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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

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LITTLE REST TWELVE, INC. AND IMEDINVEST,

Plaintiffs,

-against-

Index No. 600676/2007

RAYMOND VISAN, GEORGE V. RESTAURATION, S.A., CREATIVE DESIGN FOR RESTAURANTS AND BARS LTD., JEAN-YVES HAOUZI, ET AL.,

Defendants.

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APPEARANCES:

Counsel of Record for Plaintiff Little Rest Twelve, Inc.:

Sternik & Zeltser
119 West 72nd Street
New York, New York 10023
By: Emanuel Zeltser, Esq.

Bruce D. Katz, Esq. & Assocs.
160 Broadway, Suite 908
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By: Bruce D. Katz, Esq.

Proposed Substitute Counsel for Plaintiff Little Rest Twelve, Inc.:

Gusrae Kaplan, Bruno & Nusbaum, PLLC
120 Wall Street
New York, New York 10005
By: Martin P. Russo, Esq.
Martin H. Kaplan, Esq.
Sarah Y. Khurana, Esq.
Marlen Kruzhkov, Esq.

Fried, J.:

An evidentiary hearing was held over 11 days between May 11 and December 16, 2010 on the question of whether Gusrae, Kaplan, Bruno & Nusbaum, PLLC ("GKBN") should be appointed counsel of record for Little Rest Twelve, Inc. ("LR12"), plaintiff in this case, in substitution for Emanuel Zeltser, Esq. ("Zeltser"), of Sternik & Zeltser, Bruce D.

Katz, Esq. ("Katz"), of Bruce D. Katz & Associates, and Alexander Fishkin, Esq. ("Fishkin"), to whom I will jointly refer as "counsel of record."[1] Counsel on both sides were given ample opportunity to file proposed written findings of fact and conclusions of law, and both sides stipulated, on their own authority, to supplement their respective submissions. On April 4, 2011, counsel of record filed Notices of Removal in this case and in the related case, *Little Rest Twelve, Inc. v. Zajic*, Index No. 650209/2010 (the 2010 *Little Rest* action), thereby removing these actions to the U.S. District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1452. In a decision rendered on July 20, 2011, this action was remanded. Without further ado, I now issue a decision on the question before me: whether GKBN should be appointed counsel of record for Little Rest Twelve, Inc. ("LR12"), plaintiff in this case, in place of Zeltser, Sternik & Zeltser, Katz, and Fishkin.

The issue on this motion is whether to permit GKBN to be substituted in as counsel for LR12 in this action. A corporation, such as LR12, may appear in a civil action only by an attorney. CPLR § 321(a). The parties have agreed that resolution of the counsel issue necessarily depends on an investigation into and provisional finding about the ownership of LR12. Just as a finding of a likelihood of success in a preliminary injunction motion is not a final determination on the merits, a final determination of LR12's ownership is beyond the purview of this decision. (*See* Apr. 6 Trans. at 11-15.)

As GKBN is attempting to wrest from current counsel of record its title, GKBN

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[1] Katz first filed a notice of appearance on behalf of LR12 on May 26, 2010. The record is somewhat unclear as to when Fishkin appeared on behalf of LR12, but Efiling Docket No. 92 is a Notice of Appearance by Fishkin on behalf of LR1, dated April 27, 2010.

bears the burden of proof by a preponderance of the evidence.

GKBN claims, in a nutshell, that, on March 30, 2010, the shareholders of LR12 passed a unanimous resolution replacing the directors of LR12, and later the same day the newly elected Board of Directors passed a unanimous resolution dismissing then-counsel of record[2] and retaining GKBN in their place as counsel for LR12. Counsel of record maintains that neither March 30, 2010 resolution was valid, and therefore current counsel of record were never terminated or replaced by GKBN.

GKBN's Evidence

In support of its version of history, GKBN called a number of witnesses and submitted a formidable battery of documents into evidence to buttress their testimony.[3] In addition to the exhibits admitted into evidence at the hearing, this Court may consider may consider any documents filed in this case as Court exhibits for purposes of this hearing, by stipulation of counsel. (Nov. 30 Trans. Part I, at 22.)

According to GKBN, when the fateful day of March 30, 2010 dawned, the shareholders of LR12 were Grosvenor Trading House Limited ("Grosvenor"), which owned 85% of LR12's shares, and Jean-Yves Haouzi ("Haouzi"), a defendant in this action, who

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2 At the time, counsel of record for LR12 were Emanuel Zeltser, Sternik & Zeltser, Alexander Fishkin, and Mound Cotton Wollan & Greengrass. Mound Cotton Wollan & Greengrass soon afterward withdrew from this representation.

3 As the authenticity of a number of documents and the veracity of much of the witness testimony introduced at this hearing are highly contested, I shall periodically cite to the hearing exhibits by letter or number and occasionally cite to witness testimony by page and date of the transcript.

owned 15%. Grosvenor, in turn, had only one director: Andrew Baker ("Baker"). Consequently, the shareholder resolution replacing LR12's Directors was signed by only Baker and Haouzi. (Ex. NN.)

As evidence that Baker had authority to sign such a resolution, GKBN submitted into evidence a resolution that, on November 6, 2009, Baker was appointed sole director of Grosvenor by its sole registered shareholder, Miselva Etablissement ("Miselva"), which is a Lichtenstein entity. (Ex. E.) That resolution was signed by Baker himself, on behalf of Miselva. (Ex. E.) Baker has averred without opposition that he is Managing Director of Miselva.

GKBN has also submitted a Declaration of Trust, in which Miselva was appointed trustee of the Valmore Trust, formerly called the Fisher Trust, on March 1, 2006. GKBN has submitted a resolution of Miselva, as trustee, signed by Baker, certifying that the Fisher Trust changed its name to the Valmore Trust, dated October 1, 2006.

The upshot of all this corporate shuffling is that, according to GKBN's evidence, by the end of 2006, Miselva (through Baker), as trustee of the Valmore Trust, was sole shareholder of Grosvenor, which owned 85% of LR12's shares.

But the corporate shuffling did not end there. GKBN has submitted evidence that a Delaware company called JWL Entertainment Group, Inc. ("JWL") sold all of its 199 shares to Miselva around December 31, 2007. *(E.g.*, Ex. TT.) Part of the consideration for this purchase by Miselva was Grosvenor, the ownership of which thus passed to JWL. *(E.g.*, Exs.

O, P.) According to Baker, this means that Valmore Trust now wholly owns JWL through Miselva as trustee. (Baker Aff. ¶ 2.) Since JWL, in turn, owns Grosvenor, Miselva controls Grosvenor, and thus Baker controls Grosvenor. (Ex. Y.)

GKBN has submitted evidence that, on April 25, 2008, JWL passed a stockholder resolution removing from its Board of Directors Joseph Kay ("Kay" or "Joseph Kay") and his son, David Kay ("David Kay"), and replacing them with Andrew Baker and Michael Repolusk. (Ex. R.) The same day, JWL passed another stockholder resolution removing Joseph Kay, David Kay, and Zlata Stepanenko as officers of JWL. (Ex. S.)

GKBN has submitted a November 6, 2009 resolution of Grosvenor, in which Miselva appointed Baker as the sole director of Grosvenor. (Ex. E.) GKBN has also submitted an Annual Return submitted to Companies House in London, which indicates that, as of February 28, 2010, Baker was sole director of Grosvenor. (Ex. Q.)

On March 30, 2010, Baker, as director of Miselva, sole stockholder in JWL, signed something entitled a "written consent" by JWL, which "authorizes and directs Miselva to pass a shareholder resolution in respect of [Growvenor] . . . to enable [Grosvenor] to take control over Little Rest 12 Inc." (Ex. LL.) Accordingly, Baker signed a resolution dated March 30, 2010, in which he authorized himself to "take all steps necessary to effectuate control over Little Rest Twelve, Inc.," run its day-to-day operations, and "take all legal action necessary to ensure all of the foregoing." (Ex. MM.)

As evidence that Haouzi owned 15% of LR12 and thus had authority to sign the March

30, 2010 shareholder resolution, GKBN has submitted a document entitled "Written Action of the Directors of Little Rest Twelve, Inc.," signed by Haouzi and David Aim ("Aim") as LR12's original directors, noting that its original shareholders when it was incorporated in 2004 were Jean-Yves Haouzi (7.5%), Laurent Ben-Attar (7.5%), and Sakia Ltd. (85%). (Ex. WW.)[4] GKBN submitted a loan note and stock certificate supporting Haouzi's testimony that he purchased Ben-Attar's shares in October 2004, giving him a 15% interest in LR12. (Exs. DDD, VV.) This testimony is corroborated by the December 5, 2006 application of LR12 for approval of corporate change to the state liquor authority. (Ex. OOO.) It is also corroborated by the evidence submitted that LR12 applied for its liquor license with New York State in 2004 in Haouzi's name, and that Haouzi continues to be listed as LR12's "Principal" on its state-issued liquor license to this day. (*E.g.*, Ex. PPP.)

On July 26, 2006, Grosvenor acquired a 85% ownership interest in LR12. (Exs. C, X at 14, EEEE.) Baker and Haouzi testified that this interest was the 85% interest formerly held by Sakia. By paying off the loan that was its consideration for the shares by the end of 2006, Grosvenor became 85% owner of LR12. (Exs. X at 14, EEEE.)

Haouzi testified that Aim, the other original director of LR12, resigned as director around October 2005, and Aim was never replaced. GKBN has submitted as Exhibit XX into evidence an undated document that Haouzi testified is a copy of LR12's original By-Laws,

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[4] I admitted Exhibit WW into evidence for "whatever it is worth." (Sept. 13 Trans. at 161.)

which Baker and Haouzi testified were never modified or repealed. Haouzi also testified that there were no shareholder meetings until March 30, 2010.[5]

According to Article II, § 5 of these By-Laws submitted by GKBN, "any and all of the directors may be removed for cause or without cause by the shareholders." (Ex. XX at 6.) This provision is authorized by N.Y. Bus. Corp. Law § 706(b). According to Article III of the By-Laws submitted by GKBN, the "Board of Directors may remove any officer for cause or without cause." (Ex. XX at 7.) This provision does not appear to conflict with any provision of the N.Y. Bus. Corp. Law.

The Gibraltar Evidence

In February 2008, Arkadi Patarkatsishvili ("Badri"), a wealthy associate of Joseph Kay, died. Baker testified that, soon after Badri's death, Badri's heirs informed Baker that all or most of the assets in the Valmore Trust had been settled by Badri for his family's benefit, and not for the benefit of Joseph Kay, who had for the most part acted as Badri's agent concerning the settlement of the Valmore Trust. Until that time, Baker had understood that the Valmore Trust had been settled by Joseph Kay with his own assets for the benefit of himself and his family.

Baker testified that he, on behalf of Miselva, then initiated proceedings in Gibraltar court in 2008, seeking a determination of who the actual settlor of the Valmore Trust was and

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5 Haouzi testified that he was fired as CEO of LR12 in early 2007 and did not visit the premises again until March 31, 2010. LR12 sued Haouzi in this action in 2007 for, among other things, aiding and abetting fraud.

for whose benefit it was settled. GKBN submitted into evidence various foreign documents from the proceedings in Gibraltar. (*E.g.*, Ex. JJ.)

A foreign document is properly received into evidence, notwithstanding its lack of certification under CPLR § 4542, if it has been properly certified under the terms of the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, adopted by the United States, effective October 15, 1981. *Estate of McDermott*, 112 Misc.2d 308, 309-10 (Sur. Ct. 1982); *see also Matter of Adoption of Dafina T.G.*, 161 Misc.2d 106, 613 N.Y.S.2d 329 (Sur. Ct. May 12, 1994) (stating that foreign documents can satisfy the requirements for admissibility into evidence by being accompanied by an apostille); *cf. Matter of Will of Eggers*, 122 Misc.2d 793 (Sur. Ct. 1984) (where documents sought to be admitted was from a non-signatory country, documents had to comply with CPLR § 4542).

I reject the position taken by counsel of record that CPLR § 5304 applies here, as the Gibraltar documents at issue do not constitute a "foreign country judgment" under CPLR § 5301(b), and, in any case, the documents are not being offered to enforce a foreign money judgment. The fact that LR12 may not have been a party to the Gibraltar proceedings therefore does not affect the admissibility of these documents. Accordingly, the contrary statement by counsel of record at the hearing was incorrect, and the Gibraltar evidence is accepted into evidence. (*Cf.* LR12 Findings of Fact at 20 *with* Trans. at 31 (Sept. 13, 2010).)

Here, Gibraltar is a signatory to that Convention, and Exhibit JJ and the other Gibraltar court documents appear to be properly apostilled. Therefore, Exhibit JJ and the other

Gibraltar court documents were properly received into evidence.

The defendants in the Gibraltar proceedings included Joseph Kay. The Gibraltar proceedings involved a five-week trial in May and June 2009. Throughout these proceedings, Joseph Kay was represented by counsel, participated in discovery, and testified as a witness at trial. (Ex. JJ at 1-2.) Nina Zajic, his sister, also testified on his behalf. In a decision signed on December 17, 2009, the Gibraltar court concluded that the Valmore Trust was settled both directly by Joseph Kay and indirectly by Badri with Kay acting as his nominee, and further ruled that, as between Badri's heirs and Kay, the trust was to be administered for the benefit of Badri's heirs or Kay, in such proportions as the acquisition of assets was funded by either Badri or Kay. (Ex. JJ ¶ 151.) The court then ordered an accounting in order to determine the respective interests of Badri and Kay in the trust.

In a further order dated February 1, 2010, on a motion by Badri's heirs, the Gibraltar court ruled that Joseph Kay "has no interest in the Valmore" Trust. (Ex. KK.) Counsel of record have stipulated with proposed substitute counsel in this action, that Joseph Kay was represented by counsel throughout these proceedings, that he had notice of the motion underlying the February 1, 2010 ruling and the draft order before it was entered, that Kay's attorney in Gibraltar withdrew as counsel due to non-payment, and that the court issued the February 1, 2010 order on default. Counsel of record further stipulated that Kay had an opportunity to submit grounds of appeal after filing a Notice of Appeal of the Gibraltar court's judgment and subsequent orders, but he did not.

I am considering the Gibraltar evidence solely insofar as it is relevant to determine which counsel properly represents plaintiff in this case. Therefore, the fact that LR12 was not a party to the Gibraltar action is irrelevant to my decision. The Gibraltar court undertook to decide, as relevant to this lawsuit, whether Joseph Kay or Badri was the actual settlor and intended beneficiary of the Valmore Trust, not which counsel may properly represent LR12.[6]

The March 30, 2010 Resolutions

Less than two months following the February 1, 2010 order by the Gibraltar court, on March 30, 2010, Baker and Haouzi signed a resolution replacing the Directors of LR12, and later the same day the newly elected Board of Directors passed a unanimous resolution dismissing then-counsel of record and retaining GKBN in their place as counsel for LR12. (Exs. NN, LLL.) The Board of Directors of LR12 signed a resolution dated March 30, 2010, specifically authorizing Haouzi to retain GKBN to sue the former officers of LR12. (Ex. MMM.) Haouzi signed a retention letter dated March 31, 2010, retaining GKBN as counsel for LR12. (Ex. NNN.) All of these actions comport with the By-Laws of LR12, submitted by GKBN.[7]

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Counsel of record also challenges the Gibraltar documents on the ground that Gibraltar was an inappropriate forum for resolution of the disputes before the Gibraltar court. The question of whether Gibraltar was an appropriate forum is not before me, however, so I do not need to consider these arguments.

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As a housekeeping note: I discredit the statement by Zeltser on December 16, 2010 that he did not receive documents Bates-stamped LR12 0001–LR12 0300, in light of the

Counsel of Record's Evidence

The account of this history by counsel of record differs at almost every conceivable point.

According to counsel of record, their witnesses and their various documents: LR12 is owned by Imedinvest, a plaintiff in this lawsuit, and not by Grosvenor, and thus the March 30, 2010 purported resolutions signed by Baker and Haouzi, terminating Nina Zajic and David Kay, replacing LR12's directors, firing LR12's counsel of record, and hiring GKBN, have no effect. Joseph Kay and his family are the parties rightfully in charge of LR12, Zajic and David Kay have been officers and directors of LR12 since its founding in 2004, and Baker and Haouzi have no authority whatsoever to act on behalf of Grosvenor or LR12, without Joseph Kay's approval. In addition, Zajic and David Kay had employment contracts with LR12 that erected certain obstacles to their termination, none of which were complied with by the March 30, 2010 resolutions. Furthermore, counsel of record maintain that GKBN Kaplan's lawyers have engaged in various acts of misconduct that disqualify them from serving as counsel for LR12.

Counsel of record's case chiefly relies on the following witness testimony: (a) David Kay, Joseph Kay's son; (b) Nina Zajic, Joseph Kay's sister; (c) Joseph Kay; (d) Robby Mingels, a close friend of the Kay family, who still works for Joseph Kay; (e) Baruch

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convincing evidence submitted by GKBN that he did indeed receive these documents. Moreover, upon having received no objection from counsel of record to GKBN's submission of Proposed Court Exhibit 9, I accept that submission as part of the record in this hearing.

Gottesman, Esq., who did some work for Joseph Kay's nephew in 2008; and (f) Ellana Burstan, who did some translation work for Joseph Kay and Badri.

Some of the key documents on which counsel of record's case depends are: (a) Exhibits 17 and BBBB, which purport to memorialize the founding of LR12 at a March 11, 2004 meeting; (b) Exhibit 1, purporting to record minutes from a January 6, 2010 meeting of LR12's Board of Directors, amending LR12's By-Laws; (c) Exhibit 21, which appears to transfer one share of LR12 from Imedinvest to Grosvenor to hold in trust for Imedinvest Partners on January 7, 2008; and (d) Exhibit 2, David Kay's purported Employment Agreement.

I will give a brief overview of the content of these documents, before turning to the witness testimony.

Exhibits 17 and BBBB

Two of the key documents supporting the claims of counsel of record are Exhibit 17 and Exhibit BBBB, both of which purport to be minutes of the first "Organizational Meeting of LR12" on March 11, 2004. (Exs. 17, BBBB.)

Exhibits 17 and BBBB, both of which purport to memorialize the content of the March 11, 2004 meeting, are similar yet different in important ways. Both documents report that a March 11, 2004 meeting was attended by Joseph Kay, Theodore Kretschmer, Olga Timofeyeva, Nastia Loginoff, Nina Zajic, and David Kay, as well as Zeltser and Fishkin as LR12's attorneys. Exhibit 17, entitled "Certified Resolutions of the First Organizational

Meeting Little Rest Twelve, Inc.," states that the first six named attendees were "representatives of the Founding Shareholder and prospective directors," while Exhibit BBBB describes the first four named attendees as representatives of the "sole shareholder," Imedinvest Partners. There are other differences. Exhibit 17 reports that LR12 would initially be funded by an investment of $11.5 million obtained by its "Founding Shareholder JD Equities (Imedinvest Partners)." (Ex. 17 at 1.) Exhibit BBBB, in contrast, provides that "Imedinvest Partners shall fund" LR12 in the amount of $10 million. (Ex. BBBB at 1.) All in all, Exhibit BBBB, the one introduced by counsel of record at a later stage in these proceedings, more clearly supports the position of counsel of record that Imedinvest Imedinvest is the sole shareholder of LR12.

Exhibit 17 was introduced by counsel of record and admitted into evidence on September 16, 2010 on a preliminary basis, subject to a later evidentiary ruling. Exhibit BBBB was introduced by GKBN and admitted into evidence without objection on November 30, 2010, (Nov. 30 Trans. Part I, at 35-36).

Exhibit 1

Counsel of record introduced at the hearing, supported by the testimony of Zajic and David Kay, a document entitled "Minutes and Resolutions of Annual Meeting of Board of Directors" of LR12, dated January 6, 2010, as Exhibit 1. Exhibit 1 records that a January 6, 2010 meeting was attended by LR12's directors and officers–Olga Timofeyeva, Zajic, and David Kay–and also by three attorneys–Moshe Popack, Esq. ("Popack"), Zeltser, and Fishkin.

Exhibit 1 indicates that the LR12 Board of Directors resolved to continue the retainer of Sternik & Zeltser as LR12's lead counsel and to continue the appointment of Fishkin as LR12's registered agent. Exhibit 1 also reports that "the sole shareholder Imedinvest Partners" delegated its power to amend the By-Laws to the Board of Directors. (Ex. 1 at 1.) The attendee officers and directors then proceeded to reelect themselves as officers of LR12.

Both the 2010 By-Laws, introduced as Exhibit 1, and the 2004 By-Laws, introduced as Exhibit 17, provide that plaintiff ImedInvest is LR12's founding shareholder, and that subsequent shareholders cannot become shareholders except by amending the By-Laws, unless they are subsidiaries of ImedInvest. (Ex. 1 Art. 4, 5; Ex. 17, Art. 5.) Both versions of the By-Laws also set forth certain attributes required for a valid certificate of LR12 stock. (Ex. 1, Art. 14; Ex. 17, Art. 13.) They also restrict how transfers of stock can be made. (Ex. 1, Art. 20; Ex. 17, Art. 18.) Finally, both versions of the By-Laws provide that removal of a Director is invalid unless formal written notice is given to the Director, the entire Board, and the transfer agent, who is designated as Fishkin, 60 days before any meeting concerning the Director's removal and 90 days before his termination, and such removal is to be conditioned on satisfaction of the terms of that director's Employment Agreement. (Ex. 1, Art. 32.)

In addition, Exhibit 1 states that the LR12's By-Laws were amended on January 2010, such that they contained the following provisions, which do not appear in the By-Laws of LR12 offered into evidence by GKBN:

> (a) actions by shareholders or the Board of LR12 would be ineffective if a Director was acting as personal surety or guarantor of LR12's debts, unless

various conditions were satisfied (Article 36);

(b) no action by any shareholder or Director could be valid unless it conformed with the By-Laws, and was certified by LR12's Secretary (i.e. David Kay) and Transfer Agent (i.e. Fishkin) (Article 1);

(c) Imedinvest might hold shares in the name of other entities, but any stock issued to its subsidiaries would be deemed to be held in trust for Imedinvest, which might declare it void upon resolution (Arts. 4, 5);

(d) valid stock certificates must contain LR12's corporate seal, a certain statement indicating that stock ownership is subject to the By-Laws, and certification by LR12's transfer agent (*i.e.* Fishkin) (Art. 13);

(e) valid stock transfers must be certified on LR12's books by LR12's transfer agent (*i.e.* Fishkin), and no shareholder might give up his stock without giving a right of first refusal to Imedinvest, and second to LR12 itself (Arts. 18, 20); and

(f) LR12's counsel may be appointed and removed solely by Imedinvest, or upon amendment of the By-Laws (Art. 58); and

(g) no director might be removed while a party to any action relating to his service as a director, unless that action has been discontinued with prejudice or LR12 has posted a bond in the amount of that director's potential liability in his favor (Art. 63).

(Ex. 1.)

It is not controverted that all of these provisions were violated by the March 30, 2010 resolutions.

Exhibit 21

Also in support of their contention that Imedinvest was a shareholder of LR12, counsel of record introduced as Exhibit 21 a document dated January 7, 2008, which appears to be a

share certificate in which Imedinvest Partners transfers one share of LR12 to Grosvenor to hold in trust for Imedinvest Partners. Exhibit 21, which was not introduced in its original form, is signed by Joseph Kay, as Managing Partner of Imedinvest, and Popack, Joseph Kay's nephew, as "Authorized Representative" for Imedinvest. I admitted Exhibit 21 into evidence "for whatever it's worth," notwithstanding my "grave doubts" over its authenticity. (Nov. 30 Trans. Part I at 135.)

Exhibit 2

In support of their position that David Kay was an officer of LR12, counsel of record introduced a document entitled "Officer Employment Agreement," as Exhibit 2, as evidence that David Kay had an employment contract as an officer of LR12. David Kay testified that this document was his employment agreement with LR12, under which he was hired as an officer of LR12 with a base salary of $225,000 annually. (Ex. 2 ¶ (5)(a).) This document contains extensive provisions limiting the conditions under which he could be terminated. (Ex. 2 ¶ 10.)

To name a few of the obstacles to David Kay's termination erected by this remarkable document: if terminated, David Kay would be entitled to receive a generous severance package of $190,000 per year of service from December 2005, as well as an additional lump-sum pay-out exceeding $200,000; LR12 would undertake to discharge any of its debts that he personally guaranteed–which he testified approximated $4.31 million on January 7, 2008; he could be "terminated for cause only upon judicial determination as to validity of the alleged

cause"; and he was entitled to 60 days' notice of any meeting called to remove him as officer and 90 days' notice of his actual termination. (Ex. 2 ¶¶ 10(a), (c), (d), (e).)

Although counsel of record did not produce a similar document for Zajic, she testified that her own employment agreement with LR12 contained similar provisions conditioning her termination on LR12's discharge of debts she personally guaranteed, which she estimated to exceed $6 million.

Witness Testimony

I turn now to an analysis of these documents in light of the testimony of the various witnesses called by the parties.

Joseph Kay

Joseph Kay–whose name appears all over the documents submitted by counsel of record–appeared for one day of testimony, but failed to reappear on the day he was scheduled to resume his testimony, without adequate explanation. His testimony was stricken at that time. (Nov. 30 Trans. Part I at 9-10.)

Nina Zajic

Nina Zajic, an officer of LR12 from 2004–2010, is Joseph Kay's sister and was Joseph Gil's boss. The case of counsel of record heavily depends on her testimony.

Zajic testified that Imedinvest was LR12's founding and sole shareholder, and that if Grosvenor held shares of LR12, it was for the benefit of Imedinvest. Zajic testified that she attended the March 11, 2004 meeting recorded in Exhibits 17 and BBBB, at which the officers

of LR12 were appointed, and she did not find it odd that there were two different documents in existence purportedly memorializing the same meeting.

Zajic also testified that she attended a January 6, 2010 meeting of LR12 directors and shareholders, recorded in Exhibit 1, at which the By-Laws were amended. She further testified that she and David Kay were directors of LR12 since its founding in 2004, and that David Kay had always been an officer of LR12.

Zajic also testified concerning the authenticity of Exhibit 21, which purports to be a LR12 share certificate evidencing Imedinvest's ownership. Zajic testified that she kept the original of Exhibit 21, as with other LR12 records, in her third-floor office safe. Zajic testified that other records of LR12 were also in her office on the third floor of LR12's premises, some of them in the safe, and that they must have been confiscated by GKBN during the March 31 raid. (Nov. 30 Trans. Part I at 115-16, 129-34.)

In contradiction to this testimony in 2010, in her responses to plaintiffs' request for documents in a related case pending before this Court, *George V Restauration S.A. v. Little Rest Twelve, Inc.*, Index No. 602309/2007 ("*George V*"), which Zajic verified on September 24, 2008, she denied possessing any documents or communications concerning the relationship between LR12 and Imedinvest, J.D. Equities, and Joseph Kay. (Ex. ZZZ at 9.) In her 2009 testimony in Gibraltar, she denied having seen any documents related to Imedinvest, "other than my litigation," and had no idea who its partners were. (Ex. CCCC at 152.) It seems unlikely that Zajic should have remembered so clearly Imedinvest's

founding of LR12 and continued ownership of LR12 in 2010, if she was unaware of it in 2008 and 2009.

Zajic has also contradicted her sworn testimony that Imedinvest was LR12's founding shareholder and owner at least four times in other sworn statements. She identified Grosvenor as 85% owner of LR12 in an August 25, 2008 letter to the State Liquor Authority. (Ex. DDDD.) In her verified answer to the third party complaint in this action, she admitted the allegation that Grosvenor is a shareholder of LR12. (Ex. UUU.) In her verified responses to Interrogatory No. 2 on September 24, 2008, she stated that Grosvenor owned 100% of the shares of LR12, without conditioning that statement on a claim that it held those shares in trust for Imedinvest, although that transfer had occurred just nine months earlier, according to Exhibit 21. (Court Ex. 1 at 5.)[8] In her live testimony in the Gibraltar proceeding in 2009, Zajic represented that she knew little about Imedinvest and could not identify its partners. (Ex. CCCC at 151-52.) Because Zajic has offered contrary testimony multiple times between 2004 and now, I am skeptical of her testimony at the hearing that Imedinvest was the founding shareholder and owner of LR12, and of her claim to recognize Exhibits 17, BBBB, and 21, and the events recorded therein.

I am also dubious of Zajic's testimony that both she and David Kay were directors of LR12 and that David Kay was an officer. Zajic has made multiple previous representations

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[8] Court Ex. 1 was originally submitted as Ex. AAAA. It was renamed, after counsel of record agreed that the Court could consider as court exhibits any filed documents in this case in connection with these proceedings. (Nov. 30 Trans. Part I, at 22-23.)

that neither she nor David Kay was a director of LR12 and that only she was an officer, under circumstances in which she was obligated to identify all of the officers and directors of LR12. In her answer and counterclaim in this action, verified on October 31, 2008, Zajic explicitly denied that she was a director of LR12. (*Cf.* Ex. 9 ¶ 11 *with* Ex. UUU ¶ 11.) In responses to interrogatories in both this action and in *George V*, asking for the identities of all officers or directors of LR12, verified by Zajic, neither Zajic nor David Kay were identified as a director of LR12, and David Kay was not identified as an officer. (Court Ex. 1 at 5; Ex. ZZZ at 24.) At Zajic's deposition in another action pending before this Court, *Mutual Benefits Offshore Fund v. Zeltser*, Index No. 650438/2009, Zajic testified that she had not held any positions at LR12 other than CEO and CFO. (Nov. 30 Trans. Part I, at 55-56.) In "verified cross-claims" submitted on Zajic's and David Kay's behalf in the 2010 *Little Rest* Action, Zajic was identified as "LRT's board member since its inception," while David Kay was listed as an officer only. (2010 *Little Rest* Action, Efiling Docket No. 20, ¶¶ 9, 12.)[9] But Zajic signed verifications of discovery responses in 2008, both in this action and in *George V*, stating that she was LR12's sole officer. (Court Ex. 1 at 5; Ex. ZZZ at 24.) It is impossible to square these statements with her testimony in 2010 that she attended a 2004 meeting at which she and David Kay were both elected directors and appointed as officers of LR12.

In conclusion, I disregard Zajic's testimony as lacking in credibility, because of her

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[9] The purported verifications, however, do not appear on the electronically filed document.

multiple contradictions in previous sworn statements, and because of the inherent implausibility of her testimony, in light of the more believable contradictory evidence offered at this hearing. Zajic's close relationship to her brother, Joseph Kay, whose interests appear to be at stake in this lawsuit and related lawsuits, gives her ample motivation to produce false testimony.

Accordingly, I reject all of Zajic's testimony in this hearing as unreliable. In particular, I disregard her testimony concerning Imedinvest and that David Kay has been an officer and that he and Zajic both have been directors of LR12 since its founding.

Joseph Gil

Gil served as LR12's financial controller from May 8, 2006 until March 31, 2010. His responsibilities were to take care of LR12's books and records, review loan documentation, reconcile the balance sheet, and prepare the profit-and-loss report. At the time of his termination, Gil was earning a net salary of $1300 per week. There is no indication in this record, and it is apparently uncontested, that Gil has no personal connection to the Kay family, and no personal stake in the outcome of this litigation or any of the related litigations.

Based on an observation of Gil's demeanor, after hearing his testimony, and having reviewed the documents corroborating his testimony, in light of the other hearing testimony, I find that Gil's testimony was trustworthy.

Gil testified that David Kay and Zajic did not have employment contracts with LR12 to his knowledge. He had never seen Exhibit 2, the purported employment agreement of

David Kay. Gil testified credibly that Zajic's salary was $10,000 per month when he began at LR12, that it rose to $15,000 per month, but that, on the advice of an external accountant, it later became $120,000 per year. Gil understood David Kay's job to be running the lounge business at LR12, and David Kay earned a salary of around $60,000 per year. Gil was unaware that David Kay or Zajic had guaranteed any of LR12's loans.

Gil testified that, to his knowledge based on four years working at LR12, David Kay was neither an officer nor a director of LR12. Gil testified that Zajic was the C.O.O. when he was hired at LR12, and she later replaced Haouzi as the C.E.O., but he was unaware that she was ever a director.

In his four years working at LR12, Gil could not remember ever seeing Exhibit 17, Exhibit BBBB, or Exhibit 21 on LR12's premises. He had never heard of Timofeyeva, Kretschmer, Nastia Loginoff, Areal Group, or J.D. Equities. Gil had never even heard of Imedinvest until he saw an invoice on Imedinvest letterhead dated October 30, 2007, which he received from LR12's accountant, Lana Koifman.[10] In the Fall of 2009, the safe on the third floor was moved down to the basement office, and that safe did not, in any case, contain any corporate documents.

Counsel of record attempt to discredit Gil's testimony on multiple grounds. First, they

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This invoice itself is a curious document. It reflects a bill to LR12 for over $200,000 of expenses for services ranging from professional services to advertising, P/R, travel, and music production, and was addressed to Sternik & Zeltser, Zeltser's law firm. (Ex. JJJJ at 2.) The funds in response to this invoice evidently were transferred to "M.E. Seltser, PC, Escrow."

allege that it was "bought" by GKBN in exchange for entering into a settlement agreement, which was admitted into evidence as Court Exhibit 4. The settlement agreement, signed on September 13, 2010 by Gil and Haouzi, as COO of LR12, is purportedly between Gil, Haouzi, and LR12. Gil acknowledged at the hearing that he understood that LR12 was represented by GKBN when he entered into this agreement. He testified that he also believed GKBN to be a party to this lawsuit.

In Gil's settlement agreement, he promises to make himself available as a witness at this hearing, to testify in accordance with the statements in an attached affidavit, and to provide consulting services to LR12, as requested, pursuant to a consulting agreement, which set a rate of payment at $150/hour. In exchange, Gil is chiefly promised: (a) dismissal of the claims against him by LR12 in the 2010 *Little Rest* action, (b) dismissal of Haouzi's third-party claims against him in the instant action; (c) payment of his back wages, totaling about $10,000; and (d) reimbursement of his legal fees related to the settlement agreement, totaling less than $6,000.

Counsel of record tries to make much of the fact that Gil was promised a consultant rate of $150/hour and was paid $16,000 for his back pay and legal fees. I do not find that these facts would support a finding that GKBN bribed Gil to testify falsely. No one has contested that LR12 owed Gil $10,000 in back wages. Gil was not promised that he would actually be hired as a consultant, and the amount of payment for attorneys' fees are reasonable. In the settlement agreement, Gil succeeded in obtaining his back wages,

reimbursement of his attorney expenses in connection with this lawsuit, and being dropped from the captions of these lawsuits, so that he need have nothing further to do with the cast of characters from LR12. I do not see, from the settlement agreement, that he has obtained any further benefit from it than these modest goals.

Counsel of record also attack Gil's credibility, based on a comparison of the two affidavits he signed: the first, on April 2, 2010, following a March 31, 2010 raid on LR12's premises by Haouzi, Martin P. Russo, Esq., and other persons (the "March 31 raid"), and the second on September 13, 2010, the date Gil entered into his settlement agreement.

In Gil's settlement agreement, Gil agrees to testify in court in accordance with the September 13, 2010 affidavit, concerning his work at LR12. Counsel of record maintain that this affidavit "flatly contradicts" the affidavit Gil signed on April 2, 2010 concerning the March 31, 2010 raid.

Actually, the bulk of the September 13 affidavit has nothing to do with the March 31 raid at all; it deals mostly with other matters relating to Gil's work at LR12. In contrast, the April 2 affidavit is just three paragraphs long and deals only with the events of March 31, 2010. The main contradiction between them is that, while the April 2 affidavit avers that Martin Russo, Esq., of GKBN, told Gil he had a "court order and full authority to request all corp documents and access to everything on the premises," (Apr. 2, 2010 Aff. ¶ 3), the September 13 affidavit states: "I believe the words 'court order' may have been uttered, but I am unsure as to whether or not Mr. Russo misrepresented to the police that he had such an

order," (Sept. 13, 2010 Gil Aff. ¶ 3). Gil's September 13 averment that "I did not observe any weapons" during the March 31 raid is reconcilable with his statements in the April 2 affidavit that he "believed" or "suspected" that the intruders were armed. (*Cf.* Sept. 13, 2010 Gil Aff. ¶ 3 *with* Apr. 2, 2010 Gil Aff. ¶ 3.) Finally, I do not consider contradictory the statement in the September 13 affidavit that "[a]t no time was I threatened," with the summary statement in the April 2 affidavit that "I was then threatened and asked to vacate the premises immediately," as the latter statement is conclusory. (*Cf.* Sept. 13, 2010 Gil Aff. ¶ 3 *with* Apr. 2, 2010 Gil Aff. ¶ 3.)

The fact that Gil, on the witness stand, affirmed affirmed the truth of every statement from the April 2 affidavit that did not directly contradict the September 13 affidavit, including those that did not cast GKBN in a particularly favorable light–such as the statements that he was afraid and hid from the intruders during the March 31 raid–support my conclusion that he was doing his best to tell the truth throughout his testimony. It is not hard to understand how, on September 13, 2010, Gil could no longer remember with accuracy whether Mr. Russo or someone else had uttered the words "court order" on March 31. Likewise, it is perfectly understandable that he could have been afraid and suspected that the intruders were armed on March 31, but on September 13, he might be able to acknowledge that he did not actually see any weapons. Altogether, I do not find that the differences between the two affidavits have any bearing on Gil's credibility; if anything, the two affidavits, combined with his in-court testimony, actually make him a more credible witness.

Counsel of record also attempt to challenge Gil's credibility by pointing out that he signed a verification of the answer to the third-party complaint that was brought against David Ashfield, Ali Guidfard, Zajic, Joseph Kay, Grosvenor, and himself by Haouzi, which made a series of allegations about Imedinvest's connection to LR12, about Haouzi's restaurant management experience, and Haouzi's alleged misdeeds.[11] (2010 *Little Rest* Action, Docket No. 22.) On the stand, Gil acknowledged that he did not know what Imedinvest was and did not know whether it founded LR12. This testimony does not undermine, but rather reinforces, my overall impression of Gil, which is that he performed discrete tasks as a bookkeeper at LR12 and was not in the confidence of the Kay family.

Gil's testimony concerning whether he asked Zeltser or Katz to represent him in this action or the related action also tends to reinforce my impression of Gil. What emerges from Gil's testimony is that, when Gil was named as a defendant in these lawsuits, he was told by Zajic that Zeltser would represent him as well as the management defendants, and he had confidence that Zajic would take care of these matters. He may even have signed a letter prepared by LR12's then-counsel formally requesting such representation, although he had forgotten all about it by the time of his testimony in December. He acknowledges he did not object to Zeltser or Katz's representations of himself until after he retained his own attorney in the course of negotiating his own settlement agreement; at this point, Gil informed them

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[11] In his verification, Gil averred that he "kn[e]w the contents... and state[d] that they are true to the best of my knowledge, information, and belief."

that they did not have authority to represent him in these lawsuits. None of this testimony damages Gil's credibility.

David Kay

David Kay, son of Joseph Kay, is a college drop-out who worked alongside his aunt, Zajic, on LR12's premises. By his own account, David Kay was a director, officer, manager and vice-president of LR12; according to Gil, David Kay ran the lounge business at LR12 for a salary of about $60,000 per year. He corroborated fully the testimony of Zajic.

In particular, David Kay testified that he attended the meeting in 2004, recorded by Exhibits 17 and BBBB, in which he was elected a director and appointed an officer of LR12. He testified to the authenticity of the stock certificate transferring ownership of LR12 from Imedinvest to Grosvenor in trust for Imedinvest, recorded as Exhibit 21. He testified to the authenticity of Exhibit 2, his purported employment agreement, and to the statements contained therein, including to his $225,000 annual salary and his personal guarantee of $4.3 million to LR12. He testified that he attended the January 2010 meeting, recorded in Exhibit 1, at which LR12's By-Laws were purportedly amended.

I find the testimony of David Kay to be unworthy of belief.

First, I find non-credible the testimony of David Kay that he was an officer and director of LR12. I have already explained why I have discredited Zajic's testimony that David Kay was an officer and director of LR12. In verified cross-claims submitted on David Kay's behalf in the 2010 *Little Rest* Action, Zajic was identified as "LRT's board member

since its inception," while David Kay was listed as an officer only. (2010 *Little Rest* Action, Efiling Docket No. 20, ¶¶ 9, 12.) It seems that even as late as April 12, 2010, the date these cross-claims were electronically filed–less than a month before he would testify at this hearing–David Kay was unaware that he was supposed to be a director of LR12.

I also find non-credible David Kay's testimony concerning Exhibit 2, his supposed employment agreement with LR12. I credit Gil's testimony that he had never seen Exhibit 2 in his four years at LR12, and that he knew David Kay to have received a salary of $60,000, not $225,000. I also find Exhibit 2 inherently implausible because of the formidable barriers–both financial and logistical–it erects to David Kay's termination, so as to make his termination virtually impossible; it would be remarkable for anyone, let alone a young restaurant manager, to have negotiated an employment agreement giving himself such remarkable protection against termination.

I am skeptical of David Kay's testimony that he recognized Exhibit 21, the stock certificate dated January 7, 2008 transferring ownership of LR12 from Imedinvest to Grosvenor in trust for Imedinvest, as he verified the answer to the third party complaint submitted on his behalf on October 31, 2008, admitting that Grosvenor is a shareholder of LR12, and not conditioning that admission on a claim that it held those shares in trust for Imedinvest, although that transfer had occurred just ten months earlier, according to Exhibit 21. (Ex. UUU ¶¶ 2, 10.)

The facts that David Kay is Joseph Kay's son, and that Joseph Kay's interests are

evidently at stake in this litigation and related litigations, also supports my conclusion that David Kay was not an impartial witness, and his relationship with Joseph Kay infected his credibility.

Based on my discrediting of Zajic's testimony, which David Kay corroborates, the inherent implausibility of David Kay's testimony, in light of the more believable contradictory evidence offered at this hearing, his motivation to give false testimony, I disregard David Kay's testimony in its entirety as unreliable. In particular, I disregard the testimony that David Kay has been an officer and that he and Zajic both have been directors of LR12 since its founding.

Robby Mingels

Robby Mingels ("Mingels"), who identified himself as "very close to the family" of Joseph Kay, (Dec. 9 Trans. at 61), was produced by counsel of record as a surprise witness near the end of the hearing. Mingels testified that he provided information technology services to Joseph Kay through Imedinvest from 2004 through 2010, through his company, Axafina. He has traveled to Georgia, in the former Soviet Union, to provide services for Joseph Kay, and he is acquainted with Kay's wife. He has had contact with Joseph Kay twice since March 31. He testified that he had not seen Zajic since he had had a "falling out" with her. (Dec. 9 Trans. at 105.)

Mingels testified that LR12 had not paid its bills to Axafina in some time. Mingels testified that he contacted GKBN and offered to testify on its behalf, if it would pay LR12's

debt to Axafina, but he later withdrew that offer. He testified that he withdrew it because GKBN required him to lie under oath in exchange.

Mingels offered testimony that he personally uploaded LR12's corporate documents, such as Exhibit 1, into Axafina's servers. This testimony, in December 2010, came as a surprise, in light of the fact that Zajic and David Kay were questioned repeatedly about the location and storage of LR12's key documents during their testimony, and they had never mentioned and were apparently unaware that LR12 had a practice of backing up its corporate documents in electronic form on Axafina's servers.

I discredit as implausible Mingels's testimony that GKBN asked him to destroy his copy of Exhibit 1, containing LR12's amended By-Laws, in June 2010, as that exhibit had already been admitted into evidence during the testimony of David Kay on May 11, 2010.

Mingels corroborated the testimony of Zajic that David Kay was Vice President of LR12. It became apparent during cross-examination, however, that this opinion was based entirely on having seen David Kay sign checks and instruct employees; Mingels admitted he had never actually seen a document indicating David Kay was Vice-President. Therefore, I discount as unreliable his testimony that David Kay was an officer of LR12.

In light of the discrepancy between Mingels's testimony and that of Zajic and David Kay about the storage of LR12's corporate documents, the other discrepancies in the testimony about Exhibit 1, Mingels's admitted close friendship with the Kay family, the last-minute circumstances of Mingels's identification as a rebuttal witness by counsel of record, and

because I find his demeanor and testimony overall to be less credible than that of Joseph Gil, I discredit Mingel's testimony in its entirety as not worthy of belief.

Ellana Burlan

Counsel of record produced another witness, Ellana Burlan, who testified in support of the authenticity of Exhibit 21, the purported LR12 share certificate evidencing Imedinvest's ownership. Burlan testified that she translated Exhibit 21 to Badri in the beginning of 2005, while both of them were listening in on a telephone conversation between Baker and Joseph Kay, unbeknownst to Baker. As Exhibit 21 is dated sometime in 2008, and due to the furtive circumstances in which she claims to have seen it, I do not greatly credit the veracity of Burlan's recollections about Exhibit 21.

Baruch Gottesman, Esq.

Counsel of record also offered the testimony of Baruch Gottesman, Esq., a young attorney who described himself as self-employed. Gottesman testified that he accompanied Popack, Joseph Kay's nephew, on a European trip in March 2008 and there met with Baker for one-and-a-half hours. He testified that he received there a large stack of documents from Baker. Gottesman testified that he remembered various aspects of Popack's conversation with Baker and claimed to be able to recall each of the documents. On the strength of Gottesman's testimony, counsel of record offered into evidence Exhibits 12-16 and 18-20. During the hearing, I accepted them into evidence as documents that Baruch Gottesman received from Baker, subject to a further evidentiary ruling as to whether they could be admitted as evidence

for the truth of their subject matter. (Trans. at 136-44.) Baker was then recalled the stand; he denied having given these documents to Gottesman and testified that the purported signatures of himself were forgeries.

I do not find Gottesman's testimony worthy of belief. In particular, I am highly skeptical that he could recall each of these documents from more than two years before as vividly as he purported to do. I am also skeptical of his veracity because of his connection to the Kay family, as he was working for Popack at the time. Therefore, I find Baker's testimony as to these documents more believable, and I do not credit these documents for their truth.

Jean-Yves Haouzi

I have already outlined most of Haouzi's testimony in my overview of GKBN's case. Here I will address the arguments of counsel of record that Haouzi's testimony is unreliable.

Counsel of record have pointed out that Haouzi verified an answer and counterclaims against LR12 in this action dated July 30, 2007, in which Haouzi alleged, "[u]pon knowledge and belief," that Zajic was an officer and director of LR12, and that David Ashfield and Ali Guidfard were shareholders in LR12, but they were "merely stand ins" for Joseph Kay. (Haouzi Counterclaims, Index No. 600676/2007, Efiling Docket #15, ¶ 4.) Counsel of record also point out that on October 2, 2008, Haouzi verified an amended third party complaint in this action, alleging that, "[u]pon knowledge and belief," Joseph Kay, David Kay, Zajic, and David Ashfield were shareholders of Grosvenor, and further alleging as a fact that Zajic was

an officer and director of LR12. (Am. 3d-Party Compl., Index No. 600676/2007, Efiling Docket #20, ¶¶ 5, 7, 8, 11, 12.)

I am not troubled by Haouzi's verified allegations in 2007 that the shareholders of Grosvenor were David Ashfield, Ali Guidfard, and Joseph Kay, and that the former two were stand-ins for Joseph Kay. In his hearing testimony, Haouzi explained that these allegations were based on the understanding that Joseph Kay was not the true owner of Grosvenor in form, but that Joseph Kay, as well as David Ashfield and Ali Guidfard, worked somehow for Grosvenor. (9/14/10 Trans. at 34-40.) This explanation is consistent with Baker's explanation that, as far as he knew before Badri's death in 2008, Joseph Kay was the settlor and beneficiary of the Valmore Trust and its assets, and that, after Badri's death, Baker brought the Gibraltar proceedings to resolve the uncertainty regarding whether Joseph Kay or Badri was the true settlor in interest and the beneficiary of the Valmore Trust and its assets.

I am more troubled by Haouzi's verified statement in October 2008 that Zajic was a director of LR12–which is opposed to GKBN's position in this hearing. Nevertheless, I view it in light of the totality of the evidence. I find Haouzi's testimony on the whole much more trustworthy than that of Zajic, David Kay, or Joseph Kay.

Reliability of Exhibits 1, 17, BBBB, 21, and 2

As discussed above, the position of counsel of record in opposition to GKBN's application to be substituted in as counsel for LR12 depends on the authenticity of the key

documents that support their contention that LR12 is owned by Imedinvest, not by Grosvenor, and thus the March 30, 2010 purported resolutions signed by Baker and Haouzi, terminating Zajic and David Kay, replacing LR12's directors, firing LR12's counsel of record, and hiring GKBN, have no effect, and their related arguments.

Exhibits 17 and BBBB

These documents purport to record minutes of a meeting held in connection with LR12's formation on March 11, 2004. They are among the few documents adduced by counsel of record in support of its claims that Imedinvest was the founding shareholder of LR12 and remains its sole shareholder to this day. These documents were supported by the discredited testimony of Zajic and David Kay.

I credit the evidence adduced at the hearing that LR12 applied for its liquor license with New York State in 2004 in Haouzi's name, and that Haouzi continues to be listed as LR12's "Principal" on its state-issued liquor license.

Casting further doubt on the veracity of the testimony of Zajic and David Kay concerning Imedinvest was the curious lack of corroborating documentation and witnesses.

Counsel of record failed to produce any witnesses to testify that they were shareholders of LR12 and virtually no documentary evidence that Imedinvest exists, incorporated LR12, paid for LR12's shares, or invested funds into LR12. Counsel of record identified Joseph Kay and Theodore Kretschmer as partners or partner-representatives of Imedinvest. As previously noted, Joseph Kay's testimony was stricken for failing to appear

to continue his scheduled testimony. Kretschmer was identified as a managing partner of Imedinvest and produced in the Spring of 2010 for a deposition as a corporate representative of Imedinvest, represented by Zeltser; however, Kretschmer failed to respond to a subpoena to appear to give testimony at the hearing.[12] Olga Timofeyeva, who counsel of record claims is an officer and director of LR12 and a partner-representative of Imedinvest, was not called to appear at the hearing. Counsel of record has represented that she lives in Russia.

Counsel of record offered some, albeit shifting, explanation for where LR12's corporate documents may once have resided. Zajic testified that LR12 records were in her office on the third floor of LR12's premises, some of them in a safe, and that they must have been confiscated by GKBN during the March 31 raid. Gil subsequently testified credibly that the third floor safe was moved down to the basement office in Fall 2009, that it did not contain any corporate documents, that he had never seen Exhibits 17, BBBB, 21 on LR12's premises, that he had never even heard of Imedinvest before October 30, 2007, and that he

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Although Kretschmer provided only a Brooklyn address when asked his address at his deposition, Zeltser announced in court on December 7, 2010 that Kretschmer actually resides in Moscow, and that the Brooklyn address Kretschmer somewhat disingenuously provided at his deposition belongs to his parents and is used by him only for mailing purposes. (12/7 Trans. at 7-20.)

I reject counsel of record's contention that Kretschmer was improperly subpoenaed for court appearance. CPLR § 308 does not bar service of a witness on his way from a deposition. Moreover, my June 29, 2010 Order did not strike subpoenas or other discovery demands previously served by GKBN, but rather previously filed court documents, in which GKBN referred to itself as counsel of record, rather than as "proposed substitute counsel" for LR12. Therefore, I reject the contention by counsel of record that GKBN's subpoena of Kretschmer was defective.

had never heard the names Timofeyeva or Kretschmer. To rebut his testimony, counsel of record produced Mingels, who testified that his company, Axafina, had stored LR12's corporate records on its servers all along–apparently unbeknownst to Zajic, who did not mention this electronic storage location when questioned about the whereabouts of corporate documents during her testimony a couple of weeks before.

Based on the totality of the evidence, I now reject Exhibits 17 and BBBB as unreliable evidence.

Exhibit 1

Exhibit 1 purports to record minutes and resolutions of a January 6, 2010 meeting of LR12's Board of Directors, attended by Olga Timofeyeva, Zajic, David Kay, Popack, Zeltser, and Fishkin. As discussed, Timofeyeva did not testify, the testimony of David Kay and Zajic has been discredited as unreliable, and none of the three lawyers testified as a fact witness at the hearing. Mingels's testimony that he uploaded Exhibit 1 to Axafina's servers has also been discredited for the reasons discussed above. Consequently, I disregard Exhibit 1, including its attached amended By-Laws, as unreliable evidence.

Exhibit 21

Based on this record, and for the reasons discussed above, I have discredited the testimony of Zajic, David Kay, and Burlan concerning Exhibit 21, the purported share certificate of Imedinvest. Moreover, Joseph Kay affirmed in his April 29, 2009 trial witness statement in the Gibraltar proceeding that LR12 was a subsidiary of Grosvenor, which in turn

is a Valmore Trust holding company. (Ex. GG ¶ 277.) Like Zajic and David Kay, in their court filings in the latter part of 2008, Joseph Kay did not condition that statement on a claim that Grosvenor held its shares of LR12 in trust for Imedinvest. Consequently, I do not accept the authenticity of Exhibit 21.

Exhibit 2

For the reasons discussed above, I conclude that David Kay's purported employment agreement, Exhibit 2, is inauthentic and not evidence worthy of consideration. Consequently, the termination of David Kay's and Zajic's employment at LR12 was not subject to the conditions to which these witnesses testified and which are set forth in Exhibit 2. Therefore, the March 30, 2010 resolutions were not ineffective on the basis of the conditions set forth in Exhibit 2.

Alleged Misconduct by GKBN

Counsel of record have levied a variety of allegations against GKBN for improper conduct and preemptively demand its disqualification from representing LR12 in this lawsuit.

I do not find convincing the arguments by counsel of record that GKBN tampered with Gil's testimony. Gil's repeated responses of "not to my knowledge" was not at all misleading. The fact that GKBN evidently prepared Gil for his testimony in court is not evidence of inappropriate conduct. Gil's answer of "yes" to the Court's question: "will the benefits you are to receive by virtue of the settlement agreement affect your ability to tell the truth," was evidently based on a misunderstanding of the question; after an objection from counsel of

record, Gil answered a definitive "yes" when the Court clarified the question as: "will you be able to tell the truth here today despite the fact that you have the settlement agreement?" (Nov. 30 Trans. Part II at 10.)

I do not credit Mingels's testimony that GKBN tampered with Gil's testimony and attempted to buy Mingels's testimony. Mingels testified that GKBN had offered to pay LR12's debt to Axafina if he gave false testimony at this hearing: *i.e.*, testimony that Exhibit 1 did not contain the correct By-Laws of LR12 and David Kay was not the Vice-President of LR12. According to Mingels, so attached is he to telling the truth that he resisted all GKBN's persuasive tactics, declaring that he refused "to lie under oath." (Dec. 9, 2010 Trans. at 78.) Mingels also testified that Gil told him that GKBN had offered to bribe Gil to lie under oath.

As discussed above, I reject Mingels's testimony in its entirety as unreliable. Moreover, even if GKBN did offer to pay LR12's debt to Axafina in return for Mingels's testimony that David Kay was not LR12's Vice-President and that Exhibit 1 did not contain LR12's By-Laws, this testimony would have been more truthful than the testimony Mingels actually delivered on the witness stand. Therefore, such an offer is not an attempt to coerce false testimony. Likewise, as I find that Gil's testimony was truthful, I do not find that GKBN attempted to coerce false testimony, by entering into the settlement agreement with Gil.

Counsel of record insist, however, that GKBN perpetuated the false belief in Gil that GKBN itself was a party to this lawsuit. They point to Gil's testimony that he believed GKBN was a party to this action at the time he entered into the settlement agreement. I am

not troubled by this testimony. Gil testified that he did not remember any attorney from GKBN actually telling him that GKBN was a party to the lawsuit; it was just his impression. The settlement agreement itself does not make such a misrepresentation, and it is not hard to understand how Gil, a layman, might have misunderstood the significance of this hearing. I myself have often wondered what was going on in this hearing. There is no reason to infer from the record before me that GKBN made a misrepresentation that the law firm itself was a party to this lawsuit.

Counsel of record contend that GKBN has violated Judiciary Law § 487 by stating that it did not control Gil as a witness and failing to volunteer to the Court the fact of Gil's settlement agreement. As I discussed above, based on an observation of Gil's testimony and demeanor, I am satisfied that Gil testified truthfully. Therefore, I am not troubled by Gil's having agreed, in his settlement agreement, to testify in the manner in which he testified. As GKBN elicited testimony from Gil on the stand that he entered into a settlement agreement with respect to both this action and the 2010 *Little Rest* action, I do not find that GKBN has attempted to hide the fact of the settlement agreement from the Court.

GKBN's conduct in obtaining the settlement agreement with Gil is more troubling. I am chiefly troubled by the representation in the settlement agreement that GKBN was counsel for LR12 and had authority to broker a settlement agreement between Gil and LR12, although GKBN had not yet, on September 13, 2010, been held to be LR12's counsel by this Court, and in fact had specifically been instructed months earlier to refer to itself in this

proceeding as "proposed substitute counsel for LR12," and not as counsel for LR12, until the counsel issue had been resolved by the Court.

Nevertheless, this issue is not central to the issue before me in this hearing, which is whether GKBN may properly substitute itself as counsel for LR12 in this action. I decline to conclude, based on the record before me, that GKBN has engaged in attorney misconduct in its conduct during this hearing and in dealing with witnesses.

Finally, counsel of record argues that the substitution of GKBN as counsel for LR12 in this action creates a conflict of interest, because LR12 has sued GKBN lawyers in the 2010 *Little Rest* action, and because I issued an order, dated April 2, 2010, referring the allegations relating to the March 31 raid to the District Attorney.

I find, on the contrary, that there is an unsustainable conflict of interest because two sets of lawyers are holding themselves out as counsel for LR12, not only in this action but in other related actions. The most expeditious way to resolve this conflict is for this Court to determine whether GKBN may properly be substituted in as counsel for LR12.

GKBN's Complaint in the 2010 Little Rest Action

Counsel of record point out that attorneys for GKBN, including Martin Russo, Esq., signed a Complaint filed in the 2010 *Little Rest* action, on March 30, 2010, purportedly on behalf of LR12, which sued Zajic and David Kay for various illegal acts and identified them as directors and officers of LR12. (Compl., 2010 *Little Rest* action, ¶¶ 6, 29.)

While it is troubling that GKBN alleged in 2010 that Zajic and/or David Kay were

directors and officers of LR12, a position contrary to that taken by GKBN in this hearing, I view that unverified allegation in light of the totality of the evidence, and mindful of GKBN's evidentiary burden of proving its case by a preponderance of the evidence. In light of the substantial evidence adduced by GKBN in support of its position in this hearing, I do not view the unverified allegation in the related action as an admission and certainly not as evidence regarding whether Zajic and David Kay were directors or officers.

Allegation by Counsel of Record that the Valmore Trust Is a "Sham Trust"

Counsel of record have urged me to find that the Valmore Trust is a "sham trust," because it was ostensibly both created by and settled for the benefit of Joseph Kay. They point to evidence that Miselva transferred its interest in Fallon Invest and Trade, Inc. ("Fallon"), which was the "protector" of the Valmore Trust, to Joseph Kay on March 3, 2006, and they explain that this transfer meant that Kay, through Fallon, could remove Miselva as trustee and fire Baker at any time. The Gibraltar court suspended Fallon's power to remove the Valmore Trust's trustee in an order dated April 21, 2008. (Ex. DD at 1-3; JJ at 5.) Counsel of record cite to various decisions listing the elements of a valid trust–most of them in the income taxation context, most of them not interpreting New York law, and most of them decided before 1960.

I decline to find that the Valmore Trust is a "sham trust" on multiple grounds. First, the Gibraltar court has rendered a final judgment that Joseph Kay has no rights in the Valmore Trust, and therefore I decline to give weight to the proffered evidence that Joseph Kay was

the intended beneficiary. Second, as Joseph Kay declined to appear to continue his testimony, I draw a negative inference about what his testimony would have been and its credibility. Third, there is insufficient evidence in the record on which the requested determination could be based. Counsel of record offered as a purported "expert" on sham trusts a relatively junior lawyer named Oxana Adler, Esq., who has testified for Zeltser in the past. I declined to certify her as an expert, however, finding that her testimony and purported expertise–based largely on her two years working as a junior lawyer for the World Bank–would not be useful to the Court. Third, the caselaw concerning trusts on which counsel of record relies is factually and legally distinguishable.

Supporting my conclusion are the decisions of the Gibraltar court admitted into this record, in which that court which scrutinized the Valmore Trust at some length, and did not conclude either that the Valmore Trust was a sham or that Joseph Kay controlled either the activities of its trustee or its assets. Consequently, I decline to find that the Valmore Trust is a "sham trust."

Counsel of record have pointed out, as circumstantial evidence in support of their position that the Valmore Trust is a sham trust and in opposition to GKBN's case in general, that Zajic and David Kay managed the day-to-day operations of LR12 since its formation in March 2004 until their ouster on March 31, 2010, and Baker and Miselva had virtually no involvement in LR12's day-to-day operations during those six years. Indeed, no one seems to contest that claim, although Haouzi also apparently played a management role until his

ouster in early 2007. Counsel of record point to the apparent absurdity of a claim that Zajic and David Kay were simply permitted by LR12's "real owners" to manage the restaurant without authorization for six years until March 30, 2010.

Baker has an explanation for the timing, of course. Badri died in early 2008, and Baker commenced proceedings in Gibraltar soon afterward to obtain a court ruling, among other things, as to whether the Valmore Trust was settled by and for the benefit of Joseph Kay or for Badri. The timing of the March 30, 2010 resolutions involving Baker make sense in light of the Gibraltar court proceedings, which culminated only with the February 1, 2010 order, granting a motion by Badri's heirs on default and finding that Kay had no interest in the Valmore Trust. After allowing for time for that order to be served on Kay and Kay's time for appeal to run, the timing of the March 30, 2010 resolutions no longer appears coincidental.

Conclusion

An attorney of record may be changed by order of the court, upon motion and notice to all other parties. CPLR § 321(b)(2). The instant counsel dispute came to my attention on April 1, 2010, at argument on a motion brought by then-counsel of record by Order to Show Cause for a temporary restraining order and preliminary injunction (Motion Seq. No. 006).[13] That motion was brought by then-counsel of record for LR12 against, among other parties, Martin Russo, Esq., of GKBN, after the March 31 raid. Counsel for GKBN appeared in court

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That motion, and the subsequently filed motions (Motions Seq. Nos. 007, 009, and 010)–as well as other motions in the related cases before me–has been held in abeyance, pending a determination of the counsel issue.

and announced that they should be considered counsel for LR12 and attempted to file an appearance on behalf of LR12 on the spot. As the propriety of GKBN's appearance was sharply disputed by then-counsel of record, GKBN's appearance was stricken, and the instant inquiry into who the proper attorneys for LR12 are began. Meanwhile, I issued an order directing GKBN to cease referring to itself as counsel for LR12 and henceforth to refer to itself as "Proposed Substitute Counsel" for LR12 in this action.

Based on the ample record before me, I conclude that GKBN has carried its burden of showing, by a preponderance of the credible evidence, that the shareholders of LR12 appointed GKBN as LR12's sole attorney on March 30, 2010, and that Zeltser, Katz, and Fishkin have been terminated as counsel of record for LR12. Erstwhile counsel of record has offered no reliable evidence that Grosvenor is owned or controlled by any entity other than Miselva as Trustee for the Valmore Trust, and no reliable evidence that Imedinvest has any claim to control LR12. Therefore, I conclude that GKBN shall be substituted in as counsel of record for LR12, replacing Emanuel Zeltser, Esq., of Sternik & Zeltser, Bruce D. Katz, Esq., of Bruce Katz & Assocs., and Alexander Fishkin, Esq.[14]

Consequently, it is

ORDERED that Gusrae Kaplan Bruno & Nusbaum PLLC shall be substituted in as counsel of record for plaintiff Little Rest Twelve, Inc. in this action as of the date that this

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The question of who properly may represent any other parties to this action was not the subject of this hearing and accordingly is not addressed in this decision.

Order is signed; and it is further

ORDERED that Emanuel Zeltser, Esq., of Sternik & Zeltser, Bruce D. Katz, Esq., of Bruce D. Katz & Associates, and Alexander Fishkin, Esq., are hereby directed to refer to themselves as "former counsel to LR12" in any future filings in this action.

Dated: 7/22/2011

ENTER:

HON. BERNARD J. FRIED
J.S.C.