

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLLEEN WARD, <i>et al.</i> , on behalf of	:	CIVIL ACTION
LUCY'S HAT SHOP, LLC,	:	
Plaintiffs	:	
	:	
v.	:	
	:	No. 02-944
AVRAM HORNIK, <i>et al.</i>	:	
Defendants	:	

ORDER - MEMORANDUM

AND NOW, this 3rd day of June, 2002, the motion to dismiss the complaint of defendants Avram Hornik, Soma Lounge, LLC, and Butter, LLC is granted. Fed. R. Civ. P. 12(b)(6).¹ Jurisdiction is federal question, 28 U.S.C. § 1331, with supplemental state law claims, 28 U.S.C. § 1367.

According to the complaint, on January 28, 2002, a quorum of voting interests under the operating agreement for Lucy's Hat Shop, LLC, convened a "special meeting" at which plaintiffs Colleen Ward and Carol E. Albert, among others,² voted to file suit, on behalf of the corporation, against defendants.³ Complaint ¶¶ 27-29. The votes in favor of

¹Under Rule 12(b)(6), the allegations of the complaint are accepted as true, and all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff would prove no set of facts that would entitle her to relief. See Brown v. Philip Morris Inc., 250 F.3d 789, 796 (3d Cir. 2001).

²The complaint also alleges that voting members Eddie Chang, Matthew Gross, and William Huang (by proxy) voted to authorize this action.

³The agreement defines a quorum as "a two-thirds of the voting interests, as determined by the capital contribution of each Voting Member (as defined in Section 5.1.1 of this Agreement)" Defendant's Motion to Dismiss, exh. 1 at 3. While the parties agree that only 58.5% of the voting interests were represented at the special

this action represented 64 per cent of the voting interests present at the meeting – i.e., less than “Two-Thirds of LLC interests held by the Members present” – a percentage that falls short of that required under both the operating agreement⁴ and the Pennsylvania Limited Liability Company Law of 1994, 15 Pa.C.S.A. § 8901, *et seq.*⁵ Accordingly, the institution

meeting, they misconstrue the operating agreement. Section 5.1.1: “Members may be divided into three classes . . . [including] one which is comprised of Members who have control over all matters not reserved for Voting members . . . (the ‘Managing Member(s)’), [and] one which is comprised of Members who may vote at all Company meetings . . . (the ‘Voting Members’) . . .” *Id.* at 8. Defendant Hornik signed the operating agreement as a “Managing Member,” while all individual plaintiffs are “Voting Members.” *Id.* at 17. Accordingly, all voting members – 100% of voting interests – were represented at the special meeting. While Paragraph 8.8 (under “Management”) requires that “all Managing Member(s) . . . be present at all meetings,” this is not a requirement of the quorum provision in Article (2) and Paragraph 8.8 also specifies that the “powers of the Voting . . . members shall only be exercised during meetings of the members *as prescribed in Article (2) . . .*” *Id.* at 13 (emphasis added).

⁴Paragraph 2.8.1, governing “Formal Action by Members,” holds that “the affirmative vote of a Two-Thirds of LLC Interests held by the Members present at a meeting at which a quorum is present shall be the act of the Members. *Id.* at 4.

⁵Plaintiffs rely on the Committee Comment to § 8992 (“Authority to sue”) for the proposition that derivative suits on behalf of limited liability companies are authorized by, at most, a simple majority of disinterested members. “Interested members are excluded both as to votes *and in determining the number of votes necessary for a majority . . .* [and] [s]ome companies may wish to authorize suit more readily . . .” 15 Pa.C.S.A. § 8992, Committee Comment (emphasis added). However, the comment also notes that “the rules of this section may be varied by appropriate provision in the operating agreement.” *Id.* Moreover, the “operating agreement may contain any provision for the regulation of the internal affairs of the company agreed to by the members . . . except where this chapter . . . expressly provides that the operating agreement shall not relax or contravene any provision on a specified subject.” 15 Pa.C.S.A. § 8903 (defining “Operating agreement”). Far from expressly prohibiting a two-thirds vote for authority to sue, the Pennsylvania LLC Law provides, under “Changes in required vote,” that “the operating agreement may provide that, whenever an applicable provision of law requires the vote or consent of a specified number or percentage of members or of a class of members for the taking of any action, a higher number or percentage of votes or consents shall be required for the action.” 15 Pa.C.S.A. § 8942(d)(1).

of this lawsuit was not properly authorized, and dismissal, on defendants' motion, must be granted.⁶

Edmund V. Ludwig, J.

⁶Plaintiffs have not challenged defendants' standing to assert the defense that individual plaintiffs were not authorized to bring this action on behalf of Lucy's Hatshop, LLC, and this issue is not decided. However, under Fed. R. Civ. P. 23.1, "a derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Moreover, "defendants other than the corporation on whose behalf the derivative claim is asserted have standing to raise the defense of failure to comply with the requirements of Fed.R.Civ.P. 23.1" Recchion v. Westinghouse Elec. Corp., 606 F.Supp. 889, 896 (E.D.Pa. 1985) (citing Shlensky v. Dorsey, 574 F.2d 131, 142 (3d Cir. 1978)).