

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
19 CVS 3752

ILAN KONOVER, HK CAPITAL,  
GROUP, LLC, LIN'S HOLDINGS,  
LLC, and YOUNG LIN, all  
individually and derivatively on  
behalf of MPHK CAPITAL, LLC,

Plaintiffs,

v.

MARK PANTLIN and MPHK  
CAPITAL, LLC,

Defendants.

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MARK PANTLIN, individually and  
derivatively on behalf of  
MPHK LLC,

Counterclaim  
Plaintiff,

v.

ILAN KONOVER, ARIEL  
KONOVER, HENRY KONOVER, HK  
CAPITAL GROUP, LLC, LIN'S  
HOLDINGS, LLC, YOUNG LIN, and  
MPHK CAPITAL, LLC,

Counterclaim  
Defendants.

**ORDER ON EMERGENCY MOTION FOR  
APPOINTMENT OF RECEIVER, IN THE  
ALTERNATIVE FOR PRELIMINARY  
INJUNCTION**

THIS MATTER comes before the Court on Defendant/Counterclaim Plaintiff Mark Pantlin's Emergency Motion for Appointment of Receiver, [or] in the Alternative for Preliminary Injunction. ("Motion for Receiver," ECF No. 9.)

THE COURT, having considered the Motion for Receiver, the briefs in support of and in opposition to the Motion for Receiver, the affidavits and other exhibits filed

by the parties, the arguments of counsel at the hearing, and other appropriate matters of record, concludes that the Motion for Receiver should be GRANTED based upon the following FINDINGS and CONCLUSIONS:

**I. Facts and Procedural Background<sup>1</sup>**

1. MPHK Capital, LLC (“MPHK”) is a manager-managed North Carolina real estate development company. At the time of its formation in 2014, MPHK had two members—Mark Pantlin (“Pantlin”) and HK Capital—each owning a 50% stake in MPHK.

2. HK Capital, through its manager Ilan Konover (“Konover”), and Pantlin entered into an Operating Agreement to govern the affairs of MPHK. (“Operating Agreement,” ECF No. 10.1.) Pursuant to the Operating Agreement, Pantlin was appointed as the initial Manager of MPHK with the

authority, power and discretion to manage and control the business, affairs and properties of the Company in good faith, to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of the Company’s business, subject to all of the terms and conditions of this Agreement.

(*Id.* at Art. VII, § 7.1.)

3. The Operating Agreement conditions and limits the Manager’s authority by providing that the Manager shall not, “*without the prior written approval of all the Members,*” undertake “Major Decisions.” (*Id.* at Art. VII, § 7.3.) “Major Decisions” include, *inter alia*, “the institution, prosecution and defense of any

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<sup>1</sup> The facts are drawn from Plaintiffs’ Verified Complaint (“Verified Complaint,” ECF No. 3), and Defendants’ Verified Answer and Counterclaim (“Answer and Counterclaims,” ECF No. 8).

Proceeding in the Company's name . . . the purchase, receipt, lease or other acquisition, ownership, holding, improvement, use and other dealing with, Property, wherever located . . . the sale, conveyance, mortgage, pledge, lease, exchange, and other transfer of Property . . . [and] any capital transaction in excess of \$100. (*Id.* at Art. VII, § 7.3(a), (b), (c), (p).)

4. In 2016, Pantlin and HK Capital each assigned a portion of their interest in MPHK to a new investor, Lin's Holdings, LLC ("Lin's Holdings"). Lin's Holdings is managed by Young Lin ("Lin"). Pantlin, HK Capital, and Lin's Holdings (collectively the "Members") each currently hold a 33.33% interest in MPHK.

5. HK Capital through Konover, and Lin's Holdings through Lin (collectively "Plaintiffs"), allege that between October 2016 and June 2018, Pantlin mismanaged MPHK and made Major Decisions without the consent of all the Members. Specifically, Plaintiffs allege that, among other things, Pantlin mismanaged MPHK by executing lease agreements without consent or understanding the true costs to MPHK, paying himself unearned fees, and writing checks to himself and his daughter in excess of \$60,000.

6. On June 15, 2018, Plaintiffs removed Pantlin as Manager pursuant to Section 7.7 of the Operating Agreement.<sup>2</sup> ("Resolution," ECF No. 10.4.) Concurrent with the removal of Pantlin as Manager, Konover and Lin appointed themselves as Co-Managers of MPHK. (*Id.*) Plaintiffs contend Pantlin's authority as Manager of

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<sup>2</sup> Section 7.7 of the Operating Agreement provides: "Any Manager may resign or be removed for cause by court order or the affirmative vote of at least 50% of the voting interest of the Members." (ECF No. 10.1 at Art. VII, § 7.7.)

MPHK ceased on June 15, 2018, however, Pantlin continues to hold the same 33.33% membership interest in MPHK.

7. Since June 2018, Plaintiffs have not consulted with Pantlin nor sought his consent for any of the actions taken by Plaintiffs on behalf of MPHK. Pantlin alleges that many of Plaintiffs' actions fall under the Operating Agreement's definition of "Major Decisions" and include canceling leases and sales contracts entered into by Pantlin, hiring counsel and defending lawsuits perpetuated by the cancellation of two of the leases, and the sale of land and a building owned by MPHK to Lin's Holdings. Indeed, Plaintiffs do not dispute that they made and continue to make Major Decisions without Pantlin's consent as required by the Operating Agreement.

8. Plaintiffs also have refused to provide Pantlin information requested under N.C.G.S. § 57D-3-04.

9. On March 11, 2019, Plaintiffs filed their Verified Complaint in Wake County, North Carolina making claims against Pantlin for, *inter alia*, breach of fiduciary duty; breach of contract; and frustration of reasonable expectations.<sup>3</sup> (ECF No. 3.) Plaintiffs did not achieve service on Pantlin until October 22, 2019. (Acceptance of Serv., ECF No. 4.) On November 12, 2019, this case was designated to the North Carolina Business Court (Desig. Order, ECF No. 1), and assigned to the undersigned on November 13, 2019. (Assign. Order, ECF No. 2).

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<sup>3</sup> It is unclear from the Verified Complaint, however, Plaintiffs' claim for "frustration of reasonable expectations," which prays for "equitable relief" appears to be seeking judicial dissolution of MPHK.

10. On November 14, 2019, Defendants filed their Verified Answer, Affirmative Defenses, and Verified Counterclaims making counterclaims against Plaintiffs<sup>4</sup> for, *inter alia*, breach of fiduciary duty; breach of contract; failure to pay dividends; refusal to produce books and records under N.C.G.S. § 57D-3-04; and judicial dissolution under N.C.G.S. §§ 57D-6-01 *et seq.* (ECF No. 8.) As grounds for judicial dissolution, Pantlin alleges both that his reasonable expectations as a Member have been frustrated by, *inter alia*, Plaintiffs’ refusal to seek his consent prior to undertaking Major Decisions, and that MPHk can no longer be operated in accordance with the Operating Agreement. (ECF No. 8, Counterclaims, at ¶¶ 81–86 and 114–120.)

11. Additionally, on November 14, 2019, Pantlin filed the Motion for Receiver (ECF No. 9), along with a brief (Br. in Supp., ECF No. 10), and evidentiary materials in support (Supporting Evidence, ECF Nos. 10.1–10.7). In the Motion for Receiver, Pantlin “requests [ ] the Court to appoint a receiver to oversee MPHk’s affairs during [the] pendency of this matter and upon its judicial dissolution.” (ECF No. 9, at ¶ 9.) Plaintiff requests that George Oliver be appointed receiver for MPHk. (*Id.* at ¶ 12.)

12. On November 18, 2019, the Court noticed a hearing set to take place on November 25, 2019, and further required Plaintiffs to file their response to the Motion for Receiver and any evidence on or before November 22, 2019. (Notice of Hearing, ECF No. 11.)

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<sup>4</sup> In addition to Plaintiffs, Pantlin asserts counterclaims against Ariel Konover and Henry Konover.

13. On November 22, 2019, Plaintiffs filed a Response Brief and evidentiary material in support. (“Response,” ECF Nos. 12–12.1.) The Court held hearing on November 25, 2019, at which the Court heard oral argument from counsel. The Motion for Receiver is now ripe for decision.

## **II. Analysis**

14. Preliminary, the Court concludes that the primary relief—appointment of a receiver over MPHK—sought in the Motion for Receiver should be GRANTED. Therefore, to the extent Pantlin seeks a preliminary injunction as alternative relief, such alternative relief is DENIED as MOOT.

15. Pantlin seeks dissolution of MPHK. The North Carolina Limited Liability Company Act (“LLC Act”) gives the superior courts authority to dissolve an LLC in a proceeding initiated by: “[a] member, if it is established that (i) it is not practicable to conduct the LLC’s business in conformance with the operating agreement and this Chapter or (ii) liquidation of the LLC is necessary to protect the rights and interests of the member.” N.C.G.S. § 57D-6-02(2). When a dissolution action is brought under § 57D-6-02, “the court may issue injunctions, appoint one or more persons to serve as receiver with powers and duties the court may grant under G.S. 57D-6-04, or take other action required to manage the LLC and its assets.” N.C.G.S. § 57D-6-03(c).

16. “The court in a proceeding brought under G.S. 57D-6-02 to dissolve an LLC . . . may appoint . . . a receiver to manage the business of the LLC pending the court’s decision on dissolution and if dissolution is decreed by the court to wind up

the LLC.” N.C.G.S. § 57D-6-04(a). If the court determines that receivership is necessary, it

[s]hall describe the powers and duties of the receiver in its appointing order, which the court from time to time may amend. The powers may include the authority to do any of the following:

- (1) Dispose of all or any portion of the assets of the LLC wherever located, at a public or private sale.
- (2) Sue and defend in the receiver’s own name as receiver of the LLC.
- (3) Exercise all of the powers of the LLC to the extent necessary to manage the business of the LLC or wind up the LLC following dissolution.

N.C.G.S. § 57D-6-04(c).

17. The Court holds powers regarding receivership beyond those granted by statute because a receivership is an equitable remedy. *See Sinclair v. Moore Cent. R.R. Co.*, 228 N.C. 389, 395, 45 S.E.2d 555, 560 (1947). “Courts of equity have original power to appoint receivers and to make such orders and decrees with respect to the discharge of their trust as justice and equity may require.” *Lambeth v. Lambeth*, 249 N.C. 315, 321, 106 S.E.2d 491, 495 (1959) (citing *Skinner v. Maxwell*, 66 N.C. 45, 47–48 (1872) and *Lasley v. Scales*, 179 N.C. 578, 580, 103 S.E.2d 214, 215 (1920)); *see also Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 576, 273 S.E.2d 247, 256 (1981) (“[I]t is elementary that a Court of Equity has the inherent power to appoint a receiver, notwithstanding specific statutory authorization.”); *Barnes v. Kochhar*, 178 N.C. App. 489, 499, 633 S.E.2d 474, 480 (2006) (“A receiver may be appointed by a trial court both pursuant to statute and the trial court’s inherent authority.”).

18. The Court has thoroughly reviewed the briefs and evidence filed by the parties thus far and considered the arguments of counsel, and concludes, in its discretion, that the Court has ample grounds to appoint a receiver to manage the business of MPHK pending the Court's decision on Pantlin's claim for judicial dissolution.

19. Pantlin's Motion for Receiver and his crossclaims against Plaintiffs allege, among other things, that Plaintiffs are engaging in conduct that is in flagrant violation of Pantlin's rights under the Operating Agreement. Plaintiffs concede that they have not sought Pantlin's consent on "Major Decisions" as defined in the Operating Agreement.

20. At the hearing, Plaintiffs proposed that in lieu of appointing a receiver, Plaintiffs could attempt to consult with Pantlin and seek his consent on future Major Decisions. After discussing this proposal with counsel, however, the Court concludes that any attempt to facilitate Pantlin's participation in MPHK's management at this point would be futile.

21. The evidence before the Court, and Plaintiffs' admissions, establish that the parties will be unable to operate MPHK during the pendency of this lawsuit and until the Court can make a "decision on dissolution." N.C.G.S. § 57D-6-04(a). The Court further finds and concludes, in its discretion, that it is necessary to appoint a receiver with general authority to take charge of MPHK in order to protect the interests of all Members pending the Court's decision on Pantlin's dissolution claim.



THEREFORE, IT IS ORDERED that:

**III. Receiver**

21. For good cause shown, George Oliver is hereby APPOINTED as receiver (“Receiver”) for MPHK, under the authority and subject to the duties set forth herein, until further order of this Court. Pantlin represents to the Court that Mr. Oliver has agreed to accept appointment as the Receiver for MPHK. Counsel for the Plaintiffs represents to the Court that, to the extent the Court determines appointment of a receiver is necessary, it does not object to Mr. Oliver being appointed as the receiver.

22. At this time, the Receiver is appointed solely to manage the operations and business of MPHK as set forth more fully below and is not appointed for the purposes of dissolving MPHK, or for purposes of winding up its business or liquidating its assets.

23. The Receiver will: (1) act in conformity with North Carolina law and rules and orders of the Court; (2) avoid conflicts of interest; (3) not directly or indirectly pay or accept anything of value from the receivership estate that has not been disclosed and approved by the Court; (4) not directly or indirectly purchase, acquire, or accept any interest in the property of the receivership estate without full disclosure and approval by the Court; and (5) otherwise act in the best interests of the receivership estate.

24. The Receiver shall be compensated at an hourly rate of \$150.00 for time reasonably expended on non-legal services as the Receiver, and at an hourly rate of \$350.00 for time reasonably expended on legal services as the Receiver. The Receiver

shall be paid for fees and expenses from MPHK's assets following notice and approval of such fees by the Court pursuant to the following process:

- a. The Receiver shall prepare and file with the Court requests for payment, with invoices, for his fees and expenses within sixty (60) days of the filing of this Order, and then every sixty (60) days thereafter.
- b. The Receiver's fees must be task-billed, with separate entries for each separate and individual task performed, the date of such task, a description of each task, the amount of time expended performing the task, and a designation of whether the task involves legal or non-legal services.
- c. Any party wishing to object to the Receiver's invoice shall file the objection within five (5) business days following the Receiver's electronic filing of the request for payment on the Court's e-filing system. Absent such filing, the Court can and shall assume that all parties consent to the amount and nature of the Receiver's request for payment.
- d. The Court will enter an order regarding an award of fees and expenses following the filing of the request for payment and after receipt of any objections.

#### **IV. Authority**

25. The Receiver shall have full authority to manage the affairs of MPHK in the best interests of its creditors and Members, and to carry out the authority and duties herein assigned to the Receiver. In addition, the Receiver shall have the

following specific powers and authority, which, unless otherwise noted below, may be exercised without further order of the Court:

a. To assume full control and management of MPHK and any subsidiaries and to exercise all of the powers of MPHK, in place of its Members and/or Managers, to the extent necessary to manage the affairs of MPHK in the best interests of MPHK's Members and creditors;

b. To inspect and review the books, records, accounts, or other information maintained by or on behalf of MPHK as is necessary to perform the duties assigned herein. This includes, but is not limited to, all of MPHK's financial, accounting, tax, LLC meeting minutes, LLC formation documents (drafts or executed) and banking records. HK Capital, Lin's Holdings, Pantlin and MPHK's outside attorneys, accountants, and other consultants shall cooperate with the Receiver in providing such records and information as the Receiver may require;

c. To establish and maintain bank accounts in the name of the Receiver for the deposit of monies and funds collected and received in connection with the Receiver's administration of MPHK's assets, and to write checks and make withdrawals on such accounts;

d. To collect obligations owed to MPHK including revenue received in the normal course of business;

e. To direct payment of costs and expenses necessary to the operation of MPHK, and to negotiate contracts, debts, and other matters in the

normal course of the businesses, including negotiation of payment plans, forbearance agreements, notes in lieu of immediate payment, and similar arrangements;

f. To operate, manage, maintain, lease, sell, convey or transfer MPHK's assets in whole or in part as may be in the best interest of the receivership estate provided that such sale, conveyance or transfer, if any, shall be approved and confirmed by this Court after notice to all parties in interest;

g. To pay taxes and other governmental obligations and to file all necessary or appropriate returns or documents;

h. To execute and prepare all documents and perform all acts in the name of MPHK, which are necessary or incidental to preserving, protecting, managing, and controlling MPHK's assets or which are necessary or incidental to carrying out the powers granted herein, and to institute any and all necessary lawsuits or other legal proceedings that are necessary to preserve and protect MPHK's assets;

i. To defend all actions at law or in equity which may be brought against MPHK, including the civil actions currently pending.

26. If the Receiver believes it is necessary to retain additional attorneys, accountants, brokers, or other professionals in the course of performing the duties under this Order, the Receiver shall make a written request to the Court to retain such attorneys, accountants, or other professionals. The request shall be made by

email to the Judge's law clerk assigned to this case, with copies to all counsel of record, and shall describe the issues with which the Receiver needs assistance, identify the professional the Receiver proposes to retain, and provide an estimate of the cost for retaining such professional's services.

27. If the Receiver believes it is necessary to file any lawsuits in the course of performing the duties under this Order, the Receiver, prior to filing such action, shall make a written request to the Court by email to the Judge's law clerk assigned to this case, with copies to all counsel of record, explaining the nature of and reason for the proposed lawsuit. The lawsuits may include any claims against the Members or entities they control, including any alleged capital contributions owed to MPHK.

28. Should he believe it is necessary, the Receiver may recommend to the Court that he be permitted to file a petition for bankruptcy on behalf of MPHK pursuant the Chapter 11 of the United States Code, and, upon the Court's approval, the Receiver shall have authority to file such petition.

29. The Receiver shall not be required to post a bond.

## **V. Duties**

30. It appears that Plaintiffs have not provided any financial data or other information regarding MPHK to Pantlin since June 2018, and Pantlin is not clear as to MPHK's current financial status. Accordingly, at the earliest reasonable time after appointment, the Receiver shall investigate and make an accounting of, and prepare a list or report regarding the Partnership's assets, with each asset's current approximate or estimated value. For purposes of this Order, "assets" mean any legal

or equitable interest in, right to, or claim to, any real or personal property, tangible or intangible, whether individually or jointly, directly or indirectly controlled, and wherever located, including but not limited to: patents, licenses, intellectual property, chattels, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, inventory, checks, notes, accounts, deposit accounts (including, but not limited to, bank accounts and accounts at financial institutions), credits, receivables, lines of credit, contracts, insurance policies, and all cash, wherever located.

31. The Receiver shall also investigate, identify, and prepare a list or report regarding all debts and obligations of the Partnership that are in excess of \$5,000.00, the amount of the debt or obligation, the source of such debt or obligation, whether such obligation is secured or unsecured, whether such debt is current or overdue, the creditor or party to whom the debt or obligation is owed, and other relevant information regarding the debt or obligation;

32. Following completion of the investigations of MPHK's assets and liabilities, the Receiver shall provide the written lists or reports of MPHK's assets and liabilities to the Court by email to the clerk assigned to this matter, and shall provide copies to Pantlin, Konover, and Lin. The reports or lists **shall not be filed on the Court's electronic docket.**

33. This Order shall remain in effect until otherwise ordered by the Court.

SO ORDERED, this the 5th day of December, 2019.

/s/ Gregory P. McGuire

Gregory P. McGuire  
Special Superior Court Judge for  
Complex Business Cases