by appointing them to be the Company's Board.

It is respectfully submitted that the Motion should be denied because Plaintiff has not made the requisite showing that the Saxe Board is entitled to any injunction (much less an injunction that alters the *status quo* heavily in favor of the Saxe Board) by demonstrating that

any of the relevant factors required to grant such relief (*e.g.*, irreparable harm, likelihood of success, balance of equities) tip in the Saxe Board's favor.

As more fully set forth hereinafter, the Saxe Board has a low likelihood of success on the merits because they have not shown that Mr. Taller was removed – or the Saxe Board installed – in accordance with the Company's Operating Agreement. Moreover, given that Defendant consents to the payment of certain vendors and creditors in the regular course of business, no irreparable harm will result if the injunction is not granted. Finally, the balance of equities favors declining to enjoin Mr. Taller from asserting his rights as chairman of the Company.

The Motion should also be denied because it seeks to award the Saxe Board the ultimate relief that is sought in the Complaint at the pre-answer stage. The Motion does not provide sufficient justification for the issuance of a typical injunction, much less make the heightened showing of unusual circumstances needed to justify the rarely granted remedy of a pre-answer injunction that alters the *status quo* and would award the final relief sought.

As a result, and for the reasons more fully set forth *infra*, it is respectfully submitted that the instant Motion should be denied in all respects.

II. ARGUMENT

Point 1: This action should be dismissed because the Company is an improper Plaintiff – the Company lacks standing and must remain neutral in a dispute between two boards of managers that both claim to have legitimate authority to control of the Company

Before turning to the merits of the Motion, it is important to address a threshold issue with this action that not only requires denial of the Motion, but outright dismissal of this case; that the Company, and not the Saxe Board, is the named Plaintiff herein.

This litigation involves a clash between competing slates of board members, both of whom claim to be the current "legitimate" Board. Under these circumstances the Company must remain neutral in the dispute between the Saxe Board and the Taller Board and, accordingly, cannot appear as a litigant or otherwise favor of one group over the other.

After all, where there are two competing parties, each of whom claims to have been duly elected to control a company, the company itself can neither advocate for one slate of electors over another nor fund litigation favoring either side. In other words, when there is a legitimate disagreement between two competing factions claiming to have the power to control a company, the "neutrality principle" mandates that the company itself cannot choose a side.

This principle is rooted in straightforward contract law. Where, as here, a company's operating agreement vests power in a board of managers to control the company, typically there is no dispute over whether the board of managers can animate the company to litigate or otherwise take action against other parties when it is in the company's interest.

But where there is a legitimate dispute over who comprises the board of managers and it is thus unclear who has rightful control of the company, neither faction has a greater claim to the

company's name or resources than the other and, accordingly, neither faction has the authority to animate the company or use the company's resources against the other to bolster its position.

A recent Delaware[1] case is instructive in this regard. In *In re Aerojet Rocketdyne Holdings, Inc*., (C.A. No. 2022-0127-LWW at p. 36, n. 163 [Del. Ch. June 16, 2022]), the Delaware Chancery Court coined the phrase "the neutrality principle" and held under analogous circumstances that "[w]here a control dispute prevents the board – charged with the duty to oversee the entity – from validly acting, the corporation cannot take sides. The question of who may act for the entity must first be resolved." Put differently, a corporation "must remain neutral when a there is a legitimate question as to who is entitled to speak or act on its behalf." *Id*.

In doing so, the *Aerojet* court reasoned that, under the neutrality principle, "[t]he corporation – the 'neutral *res*' – cannot take sides while the control dispute is unresolved" because "entity's sole interest is that it be managed by those who are authorized to serve in that role." *Id*. But where "the Board has deadlocked in a contested election, [the company] is (and must remain) neutral as to the election's outcome" because it is not clear which faction is authorized to manage the company in the first instance. *See Id*.; *see also Pearl City Elevator, Inc. v. Gieseke*, C.A. No. 2020-0419-JRS, p. 11-12 (Del. Ch. Sep. 21, 2020)("Of course, as a general matter, [the company] should be neutral as to that dispute . . . between competing factions of directors."); *cf. Insituform of North America v. Chandler*, 534 A.2d 257, 270 n.12 (Del. Ch. 1987)("speaking very generally" the Delaware Code "is designed to prevent those in control of a corporation from using corporate resources to perpetuate themselves in office.").

[1] Although the Company is governed by Puerto Rico law, in the absence of Puerto Rico jurisprudence governing this issue, Delaware law is particularly influential since Puerto Rico corporate law is modeled after the Delaware Limited Liability Company Act. *See Wiley v. Stipes*, 595 F. Supp. 2d 179, 185 (D.P.R. 2009)(looking to Delaware corporate law when interpreting Puerto Rico law "[b]ecause Puerto Rico corporate law was modeled after Delaware corporate law.")

This conclusion makes sense. After all, without a determination by the Court as to whether the resolution on which the Saxe Board relies conforms with the requirements of the Operating Agreement, the Taller Board and the Saxe Board have an equal claim of control over the Company. But if the Saxe Board were permitted to animate the Company to hire counsel and sue Mr. Taller for declaratory relief naming them the "legitimate" Board as it has done here, then Mr. Taller would have an equal right to animate the Company to hire counsel and countersue in the Company's name for declaratory relief declaring that he is the "legitimate" chairman of the Board. Fortunately, the neutrality principle, which prohibits the Company from choosing a side in a dispute over who controls the Board, prevents the absurd result where the Company is pitted against itself and making conflicting claims about who controls it.

Puerto Rico statutory law not only supports the conclusion that a corporation may not choose a side in a contested election of its own managers or directors, but it also mandates that this action be dismissed because the Company lacks standing to litigate the underlying dispute herein. Specifically, Puerto Rico Laws Ann title 14 § 3655(a) provides that only "a stockholder or director, or any officer whose title to office is contested" has standing to litigate "the validity of any election, appointment, removal or resignation of any director, member of the governing body, or officer of any corporation."

Critically, unlike subsection (b) of the same statute, which expressly authorizes "the corporation" to bring claims concerning "the result of any vote of stockholders or members, as the case may be, upon matters *other than the election of company directors, officers or members,*" (emphasis added), § 3655(a) excludes "the corporation" from the list of parties with standing to litigate claims concerning the validity of the removal or appointment of managers and directors. *See Law Debenture Trust v. Petrohawk Energy Corp*., C.A. No. 2422-VCS, 25 n.

37 (Del. Ch. Aug. 1, 2007)(interpreting near-identical Delaware law and holding that "in cases to contest the validity of a corporate election, the only parties with standing are stockholders, directors, and officers whose titles to office are contested."). That § 3655(a) does not include "the company" as a party with standing to litigate claims concerning the validity or the removal or appointment of managers signals that the Puerto Rico legislature – like the Delaware legislature – intended that a company itself may not bring an action on behalf of either faction vying for control of the company to legitimize their place on the company's board.

That the Company is not a proper plaintiff in this particular action is further underscored by the fact that the Complaint does not seek any relief for the benefit of the Company itself, but instead only for the benefit of the Saxe Board. As noted above, the Company itself does not actually have an interest in the identity of its managers, provided that its managers are "those who are authorized to serve in that role." *Aerojet*., at p. 36. Here, however, the Complaint only seeks declaratory relief declaring that the Saxe Board, and not the Taller Board, is the "legitimate" Board. (*See generally* Complaint). But since the Company does not actually care who its managers are as long as they are duly appointed to manage the Company in accordance with the Operating Agreement, that relief is strictly for the benefit of the Saxe Board.

At bottom, this case should be dismissed because the Company is not a proper Plaintiff. While the members of the Saxe Board may be entitled to start an action seeking similar relief against Mr. Taller in their own names and using their own funds, they are prohibited from using the Company to sue Mr. Taller or use Company funds to do so. Accordingly, it is respectfully submitted that this case should be dismissed, the temporary restraining order vacated, and the Motion denied.

Point 2: The Standard for the Granting of Injunctive Relief

Defendant is well-aware that the Court is familiar with the showing a litigant must make to be entitled to injunctive relief and will not belabor the point here. Suffice it to say, "[t]he remedy of granting a preliminary injunction is a drastic one which should be used sparingly." *Benefit St. Partners Realty Operating Partnership, L.P. v. Di Hao Zhang*, 2022 NY Slip Op 34466(U) at *4 (Sup Ct N.Y. Cty Jan. 23, 2023)(Chan, J.).

"To be granted a preliminary injunction, [the party seeking the injunction] must establish with clear and convincing evidence that they (1) have a likelihood of success; (2) will suffer irreparable harm without the injunction; and (3) that the equities are in their favor." *Walsam 316, LLC v. 316 Bowery Realty Corp.*, 2018 NY Slip Op 32476(U) at *3 (Sup Ct N.Y. Cty Oct. 2, 2018)(Chan, J.); *citing* *Nobu Next Door LLC v. Fine Arts Housing, Inc*., 4 N.Y.3d 839 (2005).

The requirements for such a showing are further heightened where a litigant does not merely request an ordinary preliminary injunction, but instead requests an injunction altering the *status quo* and providing the pre-answer award of the ultimate relief sought in the complaint.

Indeed, to be entitled to such an unusual and drastic remedy, a litigant must not only satisfy the familiar three-prong test for the issuance of a typical preliminary injunction but must also show that additional "extraordinary circumstances" exist that justify the issuance of a preliminary injunction disturbing the *status quo* and granting the ultimate relief sought. *See e.g.*, *St. Paul Fire & Mar. Ins. Co. v. York Claims Serv.*, 308 A.D.2d 347, 349 (1st Dep't 2003) (holding that an injunction should not issue "absent extraordinary circumstances, where the *status quo* would be disturbed and the plaintiff would receive the ultimate relief sought."); *Spectrum Stamford, LLC v. 400 Atl. Tit., LLC*, 162 A.D.3d 615, 617 (1st Dep't 2018)("A mandatory preliminary injunction by which the movant would receive some form of the ultimate

relief sought as a final judgment is granted only in unusual situations, where the granting of the relief is essential to maintain the *status quo* pending trial of the action")(quotations omitted);

With these principles in mind, it is respectfully submitted that the Motion does not come close to justifying the extraordinary and rare issuance of a preliminary injunction altering the *status quo* and that the Motion should be denied accordingly.

Point 3: The Saxe Board has failed to show that it has a clear right to the relief sought or a likelihood of success on the merits.

"A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts upon the moving papers." *1234 Broadway LLC v. W. Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 A.D.3d 18, 23 (1st Dep't 2011)(citations omitted). Here, however, the Saxe Board has not shown "a clear right to relief" or a likelihood of success on the merits of its claim that the Taller Board was removed and replaced in accordance with the requirements set by the Operating Agreement. Accordingly, this prong falls in favor of declining to issue a preliminary injunction.

The Saxe Board claims that Taller Board was removed and the Saxe Board installed pursuant to a certain member resolution in lieu of a meeting dated December 20, 2023, a copy of which is annexed to the Saxe Aff. as Exhibit B (the "Member Resolution")(NYSCEF Doc 12). (*See* Saxe Aff. at ¶14). Alternatively, they claim that there was a meeting of the members on January 26, 2024 where the majority of the members (whether by proxy or directly) affirmed the removal of Taller Board and ratified the appointment of the Saxe Board. (See Saxe Aff. at ¶15). These claim are insufficient to support the issuance of a preliminary injunctions for two reasons as set forth *infra*.

(A) The Saxe Board has failed to meet its burden by showing a likelihood of success on the merits because it has not attached any documentary proof that supports its claims that the Taller Board was properly removed.

Put simply, there is no proof attached to Plaintiff's papers in support of the Motion that corroborates the Saxe Board's claims. The Saxe Board submits no documentary evidence whatsoever with respect to the January 26, 2024 meeting and instead only provides the Court with bald, undetailed, and conclusory allegations concerning the meeting that are not supported by any evidence at all. (*See* Saxe Aff. at ¶15).

Moreover, nothing on the Member Resolution attached to the Saxe Aff. suggests that any Unitholder (other than Barry Saxe) approved it, much less that it was approved by a majority of the Unitholders[2], as the Saxe Board claims. Indeed, Schedule 1 annexed thereto, which purports to be a "Table of Membership Units held by the members signing this resolution and their respective ownership percentages" is blank. Accordingly, the Saxe Board cannot rely on the Membership Resolution to support its request for a preliminary injunction because it is defective on its face.

If any documents supporting their claim that the Taller Board was removed on either December 20, 2023 or January 24, 2024 existed, it would have been easy for the Saxe Board to provide them. Yet there is no proof that the majority of the Unitholders signed the Member Resolution. Nor is there any notice of the meeting, meeting minutes, copies of resolutions, proxy authorizations, and/or a recording of votes with respect to the purported January 24, 2024

[2] Rather than refer to owners of the Company as "members" and their ownership interest as a "percentage interest," the Operating Agreement refers to owners of the Company as both "Members" and "Unitholders" and measures their ownership interest in terms of the number of "Units" they hold.

meeting sufficient to demonstrate that the Unitholders resolved to remove the Taller Board and install the Saxe Board.

Absent such proof, the Saxe Board cannot carry its burden of showing a "a clear right to relief" on the merits of their claim that the Taller Board was properly removed – and the Saxe Board installed – by either the Member Resolution or at a meeting on January 26, 2024. *See Manhertz v. Harcharran*, 2019 N.Y. Misc. LEXIS 43631, at *2-3 (Sup Ct Queens Cty Oct. 1, 2019)(preliminary injunction denied where "plaintiffs have failed to establish a likelihood of success on the merits" because "plaintiffs offer no documentary evidence to support their claims."); *see also Maldonado v. Arnaud*, 2023 N.Y. Misc. LEXIS 5863, at *14 (Sup Ct, Bronx Cty Feb. 1, 2023)(denying injunction because "conclusory statement[s], corroborated by no documentary evidence falls well short of the requisite mark . . . the sheer absence of any specific and concrete evidence . . . is fatal."). This is particularly true here, since the showing needed to justify a pre-answer injunction awarding the ultimate relief sought requires a heightened showing compared to a typical preliminary injunction.

Notably, the Saxe Board may not submit additional documentary evidence to cure the fatal defects that plague their moving papers for the first time in reply. *See Frydman v. Francese*, 2017 NY Slip Op 31069(U) at *5 (Sup Ct NY Cty May 15, 2017)("it is well-settled that evidence submitted for the first time in reply will not be considered by the court")(Kern, J.); *citing Migdol v. City of New York*, 291 A.D.2d 201 (1st Dep't 2002)("The affidavit . . . submitted with appellant's reply papers was properly rejected by the motion court since it sought to remedy these basic deficiencies in appellant's *prima facie* showing rather than respond to arguments in plaintiff's opposition papers."); *see also Weisberg v. Standard*, 2023 NY Slip Op 32439(U) at *6 (Sup Ct NY Cty July 14, 2023)(Chan, J.)(holding that it would be "improper" to consider new

facts submitted for the first time in reply). After all, if new documentary proof were submitted for the first time in reply, Defendant would be deprived of the opportunity to examine it or challenge its sufficiency for the purposes of this Motion.

(B) The Saxe Board has failed to meet its burden by showing a likelihood of success on the merits because the Taller Board cannot be removed by a written resolution without unanimous consent of all of the Unitholders.

As noted in Point 3(A), the Saxe Board has not provided the Court with any specific information or documentary evidence that would allow it to conclude that the Taller Board was removed – and the Saxe Board installed – at the January 26, 2024 meeting. As a result, the Court cannot evaluate whether the January 26, 2024 meeting complied with the requirements set forth in the Operating Agreement (or whether the meeting was even held) and thus cannot justify the issuance of a preliminary injunction based on this alleged meeting.

The Saxe Board does, however, provide a copy of the Member Resolution to the Court, albeit one signed only by Mr. Saxe. But even assuming *arguendo* that seventy (70%) percent of the members had signed the Member Resolution as claimed by Mr. Saxe, (*see* Saxe Aff. at ¶14), it nevertheless would be insufficient to remove the Taller Board and install the Saxe Board in accordance with the requirements of the Operating Agreement.

Article V of the Operating Agreement governs the composition of the Board. Section 5.3 of the Operating Agreement provides as follows:

> The initial Board of the Company shall be composed of the five (5) Managers, as set forth in Exhibit B. The number of Managers composing the Board may be determined by the affirmative vote of the Board, provided that the Board shall not consist of at least one (1) member and may have unlimited members. The Board shall be elected by the Common Unitholders annually, and shall hold office for a term of one year or until his successor is elected and qualified. The Board shall designate one Manager to serve as the Chairperson of the Board. The Chairperson shall,

> if present, preside at meetings of the Board and exercise and perform such other powers and duties as may from time to time be assigned by the Board.

Section 5.4 of the Operating Agreement addresses how a manager may be removed and provides as follows:

> A Manager(s) may, (i) by the affirmative vote of Units entitled to vote to elect the Managers in person or by proxy, at any meeting of the Unitholders called for said purpose, or (ii) written consent of all of the Unitholders entitled to vote for the Managers, be removed as a Manager(s) of the Company.

Accordingly, pursuant to the Operating Agreement, a manager may only be removed by either (a) calling a meeting of Unitholders for the express purpose of removing a Manager of the Company that results in a vote with more than fifty percent of the Units entitled to vote voting to remove said Manager, or (b) a unanimous written consent removing the managers by all Unitholders who are entitled to vote for the managers of the Company.

Even if it was approved by a majority of the members as Mr. Saxe claims, the Member Resolution complies with neither of these requirements. On its face, it is self-evident that the Member Resolution does not satisfy the first option (*e.g.*, a majority vote at a meeting of the Unitholders called for the particular purpose of removing the managers). Nor does it comply with the second option, as the Saxe Board concedes that it was not signed by every member entitled to vote for a manager. (*See* Saxe Aff. at ¶14)(claiming that "members holding over 75% of the membership interests had signed [the Member Resolution]").

To overcome this fatal flaw in its position, the Saxe Board has historically fallen back on two arguments, neither of which has merit much less is sufficient to carry their burden in establishing a "clear right to relief" and "a likelihood of success on the merits" as required to warrant the issuance of a preliminary injunction.

First, the Saxe Board has suggested that a vote at the January 26, 2024 meeting ratified the Member Resolution. But that argument fails to justify the issuance of a preliminary injunction because, as noted *supra*, they did not provide any details or documentary evidence to support that claim. Accordingly, there is no way for the Court to determine that the January 26, 2024 meeting was properly called or that any vote which took place at the meeting complied with the requirements of the Operating Agreement. In other words, given the complete absence of any proof with respect to the January 26, 2024 meeting, it cannot serve as a basis to conclude that Plaintiff has demonstrated a clear right to relief and a likelihood of success on the merits sufficient to justify the issuance of a preliminary injunction.

Second, the Saxe Board, relying on Section 3.4(c) of the Operating Agreement, has previously argued that a written consent signed by a simple majority of members is sufficient to remove a manager not withstanding Section 5.4. Section 3.4(c) provides, in relevant part, as follows:

> The actions taken by the Members holding Units entitled to vote or consent at any meeting (as opposed to by written consent), however called and noticed, shall be as valid as actions taken at a meeting duly held after regular call and notice if, either before, at or after the meeting, the Members holding Units entitled to vote or consent each sign a written waiver of notice or a consent to the holding of such meeting or an approval of the minutes thereof. The actions by the Members holding Units entitled to vote or consent may be taken by vote of the Members holding Units entitled to vote or consent at a meeting or by written consent (without a meeting, without notice and without a vote) so long as such consent is signed by the Members having not less than the minimum percentage of Company voting power or votes that would be necessary to authorize or take such action at a meeting at which all Members holding Units entitled to vote thereon were present and voted.

In other words, Section 3.4(c) permits a majority of Unitholders to waive the necessity of a formal meeting and instead sign a consent by the majority of the Unitholders passing a particular resolution that could have been passed at a meeting. By comparison, Section 5.4

permits removal of a manager only upon a majority vote of the Unitholders at a properly noticed meeting (Section 5.4[ii]) *or* by unanimous written consent of the Unitholders (Section 5.4[i]).

In the Saxe Board's view, Section 3.4(c) permitted them to ignore the unanimous written consent requirement imposed by Section 5.4(ii) and allowed a majority of the members to waive the necessity of holding a meeting and, thereafter, allowed them to remove the board members by majority written consent in lieu of a meeting. This tortured interpretation of the Operating Agreement fails to justify this issuance of a preliminary injunction for at least three different reasons.

First, it is fundamental tenet of contract interpretation is that "a specific provision dealing with a particular subject will control over a different provision dealing only generally with that same subject." *Alternative Global Six, LLC v. Durham Homes LLC*, 2023 NY Slip Op 31239(U) at *4 (Sup Ct NY Cty April 5, 2023)(Chan, J.); *see also Bank of Tokyo-Mitsubishi v. Kvaerner*, 243 A.D.2d 1, 8 (1st Dept 1998)("if there is an inconsistency between a general provision and a specific provision of a contract, the specific provision controls").

Applying that principle here, the general authority for the majority of the Unitholders to eschew the necessity of a formal meeting and vote in writing on matters concerning the Company as set forth in Section 3.4(c) must yield to the more specific requirement that without unanimous written consent of the Unitholders, a vote of the majority of the Unitholders at a duly-noticed meeting is required to remove a manager as set forth in Section 5.4.

Second, the better interpretation of the Operating Agreement is that, absent a meeting, the removal of a manager requires unanimous written consent by all Unitholders who are entitled to vote for the managers of the Company notwithstanding Section 3.4(c). After all, it would make no sense that Operating Agreement would require unanimous written consent to remove a

manager but also provide that a manager could be removed by a written majority vote. *See* *Lexington Ins. Co. v. Certain Underwriters at Lloyd's London*, 2023 NYLJ LEXIS 2264, *15 (Sup Ct N.Y. Cty Aug. 16, 2023)(Chan, J.)(basic contract interpretation principles hold that "[an] agreement should be read as a whole to determine its purpose and intent, and it should be construed to give effect and meaning to all provisions").

Third, even assuming *arguendo* that the more general Section 3.4(c) overrides the more specific Section 5.4, as noted in Point 3(A) *supra*, the Member Resolution attached the Saxe Aff. does not reflect that anyone (other than Mr. Saxe) signed it, much less that the majority of members did so. Accordingly, the Saxe Board has not sufficiently demonstrated that the Member Resolution satisfied the requirements of Section 3.4(c) in any event.

At bottom, it is respectfully submitted that the Saxe Board has not come close to establishing that it has a likelihood of success on the merits or a clear right to the relief sought. Accordingly, it is respectfully submitted that the first prong of the test for the issuance of a preliminary injunction falls heavily in favor of denying the injunction.

Point 4: The Saxe Board has failed to show the existence of irreparable harm should the injunction not issue.

Additionally, the Saxe Board cannot establish that the failure to issue the requested injunction would lead to irreparable harm. Allegations of irreparable harm will be deemed insufficient if they are unduly speculative, conclusory, or lack "concrete" evidence, (*see* *U.S. Re Cos., Inc. v. Scheerer*, 41 A.D.3d 152, 155 [1st Dep't 2007][denying preliminary injunction where plaintiff had failed to present "concrete evidence" of irreparable harm]), but given that Defendant has agreed that the Company's legitimate business expenses should be paid, (*see*

Affirmation of Derek Taller dated May 10, 2024 [the "Taller Aff."] at ¶¶12-21), Plaintiff cannot identify any irreparable harm at all.

The Saxe Board argues that the failure to issue an injunction would cause irreparable harm to the Company in two ways. First, it argues that a refusal by the Court to anoint the Saxe Board as the "legitimate" Board will strip the members of their right to choose who controls the Company. But that argument fails for two reasons.

First, as discussed at length in Point 3 *supra*, the Saxe Board has not provided any evidence that the Unitholders have actually chosen them to control the Company. Instead, all they have provided is a conclusory and self-serving affidavit and a Member Resolution that only reflects that Barry Saxe has voted to install himself in place of Mr. Taller.

Second, this argument cuts both ways. While it is true that the Unitholders have the right to choose who controls the Company in accordance with the Operating Agreement, absent adjudication of the issue of whether the Taller Board was properly removed, given that there is a dispute over whether the Saxe Board was ever elected, the Taller Board and the Saxe Board have – at best – equal claims that the Unitholders have chosen them to control the Company.

In fact, at this point the Taller Board has the better argument that it was chosen by the Unitholders to control the Company given that there is no dispute that they were elected to do so in February 2023 but, aside from a paper signed only by Mr. Saxe, there has been no evidence submitted to substantiate that the Saxe Board was selected by the members to replace them.

The Saxe Board also argues that the Company will suffer irreparable harm if the Court does not immediate declare them the "legitimate" Board because the Company will be unable to pay its bills. However, Mr. Taller agrees that the Company can pay its bills and will provide whatever assistance he can to facilitate such payments *provided that* (i) the Saxe Board and the

Taller Board reasonably agree that such bills are payable; (ii) that the Saxe Board does not use Company funds to enrich themselves; (iii) that the Saxe Board provides the Taller Board with a ledger of payments that have been made by the Company; and (iv) that the Saxe Board does not use Company assets to fund this litigation in violation off the neutrality principle, as discussed in Point 2, *supra*. (*See* Taller Aff. at ⁋⁋12-21). And provided that both the Taller Board and Saxe Board receive a ledger of incoming funds and has them deposited in the Company's bank account, Mr. Taller also agrees that the company should collect its accounts receivable. (*See Id*.). Accordingly, the Company will not suffer irreparable harm if an injunction is not issued.

To the extent that the Saxe Board complains that its transfer agent has quit, (Saxe Aff. at ⁋24), they do not explain how a preliminary injunction would help the Company in that regard. And while the Mr. Saxe suggests that the Securities and Exchange Commission (the "SEC") may take action against the Company at some point, (*id*. at ⁋25), his mere speculation in this regard is insufficient to establish the threat of imminent harm to the Company. *See* *GSO Special Situations Master Fund LP v. Wilmington Trust*, 2015 N.Y. Misc. LEXIS 6334, at *7 (Sup Ct NY Cty Oct. 16, 2015)(Scarpulla, J.)("To obtain a preliminary injunction, the movant must show that the irreparable harm that it will suffer is imminent, and not remote or speculative.").

Accordingly, given Mr. Taller's agreement that the Company can pay its vendors and collect its receivables, it is respectfully submitted that the Saxe Board has not established the existence of a threat of imminent irreparable harm sufficient to justify the issuance of a preliminary injunction. Accordingly, it is respectfully submitted that the second prong of the test for a preliminary injunction falls heavily in favor of declining to grant an injunction as well.

Point 5: The balance of equities falls in favor of declining to issue an injunction

Finally, it is respectfully submitted that the Motion should be denied because the Saxe Board has failed to establish that balance of equities falls in favor of issuing an injunction. *See Casita, L.P. v. MapleWood Equity Partners (Offshore) Ltd.*, 43 A.D.3d 260, 261 (1st Dep't 2007)(injunction declined where "plaintiff failed to make the requisite clear showing of a . . . balance of the equities in its favor").

As noted above, given the absence of documentary evidence supporting the Saxe Board's claim that it was selected by the Unitholders to replace the Taller Board as the Company's Board, the Taller Board's claim of rightful control of the Company is stronger than the Saxe Board's claim. Accordingly, the balance of equities disfavors the issuance of an injunction.

If anything, it is respectfully submitted that the Court should declare the Taller Board as the "legitimate" Board until the Saxe Board is able to establish – with documentary proof – that it was chosen to replace the Taller Board in a manner permitted by the Operating Agreement.

Moreover, it should be noted that some of the Saxe Board are irredeemably conflicted and thus unqualified to act as members of the Board. Taussig Capital, Inc., which is owned and controlled by Joseph Taussig, is currently suing the Company in the action captioned *Taussig Capital Inc. v. Vision Biobanc Holdings, Inc.* et al (Sup Ct N.Y. Cty Index No. 653881/2023).

Additionally, Hugh Hill, who was appointed by the Saxe Board to act as the Company's secretary and general counsel, has been actively helping a different litigant, David Lessen, with his employment-based lawsuit against the Company and has submitted an affirmation to assist him in doing so. (*See* Taller Aff., Ex. B). The Court should not issue a preliminary injunction legitimizing members of the Board who are plainly adverse to the Company's interests.

Finally, the balance equities cut against the issuance of a preliminary injunction because the Saxe Board waited four months since the December 20, 2023 resolution was passed before seeking an injunction. *Lazare Kaplan Intl. Inc. v. GIA Enters., Inc.*, 2006 NY Slip Op 30017(U) at *2-3 (Sup Ct, NY County Sept. 29, 2006)("[Plaintiff] cannot demonstrate that the equities weigh in its favor, since it waited six months . . . before it moved for a preliminary injunction.").

It is respectfully submitted that the Saxe Board has not carried its burden in showing that the balance of harms leans in favor of issuing a preliminary injunction. Accordingly, it is respectfully submitted that the third prong of the test for the issuance of a preliminary injunction falls against granting the relief the Saxe Board seeks herein.

Point 6: The Saxe Board has not demonstrated that the circumstances justify the issuance of a pre-answer injunction granting the ultimate relief sought in the Complaint

As noted above, a pre-answer preliminary injunction granting a litigant the ultimate relief he or she seeks in the action is a "drastic" remedy to be granted in only the most "extraordinary" of circumstances. *St. Paul Fire & Mar. Ins. Co.*, 308 A.D.2d at 349.

Here, the ultimate relief sought in the Complaint is virtually identical to the preliminary relief the Saxe Board seeks, *e.g.*, being anointed by the Court as the "legitimate" Board of the Company for the foreseeable future. Accordingly, granting the injunctive relief the Saxe Board seeks here would be tantamount to granting it pre-answer summary judgment on it claims for declaratory relief.

As a result, the Saxe Board is required to show the existence of such "extraordinary circumstances" to warrant granting the pre-answer injunction it seeks. However, the Saxe Board simply fails to discuss or identify extraordinary circumstances in this case.

Given Mr. Taller's agreement that the Company can pay its vendors and collect its receivables, no reasonable reading of the Saxe Aff. or the Complaint would leave the reader to conclude that there is any urgency to grant the pre-answer preliminary relief it seeks, particularly since the Saxe Board has failed to provide any documentary proof to support its claim that it was elected to replace the Taller Board by the Unitholders in accordance with the Operating Agreement.

IV. CONCLUSION

As set forth hereinabove, the Saxe Board has not demonstrated that such extraordinarily rare and emergent circumstances exist that a pre-answer injunction that both alters the *status quo* and grants the relief it ultimately seeks the Complaint is justified. The Saxe Board has not established a likelihood of success, irreparable harm, or that the balance of equities tips in its favor. Moreover, the Saxe Board has wrongfully hijacked the Company to bolster its claim to control of the Company's Board and used the Company's assets to fund its efforts to do so in violation of the "neutrality principle."

At bottom, the Saxe Board has failed to supply the Court with even a shred of evidence demonstrating that the Taller Board was removed – and the Saxe Board installed – in accordance with the strictures of the Company's Operating Agreement. Accordingly, it is respectfully submitted that the instant Motion should be denied in its entirety.

Respectfully Submitted,

/s/

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WORD COUNT AFFIRMATION

I hereby affirm that the foregoing document contains 6,415 words exclusive of caption, table of contents, table of authorities, and signature block. I have relied on the word count provided by Microsoft Word software to make this affirmation.

Dated: May 10, 2024
New York, New York

/s/
Matthew J. Walters