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

JOSHUA ROSEN and JERALD TENENBAUM, Plaintiffs,	Index No. 653564/13
- against -	Motion Sequence No. 1
THE VILLANO FAMILY LIMITED PARTNERSHIP, LINDA VILLANO, and CHRISTOPHER VILLANO, Defendants.	**AFFIDAVIT IN SUPPORT OF MOTION**

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOSHUA ROSEN, being duly sworn, deposes and says:

1. I am a Plaintiff in this action, and a co-founding 25% Member and Manager of Manhattan River Group, LLC (the "Company"). As such, I am personally familiar with the facts and circumstances stated below.

2. I have read the Complaint filed in this action on my behalf and verify the truth and accuracy of the contents thereof; the same is true to my own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

Introduction

3. The Company is a manager-managed New York limited liability company that operates a first-class restaurant known as La Marina, located on the Hudson River waterfront in Manhattan's historic Fort Washington Park.

4. This action arises out of Defendants' breach of a voting agreement they entered into with me and co-Plaintiff Jerald Tenenbaum ("Jerald"). Jerald, like me, is a co-founding 25% Member and Manager of the Company.

5. Jerald and I entered into a Voting Agreement with the Defendants, who own a 5% membership interest in the Company, pursuant to which Defendants are obligated to vote their membership and management interests in the Company in accordance with our instructions.

6. Defendants violated this agreement by, among other things, granting a management voting proxy to non-party FM & AC Corp., Inc. ("FM/AC"), which holds a 45% membership interest in the Company.

7. Defendants' wrongful actions are intended to allow FM/AC to block improperly the majority will of the Managers in Company affairs, and to foment a bitter power struggle that threatens to tear the Company asunder.

8. Jerald and I therefore commenced this action seeking:

(i) an injunction preventing Defendants from, directly or indirectly, selling, assigning, or otherwise transferring to any person or entity, or granting any person or entity a proxy for, VFLP's voting rights either as a Member or as a Manager of the Company, except in compliance with the Voting Agreement and the LLC Agreement; and

(ii) a judgment declaring valid and enforceable the membership interest transfer restrictions in the Voting Agreement and the LLC Agreement.

9. Unless Defendants are enjoined pending the outcome of this action, any judgment rendered herein will be meaningless, as Defendants' acts in contravention of the Voting Agreement and the LLC Agreement threaten to cripple the Company's operations and to violate management and member voting rights, the irreparable harm which cannot be compensated in dollars.

10. I respectfully submit this affidavit in support of Plaintiffs' motion for a temporary and preliminary injunction preserving the Company's status quo management and membership structure.

Background

The La Marina Project

11. In or about June 2007, Jerald and I, together with defendant VFLP, formed the Company. A copy of the Company's Articles of Organization is attached as **Exhibit 1**.

12. The Company was founded for the purpose of acquiring the rights to develop and operate a New York City Department of Parks and Recreation ("NYC Parks") concession, to be located at the Dyckman Marina in historic Fort Washington Park.

13. In connection with the Dyckman Marina project, NYC Parks issued two distinct RFPs, one covering the marina and one for the restaurant.

14. Jerald and I, with some input from Chris, developed and submitted RFPs on behalf of the Company.

15. In or about January 2008, the Company won the fiercely competitive bidding process and was awarded two concessions to operate a restaurant, lounge, and marina for a 15-year term.

16. Over the next several years, with only intermittent assistance from Chris, Jerald and I worked tirelessly to develop the project. We negotiated license agreements with NYC Parks; developed plans for the restaurant, lounge, and café; and handled permitting, licensing, and contract negotiations with vendors and consultants.

17. We also engaged in year-long negotiations with NYC Parks as well as with the New York City Law Department, and we steered the La Marina project through the arduous community board and city council approval process, ultimately obtaining the approval of both.

18. Jerald and I, along with Chris on occasion, also devoted years to clearing the site of its old trailers, boats, shacks, and other debris, and preparing the site for development.

19. After five years of preparation, with the assistance of Chris and later FM/AC, we built the concession now known as La Marina.

20. La Marina occupies more than 75,000 square feet of the Hudson River waterfront, nestled just below the Cloisters, and offers diners stunning river views and an "out of city" experience (*see* www.lamarinanyc.com). Copies of La Marina promotional and informational materials are attached as **Exhibit 2**.

21. La Marina has received significant media acclaim, samples of which are attached as **Exhibit 3**.

VFLP Transfers a Portion of its Membership Interest to FM/AC

22. Defendant Christopher Villano ("Chris") is a principal of C. Villano, Inc., the general partner of VFLP. Chris and I have been friends since about 2003.

23. Initially, VFLP held a 50% membership interest in the Company, and Jerald and I each owned 25% membership interests.

24. Chris participated in the Company's business only intermittently, due to his personal and unrelated business issues.

25. Due to financial constraints, in Spring 2011, Chris expressed an interest in reducing his interest in the Company and bringing in new members who could assist in food and beverage operations.

26. Accordingly, Chris, Jerald, and I searched for potential investors to purchase a portion of Chris's membership interest.

27. The search led to Fernando Mateo ("Mateo") whom we first met in 2009 after he was involved with an unsuccessful bid for the Dyckman Marina project.

28. At the time that we were searching for fresh capital, we became reacquainted with Mateo, who was still interested in becoming part of the La Marina project.

29. Ultimately, Mateo and his business partner, Alain Chevreux purchased a 35% membership interest in the Company from VFLP, through their company FM/AC.

30. In exchange for VFLP's 35% membership interest, FM/AC invested an initial cash contribution of $700,000 into the Company to develop and launch the business, and FM/AC was responsible for additional operational obligations for the benefit of the Company.

31. VFLP's transfer of a 35% membership interest rendered ownership of the Company as follows:

	Membership Interest
Josh	25%
Jerald	25%
VFLP	15%
FM/AC	35%

32. At around the same time, the parties entered into an Amended and Restated Limited Liability Company Agreement dated October 10, 2011 (the "LLC Agreement"). A copy of the LLC Agreement is attached as **Exhibit 4**.

33. Pursuant to Sections 3.1 and 3.2(a) of the LLC Agreement, the Company's management is vested exclusively in the Managers, the Company has four Managers, and each of the Company's four members has the right to designate one representative to serve as Manager.

34. Between October 2011 and June 2012, the Company spent more than $4,000,000 developing the restaurant and lounge concessions, and building infrastructure to support a future

marina. Jerald and I led this effort together with Mateo and Chevreux. Chris was only a marginal participant in the construction phase.

35. La Marina opened its doors to business on June 28, 2012.

<u>VFLP Transfers Another 10% Membership Interest to FM/AC</u>

36. Upon information and belief, in Fall 2012, Chris took a leave of absence from VFLP for personal reasons.

37. Recently, I learned that, in Chris's absence, his sister, Linda, began to take a more active role in the affairs of VFLP. Like Chris, Linda is also a principal of C. Villano, Inc., the general partner of VFLP.

38. Nevertheless, at all relevant times until about September 2013, Linda played virtually no role whatsoever in the Company's affairs; in fact, I have only met Linda about three times in total.

39. VFLP thereafter became interested in selling its remaining membership and management interests in the Company.

40. It found a willing purchaser in FM/AC, which, already a 35% member, was eager to increase its membership and assert greater control over the Company.

41. Due to my long-standing friendship with Chris, and to ensure that my management rights were not impeded by any deal with FM/AC, I offered to assist him in negotiations with FM/AC.

42. Initially, Chris decided to sell to FM/AC all of VFLP's 15% membership interest for which FM/AC offered to pay $800,000, plus settlement of other disputes between members of the Company.

43. Jerald and I convinced Chris to retain a 5% interest in the Company and to sell only a 10% interest to FM/AC.

44. By e-mail dated September 7, 2012, FM/AC offered an $840,000 purchase price for a 10% interest, of which purchase price Chris would receive only $380,000, with the remaining $460,000 to be used to pay a settlement in an unrelated, threatened legal matter involving Mateo and the Company. A copy of FM/AC's September 7, 2012 e-mail offer is attached as **Exhibit 5**.

45. I responded to FM/AC's e-mail offer on Chris's behalf, demanding that Chris receive $600,000 for the 10% interest he was selling; insisting that Chris not pay FM/AC's portion of the settlement of unrelated legal matters; and stating that "[i]t is a good deal, and Jerald and I are not participating in the buyout to allow [FM/AC] the extra shares at this under market price" (*see* Exhibit 5).

46. In addition, I bargained for VFLP to be relieved of monies it owed the Company under prior capital calls in the aggregate amount of $85,000.

47. After about three weeks of negotiations, the parties agreed to terms I demanded on Chris's behalf.

48. The sale of VFLP's 10% membership interest, however, would have been subject both to a right of first refusal and would have resulted in the loss of VFLP's management votes.

49. Pursuant to Section 9.2 of the LLC Agreement, any member's proposal to transfer more than 10% of that member's shares in the Company would trigger a right of first refusal as to the remaining members (*see* Exhibit 4 at p. 27).

50. Thus, in the case of VFLP's transfer to FM/AC, Jerald and I had a right of first refusal.

51. In addition, pursuant to Section 3.2(b) of the LLC Agreement, in the event a member ceases to hold at least 50% of his or its membership interests, "he or it shall lose the right to designate his Designee(s)" (*see* Exhibit 4 at p. 12).

52. Pursuant to Section 3.2, VFLP's sale of a 10% interest should have stripped VFLP of the right to designate a Manager to vote its management interests.

53. As a long-time friend of Chris, I bargained on his behalf for his ability to retain his management vote provided he either refrain from voting altogether or vote his interest in accordance with directives given to him by me and Jerald.

54. Thus, to effectuate the sale of VFLP's membership interest to FM/AC on the agreed-upon terms, two distinct contracts were prepared—a purchase agreement and a voting agreement.

55. The purchase agreement was a binding Memorandum of Understanding between all the parties, dated September 24, 2012 (the "Purchase Agreement"), and provided, among other things, that:

- Jerald and I agreed to waive our rights of first refusal as set forth in Section 9.2 of the LLC Agreement, thereby permitting the sale of VFLP's interest to FM/AC, upon certain conditions;
- Defendants would sell to FM/AC a 10% membership interest in the Company (out of the 15% then-owned by Defendants) for a cash purchase price of $600,000 plus debt forgiveness and certain indemnity rights; and
- VFLP retained its right to designate a Manager, but it was not required to be present at managers meetings, and failure to provide VFLP with notice of a managers meeting would not invalidate such a meeting.

A copy of the Purchase Agreement is attached as **Exhibit 6**.

56. To induce me and Jerald to waive our rights of first refusal and to allow Chris to retain his membership and management vote, another agreement was simultaneously entered

into, this one between only VFLP and Josh and Jerald (the "Voting Agreement"). A copy of the Voting Agreement is attached as **Exhibit 7**.

57. The Voting Agreement was also entered into as a means of permitting Chris, through VFLP, the opportunity to retain his position as Manager—albeit in an observer capacity—in the event he later decided to return to the Company, which position would otherwise have been lost by operation of Section 3.2(b).

58. The Voting Agreement, which by its terms was to remain confidential, provided:

- VFLP would vote its membership interest "as requested by [Josh] and [Jerald]";
- Josh and Jerald "will instruct the VFLP [manager] designee on how to vote in any such manner that the VFLP [manager] designee is permitted to vote";
- VFLP would not sell, pledge, or otherwise transfer its remaining interest in the Company absent the prior written consent of Josh and Jerald.

59. The Voting Agreement also specified that Plaintiffs "would be irreparably injured by [VFLP's] breach" of the Voting Agreement, "and that, in such event, [Plaintiffs] shall be entitled, in addition to any and all other remedies, to injunctive relief and specific performance, without having to post bond or prove actual damages."

60. When Jerald and I agreed to waive our rights of first refusal and permit Chris to keep his membership and management votes, it was conditioned upon the existence and terms of the Voting Agreement.

61. Had Defendants not agreed to abide by the terms of the Voting Agreement, Jerald and I would have exercised our rights of first refusal, eliminated VFLP's right to designate a manager and, as the majority of the voting interests, filled the vacant fourth Manager position with someone of our choice to ensure our continuing management authority.

62. The Purchase Agreement and Voting Agreement are both dated September 24, 2012, and were signed by all parties on that date other than Linda. I left the agreements containing the original signatures with Chris, who was to take them to Linda for her signature as the other principal of VFLP. The fully-executed agreements, signed by both Chris and Linda, were not returned to us until on or about October 18, 2012.

VFLP Breaches The Voting Agreement

63. In early October 2013, I advised Linda that, with Chris no longer serving as VFLP's designee, a new VFLP designee would need to be selected pursuant to the terms of the Voting Agreement.

64. I further provided Linda, by e-mail dated October 4, 2013 on which I copied only Jerald, with the names of two candidates to serve as the VFLP designee. Both candidates are eminently qualified for the position, as they both have extensive experience in owning and operating restaurants. I further invited Linda to "add any additional candidates to the list." A copy of my October 4 e-mail is attached as **Exhibit 8**.

65. Linda responded by e-mail of that same date, copying Mateo and Chevreux, stating tersely "Not happening Josh" (*see* Exhibit 8).

66. Matters came to a head on October 8, 2013 when Jerald and I showed up at a weekly Manager's meeting.

67. Mateo and Chevreux also showed up for the meeting.

68. Chevreux stated that he was attending as the designated Manager on behalf of FM/AC. Mateo stated that he was attending as the designated manager on behalf of VFLP.

69. Mateo then produced a document entitled "Proxy Voting Form" bearing what appeared to be Linda's signature and purporting to "assign" VFLP's "proxy vote" to Mateo for

purposes of the matters to be considered at the meeting that date (the "VFLP Proxy"). A copy of this Proxy Voting Form is attached as **Exhibit 9**.

70. Jerald and I immediately and strenuously objected to the VFLP Proxy, and we left the meeting before it was ever called to order and before any business was conducted.

71. Mateo and Chevreux thereafter purported to hold a meeting of the Managers and vote on matters and adopt resolutions without a quorum and without authority therefor.

72. Jerald restated to FM/AC, by e-mail dated October 8, that Linda's proxy was a legal nullity, and warned FM/AC not to interfere with the Company's management. A copy of this October 8 e-mail is attached as **Exhibit 10**.

73. At a subsequent meeting of the Managers held on or about October 10, 2013, Mateo again purported to participate as the designated Manager on behalf of VFLP pursuant to another VFLP Proxy.

74. Jerald and I again objected to the VFLP Proxy at the October 10 meeting. Mateo ignored our objection and purported to vote on various Company matters as VFLP's Manager designee.

75. Defendants never consulted with me or with Jerald prior to giving Mateo the VFLP Proxy.

76. Defendants also did not obtain Jerald's or my approval, written or otherwise, prior to giving Mateo the VFLP Proxy.

77. By giving Mateo the VFLP Proxy without Plaintiffs' prior approval, and by purporting to permit him to vote at a meeting of the Managers as the designated Manager of VFLP, Defendants breached the Voting Agreement and the LLC Agreement.

Defendants Must be Enjoined from Transferring
<u>Their Membership and Management Interests in the Company</u>

78. An injunction is urgently needed to prevent Defendants from taking any steps, other than in compliance with the Voting Agreement and the LLC Agreement, to transfer VFLP's voting rights either as a member or as a manager of the Company.

79. Indeed, on the purported "strength" of the VFLP Proxy, FM/AC is already masquerading as 50% manager of the Company, threatening to tear the Company apart by, among other things:

- "authorizing" distributions to themselves of the Company's "funds totaling not less than $500,000," during the off-season, when the Company can least afford it, threatening the financial viability of the Company;
- directing the Company controller to withhold payment from the Company's third-party's vendors, such as Epic Events, our external banquet sales and marketing team, breaching our written contract with Epic Events, jeopardizing the Company's vendor relationships, and threatening to dilute La Marina's substantial goodwill;
- obliterating employee morale by attempting to scuttle our management team and ultimately terminating the restaurant's General Manager, who is highly experienced and respected by the staff;
- creating a hostile environment in the restaurant by sending hate-filled e-mail memoranda to all La Marina managers, a sample of which is attached as **Exhibit 11**, calling Jerald "a liar" and opining that "a lawyer that lies is a scary thought."

80. In addition to having assigned its management voting rights to FM/AC, VFLP is presently attempting to sell its remaining 5% membership interest to FM/AC in violation of the Voting Agreement and the LLC Agreement's right of first refusal provision.

81. Unbeknownst to me at the time, as early as March 2013, FM/AC, through their attorney, Kevin Faga, Esq., approached VFLP to purchase its remaining 5% membership

interest. A copy of Mr. Faga's March 2013 letter to Linda conveying FM/AC's "interest in purchasing VFLP's remaining 5% interest in La Marina" is attached as **Exhibit 12**.

82. In August 2013, Jerald and I learned from Douglas Pick, Esq., an attorney representing VFLP, that VFLP desired and intended to sell its remaining 5% interest in the Company.

83. Apparently, VFLP charged Mr. Pick with exploiting the Company's management dispute to obtain a premium purchase price for VFLP's remaining 5% interest.

84. Indeed, Mr. Pick has e-mailed Jerald asking him to make an offer for VFLP's 5% membership interest . A copy of Mr. Pick's e-mail is attached as **Exhibit 13**.

85. Mr. Pick also informed my attorney, Peter A. Mahler, Esq., that VFLP intends to sell its remaining 5% membership interest to FM/AC, which Mr. Mahler thereafter confirmed in a letter to Mr. Pick dated September 11, 2013 (*see* Mahler Aff. ¶¶ 6-10; Exhibit 15).

86. Such a sale would violate the Voting Agreement's provision prohibiting VFLP from selling, pledging, or otherwise transferring its remaining interest in the Company "without the prior written consent of JT and JR," as neither I nor Jerald have been asked to consent, or have in fact consented, to any such sale (*see* Exhibit 7).

87. Jerald and I entered into the Purchase Agreement and the Voting Agreement with the legitimate expectation that VFLP would honor them and that we would thereby maintain our management control.

88. In fact, the agreement to maintain our management control was the only reason we were willing to waive our right of first refusal as to the sale of VFLP's membership interest.

89. As the Voting Agreement expressly acknowledges, the loss of a bargained-for contractual rights of control as managers and members constitute irreparable harm, which cannot

be compensated by monetary damages, and entitle Jerald and I to injunctive relief to maintain the status quo pending this litigation, without which any ultimate judgment in our favor will be rendered worthless.

90. Defendants' purported assignment of their management and membership voting rights to Mateo, in violation of the Voting Agreement and the LLC Agreement, constitutes *per se* irreparable injury, as it threatens Jerald and I with a loss of voting control which is the essence of our ownership rights in the Company.

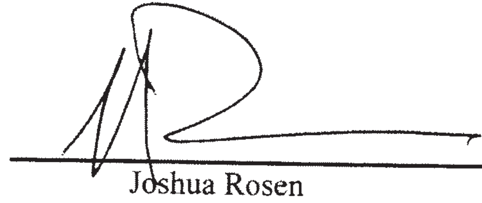
91. As mentioned above, Defendants also expressly acknowledged in the Voting Agreement that Jerald and I would be irreparably injured by Defendants' breach of the Voting Agreement, and that such breach would entitle Jerald and I to injunctive relief and specific performance without having to post bond or prove actual damages (*see* Exhibit 7).

92. The requested preliminary injunction is narrowly-tailored and restrains no more than actually necessary to preserve our rights against irreparable injury; it simply maintains the status quo by requiring VFLP to abstain from any attempt to vote its interests other than in accordance with Defendants' own agreements.

No Prior Request for Similar Relief

93. No prior request for this or related relief has been made in this action.

WHEREFORE, I respectfully request that the Court grant Plaintiffs' motion for a temporary and preliminary injunction, together with such other and further relief as the Court deems just and proper.



Joshua Rosen

Sworn to before me this
15th day of October 2013

Notary Public

PETER MAHLER
Notary Public, State of New York
No. 02MA4950560
Qualified in Westchester County
Commission Expires May 1, 2011/5