

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: COMMERCIAL DIVISION

AKIVA REICH, individually and derivatively in
the right of and on behalf of PURSLANE LLC,

Plaintiffs,

– against –

PURSLANE LLC,

Defendant / Nominal Defendant,

– and against –

PURSLANE BOATHOUSE LLC and HENRY
RICH,

Defendants.

Index no. 506922/2025

Motion Seq. No. [1]

**MEMORANDUM OF LAW IN OPPOSITION TO MOTION
PURSUANT TO CPLR § 3211(a) ET SEQ. AND FOR SUMMARY JUDGMENT
PURSUANT TO CPLR § 3211(c) AND CPLR § 3212**

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Plaintiff Akiva Reich, individually and derivatively on behalf of Purslane LLC, respectfully submits this memorandum of law in opposition to the motion dated April 4, 2025, by Defendants to dismiss the complaint pursuant to CPLR 3211(a) and for summary judgment pursuant to CPLR 3211(c) and 3212. (Dkt. no. 4 and Memorandum of Law, “MOL,” [dkt. no 13](#).)

INTRODUCTION

Plaintiff Akiva Reich was the 50% owner of Purslane LLC, which he managed with Defendant Henry Rich. In late 2019, Defendant Rich cut him out of the business with zero compensation. Rich purportedly effected a “freeze-out merger” via a process that violated the plain language of the Operating Agreement. Meanwhile, despite its alleged merger into Defendant Purslane Boathouse LLC, Purslane LLC continued to operate as before – and continues in business to this day. Plaintiff Reich now brings valid claims on behalf of himself and Purslane LLC to address Defendants’ misconduct. Defendants’ motion to dismiss and for summary judgment should be denied for multiple reasons.

As a threshold matter, Defendants’ claim that “Plaintiff was a member until Mr. Rich ... lawfully merged Purslane into or with another PURSLANE BOATHOUSE LLC” in 2020, MOL at 8, is factually inaccurate. In fact, Purslane LLC continues to do business through the present day. Discovery will reveal the full extent of Purslane LLC’s continued operations, but Plaintiff has already uncovered that Purslane LLC continued to enter into contracts and receive payments long after it purportedly merged into Purslane Boathouse LLC. For example, even though Purslane LLC had supposedly ceased to exist in January 2020, it still took more than \$600,000 in government money from the Small Business Administration’s Paycheck Protection Program (“PPP”) in

April 2020 and February 2021, *and* Purslane LLC took a **\$3 million** government grant in June 2021. In short, contrary to Defendants' self-serving and factually unsupported arguments, Purslane LLC did not merge or cease to exist. Accordingly, Defendants' core premise – that Purslane LLC no longer exists and Plaintiff lacks standing to pursue claims – fails.

Defendants' contentions that they lawfully executed a merger and removed Plaintiff as a member of Purslane LLC are equally unfounded. The Operating Agreement unambiguously provides that a member may be removed *only* in one of two specific circumstances, neither of which occurred here. (Op. Agreement, Article 8.1(b).¹)

The Operating Agreement also provides that “Purslane, LLC is a Manager-managed LLC, which is managed and controlled *solely* by the ‘Class A Managing Members’ [i.e. Akiva Reich and Henry Rich]. *Notwithstanding any contrary language contained elsewhere in this Agreement, no Members other than the Managing Member(s) shall have voting rights, powers, control, or influence over the management of Purslane, LLC whatsoever.* This Preamble trumps and takes precedence over any language contained elsewhere in this agreement that conflicts with or could be construed as conflicting with the language in this Preamble.” Op. Agreement, Preamble Regarding Investment Representations (emphasis added). This language clearly bars Henry Rich from causing Purslane LLC to enter into a merger or remove Akiva Reich as member, regardless of how many other Non-Class A Managing members Henry Rich persuaded to vote for this outcome.

¹ Attached as Exhibit J to the Affirmation of Akiva Reich, sworn May 21, 2025 (“Reich Aff.”).

Defendants' actions also violate their duty of good faith and the majority voting requirements of the New York LLC Law. And since Akiva Reich was never properly removed as Member of Purslane LLC, he retains standing to pursue derivative claims.

Finally, even if Defendants could, as they posit, ignore all of the Operating Agreement's provisions and effectuate a "freeze out merger" that removed Akiva Reich from the business upon payment of fair value for his shares, no such payment was ever made. Defendants never paid Plaintiff Akiva Reich a single cent, let alone fair value, for his interest in the business. Instead, they simply and unlawfully purported to remove him from his position as Manager and take his interest in Purslane LLC without any compensation whatsoever. Nothing in the Operating Agreement or the NY LLC Law permits this result.

Unsurprisingly, Defendants do not cite a single authority authorizing removal of a majority member of an LLC using the process they followed here, much less one in which a court approved such a process despite the Operating Agreement providing the sole mechanisms for member removal and specifying that no members other than the removed member and one other member would have "voting rights, powers, control, or influence over the management of" the business. Defendants' motion should be denied.

FACTUAL BACKGROUND

Plaintiff Akiva Reich is the majority member of Purslane LLC, an event catering business in Brooklyn. Unfortunately, Mr. Reich and his business partner, defendant Henry Rich, developed disagreements about their obligations and how to run the

business.² Rather than resolve these issues consistent with the parties' LLC Operating Agreement, in late 2019, Henry Rich – a minority member – held a sham “vote” to purportedly merge Purslane LLC into Purslane Boathouse LLC, terminate Purslane LLC, and pay Mr. Reich zero dollars for his membership interest. Majority member Akiva Reich did not consent to any of these decisions, but Henry Rich nonetheless purported to vote shares not belonging to him and claims to have effectuated a “freeze-out merger” to remove majority member Akiva Reich.

Not only were Defendants' actions invalid and unlawful, the purported termination of Purslane LLC never actually occurred. Despite telling the New York Secretary of State that Purslane LLC had been terminated, Purslane LLC in fact continued doing business as before – except that Henry Rich unlawfully excluded Akiva Reich from management, and kept the profits the business owed to Akiva Reich as its majority member. Purslane LLC and Henry Rich entered into contracts, where the contracts were signed on behalf of Purslane LLC, and parties paid accordingly. Purslane LLC took millions of dollars from the federal government. And to this day, Purslane LLC is even hiring for various roles. (Reich Aff. ¶ 3.)

Indeed, the business still uses the same website (<https://www.purslane.com/>) and email addresses, and makes no mention whatsoever of Purslane Boathouse LLC.

² Plaintiff will not respond here to the many inaccurate assertions about his actions or detail all the relevant misconduct of Defendant Henry Rich – which includes improperly drawing a personal salary for his work as manager, contrary to the terms of the Operating Agreement, and accepting \$70,000 in cash payments that were not accounted for in QuickBooks and other questionable accounting and tax practices. Defendant Rich's affidavit is not documentary evidence and is not appropriate proof on a CPLR 3211(a)(1) motion to dismiss. *See Correa v. Orient-Express Hotels, Inc.*, 84 A.D.3d 651, 651 (1st Dep't 2011). The Court should therefore disregard his claims.

Meanwhile, Henry Rich formed Purslane Boathouse LLC on May 6, 2019, but has left the company completely dormant. He hasn't even once filed the required biennial LLC registration statement; the statement has been overdue since May 31, 2021 – for *nearly four years*. (*Id.* ¶¶ 4–5 & Exh. A.)

A. Purslane LLC obtains government monies.

In 2020 and 2021, Purslane LLC took almost **\$4 million** in government funds. Specifically, in April 2020, some months after it was purportedly merged into Defendant Purslane Boathouse LLC and ceased to exist, Purslane LLC took **\$223,500** in Paycheck Protection Program (“PPP”) monies from the government, claiming to have 60 employees. It applied for forgiveness on the loan and the loan was forgiven in March 2021. (*Id.* ¶¶ 6–7.)

In order to obtain these funds, Purslane LLC had to certify “Yes” answers to questions like: “The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes....”

<p><u>CERTIFICATIONS</u></p> <p>The authorized representative of the Applicant must certify in good faith to all of the below by initialing next to each one:</p> <p>_____ The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.</p> <p>_____ Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.</p>
--

These certifications were sworn to be true:

I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured

institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

Purslane LLC had to make similar certifications, again under penalty of perjury, to obtain loan forgiveness and avoid repayment. (*Id.* ¶¶ 8–11 & Exhs. B–C.)

Then, in February 2021, Purslane LLC obtained more PPP monies, this time getting **\$416,298** and again claiming 60 jobs. The PPP loan was forgiven in February 2022. In order to obtain these funds, Purslane LLC again had to certify, under penalty of perjury, “Yes” answers to questions like: “The Applicant was in operation on February 15, 2020, has not permanently closed, and ... had employees for whom it paid salaries and payroll taxes or paid....” And Purslane LLC had to make similar certifications, again under penalty of perjury, to obtain loan forgiveness and avoid repayment. (*Id.* ¶¶ 12–14.)

Then, in June 2021, Purslane LLC took a **\$3,047,470** grant from the Small Business Administration under its Restaurant Revitalization Fund. Among other certifications, Purslane LLC would have certified that “The Applicant business has not permanently closed.” And again, Purslane LLC would have certified to the truth of its statements:

I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a grant from SBA is punishable under the law, including under 18 U.S.C. 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 U.S.C. 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 U.S.C. 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

(*Id.* ¶¶ 15–18 & Exh. D.³)

Indeed, Defendants’ own sworn statements demonstrate that the merger was a sham and that Purslane LLC continued to operate.

B. Purslane LLC is still hiring, to this day.

Even as of very recently, Purslane LLC is still hiring. One recent job posting, for the “Chef de Cuisine” role, sought a candidate to “[p]rovide any necessary culinary and logistical support to projects and initiatives at all current and future entities owned by Purslane LLC, including but not limited to: Boathouse Cafe, Cafe 77, Anais, DIC, NUMU” (emphasis added). (*Id.* ¶¶ 21–22 & Exh. E.)

Another recent job posting, for the “Head Event Chef” role, also sought a candidate to “[p]rovide any necessary culinary and logistical support to projects and initiatives at all current and future entities owned by Purslane LLC, including but not limited to: Purslane LLC, Boathouse Cafe, Cafe 77, Anais, DIC, NUMU.” (*Id.* ¶ 23 & Exh. F.)

C. Purslane LLC continued to enter into contracts and receive payments.

Consistent with the above representations, Purslane LLC continues to do business to this day. Discovery will reveal the full extent of Purslane LLC’s continued operations, but Plaintiff has already uncovered that Purslane LLC continued to enter into contracts and receive payments long after it purportedly merged into Purslane

³ Defendant Rich can’t now have it both ways. If he swears in this case that Purslane LLC had dissolved in February 2020, then he is claiming to have lied to the government to obtain nearly \$4 million in federal government funds later in 2020 and in 2021. He will be liable to the government under the False Claims Act for treble damages – or nearly \$12 million. 31 U.S.C. § 3729(a)(1).

Boathouse LLC. (*Id.* ¶ 24.) Even the door to Purslane’s headquarters still has the Purslane sign up. (*Id.* ¶ 25.)



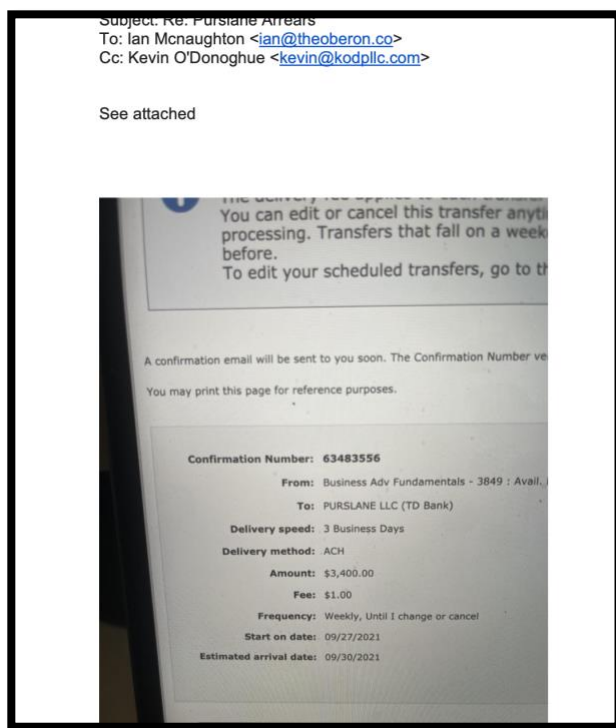
For example, in the contract for Darrin Bedol & Alan Yedid’s wedding on May 4, 2024, there is no mention whatsoever of Purslane Boathouse LLC. Instead, under the contract, “***Purslane LLC***” commits to all of the material terms, including:

- “Purslane LLC will submit a request for the special events liquor permit.”
- “Purslane LLC will provide all front and back of house staffing....”
- “Purslane LLC will oversee the ordering, delivery, and pick-up of rental items....”
- “If the client cancels the order ... Purslane LLC will return the deposit, less a \$5,000 booking fee....”
- “If the client cancels the order fewer than 30 days from the scheduled event, the client will owe Purslane LLC 100% of the agreement costs....”
- “This contract constitutes an agreement between client and Purslane LLC for catering services only....”
- “Please remit payment to: Purslane LLC - C/O Ian McNaughton....”

(*Id.* ¶ 26 & Exh. G.)

Likewise, for Jackie Avrumson & Rich Babeck’s wedding on July 16, 2021, although this wedding was planned for the Prospect Park Boathouse, the contract is not with Purslane Boathouse LLC. Like the Bedol & Yedid wedding, the highlighted portions show that this is a contract with Purslane LLC. Purslane LLC was providing the menu, the liquor permit, the staffing, etc. And it is Purslane LLC that gets paid under the contract. There’s no mention whatsoever of Purslane Boathouse LLC. (*Id.* ¶¶ 27–28 & Exh. H.)

Not only was Purslane LLC contracting for the event, but payments were made to Purslane LLC’s bank account:



(*Id.* ¶¶ 29–30 & Exh. I.)

RELEVANT PROVISIONS OF THE OPERATING AGREEMENT⁴

The Purslane LLC Operating Agreement contains several provisions that are relevant to the instant dispute.

In the Preamble, the Operating Agreement states:

Each Member acknowledges that Purslane, LLC is a Manager-managed LLC, which is managed and controlled solely by the ‘Class A Managing Members’ [i.e. Akiva Reich and Henry Rich]. Notwithstanding any contrary language contained elsewhere in this Agreement, no Members other than the Managing Member(s) shall have voting rights, powers, control, or influence over the management of Purslane, LLC whatsoever.

This Preamble trumps and takes precedence over any language contained elsewhere in this agreement that conflicts with or could be construed as conflicting with the language in this Preamble.

Operating Agreement, Reich Aff., Exh. J, at 2.

Next, Section 8.1(b) states:

(b) Cessation of Membership. A Member shall cease to be a Member only upon the occurrence of one of the following events:

- (i) the Transfer of a Member’s entire Interest back to the Company at par value, i.e., in exchange for the price the Member initially paid for the Interest; or
- (ii) the occurrence of an Event of Bankruptcy with respect to the Member (in which case the Member or its transferee shall become an Assignee).

Id. at 15.

⁴ Defendants’ argument that Plaintiff was required to attach the Operating Agreement to the complaint is meritless. *See 12 Baker Hill Rd., Inc. v. Miranti*, 130 A.D.3d 1425, 1426 (3d Dep’t 2015) (“reject[ing] defendant’s argument that plaintiff’s amended complaint was fatally defective because it did not specify which provision of the contract was breached”); *Griffin Bros. v. Yatto*, 68 A.D.2d 1009, 1009 (3d Dep’t 1979) (“[P]laintiff was not required to attach a copy of the contract or plead its terms verbatim.”).

Finally, Exhibit A to the Operating Agreement identified the members of the company and their ownership interests:

Name	Shares	Percentage Ownership	Cash Invested
CLASS A MEMBERS			
Akiva Reich	400	40%	\$200,000 plus goodwill
Henry M. Rich	201	20.1%	\$2.01 plus goodwill
CLASS B MEMBERS			
Amanda Braddock	53	5.3%	\$0.53 plus goodwill
Arden Lewis	53	5.3%	\$0.53 plus goodwill
Ian McNaughton	53	5.3%	\$0.53 plus goodwill
Julian Brizzi	10	1.0%	\$0.10 plus goodwill
Joe Pasqualetto	10	1.0%	\$0.10 plus goodwill
Marc A. Wallenstein	20	2.0%	\$0.20 plus goodwill
Shares retained by Company (for future investors)	200	20.0%	\$2.00 plus goodwill

Id. at 24. Because 20% of the member interests were un-allocated, Akiva Reich effectively owned half of the company (i.e., his ownership percentage of 40% was actually 50% of the 80% allocated shares).

PROCEDURAL HISTORY

Plaintiff filed this case on February 28, 2025. ([Dkt. no. 1.](#)) After Defendants' counsel refused to accept service, Plaintiff served the summons, complaint, and discovery requests on Defendant Purslane Boathouse LLC on March 4, 2025 ([dkt. no. 2](#)), with responses to the requests due on March 24, 2025. Plaintiff served the summons, complaint, discovery requests on Defendant Henry Rich on March 29, 2025 ([dkt. no. 3](#)), with responses to the requests due on April 18, 2025. Defendants have served no responses to date. Instead, on April 4, 2025, Defendants filed the instant motion to dismiss and for summary judgment and maintain that they will not engage in the discovery process until the motion is decided.

On May 21, 2025, Plaintiff filed an Amended Complaint.⁵ (Dkt. no. 24.)

STANDARD

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, “the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff ... the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *White Plains Plaza Realty, LLC v. Cappelli Enters., Inc.*, 108 A.D.3d 634, 636 (2d Dep’t 2013) (citations omitted). “[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (internal citations omitted).

ARGUMENT

I. The motion is premature.

There has been no discovery to date in this action because Defendants have refused to engage in any discovery. Defendants’ premature motion to dismiss and for summary judgment improperly asks the Court to accept their version of the facts instead of Plaintiff’s. Discovery will reveal which version of the facts is accurate, but

⁵ The Amended Complaint is filed as of right because Defendants have not filed a responsive pleading. *See* CPLR 3025(a); *Roam Cap., Inc. v. Asia Alts. Mgmt. LLC*, 194 A.D.3d 585, 586 (1st Dep’t 2021) (“since the court had not yet even decided defendant’s CPLR 3211 motion at the time plaintiff moved to amend its complaint, plaintiff did not need to move pursuant to CPLR 3025 (b); instead, it could have amended as of right pursuant to CPLR 3025 (a)”); *Maya Kaul v. Brooklyn Friends Sch.*, No. 512634/2020, 2022 N.Y. Misc. LEXIS 12792, at *5 (Sup. Ct., Kings Cty. Mar. 31, 2022) (“The plaintiff here may amend the complaint as of right and did not need to seek leave of court to do so.”). Plaintiff believes the amended complaint moots Defendants’ motion to dismiss, but is filing this opposition in an abundance of caution.

that cannot happen until Defendants respond to the outstanding discovery requests and produce relevant documents.

This alone is sufficient reason to deny the motion. The Second Department has repeatedly held that “[a] party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment.” *Cruz v. Fanoush*, 214 A.D.3d 703, 703 (2d Dep’t 2023) (citation and internal quotations omitted); *see also Elbaz v. New York City Hous. Auth.*, 90 A.D.3d 986, 987 (2d Dep’t 2011) (“under the circumstances presented here, the court properly denied, as premature, with leave to renew upon the completion of discovery, the defendant’s motion for summary judgment dismissing the complaint.”).

II. The motion fails on the merits.

The motion should also be denied on the merits, both because Purslane LLC continues to operate as a going concern despite its purported merger and termination, and because the purported removal of Plaintiff Akiva Reich violated several provisions of the Operating Agreement. Defendants’ motion mistakenly relies on generic provisions of the NY LLC law. But New York courts have repeatedly held that these provisions only apply as gap fillers to matters that are not specifically addressed by the Operating Agreement. Where, as here, the Operating Agreement provides for a different result, the parties’ agreement is controlling. *See Matter of 1545 Ocean Ave., LLC*, 72 A.D.3d 121, 129 (2d Dep’t 2010) (“Where an operating agreement, such as that of 1545 LLC, does not address certain topics, a limited liability company is bound by the default requirements set forth in the Limited Liability Company Law.”); LLC Law § 402(a)–(d) (describing voting rights of LLC members, qualified by the introductory phrase “[e]xcept as provided in the operating agreement ...”).

Likewise, Defendants' reliance on LLC Law § 1002 is misplaced because Section 1002(g) expressly provides that "[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, ***except in an action or contest with respect to compliance with the provisions of the operating agreement*** or subdivision (c) of this section." *See also* BCL § 623(k) ("The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except as provided in paragraph (e), and ***except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.***") (emphasis added); *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 569 (1984) ("When a breach of fiduciary duty occurs, that action will be considered unlawful and the aggrieved shareholder may be entitled to equitable relief."); *Johnson v. Asberry*, 190 A.D.3d 491, 493 (1st Dep't 2021) ("Plaintiff seeks primarily equitable relief, including an unwinding of the actions taken by [Defendant] leading up to the freeze-out merger, beginning with a declaration that [the] original operating agreement remains in effect. This is thus an 'appropriate action' for equitable relief for unlawful corporate action"); *Lazar v. Robinson Knife Mfg. Co.*, 262 A.D.2d 968, 969 (4th Dep't 1999) ("Because plaintiffs allege that the actions of

defendants were unlawful or fraudulent and seek equitable relief, the action is not barred by the exclusivity provision in Business Corporation Law § 623 (k)".⁶

As demonstrated below, this action is based on Defendants' failure to comply with the Operating Agreement and unlawful violations of its terms. It is therefore expressly permitted by LLC Law § 1002. For the same reasons, Defendants' arguments that Plaintiff's remedies for their unlawful conduct are limited to an appraisal proceeding under LLC Law § 1005 and BCL § 623, *see* MOL at 10, are wrong. Those provisions apply to a validly effected merger and do not apply to circumstances where Defendants' actions clearly violate the parties' Operating Agreement.⁷

Here, Plaintiff Akiva Reich seeks primarily equitable relief, including an unwinding of the actions taken by Defendant Henry Rich leading up to the "freeze-out merger," and a finding that Purslane LLC's original operating agreement remains in effect. New York courts have repeatedly held that such relief is available in similar circumstances. *See, e.g., Van Horne v. Ben-Dov*, 220 A.D.3d 500, 501 (1st Dep't 2023) ("While the usual remedy of a shareholder dissenting from a merger and the offered 'cash-out' price is to obtain the fair value of his or her stock through an appraisal proceeding, ... there is an exception when the merger is unlawful or fraudulent as to

⁶ *Zelouf Int'l Corp. v. Zelouf*, 45 Misc. 3d 1205(A) (Sup. Ct., N.Y. Cty. 2014), cited in MOL at 12, does not hold otherwise. In that action "the parties agreed that the court would try ... derivative claims in the instant special proceeding," and there was no discussion of the language quoted above.

⁷ Thus, Defendants' authorities approving similar conduct in circumstances where it is not barred by the Operating Agreement are irrelevant. MOL at 12 (citing *Madison Hudson Assoc., LLC v. Neumann*, 8 Misc. 3d 1025A (Sup. Ct., N.Y. Cty. 2005) and *Stulman v. John Dory LLC*, 2010 NY Slip Op 33911[U], 2010 N.Y. Misc. LEXIS 6938 (Sup. Ct., N.Y. Cty. 2010)).

that shareholder, in which event an action for equitable relief is authorized.”); *Dihyem v. Araf*, No. 524530/2022, 2022 N.Y. Misc. LEXIS 64006, at *4 (Sup. Ct., Kings Cty. Nov. 30, 2022) (Boddie, J.) (“[T]he appraisal remedy may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, or blatant overreaching is involved. In such cases, equitable relief is authorized.”) (citations omitted).

A. **Defendants continue to do business as Purslane LLC and the Court should disregard their unfounded claim that the business ceased to exist in 2020.**

As a threshold matter – and contrary to Defendants’ assertion that Plaintiff’s claims fail because Purslane LLC ceased to exist in December 2020 – the evidence will show that Purslane LLC continues to do business to this day. Plaintiffs have already uncovered evidence that in September 2021, Defendants’ counsel Mr. O’Donoghue was seeking payments to Purslane LLC’s bank account. Purslane LLC also received millions of dollars in PPP and government grant monies – after swearing under penalty of perjury that the business continued to operate, as those programs did not provide funds to businesses that are not going concerns. And Purslane LLC has continued to enter into event contracts and hire new employees – even to present day.

Accordingly, Defendant Purslane LLC and/or Henry Rich will be liable for its continued operations, notwithstanding the purported termination. *See, e.g., Bruce Supply Corp. v. New Wave Mech., Inc.*, 4 A.D.3d 444, 445 (2d Dep’t 2004) (“A corporation may be held liable on a cause of action that accrues after dissolution if the corporation continued its operations, operated its premises, and held itself out as a de facto corporation, notwithstanding its dissolution”); *Carver Fed. Sav. Bank v. Cedillo*, 573 B.R. 405, 437 (Bankr. E.D.N.Y. 2017) (“If the individual shareholders and officers of

a dissolved corporation continue to conduct a corporation's business post-dissolution, and not for the purposes of winding up the former corporation's affairs, they may become personally liable for obligations incurred by the corporation during its pre-dissolution activities."); *D & W Cent. Station Alarm Co. v. Copymasters, Inc.*, 122 Misc. 2d 453, 457 (Civ. Ct. 1983) ("since defendant continued its operations, operated its premises, and held itself out as a corporation, notwithstanding its alleged dissolution, it is estopped from pleading dissolution, and avoiding its obligations") (emphasis added).

Having been shut out of the business, Plaintiff only has limited documents at present. But discovery will reveal the full extent of Defendants' conduct, including the profits that are due to Plaintiff in connection with the businesses. *Menche v. CDx Diagnostics, Inc.*, 199 A.D.3d 678, 680 (2d Dep't 2021) ("Here, issue was not yet joined and there had been no opportunity to engage in discovery regarding the plaintiff's allegations of successor liability and fraud with respect to the apparent transformation of Labs into Diagnostics. Therefore, converting the motion to dismiss into a motion for summary judgment was premature.").

B. Defendants' actions are in clear violation of the Operating Agreement.

As noted above, New York law clearly allows Plaintiff Akiva Reich to challenge the purported merger on the grounds that Defendants' actions violated the Operating Agreement, and none of Defendants' authorities bar the type of claims Plaintiff brings here. For example, in *Farro v. Schochet*, 190 A.D.3d 689, 694 (2d Dep't 2021), the Second Department applied default New York LLC law in circumstances where no alternate terms were provided by an Operating Agreement. Further, the Plaintiff in that case affirmatively "sought appraisal of the value of his interest" post-merger. *Id.*

The court concluded that “[u]nder these circumstances, his exclusive remedy was appraisal and payment.” *Id.* Here, by contrast, the Operating Agreement controls, and Plaintiff asserts valid claims and has never sought appraisal. *See Dihyem*, 2022 N.Y. Misc. LEXIS 64006, at *4 (Boddie, J.); *Stulman*, 2010 N.Y. Misc. LEXIS 6938, at *6.

1. *The agreement expressly does not allow members to be removed in the manner employed by Defendants.*

Defendants’ argument that in 2019 they removed Purslane LLC’s largest shareholder, Akiva Reich, from his position as Manager and then voted him out of the company (i.e., forced him to cease being a Member) fails, because the LLC Operating Agreement does not allow these actions. Instead, the Operating Agreement states that “a Member shall cease to be a Member **only** upon the occurrence of one of the following [two] events: (i) the Transfer of a Member’s entire Interest back to the Company at par value, i.e., in exchange for the price the Member initially paid for the Interest; or (ii) the occurrence of an Event of Bankruptcy with respect to the Member[.]” Op. Agreement (Reich Aff., Exh. J) at 8.1(b) (emphasis added). Neither occurred here.

Defendants cannot evade the Operating Agreement’s plain language about the limited circumstances in which a Member would cease to be a Member by invoking various default procedures of the LLC law. *Stulman*, 2010 N.Y. Misc. LEXIS 6938, at *6 (“[T]he Limited Liability Company Law... provides default procedures for limited liability companies that apply in limited liability company proceedings, **unless the operating agreement applies otherwise.**”) (emphasis added). Nor can they rely on Section 6.1(b)(xii) providing general manager authority to “merge the Company into or with another company” to end-run the more specific provisions concerning Member removal (or the Preamble language discussed below). Such a reading would render the

Member removal provisions meaningless in violation of basic rules of contract construction.

2. *The purported merger is barred by the Preamble's requirement that Purslane LLC be managed and controlled solely by Akiva Reich and Henry Rich.*

Defendants' actions also violate the Preamble's directive that "no Members other than the Managing Member(s) shall have voting rights, powers, control, or influence over the management of Purslane LLC, whatsoever" because it is to be "managed and controlled **solely**" by Akiva Reich and Henry Rich. Preamble to Operating Agreement (emphasis added); *see also* Op. Agreement (Reich Aff., Exh. J) § 6.1(f) ("Voting. Members who are not Managers **shall not be entitled to vote or otherwise control operation of the Company**, to the full extent permitted by the Act and the law.") (emphasis added).

For instance, Defendants argue that "[t]he Members unanimously voted to ratify the merger and remove Plaintiff as a Manager, pursuant to Section 6.1(a), 4th paragraph...." MOL at 9. But that is irrelevant because the "Preamble trumps and takes precedence over any language contained elsewhere in this agreement that conflicts with or could be construed as conflicting with the language in this Preamble." *See* Preamble to Op. Agreement. Even assuming for the sake of argument that Section 6.1(a) allowed the members to vote out Akiva Reich and effectuate the merger, that action would violate the Preamble's overriding requirement that important decisions of this nature be made **solely** by Akiva Reich and Henry Rich. And since the Preamble

controls over any conflicting provisions elsewhere in the Operating Agreement, that action would be unauthorized and unlawful.⁸

3. *The purported merger also failed to comply with the Operating Agreement's voting requirements.*

Defendants' actions to deprive Plaintiff Akiva Reich of his interest in the company were also invalid because Henry Rich purported to vote an unassigned 20% of the outstanding shares (in addition to the 20.1% of shares he owned and was authorized to vote under the LLC Agreement), which were "retained by Company (for future investors)." Op. Agreement (Reich Aff., Exh. J), Ex. A. This unlawful maneuver effectively rewrote the Operating Agreement's assignment of shares and doubled Henry Rich's voting power, so that Akiva Reich and Henry Rich purportedly had even voting power, when the Agreement actually provided that Akiva Reich would have twice as many shares as minority shareholder Henry Rich. *See id.*

4. *The purported merger is invalid for other reasons as well.*

Defendants' actions to deprive Plaintiff Akiva Reich of his interest in the company also violated their duty to act in good faith in connection with the Operating Agreement and run afoul of LLC Law § 1002(c). That section provides that:

The agreement of merger or consolidation shall be submitted to the members of each domestic limited liability company who are entitled to vote with respect to a merger or consolidation at a meeting called on twenty days' notice or such greater notice as the operating agreement may provide. Subject to any requirement in the operating agreement requiring approval by any greater or lesser percentage in interest of the members who are entitled to vote with respect to a merger or consolidation,

⁸ Defendants' claim that there was a unanimous vote of all the Members (other than Akiva Reich) to remove him as manager is also factually inaccurate because they did not have the 1% vote of Joe Pasqualetto. However, even if the vote had been unanimous, it still would have been invalid for the reasons explained above.

which shall not be less than a majority in interest of those members who are so entitled to vote, the agreement shall be approved on behalf of each domestic limited liability company (i) by such voting interests of the members as shall be required by the operating agreement, or (ii) if no provision is made, by the members representing at least a majority in interest of the members.

(emphasis added). Here, there was no majority in interest of the members entitled to vote that voted in favor of the merger. Defendants simply ignore their duty of good faith and Section 1002(c)'s requirement, and pretend as if the "merger" could occur anyway.

C. Defendants' arguments fail even under the framework they argue applies.

Finally, even if the default LLC laws that Defendants mistakenly rely on could somehow override the plain language of the parties' Operating Agreement *and* the fact that Purslane LLC continues to do business to this day, Defendants would *still* have failed to properly effectuate the merger because they have never paid Mr. Reich the fair value – or any value – for his share of Purslane LLC.

As noted above, Purslane LLC has not actually merged into Defendant Purslane Boathouse LLC; indeed, it is still operating. Again, the precise amount owed to Mr. Reich will be established through the documents Plaintiff has requested in discovery. But it clearly cannot be nothing, especially given the valuable business that Purslane retained after its ineffective attempt to oust Mr. Reich from the business.

D. Defendants' arguments all rest on false premises and inaccurate factual assertions.

For the reasons explained above, Defendants' arguments that "The Operating Agreement was not Breached" and "The 'Objection' is Untimely," MOL at 11–12, are wrong. Defendants' remaining arguments all rest on these initial incorrect premises and fail accordingly, as outlined below.

Plaintiff Akiva Reich still maintains an interest in Purslane LLC because none of Defendants' actions operated to validly effectuate his removal or the purported merger. "[M]embers of a limited liability company (LLC) may bring derivative suits on the LLC's behalf, even though there are no provisions governing such suits in the Limited Liability Company Law." *Tzolis v. Wolff*, 10 N.Y.3d 100, 102 (2008). As Defendants' own cited authority explains, "The Second Department has noted that, although a complaint joins individual claims with those of the corporation, the complaint need not be dismissed where the plaintiff has 'not confused individual and derivative claims within each cause of action.'" *Wallace v. Perret*, 28 Misc. 3d 1023, 1030–31 (Sup. Ct., Kings Cty.) (cited in MOL at 13). In the Amended Complaint, Plaintiff has even more clearly separated these claims.

The first, fourth, and sixth causes of action properly assert claims for breach of contract. Defendants' argument that these claims should be dismissed because they effectuated a "legal merge out of his interests," MOL at 14, is wrong for the reasons stated above. First, as discussed above, Purslane LLC is still operating, and Plaintiff is owed his rightful shares. Second, the purported merger through which Defendants claim to have taken all of Plaintiff Akiva Reich's shares in Purslane LLC and given him nothing in return is fraudulent and illegal because the Operating Agreement does not allow for Akiva Reich to be removed in this manner.

The second cause of action pleads all the elements of unjust enrichment. Defendants cut out Plaintiff Akiva Reich, took over Purslane LLC, and continue to operate the business and retain all the profits, all without ever compensating Plaintiff for his majority interest in the business. Unjust enrichment claims can be pleaded in

the alternative, and Defendants should not be heard to argue there is no breach of contract while also asking the Court to dismiss the unjust enrichment claim as duplicative of the contractual claims.

The third and seventh causes of action are proper under Defendants' own cited authority. As Defendants admit, "[f]or 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." MOL at 18 (citing *Aventine Inv. Mgmt., Inc. v. Canadian Imperial Bank of Com.*, 265 A.D.2d 513, 514 (2d Dep't 1999)). That is exactly what Plaintiff alleges here. Defendants' actions were designed to prevent performance of the Purslane LLC Operating Agreement and withhold its benefits from Plaintiff Akiva Reich. Concluding that Defendants' conduct breached their duty of good faith and fair dealing would not be inconsistent with any terms of the Operating Agreement. Rather, it would prevent Defendants from acting in bad faith to take over Plaintiff Akiva Reich's interest in Purslane LLC.

The fifth cause of action for unjust enrichment in connection with Defendants' usurping of business opportunities that should have gone to Purslane LLC states a claim for the reasons stated above with respect to the second cause of action.

The eighth cause of action for corporate waste also states a claim. Defendants' only argument for dismissal of this claim is the same self-serving narrative that their actions purportedly complied with the Operating Agreement. (MOL at 19.) They did not, as explained above. Plaintiff should be allowed to hold them accountable.

Finally, Plaintiff Akiva Reich is entitled to an accounting, as requested in the ninth cause of action. Discovery will show that Plaintiff has made repeated requests for financial information, but Defendants have provided only minimal and inadequate disclosures in response to these requests. And Plaintiff retains an interest in Purslane LLC because Defendants have not removed (and cannot remove) him as a member other than for the reasons stated in the Operating Agreement.

CONCLUSION

For the foregoing reasons, plaintiff Akiva Reich respectfully requests that this Court reject Defendants' motion pursuant to CPLR 3211(a), 3211(c) and 3212.

Dated: May 21, 2025
New York, NY

Respectfully Submitted,
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: COMMERCIAL DIVISION

AKIVA REICH, individually and derivatively in
the right of and on behalf of PURSLANE LLC,

Plaintiffs,

– against –

PURSLANE LLC,

Defendant / Nominal Defendant,

– and against –

PURSLANE BOATHOUSE LLC and HENRY
RICH,

Defendants.

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Motion Seq. No. [1]

RULE 17 CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

I hereby certify that the foregoing document complies with the word count limit set forth in Section 202.8-b of the Uniform Civil Rules for the Supreme Court because it contains 6,446 words, excluding the caption, table of contents, table of authorities, and signature block. In making this calculation, I have relied on the word count of the word-processing system used to prepare this document.

Dated: May 21, 2025
New York, NY

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