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

VISION BIOBANC HOLDINGS LLC, Plaintiff, v. DEREK R. TALLER, Defendant.	Index No. 651706/2024 Motion Sequence: #002

PLAINTIFF'S REPLY IN SUPPORT OF PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Following the Court's issuance of the Order to Show Cause (Doc. No. 13; the "Order"), Vision's Current Board[1] has used the managerial authority entrusted to it by the Company's members and the Court, and the protections afforded by the Court's Order, to begin the difficult process of returning the Company to normal operations. Outstanding bills are being paid, receivables are being collected, and management continues its efforts to restore access to the Company's information technology systems, all while cooperating with law enforcement and dealing with litigation arising from Defendant Taller's years of misdeeds. Plaintiff respectfully requests that the Court enter a preliminary injunction to allow that progress to continue while the parties move forward with litigation of Plaintiff's underlying claim for declaratory judgment, which will ultimately resolve any dispute regarding the Current Board's election and Taller's removal.

Defendant's Opposition (Doc. No. 18) raises various arguments against a preliminary injunction, all of which are baseless, and Defendant makes a specious request to be allowed to reinsert himself into the Company's management, which should be rejected out of hand. Totally absent from the Opposition, however, is any showing, or even a suggestion, that the Current Board has used its interim authority to take any action that is not in the best interest of the Company and its members or that in any way prejudices Taller. To put it simply, the status quo is working, and the Court should preserve it by entering a preliminary injunction maintaining the Current Board's management authority and the protections against interference by Taller for the duration of this litigation.

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[1] Capitalized terms not otherwise defined herein have the same meaning as in Plaintiff's Memorandum of Law in Support of Order to Show Cause.

ARGUMENT

I. THE COMPANY HAS STANDING TO BRING THIS ACTION

Contrary to Taller's characterization, this litigation does not "only seek[] declaratory relief declaring that the Saxe Board, and not the Taller Board, is the 'legitimate' Board." Opp. at 6. Through this Order to Show Cause, the Company seeks to put a stop to Taller's disruptive and illegal retaliatory acts, which have crippled the Company and threaten its viability. These include threatening and sowing confusion among the Company's service providers and counterparties; cyberattacks to hijack the Company's servers, email accounts, and domain name, including the successful hijacking of the Company's core Microsoft data account, which remains compromised to this day despite extensive efforts of current management; and attempting to siphon funds from the Company's account for Taller's personal use. The Company plainly has standing to protect its business interests against Taller's acts of sabotage and theft.

Moreover, even to the extent this action involves disputes over Manager removal and appointment, the Company has standing to protect the legitimacy of its members' actions under its Operating Agreement and give effect to the lawful removal of Taller from management. Taller's reliance on *In re Aerojet Rocketdyne Holdings, Inc*., 2022 WL 2180240 (Del. Ch. June 16, 2022), an unpublished decision from Delaware involving materially different facts, is misplaced. In *Aerojet*, "a cautionary tale about the perils that can befall a board with an even number of directors," the company's board was deadlocked over director nominations for an upcoming shareholder meeting, with two competing factions within the board nominating separate slates of candidates to stand for election. *Id.* at *1, *8-9. The court applied the "neutrality principle" to require that the company remain neutral in the lead up to the upcoming election to ensure that shareholders would be free to vote without the company appearing to favor one slate of nominees

over the other. *Id.* at *14. Here, in contrast, the Company's members have *already* voted (twice), with more than 70% voting to remove Taller and elect the Current Board. The Company—on behalf of its members—has standing to bring this action to put a stop to Taller's efforts to delegitimize the members' actions.[2]

Taller's embrace of the "neutrality principle" and insistence that the Company stand on the sidelines is ironic in view of the fact that he previously caused his attorneys to bring an action in the name of the Company asking the Court to oust the Current Board and reinstall him. *See Vision BioBanc Holdings, LLC v. Barry Saxe, et al.*, Index No. 650288/2024 (filed Jan. 19, 2024) (the "Prior Injunction Action"). That action was promptly dismissed after the attorneys Taller caused to file it concluded that Vision's members had acted decisively to remove Taller and elect the Current Board, and that they "could no longer continue the case on behalf of [Vision]," Prior Injunction Action, NYSCEF Doc. No. 23. Having previously attempted to bring litigation in the Company's name to further his own objectives, Taller should not be heard to complain about any perceived unfairness of the Company bringing this action to effectuate the valid actions of its members and put a stop to Taller's retaliatory acts designed to harm the Company.[3]

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[2] Taller's other Delaware citations are even further from the mark. *Pearl City Elevator, Inc. v. Gieske*, 2020 WL 5640268 (Del. Ch. Sept. 21, 2020), also unpublished, involves questions of attorney-client privilege not at issue here, while *Insituform of North America, Inc. v. Chandler*, 534 A.2d 257 (Del. Ch. 1987), discusses a statutory prohibition "prevent[ing] a corporation from voting its own stock," which has nothing to do with the facts of this case. *Id.* at 270 n.12.

[3] Even if the Court were to agree with Taller that the Company does not have standing, it should not dismiss the action and vacate the previously ordered TRO, as Taller requests. *See* Opp. at 6. Doing so would only result in wasteful and duplicative litigation, with the parties relitigating precisely the same issues under a different caption, while exposing the Company to irreparable harm in the meantime. The more efficient and equitable remedy would be to substitute Mr. Saxe as the named plaintiff, with the Company named as a nominal party. But the Court need not reach these issues because, for the reasons discussed above, the Company is the proper plaintiff to bring this action.

II. THE COMPANY HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

At this stage, Plaintiff is required only to make a "prima facie showing of reasonable probability of success." *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430, 431 (1st Dept. 2016) (quotations omitted). Plaintiff need not provide "conclusive proof," *Ruiz v. Meloney*, 26 A.D.3d 485, 486-87 (2d Dept. 2006), and "[i]t is well settled that a likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence is inconclusive." *Four Times Sq. Assocs., LLC, v. Cigna Inv., Inc.*, 306 A.D.2d 4, 5 (1st Dept. 2003).

Taller contends that Plaintiff's burden should be higher in this case because it seeks to alter the "status quo" and seeks "ultimate relief" through its preliminary injunction. *See* Opp. at 7. Neither is true. A preliminary injunction here would merely preserve the status quo as established by the member votes to remove Taller and elect the Current Board. Moreover, Plaintiff seeks only interim relief at this stage, ensuring that the Current Board has authority to manage the Company, and enjoining Taller from further interference, until such time as the Court can rule on the ultimate merits of Plaintiff's claim for declaratory judgment. Taller will have the opportunity to litigate any argument he may have regarding the validity of his removal and the Current Board's election, but the Company must be managed in the meantime, and the requested preliminary injunction will ensure the Current Board can do so without any further disruption and interference, both legal and illegal, by Taller.

Taller's attacks on the sufficiency of Plaintiff's evidence also are unavailing. He contends that "there is no proof that the majority of Unitholders" approved his removal through the December 2023 Member Resolution or at the January 26, 2024 Special Meeting. But this argument simply ignores the sworn affidavit of Barry Saxe, the Chair of the Current Board, in which Mr. Saxe proffers testimony, based on his personal knowledge, of the members' actions. Tellingly, Mr.

Saxe's affidavit was submitted in advance of the TRO hearing, and he personally appeared for the hearing, but Taller's counsel made no effort to cross-examine him, nor did he request to depose him prior to submitting the Opposition nearly a month later.

Taller offers no documents or testimony to contradict Mr. Saxe's sworn statements. For example, Taller does not identify, much less proffer testimony from a single member who claims to have supported Taller's return to the Board or opposed the election of the Current Board. On this record—with Mr. Saxe's sworn, unrebutted testimony as the only evidence before the Court—Plaintiff has more than carried its burden to make a "prima facie showing of reasonable probability of success." *Barbes Rest. Inc.*, 140 A.D.3d at 431.

While Taller criticizes the limited "documentary evidence" submitted by Plaintiff, there is no prohibition against granting a preliminary injunction based on sworn testimony, and Taller's authority does not suggest otherwise. For example, in *Manhertz v. Harcharran*, the court summarily denied a preliminary injunction where the plaintiffs "offer[ed] no documentary evidence to support their claim," but in that case, there is no indication sworn testimony was offered either—the court simply had no evidence, documentary or otherwise. 2019 N.Y. Misc. LEXIS 43621, *2 (N.Y. Sup. Queens Cnty. Oct. 1, 2019).

Moreover, the absence of documentary evidence is, in part, due to Taller's own misconduct. Many of the members' identities are confidential, and Plaintiff is particularly reluctant to identify publicly the members who voted in favor of Taller's removal in view of his history of harassing and intimidating members who voted to remove him. Additionally, some of the records relating to the Member Resolution and January 2024 Meeting are on the Company's Microsoft server account, which remains compromised due to Taller's cyberattacks. Affirmation of Hugh Hill In Support of Plaintiff's Order to Show Cause ("Hill Aff.") ¶ 9. A holding that Plaintiff has

not carried its burden due to the lack of additional documentary evidence would enable Taller to benefit from his misconduct.

Finally, it bears repeating that the Foley & Lardner attorneys who filed the Prior Injunction Action decided to dismiss that action after reviewing the evidence of the members' actions because they were convinced that "a supermajority of [Vision's members] had supported the [Current Board]." Prior Injunction Action, NYSCEF Doc. No. 23; *see also* Hill Aff. ¶ 10. This decision by attorneys retained by Taller purportedly to represent the Company speaks volumes about Plaintiff's likelihood of success on the merits.

III. THE COMPANY FACES IRREPARABLE HARM ABSENT AN INJUNCTION

Taller's eleventh-hour proposal that he will now allow the Company to pay its bills and collect its receivables provided the Court allows him to be involved in overseeing the Company's operations during the pendency of this action is a non-starter. *See* Opp. at 16-17. Given Taller's conduct both before and after his removal, including the siphoning nearly $2.5 million of the Company's cash for his own benefit, and a pattern disruptive interference without regard to the best interests of the Company and its members, there is simply no prospect that Taller can be trusted to act reasonably or cooperate with the Current Board.

Since the Court entered the TRO, the Current Board has been working diligently to return the Company to normal operations. Among other things, they have been able to: (i) settle unpaid tax bills due to the Puerto Rico government; (ii) pay outstanding invoices for clerical work; (iii) pay outstanding information technology service providers stretching back to November 2023; (iv) settle claims of unpaid rent stemming from Taller's abandonment of the Company's San Juan office; and (v) resume collecting money due to the Company from its counterparties. Hill Aff. ¶

12. Despite Taller's about-face promises to behave, his return to management inevitably will cause confusion and disruption, and undo the progress that already has been made.

The list of six "vendors" Taller attaches to his affidavit underscores that his request to be involved in the Company's operations is not well-intentioned and will be disruptive. Two of the six entities appear to be sham companies Taller intends to use to siphon money to himself, as the Company's records do not reflect any legitimate contractual relationship or communications with those entities. *Id.* ¶ 13. Moreover, five of the six invoices are dated *after* Taller's removal from the Company, and were not approved by the Current Board, calling into question the legitimacy and propriety of the expenses. *Id.* ¶ 14.

In order to ensure the Company's continued progress toward normal operations, the Court should deny Taller's request to have any role in management during the pendency of this action, lest the proverbial fox be let back into the hen house.

IV. BALANCING OF THE EQUITIES FAVORS A PRELIMINARY INJUNCTION

The balance of equities clearly favors respecting the will of Vision's members, who have made clear that they want the Company to be managed by the Current Board, and not by Taller. Unable to contest this, Taller resorts to baseless mudslinging about unrelated matters.

Taller argues the equities favor him because "some of the Saxe Board are irredeemably conflicted." Opp. at 18. He notes that one member of the Current Board, Joseph Taussig, owns and controls Taussig Capital Inc. ("TCI"), which previously had filed a lawsuit (also before this Court) against the Company and Taller personally. *See Taussig Capital Inc. v. Vision Biobanc Holdings, Inc. et al.*, Index No. 653881/2023 (filed Aug. 11, 2023) (the "TCI Litigation"). TCI filed that action to enforce a contract, entered into while Taller was in sole control of the Company, pursuant to which TCI provided corporate advisory services to assist the Company in establishing and

licensing a bank in Puerto Rico to make loans to early-stage health care and medical technologies. Notably, the TCI Litigation has been resolved as between TCI and the Company, and all claims asserted in that action against the Company have been discontinued, with only claims against Taller personally remaining to be litigated. *See* TCI Litigation, NYSCEF Doc. No. 41; Hill Aff. ¶ 16.

Taller further alleges, incorrectly, that Hugh Hill, the Company's Secretary and corporate 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." Opp. at 18; *see also Lessen v. StHealth Capital Advisors LLC*, Index No. 655070/2023 (the "*Lessen* Litigation"). Taller neglects to inform the Court, however, that Mr. Hill's affirmation has nothing to do with the merits of any claim by Mr. Lessen against the Company. Instead, it is limited to the discrete issue of whether Mr. Taller's counsel in this action, who also purports to represent both Taller and the Company (as well as unrelated companies Taller controls) in the *Lessen* Litigation, was ever retained by the Company to represent it. After reviewing the Company's files, Mr. Hill stated, truthfully, that there was no record of the Company ever retaining Taller's counsel to represent it in the *Lessen* Litigation, and that Taller had no authority to retain counsel for the Company. Hill Aff. ¶ 17. Again, Mr. Hill's truthful statement has nothing to do with the merits of any claim Mr. Lessen may have against the Company, and there is no conflict or adversity of interest from his submission of an affirmation clarifying that Taller's counsel does not represent the Company in that action.

Taller also argues that Plaintiff has "waited four months" to seek the instant declaration. Opp. at 19. This is perhaps the most curious of Taller's arguments in view of his own past failures to seek judicial resolution of his claims to continued management authority over the Company.

The Prior Injunction Action was dismissed *without prejudice* specifically so that Taller—who had caused an attorney to file a letter objecting to the discontinuance—would be free to bring an action asserting his claims. *See* Prior Injunction Action, NYSCEF Doc. Nos. 23, 24. But Taller never did so, choosing instead to wage an extrajudicial campaign of retaliation and interference, which threatened to paralyze the Company, forcing the Company to bring this action.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant a preliminary injunction restraining Defendant Taller from disputing the Board's managerial authority and interfering with the Company's operations until the resolution of this action.

Dated: May 17, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 17 of 22 NYCRR § 202.70, Rules of the Commercial Division of the Supreme Court, I, Andrew W. Robertson, certify that the accompanying Memorandum of Law contains 2,737 words, excluding the parts of the document that are exempted by Rule 17. This complies with the word count limit. This certification was prepared in reliance on the word-count function of the word processing system (Microsoft Word) used to prepare the document.

Dated: May 17, 2024

Andrew W. Robertson