SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** **IAS MOTION 54EFM**

Justice

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INDEX NO. 650566/2020

SANJIV MEHRA,

MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION + ORDER ON MOTION

THE KIND GROUP LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 21-48, 51-78 were read on this motion to RELEASE RECORDS.

The parties stipulated to a trial on a written record (*see* Dkt. 19). Plaintiff established proper purposes to inspect the books and records of defendant pursuant to LLC Law § 1102 and defendant has not demonstrated that one of the exceptions in § 7.4 of its operating agreement is a defense to disclosure (*see* Dkt. 22 at 16 [Board of Managers may keep confidential from any Member "any information (i) that the Board of Managers reasonably believes to be in the nature of trade secrets, (ii) the disclosure of which the Board of Managers in good faith believes is not in the best interest of the Company and (iii) that the Company or any of its Subsidiaries is required by law or by agreement with a third party to keep confidential"]). Nor has defendant shown that the requests were made in bad faith or for an improper purpose (*Dyer v Indium Corp. of Am.*, 2 AD3d 1195 [3d Dept 2003] ["The corporation bears the burden to show bad faith or an improper purpose"]; *see Lopez v SCM Corp.*, 71 AD2d 976 [1st Dept 1979]).

Plaintiff has valid reasons to review the records to determine the value of the company and defendant does not cite any authority for the proposition that an imminent transaction is a legal prerequisite to doing so and, in any event, defendant disclaimed this defense (*Berkowitz v Astro Moving & Storage, Co.*, 240 AD2d 450, 451 [2d Dept 1997] ["It is well settled that valuation of shares is a proper purpose for an inspection"]; *see* Dkt. 39 at 28 [Tr. at 109] ["Q. Is it a defense of Kind's that there was no imminent transaction at the time the request was made, is that a defense of Kind's in this litigation? A. No."]). Moreover, plaintiff has demonstrated that he is investigating potential breaches of fiduciary duty; that such claims may prove meritless is not a reason to deny access (*Pokoik v 575 Realties, Inc.*, 143 AD3d 487, 488 [1st Dept 2016] ["Petitioners' concerns about board mismanagement and excessive expenditures and wasteful dissipation of corporate assets are, on their face, a proper purpose, 'even if the inspection ultimately establishes that the board had engaged

in no wrongdoing"'], quoting *Retirement Plan for Gen. Empls. of City of N. Miami Beach v McGraw-Hill Cos. Inc.*, 120 AD3d 1052, 1056 [1st Dept 2014]). The requested records are not trade secrets and there is no legal obligation that prevents disclosure; the only concern is about confidentiality.

In fact, this case has always been about defendant's concern that plaintiff will not keep the records confidential despite his offer to do so at the outset. A confidentiality stipulation will be court-ordered and plaintiff will be subject to criminal contempt if he violates it. The confidentiality concerns here are no greater than in virtually every other commercial case where such a stipulation is understood to provide sufficient protection and in which the information is often much more sensitive. A member will not be denied books-and-records rights based on speculative concerns about willingness to violate a court-ordered confidentiality stipulation. Plaintiff's prior public relations history and the parties' contentious litigation in Delaware does not compel a different result.

A holding to the contrary would permit a manager to withhold possibly incriminating books and records based on the bare, unsupported assertion that disclosure would not be in the best interest of the company. Given the similarity between section 7.4 of the operating agreement and LLC Law § 1102, that would severely undermine the rights of members to investigate corporate wrongdoing. Defendant's invocation of the best interests of the company to deny access is pretextual under the circumstances because the company's only proffered concerns are ameliorated with a standard confidentiality agreement. After all, bitter litigation is often the context of a books-and-records requests (*see Lopez*, 71 AD2d at 977 ["The mere fact that Muller and his companies are engaged in litigation with SCM does not demonstrate lack of good faith. Nor would there be an improper purpose or bad faith if communications with shareholders discussed such litigation"]). Indeed, any manager accused of wrongdoing can claim to have the company's best interests at heart because without disclosure messy, public litigation could be avoided. But when the requested records principally concern corporate value and payment of expenses, crediting such an assertion and denying access would improperly shield management from scrutiny. To be sure, there is no basis for any finding of wrongdoing here; that does not mean that access should be denied (*see Pokoik*, 143 AD3d at 488).

Accordingly, it is ORDERED that within one week the parties shall e-file and email the court a Word version of a proposed judgment providing that the books and records requested in the complaint shall be produced within 30 days of this decision along with a confidentiality order similar to the court's standard form, which makes clear that in any litigation there shall be strict adherence to the notice protocol to ensure the company can raise any sealing concerns before documents are filed publicly. Of course, designating a document "confidential" does not mean that the court will permit sealing of any kind and, of course, the judgment should not affect plaintiff's ability to rely on the documents in any current or contemplated litigation concerning the company. The judgment shall also

provide that the court retains jurisdiction over its enforcement, including any violations of the court-ordered confidentiality provisions.

10/22/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [X] **CASE DISPOSED** [ ] **NON-FINAL DISPOSITION**

[X] **GRANTED** [ ] **DENIED** [ ] **GRANTED IN PART** [ ] **OTHER**