

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Commercial Division

-----X
AKIVA REICH, individually and derivatively in
the right of and on behalf of PURSLANE LLC,
Plaintiffs – Judgment Creditors,
- against –

INDEX NO. 506922/2025

PURSLANE LLC,
Defendant / Nominal Defendant,

- and against –

PURSLANE BOATHOUSE LLC and HENRY RICH,
Defendants.
-----X

**BRIEF MEMORANDUM OF LAW PURSUANT TO CPLR §3211(a) et seq. and for
SUMMARY JUDGMENT PURSUANT TO CPLR §3211(c) and CPLR §3212**

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Table of Contents

Table of Contents 2

SUMMARY OF ARGUMENT 5

 I. Facts Relevant to the Motion 7

STANDARD OF REVIEW 9

ARGUMENT 11

 I. THE CAUSES OF ACTION CANNOT SURVIVE THIS MOTION AS A MATTER OF LAW 11

 A. The Operating Agreement Was Not Breached 11

 B. The “Objection” Is Untimely 12

 C. It is Impermissible to Mix Direct and Derivative Claims In the Same Cause of Action . 13

 II. The Causes Of Action Must Each Be Dismissed As A Matter of Law 14

 III. The Second Cause of Action for Unjust Enrichment Must Be Dismissed as Duplicative of the First Cause of Action and Substantively Without Merit 16

 IV. The Third and Seventh Causes Of Action for Breach of Good Faith and Fair Dealing Must Be Dismissed 17

 V. The Fifth Cause of Action For Unjust Enrichment Is Duplicative and Must be Dismissed 18

 VI. The Eighth Cause Of Action Must Be Dismissed As No Valid Claim for “Corporate Waste” Due to a Majority Approved Merger is Viable 19

 VII. The Ninth Cause Of Action for Equitable Accounting is Not a Cause of Action Nor is Such Available to a Non-Member of the LLC..... 20

 VIII. THIS COURT SHOULD GRANT SUMMARY JUDGMENT TO THE DEFENDANTS PURSUANT TO CPLR §3211(C)..... 20

CONCLUSION..... 21

TABLE OF AUTHORITIES

Cases

<i>Abrams v. Donati</i> , 66 N.Y.2d 951, 953 [1985].....	16
<i>Alpert v 28 Williams St. Corp.</i>	15
<i>Alpert v 28 Williams St. Corp.</i> , 63 NY2d 557, 573 [1984].....	8, 14
<i>Andre v. Pomeroy</i> , 35 N.Y.2d 361[1974].....	20
<i>Appleton Acquisition, LLC v National Hous. Partnership</i> , 10 NY3d 250, 255-256 [2008].....	7
<i>Aventine Inv. Mgmt., Inc. v Canadian Imperial Bank of Commerce</i> , 265 AD2d 513, 514 [2d Dept 1999]...	18
<i>Baliotti v Walkes</i> , 134 AD2d 554 [2d Dept 1987].....	13
<i>Barbour v Knecht</i> , 296 AD2d 218, 227-28 [1st Dept 2002].....	14
<i>Benedict v Whitman Breed Abbott & Morgan</i> , 110 AD3d 935, 938 [2013].....	20
<i>Breed v Barton</i> , 54 NY2d 82, 85 [1981]	6
<i>Centi v McGillin</i> , 34 NY3d 1072, 1073 [2019].....	17
<i>Citibank, N.A. v Walker</i> , 12 AD3d 480, 787 NYS2d 48 [2d Dept 2004]	19
<i>Dalton v Educational Testing Serv.</i> , 87 NY2d 384 at 389 [1995]	18
<i>DeMarco v Clove Estates, Inc.</i> , 250 AD2d 724 [2d Dept 1998]	13
<i>Farro v. Schochet</i> , 190 Ad3d 689 [2 nd Dept. 2021]	6
<i>Fontanetta v Doe</i> , 73 AD3d 78, 84-85 [2d Dept 2010].....	11
<i>Godfrey v Spano</i> , 13 NY3d 358, 373 [2009]	9
<i>Gorunkati v Baker Sanders, LLC</i> , 179 AD3d 904, 905-906 [2020]	20
<i>Gosben v. Mutual Life Ins. Co. of N.Y.</i> , 98 N.Y.2d 314, 326 [2002])	13
<i>Hong Qin Jiang v Li Wan Wu</i> , 179 AD3d 1035, 1040 [2020]	16
<i>IDT Corp. v Morgan Stanley Dean Witter & Co.</i> , 12 NY3d 132, 142 [2009]	16
<i>Jacobs v Cartalemi</i> , 156 AD3d 605, 607 [2017].....	6
<i>Kline v Schaum</i> , 174 Misc 2d 988 [App Term, 2d Dept 1997]	10
<i>Lawrence v Kennedy</i> , 95 AD3d 955, 958 [2012]	20
<i>Leon v Martinez</i> , 84 NY2d 83, 87-88 [1994]	9, 11
<i>Lichtenberg v Besicorp Group, Inc.</i> , 43 F.Supp 2d 376, 387-88 [SDNY 1999]	13
<i>Lloyd Capital Corp. v Pat Henchar, Inc.</i> , 80 NY2d 124, 128 [1992]).	17
<i>Madison Hudson Assoc., LLC v. Neumann</i> , 8 Misc. 3d 1025A [Sup Ct, NY County 2005].....	12
<i>Maldonado v DiBre</i> , 140 AD3d 1501, 1503-1505 [2016].....	6
<i>MBIA Ins. Corp. v Countrywide Home Loans, Inc.</i> , 87 AD3d 287, 297 [1st Dept 2011].....	18
<i>McNamee Constr. Corp. v City of New Rochelle</i> , 29 AD3d 544, 545 [2006].....	21
<i>Mihlovan v Grozavu</i> , 72 NY2d 506, 508 [1988]	21
<i>Murphy v American Home Prods. Corp.</i> , 58 NY2d 293, 304 [1st Dept. 1993]	18
<i>Pacella v RSA Consultants, Inc</i>	20
<i>Pechko v Gendelman</i> , 20 AD3d 404, 406-407 [2d Dept 2005]	16
<i>Peter F. Gaito Architecture LLC v Simone Dev. Corp.</i> , 46 AD3d 530, 530 [2d Dept 2007]	7, 10
<i>Reingold v Bowins</i> , 180 AD3d 722, 723 [2020]	16
<i>Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.</i> , 13 N.Y.3d 398, 403 [2009].....	15
<i>Schumacher v. Richards Shear Co.</i> , 59 NY2d 239, 245(1983)	17
<i>Stavroulakis v. Pelekanos</i> , 2018 WL 846677 at *12 [Sup. Ct. NY Cty. 2018]	14
<i>Stinton v Robin's Wood, Inc.</i> , 45 AD3d 203, 211 [2d Dept 2007]	10
<i>Stulman v. John Dory LLC</i> (2010 WL 10078475 at *4 [Sup. Ct. NY Cty. 2010)	12, 14

Tenney v Rosenthal, 6 NY2d 204, 211 [1959] 13
Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 [2004] 16
Wallace v Perret, 28 Misc3d 1023, 1033 [Sup Ct, Kings County 2010] 13
W.W.W. Assoc. v. Giancontieri, 77 N.Y.2d 157, 162 [1990] 15
Zelouf v Zelouf, 2013 45 Misc 3d 1205(A) [Sup Ct. NY County 2013] 12, 15
Zentz v Int'l Foreign Esch. Concepts, LP (2011 NY Slip Op 51908[U] [Sup Ct, Kings County 2011]... 13

Statutes

22 NYCRR 202.8(b)..... 21
BCL §623..... passim
BCL §626(b). 7
CPLR §3211 (a) (7),..... 9, 10
CPLR §3211(a)(1)..... 11, 18
CPLR §3211(c)..... 20
CPLR 3211(a)(1) 11
LLC Law §402(c)(3).....9,10
LLC Law § 407(a)..... 8, 11
LLC Law §417(a).....9, 15
LLC Law § 414..... 15
LLC Law
§420.....15
LLC Law §1002..... passim
LLC Law § 1005..... passim

Treatises

15 Fletcher's Cyclopedia Corporations [rev ed], §7122 17
19 CJS, Corporations, §1380 17

SUMMARY OF ARGUMENT

Plaintiff, AKIVA REICH (“Mr. Reich”) no longer has any rights as a member of Purslane LLC and lacks standing and capacity to bring this action. The Complaint (Exhibit “A”) is rife with intentional misrepresentations, legal claims that are without merit and procedural defects. Even the caption is in error, as it claims that Plaintiff is a “judgment creditor” when there has never been a judgment in favor of Plaintiff.

As a matter of law, the claims are legally defective otherwise cannot survive a motion to dismiss: pursuant to the New York Limited Liability Company Law Article 10, Mr. Reich’s sole recourse (in 2020) was to seek damages in the form of a “fair value” appraisal of his former interests and all “derivative claims” must be dismissed because he no longer has the required standing to maintain these claims, and because he mixes direct and derivative claims in the same causes of action. Every claim here is direct since the new entity, Purslane Boathouse LLC (“PB”) went on without Mr. Reich, with the otherwise unanimous vote of all members of Purslane LLC (“Purslane”).

Mr. Reich knows there is no valid claim (Letters, Exhibit “B”, “G” and emails, Exhibit “E”) which is why he did not file in the years since 2019 when the merger was noticed and approved unanimously by all other members holding 60% of the voting equity. After Mr. Reich was removed from the operation, the new entity, PB was able to prosper, because he was the problem; he now seeks to cash in on the company that has found success without him.

This action was filed over five years from the final merger date, December 08, 2020¹, Plaintiff to date still has failed to object, dissent, or file a petition. Therefore, BCL §623(h)-(k) applies and Plaintiff is bound by the Company’s determination of value. It is well settled that under **LLC Law**

¹ The Agreement of Merger was signed January 13, 2020 (Exhibit “D”) and was sent to NYSDOS in February 2020 (Exhibit “F”). However, perhaps due to the COVID-19 pandemic, the NYS DOS record states December 8, 2020 as the inactive date (Exhibit “F”). This does not affect the merger since in February 2021, the cash out offer was made again to Plaintiff, who never dissented nor took any further action thereafter. See, Exhibit “G”.

§1002(g), an appraisal proceeding is the sole remedy for the removed member in a reverse merger (See, *Farro v. Schochet*, 190 Ad3d 689 [2nd Dept. 2021]). Further, LLC Law § 1005 provides for the payment of the value of that interest or, in the event of a dispute, sets forth the procedure for determining the value of that interest per BCL §623. Since the November 2019 merger divested him of his membership interest, the other causes of action cannot survive.

The causes of action in the Complaint consist of various derivative claims brought by Mr. Reich, allegedly on behalf of the subject businesses, seeking damages for breach, waste, unjust enrichment, and declaratory relief. However, Limited Liability Company Law § 1002 (f) provides that, subsequent to a merger, **a dissenting member possesses no interest in the surviving or resulting business entity**, but is instead **entitled only to a cash payment of the fair value of his or her membership as of the close of the business day prior to the merger**. This is \$0.

Mr. Reich's membership in Purslane was terminated by the merger into PB, and he failed to dissent or seek an appraisal of the value of his interest in order to be fairly compensated therefor -- his exclusive remedy -- therefore, he is precluded from maintaining any derivative claims on behalf of the subject businesses (*see* LLC Law §§ 1002 [f]; 1005; *see also* *Breed v Barton*, 54 NY2d 82, 85 [1981]; [Jacobs v Cartalemi](#), 156 AD3d 605, 607 [2017]; [Maldonado v DiBre](#), 140 AD3d 1501, 1503-1505 [2016]). Accordingly, the Court must dismiss the causes of action in the complaint.

Mr. Reich's (false) claims of misappropriation of funds or otherwise is not relevant, since LLC Law § 1002 (g) provides, with limited exceptions not relevant herein, that a member of a merged company who has a right to demand payment for his membership interest "shall not have any right at law or in equity . . . to attack the validity of the merger . . . or to have the merger . . . set aside or rescinded."

Moreover, the language of the statute makes clear that an appraisal proceeding is the member's "sole remedy," and no exception exists for alleged fraud or illegality in the procurement of the merger

(*see Appleton Acquisition, LLC v National Hous. Partnership*, 10 NY3d 250, 255-256 [2008]). No fraud or illegality is claimed by the Plaintiff.

Annexed in support of all factual statements in this memorandum is the Affidavit of Defendant HENRY RICH (“Aff. of Mr. Rich”). In November 2019, Plaintiff was advised that the offer to him for his equity was \$0 but he would be given \$5,000 in exchange for a mutual release and separation; the valuation offer was \$0 due to the debts of the entity (Exhibit “B”; Aff. of Mr. Rich at 7) – and Mr. Reich owed the Company at least \$30,000 at the time. In good faith, and an abundance of caution, this offer was made again in February 19, 2021 and sent to Plaintiff’s counsel (Exhibit “G”; Aff. of Mr. Rich at 7 and). There was no response, objection nor dissent. The \$0 valuation stands.

Pursuant to LLC Law §1005, a dissenting member offer was made to Plaintiff, at which time he had ninety days to proceed under BCL §623(h)-(k). This filing is the first action taken, and it over 5 years after the offer was made. There is no merit to this action and Plaintiff is over five years too late for a BCL fair value hearing.

Since Mr. Reich is not a member of Purslane Boathouse LLC he cannot file a derivative action and cannot seek an accounting pursuant to BCL §626(b). Mr. Reich has not been a manager of Purslane since November 21, 2019 and has not been a member since January 13, 2020 (or December 8, 2020 when NYSDOS shows the filing, Exhibit “G”). Plaintiff cannot bring an action on behalf of that entity. He has no standing to bring this action, and his time to bring an action ended in February 2020.

I. Facts Relevant to the Motion

The Court must disregard bare or conclusory allegations and allegations that are flatly contradicted by documentary evidence (see *Peter F. Gaito Architecture LLC v Simone Dev. Corp.*, 46 AD3d 530, 530 [2d Dept 2007]). The Defendants submit documentary evidence that cannot be disputed by Plaintiff in opposition.

Plaintiff admits that on November 21, 2019, he was notified of a vote for a merger being done by PURSLANE LLC (“Purslane”) pursuant to New York Limited Liability Company Law (“LLC Law”)§ 407(a) and/or LLC Law §1002(c) along with an offer to cash out his equity (admission of notice Exhibit “A”, paragraphs 29-30; Letter, Exhibit “B”). The vote set a meeting date of December 22, 2019, unless members voted in writing in advance, which would cause the meeting to be terminated. All members voted unanimously to remove Mr. Reich – who would not be voting on his own removal per the terms of the Operating Agreement (Exhibit “C” at 6.1). Unanimous vote was otherwise not required by the Operating Agreement nor the LLC Law (see, LLC Law §417).

This was during the pandemic and the company was in need of investment to survive, but Plaintiff was demanding to be paid money in order to consent to things like renewal of liquor licenses and other approvals (see, Aff. of Mr. Rich at 11; see 12 - 15). This merger was done not only for the benefit of the company, but for its survival, by improving its management structure, increasing its ability to operate, removing obstructions to operation, and allowing for investment and new opportunities, including working with the Prospect Park Boathouse -- all of which were impossible with Mr. Reich obfuscating the purpose of the Company (Aff. of Mr. Rich at 7,11-15; see, Alpert v 28 Williams St. Corp., 63 NY2d 557, 573 [1984]). Mr. Reich was notified of the merger, which removed him as a member, on January 15, 2020, along with a mutual separation and release, and the Agreement of Merger which included the dissenting member information and new capital table (Exhibit “D”).

Plaintiff was a member until Mr. Rich, a Manager of the Company, pursuant to Sections 6.1(b)(xii), (xiii), (xiv), and (xv) of the Operating Agreement (“Exhibit “C”) , lawfully merged Purslane into or with another PURSLANE BOATHOUSE LLC (“PB”), resulting in the Members of the Company receiving the fair market value of their membership interests (Merger, dated January 13, 2020; Exhibit “D”; see Exhibit “F”). Pursuant to Article VI, Section 6.1 (a), this merger was approved by a vote of the other Manager and Board member, Henry M. Rich, and by the additional “Third

Member,” Amanda Braddock as required by that section. The other members all approved this by a vote as well, although such was not required.

The Members unanimously voted to ratify the merger and to remove Plaintiff as a Manager, pursuant to Section 6.1(a), 4th Paragraph, which provides: “Purslane, LLC and the Company agree that a manager of Purslane, LLC may be removed from such position only upon a unanimous Vote of all the Members (other than the Manager).” (Exhibit “C”; see, “B” letter with signed voting record).

STANDARD OF REVIEW

On a motion to dismiss pursuant to **CPLR §3211 (a) (7)**, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, “conclusory allegations — claims consisting of bare legal conclusions with no factual specificity — are insufficient to survive a motion to dismiss” (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

In relevant part, **LLC Law §407** states:

(a) Whenever under this chapter members of a limited liability company are required or permitted to take any action by vote, except as provided in the operating agreement, such action may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken shall be signed by the members who hold the voting interests having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all of the members entitled to vote therein were present and voted...

In relevant part, **LLC Law § 1002** provides:

(f) Upon the effectiveness of the merger ... [any] dissenting member ... shall not become or continue to be a member of or hold an interest in the surviving or resulting limited liability company ... but shall be entitled to receive in cash ... fair value of his or her membership... as of the close of business of the day prior to the effective date of the merger.

(g) A member of a domestic limited liability company who has a right under this chapter to demand payment for his or her membership interest shall not have any

right at law or in equity under this chapter to attack the validity of the merger or consolidation or to have the merger or consolidation set aside or rescinded.

In relevant part, **LLC Law §1005** states:

(a) Within ten days after the occurrence of an event described in section ten hundred two of this article, the surviving or resulting domestic limited liability company ... shall send to each dissenting former member a written offer to pay in cash the fair value of such former member's membership interest...

(b) If a former member and the surviving or resulting limited liability company fail to agree on the price to be paid for the former member's membership interest within ninety days after the surviving or resulting domestic limited liability company ... shall have made the offer ... or if the domestic limited liability company ... shall fail to make such an offer ... the procedure provided for in paragraph (h), (i), (j) and (k) of section six hundred twenty – three of the business corporation law ... shall apply... (emphasis added).

In relevant part **Business Corporations Law §623** states:

(h) The following procedure shall apply if the corporation fails to make such offer within such period of fifteen days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares:

...

(2) If the corporation fails to institute such proceeding within such period of twenty days, any dissenting shareholder may institute such proceeding for the same purpose not later than thirty days after the expiration of such twenty day period. **If such proceeding is not instituted within such thirty day period, all dissenter's rights shall be lost unless the supreme court, for good cause shown, shall otherwise direct.**

Courts “must apply the terms of the statute as written” (*Stinton v Robin's Wood, Inc.*, 45 AD3d 203, 211 [2d Dept 2007]).

Thus, “[i]n assessing a motion to dismiss a cause of action pursuant to CPLR §3211(a)(7), where evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one” (*Peter F. Gaito Architecture, LLC*, 46 AD3d at 531). “If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action” (*id.*; see also *Kline v Schaum*,

174 Misc 2d 988 [App Term, 2d Dept 1997] [finding that dismissal is warranted where “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief”]).

Similarly, dismissal is warranted under CPLR 3211(a)(1) if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see *Leon v Martinez*, 84 NY2d 83 [1994]; see also *Fontanetta v Doe*, 73 AD3d 78, 84-85 [2d Dept 2010] [finding that “judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable,’ would qualify as ‘documentary evidence’” and may be considered in support of a motion to dismiss]).

ARGUMENT

I. THE CAUSES OF ACTION CANNOT SURVIVE THIS MOTION AS A MATTER OF LAW

As stated above, the legal procedures followed by the Defendants. It is apparent that Plaintiff is not familiar with the LLC Law, BCL and merger process based on the statements made in the Complaint. Notably, there is not one document attached to the Complaint as an exhibit that would demonstrate any truth of any claims of “concerns” or “notices” by Mr. Reich, nor any “demand” – because none were made while Mr. Reich was a member (Exhibit “A” at 49). This too is a violation as demand is a requirement of a derivative action.

A. The Operating Agreement Was Not Breached

There was no breach of the operating agreement. The merger process in LLC Law Article 10 is clear and the rules for such merger were followed exactly. Notice is not required for an LLC merger (only a corporation) and a majority of the equity holders in an LLC make votes and take action by written vote without notice (LLC Law §407(a); but notice was given as he admits. Mr. Reich owned 40% (Exhibit “C”, pg. 24) and thus could be outvoted by the other members.

“Members of a limited liability corporation may provide written consent in order to take action in lieu of an actual vote, unless the operating agreement provides otherwise” (*Madison Hudson Assoc., LLC v. Neumann*, 8 Misc. 3d 1025A [Sup Ct, NY County 2005]). Plaintiff does not allege a requirement of voting in person, and such is permitted by the Operating Agreement (Exhibit “C”).

Mr. Reich is “barred in law and equity from challenging the validity of the merger or seeking rescission of the merger, pursuant to LLC Law § 1002, because the merger was approved by more than a majority of members, (LLC Law § 1002 [c], [g])” (see, *Stulman v. John Dory LLC* (2010 WL 10078475 at *5 [Sup. Ct. NY Cty. 2010])).

B. The “Objection” Is Untimely

The time for an objection to the valuation per LLC Law 1005 (a) was 10 days; or, (b) within no more than 90 days from the offer to the dissenting member, Mr. Reich, which the Complaint admits was made (or if no offer is made) then the judicial appraisal procedure of BCL §623 shall apply. If no objection is made, the dissenting members ability to object is “lost” per BCL §623(h)(2). Under any of the time periods, there was no dissent or action taken for over five years from notice; the offer was made again in February 2021 after the NYSDOS had confirmed the merger in December 2020 – but to date, no objection has been made and no injunctive relief nor request for fair value has been made (Exhibit “G”; see Exhibit “F”, NYSDOS record).

Any claims relating to the value of Purslane at the time of the merger had to be asserted in a “fair value” appraisal proceeding during which such value could be adjusted if Mr. Reich had evidence the \$0 valuation was incorrect. However, he cannot do this now since he missed the window by approximately five years (see, e.g., *Zelouf v Zelouf*, 2013 45 Misc 3d 1205(A) [Sup Ct. NY County 2013]).

Since Mr. Reich is not a member, he cannot maintain this action: BCL §626(a) requires that only the “holder of shares” has capacity make these claims. As the Court of Appeals stated: “the standing of the shareholder is based on the fact that, when he sues derivatively, he is defending his own

interests as well as those of the corporation. If he disposes of his shares after initiating the derivative action, he destroys the technical foundation of his right to continue to prosecute the suit.” (*Tenney v Rosenthal*, 6 NY2d 204, 211 [1959]).

The “continuous ownership” and/or “contemporaneous ownership” rule – that member of a company loses standing to maintain his derivative claims if he ceases to be a member during the litigation – applies here (see *DeMarco v Clove Estates, Inc.*, 250 AD2d 724 [2d Dept 1998] affirming dismissal of complaint where plaintiff “failed to establish his status as a shareholder under the ‘contemporaneous ownership’ rule”; *Zentz v Int’l Foreign Esch. Concepts, LP* (2011 NY Slip Op 51908[U] [Sup Ct, Kings County 2011] dismissing derivative claims, finding “[t]his rule has been strictly enforced by courts because only current shareholders have a continuing interest in the welfare of the company”); see also *Lichtenberg v Besicorp Group, Inc.*, 43 F.Supp 2d 376, 387-88 [SDNY 1999] [finding that, “[u]nder New York law, it is well-established that after a cash-out ... whereby the plaintiffs cease to be shareholders in the surviving corporation, plaintiffs lose standing to maintain a derivative action”]).

The merge out of Mr. Reich (Exhibits “B”, “C”, “D” and “G”), and “conclusively establishe[d] a defense to the asserted claims as a matter of law.” (*Gosben v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]).

C. It is Impermissible to Mix Direct and Derivative Claims In the Same Cause of Action

Furthermore, the Complaint frequently mixes direct and derivative claims stating that actions harmed both the Company and that “Akiva” was directly harmed. In the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth claims, this is clear. In fact, The Fifth, Sixth, Seventh, Ninth and Tenth causes of action actually mix the relief in the title, i.e. “Direct Claim against Purslane LLC and derivative claim against Henry Rich”).

While clearly Plaintiff has no derivative claims, he cannot plead both in the same cause of action (see, *Wallace v Perret*, 28 Misc3d 1023, 1033 [Sup Ct, Kings County 2010] [Demarest, J.]

[dismissing causes of action on this basis], citing *Baliotti v Walkes*, 134 AD2d 554 [2d Dept 1987]; see also *Barbour v Knecht*, 296 AD2d 218, 227-28 [1st Dept 2002] [finding mingled derivative and individual claims in causes of action require dismissal of such causes of action]).

II. The Causes Of Action Must Each Be Dismissed As A Matter of Law

The First, Fourth, and Sixth Cause of Action all assert “breach of contract”. Plaintiff intentionally ignores the legal merge out of his interests (Exhibit “D”), which defeats the claim in the First Cause of Action, which is both derivative and direct. LLC Law 1002 (c) and (g) make it clear that Mr. Reich is foreclosed from any claim for rescission or otherwise, with his sole remedy of appraisal rights – which pursuant to LLC Law §1005 and BCL §623(h)(2) were lost when they were not asserted. There is no claim for fraud or illegality made (BCL §623(k)).

The merger was done to remove a member who was recalcitrant and extorting the Company for payments before he would agree to sign routine business documents, such as liquor license renewals and venue contracts (see, *Aff. of Rich* at 7, 11). This is permissible with a business believes it would be “better off with a problem shareholder” (see, *Stavroulakis v. Pelekanos*, 2018 WL 846677 at *12 [Sup. Ct. NY Cty. 2018]). In fact, the “removal of members qualifies as an independent corporate purpose when the ‘removal of the minority shareholders, furthers the objective of conferring some general gain upon the corporation’” (*Stulman v. John Dory LLC* (2010 WL 10078475 at *4 [Sup. Ct. NY Cty. 2010]) quoting *Alpert v. 28 Williams St. Corp.*, supra at 573).

Mr. Reich was also properly removed as a manager. The Purslane LLC Operating Agreement permits termination of a manager if the other members vote unanimously in favor. They did so on November 19, 2019, pursuant to Section 6.1(a), 4th Paragraph, which provides: “Purslane, LLC and the Company agree that a manager of Purslane, LLC may be removed from such position only upon a unanimous Vote of all the Members (other than the Manager).” (Exhibit “C”; see, Exhibit “B”,

signed voting record and letter; Aff. of Mr. Rich a 5). This is admitted by Plaintiff who avers he received the letter, so this claim is clearly without merit. Plaintiff was removed as a manager and then merged out by the same vote (Exhibit “B”; see Exhibit “C” at 5.9 and 6.1). It is clearly “authorized” by the Operating Agreement to undertake this action and thus the various and duplicative cause of action for breach of contract must be dismissed. Regardless, pursuant to Limited Liability Company Law § 414, a manager of a limited liability company may be removed or replaced with or without cause by a vote of the members holding the majority interest, which was clearly done.

The Complaint also admits that Mr. Reich was in breach of his obligations (Exhibit “A” at paragraphs 34 and 35). Since there is no dispute about notice, and the votes of the other members were all unanimous (Exhibit “B”) and the merger was filed per the LLC Law (Exhibit “D” and “F”) the Complaint must be dismissed as a matter of law.

Since, after the merger, Mr. Reich was no longer a member, he had no say in its management. The same is true for the impermissibly mixed Fourth Cause of Action, which contains no actual information and is duplicative of the prior causes of action. The Sixth Cause of Action is also impermissibly mixed and claims an improper “dissolution” which did not happen – there was a merger (Exhibit “D”) which apparently Plaintiff does not understand is not a dissolution. The remedies for Plaintiff existed at that time but he did not seek an injunction nor a fair value hearing, and those remedies are now lost (see, BCL §623(h)(2) ... If such proceeding is not instituted within such thirty day period, all dissenter's rights shall be lost unless the supreme court, for good cause shown, shall otherwise direct. (*see, [Alpert v 28 Williams St. Corp.](#), supra at 573; see, [Zelouf](#), supra).*)

Under New York’s rules of contract interpretation, “when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms.” (*Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 403 [2009]; *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 [1990]). “This rule is applied with special force ‘... where commercial certainty is a paramount

concern, and where the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length." (*Riverside*, 13 N.Y.3d at 403-404, quoting *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 [2004] (internal quotation marks, ellipses and citations omitted).

It is well settled that a Complaint may be dismissed when it is premised upon "that a material fact alleged by the Plaintiff 'is not a fact at all' and that 'no significant dispute exists regarding it' (*Pebko v Gendelman*, 20 AD3d 404, 406-407 [2d Dept 2005]). As a result, the claims must be dismissed since the LLC Operating Agreement permits the removal of Mr. Reich and such was done in compliance with those terms (Exhibit "E").

Furthermore, this is a derivative claims that are improperly alleged as direct claims must be dismissed for lack of standing. (*Abrams v. Donati*, 66 N.Y.2d 951, 953 [1985]: "[a] complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed.").

III. The Second Cause of Action for Unjust Enrichment Must Be Dismissed as Duplicative of the First Cause of Action and Substantively Without Merit

"To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Reingold v Bowins*, 180 AD3d 722, 723 [2020] [internal quotation marks omitted]; *see Hong Qin Jiang v Li Wan Wu*, 179 AD3d 1035, 1040 [2020]). Damages for unjust enrichment are "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). "A bare legal conclusion that it is against equity and good conscience to retain an unidentified benefit is insufficient to adequately allege that an asserted enrichment was unjust" (*Reingold v Bowins*, 180 AD3d at 723).

Mr. Reich makes a number of odd claims about an unnamed "attorney" (not the drafter of these documents) being involved in funding, and claims this invalidates the merger. This is baseless. since

"the source of funds used ... is not typically a factor in determining its validity" ([Centi v McGillin](#), 34 NY3d 1072, 1073 [2019]; see *Lloyd Capital Corp. v Pat Henchar, Inc.*, 80 NY2d 124, 128 [1992]). Unless there is a contractual prohibition on such funding, this claim fails.

In the Sixth Cause of Action, Plaintiff who claims Purslane LLC was “dissolved” and makes specious claims that a dissolution must be unanimous under the Operating Agreement, although such is not specifically identified. This is legally inaccurate since merger is not dissolution. Moreover, the Operating Agreement allows a “Majority Vote of the Members to continue the company without dissolution” in the event that “all or substantially all of the assets of the Company in a single transaction” occurs – which is effectively what the merger did here (see, Exhibit “C”, Section 9.1(C)., Plaintiff also fails to acknowledge that Mr. Rich, as Manager, pursuant to Section 6.1 (b)(xiii) is permitted to “cause the Company to participate in ... a .. merger resulting in the Members receiving the fair market value of their membership interests”. The value was deemed \$0 as provided in the notices to Mr. Reich on multiple occasions (Exhibit “B”, “D”, “E” and “G”), but he was offered \$5,000 in exchange for a release. If this is a “no offer” then the same rules apply.

In New York, a successor entity in a merger is the successor-in-interest of the acquired entity (see, *Schumacher v. Richards Shear Co.*, 59 NY2d 239, 245(1983); 19 CJS, Corporations, § 1380; 15 Fletcher's Cyclopedia Corporations [rev ed], § 7122). To the extent that contract contracts existed that were previously with the acquired entity, the successor entity is liable to perform such contracts and is not required to have new contracts due to the merger – such would be inequitable and impractical.

IV. The Third and Seventh Causes Of Action for Breach of Good Faith and Fair Dealing Must Be Dismissed

There is an Operating Agreement signed by the members and initialed on every page upon information and believe by Mr. Reich (Exhibit “C”). The only claim available to Plaintiff therefore is “breach of contract”. But since Plaintiff knows it cannot prove breach of contract since no elements,

including damages can be met, it has thrown out a variety of desperate causes of action, hoping the Court might allow one to survive. No causes of action can survive this cross-motion.

“For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract, or to withhold its benefits from the plaintiff.” (*Aventine Inv. Mgmt., Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [2d Dept 1999]). Otherwise, this is deemed to be duplicative with the breach of contract claim and cannot be cross-pleaded. “A claim for breach of the implied covenant of good faith and fair dealing is properly dismissed as duplicative of a breach of contract claim where both claims arise from the same facts. (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 [1st Dept 2011]). This claim cannot be maintained where “it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract.” (*MBIA Ins. Corp. supra* at 419-420). Furthermore, “no obligation can be implied that ‘would be inconsistent with other terms of the contractual relationship’” (*Dalton v Educational Testing Serv.*, 87 NY2d 384 at 389 [1995], quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1st Dept. 1993]). The Third and Seventh Causes of Action therefore must be dismissed.

V. The Fifth Cause of Action For Unjust Enrichment Is Duplicative and Must be Dismissed

The Fifth Cause of Action for “Unjust Enrichment” is barred as it is duplicative of the claims in the First, Fourth, Sixth Breach of Contract Causes of Action. There is a valid Operating Agreement, and thus this must be dismissed as a matter of law pursuant to CPLR §3211(a)(1).²

² There cannot be any dispute that the operating agreement exists and this is duplicative of the “breach of contract” claims.

Plaintiffs' unjust enrichment claim also is untenable. It is well settled that “[t]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered” (*Citibank, N.A. v. Walker*, 12 AD3d 480, 787 NYS2d 48 [2d Dept 2004]). The crux of plaintiffs' unjust enrichment claim is that Mr. Reich and Purslane “improperly diverted assets and opportunities” to PB in the merger. This cannot be sustained; if Mr. Reich objected, his sole remedy was judicial appraisal in 2020. Thus, the equitable predicate required for an unjust enrichment claim is wanting. (*Id.*).

VI. The Eighth Cause Of Action Must Be Dismissed As No Valid Claim for “Corporate Waste” Due to a Majority Approved Merger is Viable

Plaintiff once again fails to acknowledge the facts of this case which is perhaps why no documents are annexed to the Complaint – all such documents prove that the merger was done properly pursuant to the LLC Law and the Operating Agreement. To claim “waste” is logically impossible to prove since after the fully informed, uncoerced, independent members unanimously ratified the merger by their vote (Exhibit “B”) and the merger then permitted the new entity to take on new contracts and expand without the interference of Mr. Reich. The Plaintiff may find the merger to be “unfair” – but this is allowed by the LLC Law. Here, there was a legitimate purpose for the merger (explained in detail in Exhibit “B” and Exhibits “E” and “G”) and regardless, his sole remedy under the LLC Law was injunctive relief and a judicial appraisal hearing within the times required by the LLC Law and BCL. Plaintiff simply ignored the law (despite being advised of it multiple times in the prior letters and emails, see Exhibit “E”) and waited to see how PB fared. This is yet another attempt to claim “unfairness” and to seek a fairness hearing in bad faith, for shares he “lost” by operation of statute over five years ago. The remedies at law are clear and this duplicative cause of action cannot survive this motion.

VII. The Ninth Cause Of Action for Equitable Accounting is Not a Cause of Action Nor is Such Available to a Non-Member of the LLC

There is no valid claim for “accounting” the Ninth Cause of Action as this is not a cause of action, but rather a remedy. There is no evidence of any demand for financial documentation that were denied (in fact, the financials were provided upon request to Plaintiff multiple times, most recently in 2021 when the 2019 taxes were requested; see Exhibit “E”, email to Adam Pollack Esq. outlining the dates of the merger and failure to object for over a year).

There is no remaining cause of action upon which to premise this relief upon since as stated herein, the equitable remedy of an accounting since a party may seek an accounting only where it can establish "the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Gorunkati v Baker Sanders, LLC*, 179 AD3d 904, 905-906 [2020]; *see Pacella v RSA Consultants, Inc.*, 164 AD3d 806, 808 [2018]). Mr. Reich is not a member of PB and has not been for over five years.

"To obtain an accounting, a plaintiff must show that there was some wrongdoing on the part of a defendant with respect to the fiduciary relationship' concerning property in which the plaintiff has an interest" (*Pacella v RSA Consultants, Inc.*, 164 AD3d at 808, quoting *Benedict v Whitman Breed Abbott & Morgan*, 110 AD3d 935, 938 [2013]; *see Lawrence v Kennedy*, 95 AD3d 955, 958 [2012]). Since the November 2019 merger terminated Mr. Reich's membership status in the subject businesses, the Court must granted that branch of the Defendants' motion on the basis that Mr. Reich lacked an interest sufficient to support a demand for an accounting (*see Gorunkati v Baker Sanders, LLC*, 179 AD3d at 905-906; *Pacella v RSA Consultants, [*4]Inc.*, *supra* at 808).

VIII. THIS COURT SHOULD GRANT SUMMARY JUDGMENT TO THE DEFENDANTS PURSUANT TO CPLR §3211(C)

It is well settled that Summary Judgment motions are permitted if upon all the parties and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court to direct judgment as a matter of law. (*Andre v. Pomeroy*, 35 N.Y.2d 361[1974]).

CPLR §3211(c) allows the court to treat this motion as one for summary judgment pursuant, even pre-Answer. (*see Miblonan v Grozavu*, 72 NY2d 506, 508 [1988]; *see generally McNamee Constr. Corp. v City of New Rochelle*, 29 AD3d 544, 545 [2006]).

CONCLUSION

As set forth above, and in the movant's Affirmation and Memorandum of Law, there are no facts in dispute here and therefore the motion should be granted, with prejudice.

Dated: April 1, 2025
Brooklyn, New York

_____/s_____
Kevin O'Donoghue

22 NYCRR 202.8(b) Certification: I certify that the brief annexed hereto is in compliance with 22 NYCRR 202.8(b) is in Garamond, 12-point font and is 6,041 words inclusive of all headings and footnotes, and is 16 pages exclusive of the title page, tables of authorities and contents and backing page that follows.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Commercial Division

-----X

AKIVA REICH, individually and derivatively in
the right of and on behalf of PURSLANE LLC,
Plaintiffs – Judgment Creditors,
- against –

INDEX NO. 506922/2025

PURSLANE LLC,
Defendant / Nominal Defendant,

- and against –

PURSLANE BOATHOUSE LLC and HENRY RICH,
Defendants.

-----X

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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CERTIFICATION PURSUANT TO 22 N.Y.C.R.R. §130-1.1a

KEVIN SEAN O'DONOGHUE hereby certifies that, pursuant to 22 N.Y.C.R.R. §130-1.1a, the foregoing Memorandum is not frivolous nor frivolously presented.

Dated: April 1, 2025
New York, New York

_____/s_____
KEVIN SEAN O'DONOGHUE, Esq.

PLEASE TAKE NOTICE

* *that the within is a true copy of a _____ entered in the office of the clerk of the within named Court*
on _____.
* *that a _____ of which the within is a true copy will be presented for settlement to the Hon. one of the*
judges of the within named Court at _____, on at 9:30 a.m.
