

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

ROCK THE OCEAN PRODUCTIONS,)
LLC, Derivatively on behalf of)
TMF2013, LLC,)

Plaintiff,)

VS.)

HUKA PRODUCTIONS, LLC, d/b/a)
HUKA ENTERTAINMENT, and)
H1 EVENTS, LLC,)

Defendants.)

NF
NO. 15-1153-BC

FILED
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DAVIDSON COUNTY
D.C. & M.

**MEMORANDUM AND ORDER GRANTING
DEFENDANTS' MOTIONS TO DISMISS ALL CLAIMS OF
PLAINTIFF'S VERIFIED DERIVATIVE ACTION
EXCEPT FOR CLAIM FOR APPOINTMENT
OF INDEPENDENT ACCOUNTANT FOR 2016 FESTIVAL**

TMF 2013, LLC ("TMF") is a two member LLC. It was formed by Plaintiff Rock the Ocean Productions, LLC ("RTO") and Defendant Huka Productions, Inc. ("Huka") to market and produce a series of musical festivals to raise awareness of endangerment to the world's oceans. Huka's interest in TMF is a majority one of 60% of the governance rights. The involvement of Defendant H1 Events, LLC ("H1") is that in 2014 Huka conveyed its 60% interest to Defendant H1. RTO contests the validity of that conveyance.

RTO has filed this lawsuit as a derivative action on behalf of TMF seeking a judgment for:

- Defendant Huka's expulsion from TMF;
- An accounting of past books and records;

- An award of damages and attorneys fees to TMF; and
- Imposition of a constructive trust on proceeds generated in the upcoming 2016 Festival.

The foregoing relief is based upon claims made in the lawsuit that one or both of the Defendants breached fiduciary duties, abused control, grossly mismanaged TMF, wasted TMF's assets, and usurped a corporate opportunity of TMF.

Also, immediate relief of retention of an independent accountant to manage cash flow and accounting for the upcoming April 2016 Festival is sought. The legal basis for this relief is paragraph 6 of the parties' Term Sheet agreement.

The case is presently before the Court on the Defendants' motion to dismiss on two grounds: (1) there is a prior *in rem* lawsuit pending in the United States District Court for the Middle District of Tennessee (the "Federal Action") substantially similar to this case and which requires dismissal of this case under the prior suit pending doctrine and (2) RTO waived its right, in the parties' Term Sheet agreement forming TMF, to bring a derivative action, and that waiver requires dismissal of this case.

As to the Federal Action, the Defendants acknowledge the law that ordinarily a prior suit pending in federal court does not preclude the same litigation in state court. *Pitts v. Villas of Frangista Owners' Ass'n, Inc.*, No. M2010-01293-COA-R3-CV, 2011 WL 4378027 at *4 (Tenn. Ct. App. Sept. 20, 2011). There is, though, an exception to the doctrine under which the Defendants are proceeding. The exception is if the federal court case is an *in rem*

or *quasi in rem* action, that prior federal case bars a state lawsuit from adjudicating that same *res*. *West v. Vought Aircraft Indus., Inc.*, 256 S.W.3d 618, 623 n. 5 (Tenn. 2008).

As to the second ground for dismissal, the Defendants cite to paragraph 5(a) of the parties' Term Sheet agreement as the authority for their claim that RTO waived its right to bring a derivative action. Paragraph 5(a) requires "unanimous" consent of TMF members on the "filing of a suit or litigation by" TMF. Defendants Huka and H1 have not consented to this litigation; therefore this derivative action, the Defendants argue, is barred by the parties' Term Sheet agreement. Such a waiver, Defendants assert, is valid under Tennessee Code Annotated section 48-249-205(a). That section allows parties to waive, with some exceptions, provisions of the LLC Act. The Defendants' theory is that paragraph 5(a) of the Term Sheet constitutes a waiver by the parties of the LLC Act provision, found at section 48-249-801, for members to file derivative actions.

The Plaintiff's opposition to the prior suit pending defense is twofold:

- The Federal Action is not an *in rem* or *quasi in rem* claim.
- The Federal Action is between different parties than this case. Defendant H1 in this case is not a party to the Federal Action. Also, RTO, directly, is the Plaintiff in the Federal Action; whereas in this case RTO's role is derivative on behalf of an independent and separate entity TMF.

The Plaintiff's opposition to Defendants' waiver argument is that the Plaintiff disputes the Defendants' construction and interpretation of the Term Sheet and the LLC Act. Under the Plaintiff's construction and interpretation, its derivative claim is not precluded.

After considering the record and argument of Counsel, the Court grants the motion to dismiss in part and holds the other part of the motion to dismiss in abeyance for additional briefing. Specifically, the Court dismisses part of Count 1, and dismisses in their entirety Counts 2 and 3 of the Verified Derivative Complaint. These are the causes of action the Plaintiff has asserted to obtain an accounting, expel Huka, recover damages and attorneys fees and impose a constructive trust for breaches of duty, and mismanagement. These claims, the Court concludes, are barred by the pending Federal Action under the prior suit pending doctrine. These claims are not, however, barred by waiver. The Court does not grant dismissal based upon waiver. The Court adopts the Plaintiff's construction and application of the LLC Act that a member's right to bring a derivative claim is a provision of the LLC Act that cannot be waived.

The one part of the Verified Derivative Complaint the Court does not dismiss is the Plaintiff's claim for immediate relief of appointment of an independent accountant for the April 2016 Festival (the "Appointment Claim"). The Court needs additional briefing from Counsel on whether the Appointment Claim is an *in personam* claim of TMF, brought derivatively by RTO, for immediate specific performance of a provision of the Term Sheet

and, therefore, not barred by the pending Federal Action; or, to the contrary, whether the Appointment Claim is part of the *res* over which this Court has decided the Federal Action has jurisdiction.

It is therefore ORDERED that Defendants' motion is granted in part, and Count 1 paragraph 71; Counts 2 and 3; and parts A, B, C, E, F, G, H of the Prayer for Relief of the Verified Derivative Complaint are dismissed with prejudice.

Held in abeyance, for additional briefing, is a ruling on Defendants' motion to dismiss Plaintiff's claim for immediate appointment of a third-party to oversee the cash flow and accounting for the upcoming 2016 Festival.

Given the approaching April 2016 Festival date, it is ORDERED that Defendants shall file supplemental briefing, on or before January 20, 2016, on whether the Appointment Claim is an *in personam* or *in res* claim and Plaintiff shall file its supplemental briefing on this issue by January 25, 2016. The Court shall rule on the papers.

As well, the Court has considered that the Plaintiff may not wish to proceed in this case if its sole potential claim for disposition is the Appointment Claim. If the Plaintiff does not wish to pursue that lone claim in this case, the Plaintiff shall file a notice to that effect by January 8, 2016, at noon. The Court regrets the short time but must proceed this way in the event Plaintiff proceeds with the Appointment Claim and the attendant need for supplemental briefing before the close of January 2016.

The authorities and reasoning upon which this decision is based are as follows.

In dismissing part of Count 1, all of Counts 2 and 3, and most of the Prayer for Relief of the Verified Derivative Complaint, the Court adopts Defendants' comparative analysis of the Federal Action and this case. Both cases allege the same, key acts of wrongdoing:

- Huka did not properly prepare a budget for TMF or maintain and grant access to TMF's books and records ¶¶ 21-31 Verified Derivative Complaint in this case ("VDC") ¶¶ 37-48; Federal Action Complaint ("FAC");
- Huka paid itself producer fees, alleged as an action of self-dealing in violation of the parties' Term Sheet (¶¶ 32-41 VDC; ¶¶28-31 FAC);
- Huka did not make charitable contributions required under the Term Sheet (¶¶ 46-49 VDC; ¶¶ 32-36 FAC).

Both cases seek the same relief:

- A counterclaim by Huka for RTO's membership interest in TMF to be terminated (¶¶ 103-107 Federal Action Answer and Counterclaim) and a claim in this lawsuit that Huka's membership interest in TMF be terminated.¹
- an accounting of TMF (¶¶ 78-83 VDC; ¶¶ 82-78 FAC);
- damages.

Under these circumstances, essential elements of the prior suit pending doctrine are present in this case: the two lawsuits involve identical subject matter, and the Federal Action

¹Originally, RTO in Count Three of the Amended Complaint in the Federal Action sought judicial termination of Huka's membership interest in TMF. On December 15, 2015, the Federal Court entered an order of RTO's voluntary dismissal of that Count.

(the first lawsuit) is pending in a court having subject matter and personal jurisdiction. See *West v. Vought Aircraft Indus., Inc.*, 256 S.W.3d 618, 623 (Tenn. 2008).

The remaining element to establish the prior suit pending doctrine is that the parties in both cases, if not identical, must be sufficiently similar so as to not practically make a difference. See *Comcast of the South v. Electric Power Bd. of Chattanooga*, 2009 Tenn. Ct. App. 212 at *18-*17 (Tenn. Ct. App. 2009); *Fid. & Guar. Life Ins. Co. v. Corley*, 2003 Tenn. App. LEXIS 940 at *23 (Tenn. Ct. App. Dec. 31, 2003). So, for example, in *Comcast*, its membership in a trade association, which had filed an earlier identical suit, barred the subsequent lawsuit Comcast filed individually. In *Corley*, the insurance carrier's subsequent interpleader action against the deceased's wife, the beneficiary on the policy, and the deceased estate was barred by a pending suit filed by the beneficiary only against the carrier. Of particular note in *Corley* is that even though certain necessary parties had not been joined in the earlier suit, the subsequent interpleader had to be dismissed because the previous court had acquired jurisdiction over the *res*—the insurance proceeds.

In this case, the interest of RTO, as a derivative plaintiff, is to have Huka's membership interest terminated and have RTO take over TMF and recover damages. The same result is sought in the Federal Action where RTO is an individual plaintiff and seeks

to recover damages for the same conduct in issue in this case, and in a counterclaim Huka seeks for RTO's interest in TMF to be terminated.² See *Farmers Ins. Exch. v. Shempert*, No. W2013-01059-COA-R3CV, 2014 WL 407903, at *3 (Tenn. Ct. App. Feb. 3, 2014) (citing *Erie Ins. Exch. v. Rose*, No. M2011-*02495-*COA-*R3-*CV, 2012 WL 3027224 (Tenn. Ct. App. July 24, 2012)) (“[T]he element of ‘identical subject matter’ for the purposes of the doctrine of prior suit pending is not limited to the claims asserted by the plaintiff in his

²Count IV of Huka's Counterclaim in the Federal Action states:

Count IV: Judicial Termination of RTO's Membership Interest

103. The above allegations are incorporated by reference.

104. Pursuant to Tenn. Code Ann. § 48-249-503(a), a member's membership interest in an LLC may be judicially terminated upon application by the LLC or another member in the event (a) the member engaged in wrongful conduct that adversely and materially affected the LLC's business; (b) the member willfully and persistently committed a material breach of the LLC documents, or of a duty owed under Tenn. Code Ann. § 48-249-403 to the LLC or to the other members; or (c) the member engaged in conduct relating to the LLC's business that makes it not reasonably practicable to carry on the business with the member.

105. As articulated above, RTO repeatedly and intentionally has interfered with the day-to-day operations of the Festivals and has placed the Foundation's best interests ahead of those of TMF2013 and of Huka. Additionally, RTO repeatedly has failed to comply with its obligations as articulated in the Term Sheet, and these failures continued despite notices from Huka.

106. By continuing to place the Foundation's interest ahead of TMF2013's, and in its repeated failures to comply with its obligations as articulated in the Term Sheet, RTO has (a) engaged in wrongful conduct that adversely and materially affected and affects TMF2013's business; (b) willfully and persistently committed a material breach of the Term Sheet; (c) breached its duties to TMF2013 and to Huka as set forth in Tenn. Code Ann. § 48-249-403, including the duty of care, the duty of loyalty, and the duty of good faith and fair dealing; and (d) engaged in conduct relating to TMF2013's business that makes it not reasonably practicable for Huka to carry on business with RTO.

107. Consequently, Huka respectfully requests that this Court immediately terminate RTO's interest in TMF2013.

complaint, but encompasses the subject matter of the lawsuit.”). Thus, the parties are “sufficiently similar as to make no practical difference.” *Comcast*, 2009 Tenn. App. LEXIS 212 at *17-*18.

Moreover, because both this lawsuit and the Federal Action involve a dispute over ownership of TMF, in issue is personal property or *res*. A membership interest in an LLC is personal property. TENN. CODE ANN. § 48-249-502(a). “In cases involving *in rem* or *quasi in rem* jurisdiction, a prior suit pending in a federal court or in the court of another state will prevent a party from bringing a second lawsuit in Tennessee.” *Pitts v. Villas of Frangista Owners Ass’n, Inc.*, 2011 WL 4378027, *4 (Tenn. Ct. App. Sept. 20, 2011) (emphasis contained in original) (quoting *West v. Vought Aircraft Industries, Inc.*, 256 S.W.3d 618, 623, n. 5 (Tenn. 2008)). Such preclusion is particularly appropriate in this case for if the Federal Court were to rule in favor of Huka on its Counterclaim to terminate RTO’s interest in TMF, that ruling would be *res judicata* in this state court derivative action. If the Federal Court terminated RTO’s interest in TMF, then RTO would have no membership interest to which it could assert a derivative claim on TMF’s behalf. Under these circumstances, there is a potential that proceeding further on the merits in this action on RTO’s derivative lawsuit could eventually become moot as RTO would not have standing to bring this derivative lawsuit.

For all these reasons, this Court concludes that the bulk of this lawsuit is barred by the prior suit pending in the Federal Action. That court has taken jurisdiction of the personal

property of the parties' membership interests in TMF through Huka's counterclaim and precludes this Court from adjudicating claims regarding that same *res*.

There is, however, one part of this lawsuit which may not be precluded by the prior suit pending doctrine. It is the Plaintiff's claim to immediately and specifically enforce section 6 of the parties' Term Sheet agreement. The issue the Court sees is whether the Appointment Claim is an *in personam* claim of TMF or part of the *res* over which the Court in the Federal Action has prior jurisdiction.

The context of the Appointment Claim is that section 6 of the Term Sheet provides that "During the Term, Huka shall appoint . . . an independent accountant to manage cash flow and prepare the books and records of each Festival." This has not been done, the Plaintiff alleges, for the upcoming 2016 Festival. In Count 1 and subsection (D) of the Prayer for Relief of the Verified Derivative Complaint and in an October 26, 2015 Motion, the Plaintiff seeks the immediate appointment of an independent third-party to perform the cash flow/accounting function. The tasks of such appointee are separate and independent from the Federal Action, the Plaintiff argues. The appointment is requested as immediate relief, and the appointment is specific performance of the Term Sheet for TMF. The Appointment Claim is, then, Plaintiff argues, incidental and collateral to the claims of liability, expulsion and damages:

Importantly, RTO is not asking that the Special Master be appointed to resolve any legal disputes in this matter (*e.g.*, whether Huka's actions constitute a

breach of its duties to TMF). Rather, RTO merely requests that the Court appoint a Special Master to serve as the “independent accountant to manage the cash flow and prepare the books and records of each Festival and/or the Company” that is expressly required by the Term Sheet and should have been installed at TMF’s inception. (Term Sheet, § 6). This task, in addition to being consistent with the plain language of the Term Sheet, is collateral or incidental to the ultimate issue of whether Huka has, in fact, breached its fiduciary obligations to TMF, and is therefore the type of issue that is properly referred to a Special Master.

Plaintiff’s Memorandum in Support of Motion for Appointment of Special Master, October 25, 2015 at 23.

Defendants’ jurisdictional arguments, however, are irrelevant to the question of whether the Court should appoint a Special Master. The Term Sheet unequivocally commands the appointment of an *independent* accountant to manage TMF’s cash flow and books and records, and Defendants have admitted that all of the individuals responsible for such tasks are beholden to and act solely at the discretion of Huka and H1. By appointing a Special Master to serve as a truly independent third-party, the Court will ensure that the financial transparency Defendants have failed to provide in the past will not serve as an impediment going forward.

* * *

Defendants’ exercise in hyperbole ignores the fact that the appointment of an independent third-party to “manage [TMF’s] cash flow and prepare the books and records for the Festival and/or [TMF]” is entirely consistent with – and *commanded by* – the Terms Sheet. (Term Sheet § 6). The Motion does not seek to “replace Huka” or have the Special Master “control planning preparations for the upcoming music festival.” Nor does the Motion request the appointment of a Special Master to adjudicate the main issues in this case. Rather, the Motion seeks only to create the accountability and financial transparency required by the Term Sheet and Tennessee Law.

Plaintiff’s Reply in Further Support of Motion for Appointment of Special Master, November 18, 2015, at 2, 7 (emphasis in original, footnote omitted).

In evaluating whether the Plaintiff's claim for appointment of a third-party accountant is part of the *in rem* jurisdiction of the court in the Federal Action or an *in personam* claim of TMF, this Court has considered Exhibit E to Huka's November 16, 2015 *Response to Plaintiff's Motion for Appointment of Special Master*. Exhibit E contains the August 2, 2015 Order of the Magistrate in the Federal Action stating that he "does not believe he has the authority under Rule 53 to make such an appointment to run a nonparty to this litigation. As of now TMF is not a party."

The Court has also considered the following authorities. While not on point, these authorities stand for the related propositions that:

- The elements of the doctrine of prior suit pending are not to be applied inflexibly. 20 AM. JUR. 2D *Courts* § 84 (Nov. 2015) (citing *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wash. App. 37, 231 P.3d 266 (Div. I 2014)).
- Where claims are not required to be brought in the prior federal lawsuit the federal court cannot be said to have already taken jurisdiction of the claim, and the plaintiff may choose to bring the claim in the forums which the law makes available to him. *Young v. Kitrell*, 833 S.W.2d 505, 509, FN 4 (Tenn. Ct. App. 1992).
- That a second lawsuit seeks equitable relief, where the prior suit sought legal relief, affects the parties necessary to afford the relief such that judgment in the prior suit is not a bar to the second. *Federal Deposit Ins. Corp. v. Chapman*, 2012 WL 3801490 (Aug. 31, 2012 Tenn. Ct. App.).
- "It is certainly true, that a Court of Equity may entertain a bill for the specific performance of a contract respecting land situated in a foreign country, if the parties are resident within the territorial jurisdiction of the court. In such case, although the court cannot bind the land itself by the decree, it can bind the conscience of the party in regard to the land,

and enforce him, by process against his person, to perform his agreement. But the decree is merely *in personam*, and not *in rem*. Still, the want of power to act upon the land, or to enforce the decree *in rem*, is no objection to the jurisdiction to act upon the person, and in that mode compel an execution of the contract according to equity and good conscience.” *Johnson v. Kimbro*, 40 Tenn. 557, 559 (1859) (West 2016).

- “Equity acts in personam. Its meaning is that equity deals primarily with the person, and usually only through the person with the *res*. According to some authorities, in the absence of a statute enlarging its powers, a court of equity can act only *in personam*, and not *in rem*; but according to other authorities equity has inherent power to act by decrees *in rem*, and it has been stated that equity jurisdiction cannot be said to be exercised strictly *in personam*. Equity can act directly *in rem* when authorized by statute.” 30A C.J.S. *Equity* § 127 (West 2016).
- “Specific performance, as an equitable remedy, ordinarily acts *in personam*, for venue purposes.” 81A C.J.S. *Specific Performance* § 103 (West 2016).
- “The general rule is that equitable remedies act *in personam*. The fact that an equitable decree will indirectly affect title to or an interest in land does not preclude the characterization of the action as one *in personam*, where the remedy will be enforced against the person. *Greenpeace, Inc. v. Exxon Mobil Corp.*, 133 S.W.3d 804, 809 (Tex. App. 2004) (citations omitted) (West 2016).
- “An action *in personam* is said to be one which has for its object a judgment against the person, as distinguished from a judgment against property to determine its status. An action *in personam* is sometimes defined as a proceeding to enforce personal rights or obligations, which action is brought against the person. Such definitions are of little or no value, and as much guidance could be furnished by defining an action *in personam* as one which is neither *in rem* nor *quasi in rem*. However, some guidance can be had from cases which classify particular actions. As far as suits for injunctive relief are concerned, it is well settled that an injunction acts *in personam* and not *in rem*. This is in keeping with the general rule that equitable remedies act *in personam*. If the judgment in a proceeding can only be one that acts *in personam*, it is

difficult to classify such a proceeding as a proceeding *in rem* or *quasi in rem*. Since an action for injunction is an action *in personam*, the pendency of the suit in federal court presents no reason for abating the proceedings in state courts. The fact that the proceeding in this case involved the right to defendant to sell the property in his capacity as trustee does not transform the suit for injunction to an action *in rem*. The fact that the equitable decree will indirectly affect title to or an interest in land does not preclude the characterization of the action as one *in personam*, where the remedy will be enforced against the person. The Texas courts have held that a suit for specific performance of a contract to convey land is a suit *in personam*, despite the fact that TEX.REV.CIV.STAT.ANN. art. 2214 (Vernon 1971) provides that the decree itself operates to pass title without any act to be done by the party against whom judgment is rendered.” *Green Oaks Apts., Ltd. v. Cannan*, 696 S.W.2d 415, 418-19 (Tex. App. 1985) (citations omitted) (West 2016).

Based upon the following analysis, authorities and that this issue was not one Counsel could have anticipated, the Court seeks supplemental briefing, as scheduled above, on whether the Plaintiff’s claim for appointment of a third-party accountant is part of the *in rem* jurisdiction of the court in the Federal Action or is an *in personam* claim of TMF.

As to Defendants’ argument that the Plaintiff waived its right to file this derivative action, the Court does not grant that ground of Defendants’ motion to dismiss. The basis of Defendants’ waiver argument is paragraph 5(a) of the parties’ Term Sheet agreement. It provides that the filing of any suit or litigation by TMF, other than litigation filed in the ordinary course of TMF’s business, requires unanimous consent of the members. Neither Huka nor H1 has consented to the derivative claims asserted herein. Accordingly, the Defendants argue that under the provision of the Term Sheet, the right to bring this action

has been waived. Such waiver is allowed by statute, Defendants argue, pursuant to Tennessee Code Annotated section 48-249-205:

That an operating agreement of a limited liability company may extinguish the right of a member to file a derivative action on behalf of an LLC is clear. Tenn. Code Ann. §48-249-205(a) expressly recognizes that members of an LLC may waive or alter provisions of the Act except as set forth in Section 48-249-205(b). Section 48-249-205(b) contains twenty-one (21) limitations on the ability of members to alter the provisions of the Act, but contains no provision precluding members from altering or modifying Section 48-249-801, the provision that would otherwise allow a member to file a derivative action on behalf of the an LLC. Because RTO agreed with Huka in the Term Sheet that TMF would file no lawsuit absent *unanimous* consent of the two members, this action should be dismissed.

H1 Events, LLC's Response in Opposition to Motion to Appoint Special Master, November 16, 2015 at 4 (emphasis in original).

To the contrary, the Court adopts the Plaintiff's construction and application of the LLC Act: "[T]he plain language of the LLC Act . . . prohibits the members of an LLC from: (i) eliminating or varying a member's personal liability to the LLC; (ii) eliminating a member's duty of loyalty to the LLC; and (iii) unreasonably reducing a member's duty of care to the LLC. See T.C.A. § 48-249-205(b)(5), (13), (14). Further, if Defendants' interpretation of the Term Sheet was adopted, the Term Sheet would violate the LLC Act by restricting TMF's right to seek damages resulting from its members' mismanagement or self-dealing. See T.C.A § 48-249-205(b)(21) (prohibiting LLC documents from 'restricting any right of *any person other than* a manager, director, officer, employee, agent, member or

holder of financial rights.’) (emphasis added).” *Plaintiff’s Opposition to Defendants’ Motions To Dismiss*, December 7, 2015 at 6 (footnote omitted).


The Court also adopts the Plaintiff’s interpretation of paragraph 5(a) of the Term Sheet as requiring unanimous consent to lawsuits brought by TMF and the Plaintiff’s distinction of derivative actions as brought “in the right of a company”:

Even if the LLC Act permits such a waiver – which it does not – the provision at issue is expressly limited to the “[f]iling of a suit or litigation *by [TMF]*.” (Term Sheet, Exh. A(e)) (emphasis added). Suits brought *by* a company directly are distinct from derivative actions brought *in the right of* a company. *See e.g. Weiner v. King*, 43 Misc. 3d 1203(A), at *11 (Sup. Ct. 2014) (distinguishing a suit “by” an LLC from a derivative suit brought “in its right”) (copy attached); *Silver v. Chase Manhattan Bank*, 49 A.D.2d 851, 851, 374 N.Y.S.2d 8, 8 (N.Y. App. Div. 1975) (distinguishing between a direct action by a company and a derivative action on behalf of a company) (copy attached). In the absence of unequivocal language specifically prohibiting the filing of a derivative action *in the right of* TMF, RTO cannot be deprived of its statutory right to protect TMF’s interests by filing this derivative action. *See Davis v. Davis*, No. 13 CVS 388, 2014 WL 6609397, at *4 (N.C. Super. Nov. 21, 2014) (holding that the plaintiffs have the right to bring a derivative action despite the operating agreement’s requiring unanimous consent of all managers to “manage the business” and “bind the company”) (copy attached); *Nama Holdings, LLC v. Greenberg Traurig, LLP*, 26 Misc. 3d 1214(A), 907 N.Y.S.2d 102 (Sup. Ct. 2008), *aff’d as modified*, 62 A.D.3d 578, 880 N.Y.S.2d 34 (N.Y. App. Div. 2009) (rejecting defendants’ argument that plaintiff lacked standing or the right to bring a derivative suit based on a provision in the company’s operating agreement that expressly gave the managers the sole authority to bring lawsuits on behalf of the company) (copy attached).

Plaintiff’s Opposition to Defendants’ Motions To Dismiss, December 7, 2015 at 7.

For these reasons, the Court concludes as a matter of law that this derivative lawsuit, brought by RTO on behalf of TMF, has not been waived. Nevertheless, because of the prior *in rem* Federal Action all of Plaintiff’s claims must be dismissed except for its claim for

immediate appointment of an independent accountant. A ruling on this claim on Defendants' motion to dismiss is held in abeyance, as explained above, for supplemental briefing.



ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: John Jacobson
Michael Dumitru
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