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MEMO DECISION & ORDER

INDEX No. 6588/2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/31/13
ADJ. DATES 7/5/13
Mot. Seq. # 002 - Mot D
Mot. Seq. # 003 - XMD
CDISP Y____ N XX

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KNET, INC., THOMAS GROGAN, both individually and on behalf of INTERCEPTOR IGNITION INTERLOCKS, INC. and GARY MELIUS,

Plaintiffs,

-against-

JOHN RUOCCO, DENNIS DONNELLY and ROSEMARIE SYLVESTER,

Defendants.

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CERTILMAN, BALIN, ADLER
Attys. For Plaintiffs
90 Merrick Ave.
East Meadow, NY 11554

O'ROURKE & HANSEN, PLLC
Attys. For Defendants
235 Brooksite Dr.
Hauppauge, NY 11788

Upon the following papers numbered 1 to 15 read on this motion for an order directing a re-convened special shareholders' meeting, among other things, and cross motion to disqualify plaintiffs' law firm; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-7; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 8-10; 11-12; Other 13 (memorandum); 14-15 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that those portions of this motion (#002) by the plaintiffs for an order directing a re-convened special shareholders meeting and compelling the defendants to produce the books and records of the corporate plaintiff and other documents were resolved by order dated June 26, 2013 and are thus granted to the extent set forth therein; and it is further

ORDERED that the remaining portions of the plaintiffs' motion (#002) wherein they seek mandatory injunctive relief removing defendants, John Ruocco and Rosemarie Sylvester, as officers and/or directors of the corporate plaintiff pursuant to BCL §707 and §716 and preventing them or any of their family members or persons under their control from serving on the board of directors or as an officer of the corporate plaintiff is considered under CPLR 6311 and is granted conditionally to the extent set forth below; and it is further

ORDERED that the cross motion (#003) by the defendants for disqualification of the plaintiffs' law firm is considered under the Rules of Professional Conduct at 22 NYCRR Rule 3.7 and is denied.

This action arises out of purported actionable conduct on the part of the defendants which allegedly caused losses, near ruin and harm to the corporate plaintiff, Interceptor Ignition Interlocks, Inc. (hereinafter Interceptor), in which plaintiffs, KNET, Inc. [hereinafter KNET], and Thomas Grogan are shareholders. Plaintiff, Gary Melius, is the principal and sole shareholder of plaintiff KNET. By their complaint, the plaintiffs seek recovery of damages incurred by reason of one or more of the defendants' breach of fiduciary duties, acts of corporate waste and mismanagement, self-dealing, and their engagement in conduct that contravenes the by-laws of Interceptor and the rights of its shareholders to participate in the management of its corporate business. The plaintiff Melius also seeks damages attributable to acts of fraudulent inducement with respect to a guaranty of payment of certain financial obligations of Interceptor that Melius executed. The plaintiffs further seek the removal of John Ruocco as a director and officer of Interceptor and permanent injunctive relief against his exertion of control over its corporate form and function. An amended complaint was allegedly filed on May 14, 2013, no copy of which is attached to the moving papers or listed in the e-file maintained in this action by the court. It allegedly enlarges the claims to include demands for the removal of defendant Rosemarie Sylvester from the office of director and other offices of Intercept due to alleged improper and wrongful conduct on the part of her herself and her brother, Ruocco.

By the instant motion (#002), the plaintiffs seek the relief granted under the prior order dated June 26, 2013 and preliminary injunctive relief removing defendants, John Ruocco and Rosemarie Sylvester, as officers and/or directors of the corporate plaintiff pursuant to BCL §707 and §716 and preventing them or any of their family members or persons under their control from serving on the board of directors or as an officer of the corporate plaintiff. The plaintiffs claim that the objective of a May 1, 2013 special shareholders meeting which this court ordered to be held in an order dated April 12, 2013 was to elect directors and failed in the accomplishment of such objective due to the machinations of the defendants. The meeting was closed without a vote of the shareholders in attendance personally or by proxy. Nevertheless, defendants Ruocco and Sylvester held a vote on their proposed slate of directors following the close of the meeting. This surreptitious election by Ruocco and Sylvester resulted in the election of their nominee Catacasinos as a third director and a defacto confirmation of Ruocco's prior designation of himself and defendant Sylvester as directors which occurred at proceedings previously conducted by them without a meeting of the shareholders. The plaintiffs thus press for the removal of Sylvester and Ruocco as directors of the plaintiff and as officers thereof and injunctive relief precluding their election as directors at the reconvened special shareholders meeting which is now scheduled to be held pursuant to order of this court on *September 11, 2013* pursuant to order of this court.

The defendants oppose the motion and cross move (#003) for disqualification of the plaintiffs' law firm due to the appearance of one of its members at the shareholders meeting conducted on May 1, 2013. For the reasons stated, the plaintiffs' demands for mandatory injunctive relief is granted but only to the limited extent set forth below while the defendants' cross motion to disqualify the plaintiffs' counsel is denied.

The standard used to determine a party's entitlement to preliminary injunctive relief rests upon the establishment of the following three elements: 1) a likelihood of success on the merits; 2) irreparable harm if the relief is not granted; and 3) that a balance of the equities tilts in its favor (*see* ***Blinds and***

Carpet Gallery, Inc. v E.E.M. Realty, Inc., 82 AD3d 691, 917 NYS2d 680 [2d Dept 2011]). Its purpose is not to determine the ultimate rights of the parties but to maintain the status quo until there can be a full hearing on the merits (*see* ***Board of Mgrs. of Britton Condominium v C.H.P.Y. Realty***, 101 AD3d 917, 956 NYS2d 150 [2d Dept 2012]; ***S.J.J.K. Tennis, Inc. v Confer Bethpage, LLC.***, 81 AD3d 629, 916 NYS2d 789 [2d Dept 2011]; ***Gluck v Hoary***, 55 AD3d 668, 865 NYS2d 356 [2d Dept 2008]). Where mandatory injunctive relief is requested, that is, one requiring affirmative action on the part of the non-moving party that confers upon the movant some form of the ultimate relief sought, the traditional three prong test is enlarged to include a showing of "unusual" or "extraordinary" circumstances (*see* ***Roberts v Paterson***, 84 AD3d 655, 923 NYS2d 326 [1st Dept 2011]; ***Board of Mgrs. of Wharfside Condominium v Nehrich***, 73 AD3d 822, 900 NYS2d 747 [2d Dept 2010]; ***Second on Second Café, Inc. v Hing Sing Trading, Inc.***, 66 AD3d 255, 884 NYS2d 353 [1st Dept 2009]; ***SHS Baisley, LLC v Res Land, Inc.***, 18 AD2d 727, 728, 795 NYS2d 690 [2d Dept 2005]; ***St. Paul Fire & Mar. Ins. Co. v York Claims Serv.***, 308 AD2d 347, 349, 765 NYS2d 573 [1st Dept 2003]). In such cases, the status quo "is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon the complainant" (***Bachman v Harrington***, 184 NY 458, 464 (1906). The drastic relief afforded by a mandatory injunction is sparingly granted since it requires affirmative action on the part of the non-moving party and confers upon the movant some form of the ultimate relief sought.

Upon the record adduced on this motion, including the minutes of the May 1, 2013 special shareholders meeting, the court finds that the proceedings resulting in a confirmance of the prior designation of Ruocco and Sylvester as directors and the new election of Catacasinos as a director were improper, ultra vires and otherwise violative of corporate governance documents. The impropriety of such proceedings is evident from the fact that they were conducted at the close of the special shareholders meeting that was the subject of the prior order of this court dated April 12, 2013.

The court finds these circumstances sufficiently extraordinary to warrant the granting of mandatory injunctive relief in the form of the removal of Sylvester and Catacasinos and the removal of defendant Ruocco, as qualified below, from their directorship offices and an order precluding them from acting in the capacity of a director until such time as they are, if ever, duly elected by a vote of the shareholders entitled to vote at the reconvened special shareholders meeting now scheduled for *September 11, 2013* or any adjourned date thereof. The court finds that in light of the improper conduct on the part of defendants Ruocco and Sylvester, a restoration of the status quo to that which was in effect prior to the defendants' engagement in such conduct is available to the plaintiffs to ameliorate further harm. The court further finds that under the circumstances, a balance of the equities tips in favor of the plaintiffs (*see* ***1650 Realty Assocs. v Golden Touch Mgt., Inc.***, 101 AD3d 1016, 956 NYS2d 178 [2d Dept 2012]; ***91-54 Gold Rd., LLC v Cross-Deegan Realty Corp.***, 93 AD3d 649, 939 NYS2d 555 [2d Dept 2012]; ***Arcamone-Makinano v Britton Prop., Inc.***, 83 AD3d 623, 920 NYS2d 362 [2d Dept 2011]). Defendants Ruocco, Sylvester and Catacasinos are hereby restrained and enjoined from acting as directors of the plaintiff Interceptor until such time, if at all, they are duly elected to such office, except that defendant Ruocco shall serve as the sole acting director for the limited purpose of transacting business associated with the upcoming special shareholders meeting as scheduled by the court, should the governing documents of Interceptor require such action be taken by a director,

including presiding at such meeting and recording the votes and other proceedings held therein in minutes reduced to writing.

The court, however, denies the plaintiffs' further demands for injunctive relief regarding the removal of defendant Ruocco as president of the corporate plaintiff. Defendant Ruocco shall remain as the de facto president of Interceptor and as such, may carry on its regular business, but only in the ordinary course thereof, until such time as the office of president is filled in accordance with the governing documents of Interceptor. Having acted in such capacity without objection prior to the commencement of this action in March of this year, the status quo would be altered rather than preserved if this injunctive relief were granted without any showing of irreparable harm to the plaintiffs or that a balance of the equities tips in their favor. Defendant Ruocco is further directed to do all things necessary to accomplish the clear objectives of the special shareholders meeting, as framed by the court, that is now scheduled for *September 11, 2013* or any adjourned date thereof, in his capacity as president. In the event, however, that Interceptor's governing documents require that such action be undertaken by a director, Ruocco shall so act in his limited capacity as director as set forth above.

The plaintiffs' demand for removal of defendant Sylvester from any office held by her in the corporate plaintiff, is denied as the corporate office defendant Sylvester allegedly holds is not discernible from the moving papers. However, the plaintiff sufficiently established a prima facie entitlement to a restraint against Sylvester from acting in the capacity of an officeholder due to the absence of any validity in her election or designation to any office. Since this relief is essentially unopposed by the defendants, Sylvester is hereby enjoined and restrained from acting as any officeholder, until such time, if ever, she is put there in accordance with the governing documents of the corporate plaintiff, Interceptor.

Denied, however, are the plaintiffs' remaining demands for mandatory injunctive relief forever restraining defendants Ruocco and Sylvester and others under their control, from holding directorships or offices in the corporate defendant. This drastic relief, which would confer upon the plaintiffs all of the relief requested in certain of the causes of action advanced in the complaint, is unwarranted under the present procedural posture of the case, as it would effect an alteration rather than a preservation of the status quo prior to a determination of facts material to the issues raised by the pleadings, many of which are in dispute. In this regard, the court notes that the claim of a combined majority interest of defendants Ruocco and Sylvester in the corporate plaintiff in the approximate amount of 65% of the outstanding shares has not been rebutted to date. The moving papers are devoid of sufficient proof that this drastic and permanent restraint is available to the plaintiffs under any factual scenario let alone on the facts discernible from the record adduced on these motions, including that there has been some engagement in ultra vires acts and other conduct violative of the corporate plaintiff's governing documents on the part of one or more of the defendants. The court finds on this record that engagement in any such wrongful conduct has not been shown to warrant one or more of the defendants' permanent ouster from the management of the plaintiff corporation pursuant to BCL §706 or §716. These circumstances clearly warrant a denial of those portions of the plaintiffs' motion wherein they seek this drastic and permanent, mandatory injunctive relief. All remaining demands for relief advanced by the plaintiffs in their submissions on the instant applications are denied as lacking in merit.

The limited injunctive relief granted herein is effective immediately upon receipt of this order by counsel for the defendants. However, as a condition of the continuation of such preliminary

injunctive relief, the plaintiffs must post an undertaking, conditioned as required by CPLR 6312(b), in the amount of $10,000.00 within 15 days of the receipt of this order by plaintiffs' counsel. Proof of the posting of such bond shall be served upon defense counsel and upon this court by facsimile.

The defendants, in their cross motion (#003) seek an order disqualifying the plaintiff's counsel due to the attendance of one of its associates at the May 1, 2013 special shareholders meeting pursuant to 22 NYCRR 1200, Rule 3.7(a). It is premised upon allegations that counsel's attendance at such meeting makes a him a witness to such conduct and will be called upon to testify at trial. For the reasons stated below, the cross motion is denied.

It is well established that "'the advocate-witness rules contained in the Rules of Professional Conduct (*see* 22 NYCRR 1200) provide guidance, but are not a binding authority, for the courts in determining whether a party's attorney should be disqualified during litigation'" (***Magnus v Sklover***, 95 AD3d 837, 944 NYS2d 187 [2d Dept 2012]; *quoting* ***Trimarco v Data Treasury Corp***., 91 AD3d 756, 757, 936 NYS2d 574 [2d Dept 2012]). Rule 3.7(a) of the Rules of Professional Conduct (22 NYCRR 1200) provides that, unless certain exceptions apply, "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact" (*id.*; ***Friia v Palumbo***, 89 AD3d 896, 932 NYS2d 542 [2d Dept 2011]).

In order to disqualify counsel, a party moving for disqualification must demonstrate that (1) the testimony of the opposing party's counsel is necessary to his or her case; and (2) such testimony, if called for, would be prejudicial to the opposing party (*see* ***S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp***., 69 NY2d 437, 446, 515 NYS2d 735 [1987]); ***Magnus v Sklover***, 95 AD3d 837, *supra;* ***Hudson Valley Marine, Inc. v Town of Cortlandt***, 54 AD3d 999, 865 NYS2d 122 [2d Dept 2008]; ***Bentvena v Edelman***, 47 AD3d 651, 849 NYS2d 626 [2d Dept 2008]). In determining whether the attorney's testimony is necessary, the court must consider the relevance of the expected testimony and must "take into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (***S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp***., 69 NY2d at 446, *supra;* ***Wolfson v Posner***, 57 AD3d 979, 869 NYS2d 804 [2d Dept 2008]). Here, there was no showing of either the necessity of plaintiff's counsel's testimony on a significant issue of fact nor any showing of any prejudice. The defendants' cross motion (#003) is thus denied.

DATED: 8/27/13

THOMAS F. WHELAN, J.S.C.