

STATE OF NORTH CAROLINA
IREDELL COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 2372

EPIC CHOPHOUSE, LLC;
RICHARD D. MACK; and LARRY
SPONAUGLE,

Plaintiffs,

v.

JAMES A. MORASSO; JAM
RESTAURANT GROUP, INC.;
CHILLFIRE GRILL, LLC; and
WEBB CUSTOM KITCHEN, LLC,

Defendants.

**ORDER ON DEFENDANTS JAMES A.
MORASSO AND JAM RESTAURANT
GROUP, INC.'S MOTION TO
CONSERVE DISTRIBUTIONS AND
APPOINT A RECEIVER**

1. James Morasso and JAM Restaurant Group, Inc. move to appoint a receiver for Epic Chophouse, LLC (“Epic”) and to issue a preliminary injunction to conserve its assets. (ECF No. 50.) For the following reasons, the Court **GRANTS** the motion in part.

2. Earlier decisions describe the nature of this case and the alleged claims. *See Epic Chophouse, LLC v. Morasso* (“*Epic II*”), 2020 NCBC LEXIS 101, at *2–5 (N.C. Super. Ct. Sept. 8, 2020); *Epic Chophouse, LLC v. Morasso*, 2019 NCBC LEXIS 55, at *2–5 (N.C. Super. Ct. Sept. 3, 2019). Thus, the Court provides only a short summary here.

3. This case arises out of a dispute among Epic’s members—Morasso, Richard Mack, and Larry Sponaugle. Formed in 2009, Epic operates a restaurant by the same name. The members finalized an operating agreement soon after. Among other things, Epic’s operating agreement requires unanimous member approval for certain decisions, names Morasso as “full time General Manager” of the restaurant, and

purports to allow removal of a member “with cause.” (Operating Agrmt. ¶¶ 1, 2, 4, 9.f., 9.g., ECF No. 40.1.) In September 2018, after accusing Morasso of shirking his duties and making important decisions without their approval, Mack and Sponaugle voted to remove him as a member. (See ECF No. 44.3 at 2–3.)

4. A few days later, Mack, Sponaugle, and Epic (“Plaintiffs”) sued Morasso, claiming that he had breached his fiduciary duties and the operating agreement. Their complaint also included a request for a declaratory judgment that Morasso is no longer a member of Epic. (See Compl. ¶ 94, ECF No. 3.) In response, Morasso counterclaimed for dissolution of Epic. (See Countercl. ¶ 27, ECF No. 12.) He alleges that his purported removal was ineffective, that Epic has stopped paying his pro rata share of distributions, and that he “has been financially and physically frozen out of the company.” (Countercl. ¶¶ 22, 23, 27.) After a lengthy period of discovery, each side cross-moved for partial summary judgment as to Plaintiffs’ declaratory-judgment claim.

5. While the cross-motions were pending, Morasso moved to appoint a receiver for Epic. He points to unrebutted evidence that Mack and Sponaugle have diverted funds from Epic to their other restaurant ventures in recent months. (See Br. in Supp. 2–4, ECF No. 51.) Sponaugle admits, for example, that he and Mack used Epic’s assets to start a restaurant called Hominy & Hogg. (See Dep. Sponaugle 23:21–23, ECF No. 51.2.) Doing business as Legendary Hospitality, LLC, Mack and Sponaugle also plan to open a restaurant in South Carolina using Epic’s name and recipes. (See Dep. Sponaugle 13:1–23, 14:2–14.) The evidence shows that Epic paid

for equipment and security deposits for the South Carolina restaurant, (*see* Defs.’ Exs. 2, 6, 7, ECF Nos. 51.3, 51.7, 51.8), and made direct payments to Hominy & Hogg and Legendary Hospitality, (*see* Defs.’ Exs. 13, 14, ECF Nos. 51.15, 51.16). Worried that Mack and Sponaugle have depleted Epic’s resources for their own benefit, Morasso now asks the Court to appoint a receiver and to enjoin further transfers during the pendency of his dissolution claim. (*See* Br. in Supp. 10.)

6. Plaintiffs do not dispute having used Epic’s funds to open other restaurants. Instead, they argue that Morasso lacks standing to seek dissolution because he is not a member of Epic. (*See* Opp’n 1–4, ECF No. 55.) In addition, without citing any evidence, Plaintiffs assert that Epic’s business improved after Morasso’s forced withdrawal because he “was an impediment to the business.” (Opp’n 5.) Finally, Plaintiffs suggest that, in lieu of a receivership, they should have the chance to buy Morasso’s interest under N.C.G.S. § 57D-6-03(d). (*See* Opp’n 5.)

7. The Court held a single hearing on the cross-motions for summary judgment and the receivership motion. After careful review, the Court granted partial summary judgment in favor of Morasso in an order and opinion dated September 8, 2020. Based on the undisputed evidence, the Court concluded that the operating agreement’s involuntary withdrawal provision is unenforceable, rendering the effort to remove Morasso ineffective. *See Epic II*, 2020 NCBC LEXIS 101, at *11. The Court therefore declared that Morasso continues to be a member of Epic. *See id.* at *12. With the benefit of that decision, the Court now decides Morasso’s receivership motion.

8. In an action brought to dissolve an LLC, the Court “may appoint one or more persons to serve as a receiver to manage the business of the LLC pending the court’s decision on dissolution.” N.C.G.S. § 57D-6-04(a). The appointment of a receiver is “a harsh remedy,” though. *Neighbors v. Evans*, 210 N.C. 550, 554, 187 S.E. 796, 798 (1936). The complaining member must show that he will likely succeed on the merits of his claim for judicial dissolution and that there is no other safe and expedient remedy. *See 759 Ventures, LLC v. GCP Apartment Invs., LLC*, 2018 NCBC LEXIS 44, at *7 (N.C. Super. Ct. May 9, 2018); *Battles v. Bywater, LLC*, 2014 NCBC LEXIS 54, at *20 (N.C. Super. Ct. Oct. 31, 2014).

9. Morasso has carried this burden here. First, the summary-judgment order resolves any doubts about Morasso’s standing. The Court has declared that Morasso is a member of Epic. *See Epic II*, 2020 NCBC LEXIS 101, at *12. He therefore has standing to seek dissolution and ancillary remedies in support of that claim. *See* N.C.G.S. §§ 57D-6-02(2), -03(c), -04(a).

10. It follows that Morasso is likely to succeed on his dissolution claim. The other members of Epic tried to force Morasso out of the business without his consent. Although that effort was legally ineffective, it succeeded in depriving Morasso of his membership rights—for example, the rights to vote on Epic’s affairs and receive distributions—for nearly two years. (*See, e.g.*, Dep. Calcutta 17:9–25, ECF No. 51.5.) Reconciliation appears to be out of the question: Mack and Sponaule state in their opposition that they “could simply outvote Morasso on any matter” even if he is a member. (Opp’n 5.) In short, Morasso has shown that he is likely to succeed on his

claim that liquidation “is necessary to protect [his] rights and interests.” N.C.G.S. § 57D-6-02(2).

11. Nor is there any other safe and expedient remedy. As our Supreme Court has observed, “evidence of diversion of corporate funds” may be enough to support the appointment of a receiver even for “a going, solvent corporation.” *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 577, 273 S.E.2d 247, 256 (1981). This is especially so when the receivership is necessary to preserve the subject of the litigation. *See id.*

12. Here, Morasso has offered un rebutted evidence that Mack and Sponaugle diverted funds from Epic to at least two other restaurant ventures. This includes upwards of \$1,000,000 worth of “unusual” transactions “for expenses unrelated to” Epic. (Br. in Supp. 3–4; *see also* Defs.’ Exs. 2, 3, 5–19, ECF Nos. 51.3, 51.4, 51.6–20.) There is also evidence that Epic took out a sizeable loan, suggesting that the diversion of funds is threatening its solvency. (*See* Defs.’ Exs. 5, 10, 12, 15, 19, ECF Nos. 51.6, 51.11, 51.13, 51.16, 51.20; Br. in Supp. 6.) Notably, Plaintiffs do not contradict Morasso’s evidence and allegations, (*see generally* Opp’n 1–7), but have instead suggested that Epic may need to file for bankruptcy protection if economic disruptions from the COVID-19 pandemic persist, (*see* Pls.’ Mem. Sup. Mot. Sum. J. 17–18, ECF No. 44; Mot. to Further Amend Case Mgmt. Deadlines 2–3, ECF No. 45). Continued outflows from Epic would likely endanger Morasso’s interest or diminish its value to the advantage of Mack and Sponaugle (as the beneficiaries of the funds being directed to their other ventures).

13. For these reasons, the Court concludes that it is proper to appoint a receiver pending the Court's decision on dissolution. *See Lowder*, 301 N.C. at 577, 273 S.E.2d at 256; *Konover v. Pantlin*, 2019 NCBC LEXIS 102, at *7–8 (N.C. Super. Ct. Dec. 5, 2019).

14. As noted, Plaintiffs argue that the Court should allow them to purchase Morasso's interest in lieu of appointing a receiver. By statute, if a "court determines that dissolution is necessary," one or more members of the LLC may avoid dissolution by electing to purchase the complaining member's interest "at its fair value in accordance with any procedures the court may provide." N.C.G.S. § 57D-6-03(d). Although Morasso is likely to succeed on his dissolution claim, the Court has not yet determined that dissolution is necessary, meaning that Plaintiffs' right to buy Morasso's interest hasn't ripened.* Even assuming that Plaintiffs will eventually elect to exercise their right under section 57D-6-03(d), the appointment of a receiver is needed to preserve Epic's assets in the interim and to ensure that the Court can determine fair value without prejudice to either side.

15. To appoint a receiver, the Court must issue an order that identifies the receiver, addresses the need for a bond, and describes the powers and duties of the receiver. *See* N.C.G.S. § 57D-6-04. Neither side has proposed candidates to serve as receiver, however. Nor has Morasso submitted a proposed order that describes all the terms of the receivership, including the receiver's powers and duties. Accordingly,

* To advance the issue, the parties are free to stipulate that dissolution is necessary or to ask the Court to make that determination. And, of course, nothing in this Order is intended to dissuade the parties from settling all issues, including dissolution and a potential buyout, through mediation or otherwise.

the Court defers appointment of the receiver pending further submissions from the parties.

16. In the meantime, additional relief is needed. By statute, the Court has broad authority to grant injunctions in connection with the appointment of a receiver. *See* N.C.G.S. § 57D-6-03(c). Having weighed the equities, the Court concludes that a temporary injunction is needed to preserve the status quo until the formal appointment of a receiver. Epic, Mack, and Sponaugle shall be enjoined from making payments from Epic's accounts for the benefit of Mack and Sponaugle's other restaurant ventures. But the Court declines to enter a mandatory injunction, as Morasso requests, to claw back funds already transferred from Epic. *See A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759–60 (1983) (holding an injunction is appropriate when a plaintiff is likely to succeed and, “in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation” (citation and quotation marks omitted)).

17. One other point bears mention. As stated in the summary-judgment order, the parties must complete mediation by October 8, 2020. It may take nearly that long for the parties to propose a slate of receiver candidates and make objections. For that reason and to allow the parties to mediate in good faith, the Court does not anticipate formally appointing a receiver until after the mediation.

18. Accordingly, in the exercise of its discretion, the Court **GRANTS** Morasso's motion in part:

a. Epic and any persons or entities in active concert with it are **ENJOINED** from making payments to any person or entity for the benefit of Mack and Sponaugle's other restaurant ventures (including but not limited to Hominy & Hogg and Legendary Hospitality) or for any other purpose not genuinely related to Epic's business.

b. Pursuant to Rule 65(c) and as a condition of this Order, Morasso shall post security in the amount of \$500.00 in the form of cash, check, surety bond, or other undertaking satisfactory to the Iredell County Clerk of Superior Court. In its discretion, the Court determines that this amount is reasonable.

c. The injunction shall expire upon termination of this action or as otherwise ordered by the Court.

d. Within fourteen days of this Order, each side shall submit the names and qualifications of two candidates to serve as receiver for Epic. Also within fourteen days of this Order, Morasso shall submit a proposed order for the appointment of a receiver that includes all requirements identified in N.C.G.S. § 57D-6-04. Within seven days of service of these submissions, each side may file objections to the proposed candidates, and Plaintiffs may file objections to Morasso's proposed order. The Court encourages the parties to stipulate to a candidate for receiver and to the terms of the receivership.

e. Except as otherwise provided in this Order, Defendants' motion is **DENIED** without prejudice.

SO ORDERED, this the 9th day of September, 2020.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases