

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

**MATTHEW STEPHENS** :  
Plaintiff : **CASE NO. 2011 CVH 02157**  
vs. : **Judge McBride**  
**N3829X, LTD., et al.** : **DECISION/ENTRY**  
Defendants :

Law Office of Ronald G. Smith. Ronald G. Smith, attorney for the plaintiff Matthew Stephens, 9737 Loveland-Madeira Road, Loveland, Ohio 45140.

Robert W. Cettel, attorney for the defendants N3829X, Ltd. and the named individual defendants, 7265 Kenwood Road, Cincinnati, Ohio 45236-4411.

This cause is before the court for consideration of a motion to dismiss filed by defendants Robert Desgrange, Ralph Fisch, Mark Stear, Thomas Carr, William Miller, Robert DuPont, Kurt Foglesong, Rob Swarts, Tim Hinsay, Dennis Fox, and Al Polaneczky (hereinafter "the named individual defendants").

The court scheduled and held a hearing on the motion to dismiss on February 27, 2012. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

## **FACTS OF THE CASE**

The defendant N3829X is an Ohio limited liability company of which the plaintiff Matthew Stephens became a member in 1999.<sup>1</sup> N3829X's primary asset is an airplane operated out of the Clermont County Airport.<sup>2</sup>

In a letter dated March 6, 2011, the manager of N3829X advised the plaintiff that "his partnership in N3829X [had] been revoked."<sup>3</sup> Later, on June 18, 2011, the plaintiff was advised by the corporation's counsel that the "Members had declared an Event of Disassociation."<sup>4</sup>

The plaintiff filed the present action seeking declaratory judgment that, among other things, he is a member of N3829X and establishing the membership status of the named individual defendants. The plaintiff questions the validity of the various operating agreements set forth by N3829X and asserts that the corporate records are void of evidence of purported transfers of membership interests by the various parties. He also characterizes the meetings held to discuss matters such as his disassociation as meetings "of some persons purporting to be members of N3829X[.]"<sup>5</sup>

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<sup>1</sup> Complaint at ¶¶ 2 and 5.

<sup>2</sup> Id. at ¶ 3.

<sup>3</sup> Id. at ¶ 17 and Exhibit J.

<sup>4</sup> Id. at ¶ 31.

<sup>5</sup> Id. at ¶ 18.

The named individual defendants now seek to dismiss the action against them, arguing that there is no controversy between them and the plaintiff and that the only proper party-defendant in the present case is the limited liability company itself.

## LEGAL ANALYSIS

The named individual defendants have moved for dismissal of the action against them pursuant to Civ.R. 12(B)(1) and (6).

Pursuant to Civ.R. 12(B)(1), a complaint will be dismissed if the trial court lacks subject matter jurisdiction.

“ ‘After a party files a Civ.R. 12(B)(1) motion to dismiss, the trial court must determine whether the complaint contains allegations of a cause of action that the trial court has authority to decide. \* \* \* The Ohio Supreme Court has further noted that the ‘trial court is not confined to the allegations of the complaint when determining its subject-matter jurisdiction pursuant to a Civ.R. 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry.’ ”<sup>6</sup>

“The jurisdiction of the court of common pleas and its divisions is determined by statute.”<sup>7</sup> “R.C. 2721.02(A) authorizes that court ‘to declare rights, status, and other legal relations whether or not further relief is or could be claimed.’ ”<sup>8</sup>

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<sup>6</sup> *Johnsonite, Inc. v. Welch* (Dec. 30, 2011), 11<sup>th</sup> Dist. No. 2001-G-3012, 2011-Ohio-6858, ¶ 51, quoting *Brethaur v. Fed. Express Corp.*, 143 Ohio App.3d 411, 413, 758 N.E.2d 232 (Ohio App. 10<sup>th</sup> Dist., 2001).

<sup>7</sup> *White Family Cos., Inc. v. Invesco, Ltd.* (Jan. 15, 2010), 2<sup>nd</sup> Dist. No. 23305, 2010-Ohio-118, ¶ 12.

<sup>8</sup> *Id.*

Pursuant to Civ.R. 12(B)(6), a complaint will be dismissed for failure to state a claim upon which relief can be granted. “A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint.”<sup>9</sup> “A trial court must presume all factual allegations contained in the complaint to be true and must make all reasonable inferences in favor of the nonmoving party.”<sup>10</sup> “‘As long as there is a set of facts, consistent with the plaintiff’s complaint, which would allow the plaintiff to recover, the court may not grant a defendant’s motion to dismiss.’”<sup>11</sup>

The complaint in the present action requests declaratory judgment. “To be entitled to declaratory relief, a plaintiff must demonstrate that (1) a real controversy exists between the parties; (2) the controversy is justiciable in character; and (3) the situation requires speedy relief to preserve the rights of the parties.”<sup>12</sup> “A court may dismiss a declaratory judgment action pursuant to Civ.R. 12(B)(6) only when: (1) no real controversy or justiciable issue exists between the parties, or (2) the declaratory judgment will not terminate the uncertainty or controversy.”<sup>13</sup>

The named individual defendants’ arguments for dismissal under both Civ.R. 12(B)(1) and (6) are the same; namely they argue that there is no real controversy

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<sup>9</sup> *Matthews v. D’Amore* (Nov. 2, 2006), 10<sup>th</sup> Dist. No. 05AP-1318, 2006-Ohio-5745, ¶ 51, citing *State ex rel. v. Hanson v. Guernsey Cty. Bd. of Comm.* (1992), 65 Ohio St.3d 545, 548.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, quoting *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145.

<sup>12</sup> *Id.* at ¶ 53, citing *Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-4945, at ¶ 8, citing *Herrick v. Kosydar* (1975), 44 Ohio St.2d 128, 339 N.E.2d 626.

<sup>13</sup> *Id.*, citing *McConnell v. Hunt Sports Ents.* (1999), 132 Ohio App.3d 657, 681, 725 N.E.2d 1193 (Ohio App. 10<sup>th</sup> Dist., 1999).

between the plaintiff and the individuals and there is no justiciable controversy for which speedy relief is necessary.

In *Matthews v. D'Amore* (Nov. 2, 2006), 10<sup>th</sup> Dist. No. 05AP-1318, 2006-Ohio-5745, the plaintiffs filed an action seeking declaratory judgment that they, and not the individuals named as defendants, were the only members of an Ohio limited liability company.<sup>14</sup> The defendants sought a determination from the court that they, and not the plaintiffs, were, in fact, the members of the LLC.<sup>15</sup> After reviewing the parties' cross-motions for summary judgment, the trial court found that the plaintiffs were the only members of the LLC and that the defendants possessed no rights or membership interest therein.<sup>16</sup> This decision was challenged on appeal and the appellate court, after examining the law of membership in an LLC, affirmed the trial court's holding.<sup>17</sup>

In the case at bar, the plaintiff is challenging his disassociation from N3829X on several bases, including the assertion that this disassociation was not proper and the members who voted on his disassociation may not actually be members of the limited liability company under the law. While the first argument would be properly against N3829X only, the second argument will involve a determination by this court as to what individuals hold a membership interest in the company. The plaintiffs in *Matthews v. D'Amore* sought a declaration that they were the only members of the LLC and named the other purported members as defendants, as they were seeking a declaration that would be detrimental to any membership rights claimed by those individuals. The court finds the same legal theory to be applicable in the present case.

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<sup>14</sup> Id. at ¶ 11.

<sup>15</sup> Id. at ¶ 16.

<sup>16</sup> Id. at ¶ 18.

<sup>17</sup> Id. at ¶¶ 31-54.

There is a real controversy between the plaintiff and the named individual defendants that is justiciable in nature. The plaintiff has challenged the defendants' ability to vote to disassociate him based on his argument that there is no proper proof that they are actually members of N3829X. The plaintiff has requested declaratory judgment as to the defendants' status as members of the group to determine if each individual could properly vote to disassociate him. Furthermore, as the plaintiff's rights as a member of N3829X have currently been suspended or terminated, the court finds that the situation requires speedy relief to preserve the rights of the parties.

Based on the above analysis, the court finds that dismissal of the present action is not warranted under either Civ.R. 12(B)(1) or (6).

### **CONCLUSION**

The named individual defendants' motion to dismiss is not well-taken and is hereby denied. Counsel shall conference and call the Assignment Commissioner within five days of the date of this decision to obtain a date for a case management conference which shall be held within three weeks. If counsel fail to conference and contact the Assignment Commissioner for this purpose within five days, the Assignment Commissioner shall proceed to schedule the case management conference on a date

that is available on the court's calendar within three weeks.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

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Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-mail/Regular U.S. Mail this 19th day of March 2012 to all counsel of record and unrepresented parties.

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