SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LIAN WU SHAO, Plaintiff, - against - TIANJI LI, NEW WORLD MALL (NY) LLC, SAM CHANG, NWM MEMBER LLC, and NEW WORLD MALL, LLC, Defendants.	:	Index No. 651886/2011

MEMORANDUM OF LAW IN OPPOSITION TO PARTIAL SUMMARY JUDGMENT MOTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

Defendants Tianji Li ("Mr. Li") and New World Mall (NY) LLC (collectively, "Defendants") respectfully submit this memorandum of law in opposition to the motion by plaintiff Lian Wu Shao ("Mr. Shao") for partial summary judgment. In addition, Defendants hereby adopt the arguments set forth in the papers filed by defendants Sam Chang ("Mr. Chang") and NWM Member LLC in opposition to the motion.

PRELIMINARY STATEMENT

Plaintiff's motion is based on the false premise that he was "duped" into signing the Second Amended and Restated Operating Agreement of the LLC (the "Second Amendment") which contained changes from the previous operating agreement that he either did not notice or understand (Shao Aff., ¶ 9, 14-16). Nothing could be further from the truth.

Indeed, Mr. Shao fails to advise this Court that he not only signed the agreement with his "eyes wide open" but that he did so while being represented by his own independent counsel! The Second Amendment memorialized the significant changes to the parties' prior ownership and management structure which were proposed by Mr. Shao. The agreement was executed in the office of Mr. Shao's attorney, Bill Xian Feng Zou, Esq., after Mr. Zou made changes to the draft, redlined agreement based upon his discussions with Mr. Shao.

Significantly, Mr. Shao's true complaint is not that he was deprived of a right of first refusal but, rather, that he was removed as Manager of the LLC. However, the Second Amendment specifically provided for the removal of a manager, with or without cause, by the vote of 73% of Membership Interests. Thus, Mr. Shao expressly assumed the risk that Mr. Chang, who owned 50.1%, could vote with Mr. Li, who owned 23.7%, and that together their combined vote totaling 73.8% could remove Mr. Shao as Manager at any time with or without cause. This is exactly what happened and why Mr. Shao is now objecting.

However, Mr. Shao is a sophisticated businessman who was represented by competent counsel. Pursuant to the clear and unambiguous terms of the Second Amendment, Mr. Shao expressly agreed that Messrs. Chang and Li could remove him as Manager at any time. Accordingly, this Court should reject Mr. Shao's request to rewrite the terms of the contract to relieve him of those provisions which he now deems disadvantageous.

FACTS

Background

Mr. Chang formed the LLC in or about January 2009 to acquire, develop and manage property previously operated as a retail store known as Alexander's located at 136-20 to 136-30 Roosevelt Avenue and 40-17 to 40-21 Main Street, Flushing, New York (the "Premises") (Affidavit of Tianji Li, sworn to June 13, 2012 ("Li Aff."), ¶ 6). On February 16, 2009, Mr. Chang entered into an Amended and Restated Operating Agreement of New World Mall LLC (the "First Amendment") with Exceli-Star Development LLC ("Exceli-Star") (Shao Aff., Exh. A), an entity jointly owned by Mr. Li and Mr. Shao with an additional 5% partner (Li Aff., ¶ 6). Mr. Chang owned 50.1% of the LLC and Exceli-Star owned 49.9%. Id. Significant ownership decisions required a supermajority vote of 75% which meant, in effect, that unanimity was required. Id. Both Mr. Chang and Exceli-Star served as Managers of the LLC. Id.

The business purpose of the LLC was to renovate and convert the Premises to a shopping mall known as the New World Mall (Li Aff., ¶ 7). In furtherance thereof, the LLC entered into a net lease agreement with Alexander's of Flushing, Inc. (the "Alexander's Lease") and subleased six floors of the shopping mall to five separate entities known as New World Garage, Inc., New World Food Court, Inc., J Mart Group, Inc., New World Shopping Center, Inc. and Grand Restaurant Group, Inc. (collectively, the "Subtenants") for an initial term through January 30,

2027 with a ten year renewal option. Id. Initially, both Mr. Shao and Mr. Li had ownership interests in the Subtenants. Id.

Although the day-to-day management of the LLC was vested in Exceli-Star, Mr. Shao was primarily responsible for the construction of the mall (Li Aff., ¶ 8). Unfortunately, Mr. Shao's management of the construction project was an unmitigated disaster and nearly brought the Company to the brink of financial ruin. Id. First, Mr. Shao failed to properly supervise the construction which led to massive cost overruns and significant delay. Id. Second, Mr. Shao either permitted and/or participated in significant illegal and/or improper work creating serious safety hazards and building code violations including, but not limited to, improperly installing stone panel cladding on the building exterior which caused the façade to crumble potentially resulting in injuries to pedestrians; improperly installing glass on the building's skylight and awnings resulting in injuries from falling glass; failing to install an adequate electrical switch for the fire pump and removing a required fire wall; and constructing illegal mezzanines without adequate emergency egress. Id.

Third, Mr. Shao operated "under the table" and "off the books" (Li Aff., ¶ 9). Among other things, Mr. Shao hired his friends as workers and contractors without procuring workers' compensation and liability insurance thereby potentially subjecting the LLC to substantial liability. Id. Significantly, three personal injury lawsuits were filed against the LLC which does not have insurance coverage for these claims. Id. In addition, Mr. Shao failed to pay contractors or obtain lien releases, sign offs for work or proper contract documentation. Id.

Perhaps most egregiously, Mr. Shao forged the over-landlord's signature on numerous Department of Buildings documents resulting in a risk of the Alexander's Lease being terminated (Li Aff., ¶ 10).

Finally, Mr. Shao also acted contrary to the interests of the LLC in order to further his financial interests in the Subtenants (Li Aff., ¶ 11). Among other things, Mr. Shao failed to provide separate electrical and water submeters for the Subtenants resulting in the LLC being charged for consumption or usage which was the sole obligation of the Subtenants. Id. In addition, Mr. Shao performed work for the Subtenants at the LLC's expense which the LLC was not obligated by the terms of its lease to perform. Id. Significantly, Mr. Shao's attorney, Mr. Zou, prepared the subleases which failed to include standard provisions for shopping center leases and benefitted the Subtenants to the detriment of the LLC (i.e., the entirety of each floor was rented without any common space). Id. As a result of Mr. Shao's wrongful acts, the LLC suffered significant monetary damages which form the basis of the LLC's counterclaims in this action against Mr. Shao. Id.

Mr. Shao's egregious mismanagement and conflicts of interest caused serious problems for the operation and governance of the LLC (Li Aff., ¶ 12). Since Mr. Shao and Mr. Li frequently disagreed, Exceli-Star (which they controlled equally) could not vote its interest which resulted in the LLC becoming deadlocked because major decisions required Exceli-Star's vote. Id.

In the fall of 2010, Mr. Shao told Mr. Chang that he was becoming frustrated with decision-making for the LLC because it required that he and Mr. Li come to an agreement to vote Exceli-Star's interest (Affidavit of Sam Chang, sworn to June 12, 2012 ("Chang Aff."), ¶ 3). To rectify this situation, Mr. Shao proposed dissolving Exceli-Star and distributing its sole asset (i.e., its 49.9% membership interest in the LLC) directly to its individual members. Id. at ¶ 4. Under this new proposal, Mr. Chang's company, NWM Member LLC, would continue to own

50.1% of the LLC while Messrs. Shao and Li (or their wholly owned entities) would each own 23.7% with the other Exceli-Star owner, Yung Hsing Chou, owning the remaining 2.5%. Id.

In addition, Mr. Li agreed to sell his interest in the Subtenants to Mr. Shao or his wife at a below market price equal to the amount of his capital contributions without any profit (Li Aff., ¶ 12). Presently, Mr. Shao, his wife or an entity owned by them, own approximately 50% of each of the Subtenants. Id.

In connection with these proposed changes, Mr. Shao offered Mr. Chang essentially the same deal which Mr. Chang subsequently entered into with Mr. Li (Chang Aff., ¶ 5). Thus, Mr. Shao offered to pay Mr. Chang $1,520,000 for the return of his capital contribution to the LLC plus a monthly payment of $60,000 in exchange for an assignment to Mr. Shao of the rights associated with Mr. Chang's Membership Interest. Id. Ultimately, however, Mr. Chang and Mr. Shao did not reach an agreement. Id.

Thereafter, Mr. Shao suggested that the operating agreement also be amended to provide for a new management and voting structure (Li Aff., ¶ 13; Chang Aff., ¶ 6). The parties agreed that Messrs. Chang, Shao and Li would all serve as Managers but Mr. Chang would have two votes while Mr. Li and Mr. Shao would each have one vote with three votes required to approve managerial decisions on behalf of the Company. Id. The parties similarly agreed that major decisions of the Company would require a super majority consisting of Mr. Chang's vote plus either Mr. Li or Mr. Shao's vote. Id. In short, the parties' agreement was clear and unambiguous -- if Mr. Chang aligned himself with either Mr. Shao or Mr. Li, this combination would control the Company irrespective of any objections by the third member (Li Aff., ¶ 13).

The Second Amendment

In connection with these proposed transactions, Messrs. Chang, Shao and Li were each represented by separate counsel (Li Aff., ¶ 14; Chang Aff., ¶ 7; Affidavit of John Leagh, Esq., sworn to June 11, 2012 ("Leagh Aff."), ¶ 2). Mr. Chang was represented by his in-house counsel, Brian G. Wrynn, Esq. Id. Mr. Shao was represented by Bill Xian Feng Zou, Esq. Id. Mr. Li was represented by John Leagh, Esq. of Leagh & Associates, PLLC. Id.

The stock transfer agreements in which Mr. Li transferred his interest in the Subtenants to Mr. Shao's wife (which closed on December 8, 2010, the same day that the Second Amendment was executed), provided as follows:

> **Legal representation.** The parties hereby acknowledge that Leagh & Associates, PLLC represents only the Seller [i.e., Mr. Li], and Law Offices of [Bill] Xian Feng Zou, represents only the Buyer [i.e., Mr. Shao's wife]. The parties hereby acknowledge that the entire agreement has been translated and explained to each of them in the Mandarin dialect of Chinese, their native tongue and they fully understand the terms of the agreement. (Li Aff., Exh. B, ¶ 13)[1]

Mr. Wrynn (who had originally prepared the First Amendment) also prepared the initial draft of the Second Amendment and, on December 8, 2010, circulated a redlined version to all parties highlighting the changes from the First Amendment (Li Aff., ¶ 16, Exh. A; Chang Aff., ¶ 7; Leagh Aff., ¶ 3, Exh. A). That same day, Mr. Leagh forwarded the redlined version via email to Mr. Zou (Leagh Aff., ¶ 3). Thereafter, the parties and their attorneys met at Mr. Zou's office that evening to discuss the proposed Second Amendment. Id.

The Management section of the proposed agreement contained the following two new highlighted sentences:

> The vote of Sam Chang as Manager shall count as Two (2) votes; the vote of Lian Wu Shao as Manager shall count as one (1)

[1] Each of the five stock transfer agreements contain the same quoted language (Li Aff., ¶ 15, n. 1).

> vote and the vote of Tianji Li shall count as one (1) vote. The vote of a minimum of 3 of the 4 of the Manager votes is required to approve managerial decisions on behalf of the Company. (Li Aff., Exh. A, p. 5)

In addition, the marked version highlighted the fact that the 75% super majority vote requirement was being changed (Li Aff., ¶ 17). The draft listed the new membership interests of the former Exceli-Star members as follows: Mr. Shao -- 24.70%; Mr. Li -- 24.70%; and their silent partner, Yung Hsing Chou -- 0.5% (see Li Aff., Exh. A, p. 21). These percentages changed in the final agreement to Mr. Shao -- 23.70%; Mr. Li's company, New World Mall (NY) LLC -- 23.70%; and Mr. Chou -- 2.5% (Shao Aff., Exh. G, p.19).

The important point, however, is that the draft memorialized the parties' agreement that the combination of Mr. Chang's 50.1% interest plus either Mr. Li or Mr. Shao's interest would control the Company (Li Aff., ¶ 17). Thus, the draft showed the previous 75% requirement being changed to 74% which meant that if Mr. Chang voted his 50.1% interest with either Mr. Li or Mr. Shao's 24.7% interest (as set forth in the draft) this combination totaling 74.8% would exceed the required 74% threshold necessary for major corporate decisions (Li Aff., ¶ 17; Exh. A). (In the final executed version in which Mr. Li and Mr. Shao's ownership percentages were changed from 24.70% to 23.70%, the 74% threshold was changed to 73% which achieved the same result – i.e., the combination of Mr. Chang's 50.1% interest plus either Mr. Li or Mr. Shao's 23.7% interest equaling 73.8% would exceed the required 73% threshold for major decisions) (Shao Aff., Exh. G).

In his affidavit, Mr. Shao disingenuously refers to the change from 75% to 73% as a "subtle" and "seemingly innocuous, almost unrecognizable change[s]" which was "not explained" to him (Shao Aff., ¶¶ 14-15). In fact, however, nothing could be further from the truth.

First, the change in the 75% threshold was initially highlighted in the draft agreement a total of eight (8) times (see Li Aff., Exh. A, p. 4 (Additional Members); p. 5-6 (Numbers) (change appears twice); p. 7 (Removal); p. 7 (Vacancies); p. 8 (Quorum); p. 8-9 (Manner of Acting); and p. 15 (Dissolution)). Thereafter, in the final executed version, the change from 75% to 73% was made consistently throughout the agreement a total of ten times (see Shao Aff., Exh. G, p. 4 (Additional Members); p. 4 (Sale of All Assets); p. 5 (Numbers) (change appears twice); p. 7 (Removal); p. 7 (Vacancies); p. 7 (Salaries); p. 8 (Quorum); p. 8 (Manner of Acting); and p. 14 (Dissolution).

Notwithstanding his assertion to the contrary, Mr. Shao knew exactly what this change meant -- that the combination of Mr. Chang's vote with either Mr. Li's vote or Mr. Shao's vote would not only control the Company but also permit the removal of the third manager (see Shao Aff., Exh. G, p. 7). Indeed, this change along with the change in ownership and votes required to approve managerial decisions (i.e., 3 out of 4) were the very reasons why the agreement was being amended in the first place (Li Aff., ¶ 19). In short, Mr. Shao expressly assumed the risk that Mr. Chang and Mr. Li could join together to remove him as manager at any time.

The marked version highlighted significant changes to the Transferability provision as well (Li Aff., Exh. A at 14-15). In his affidavit, Mr. Shao asserts that he "did not notice" that the restrictions on assigning and pledging of Membership Interests were being eliminated (Shao Aff., ¶ 14). However, the draft specifically highlighted this fact by striking the words "assign" and "pledge" (Li Aff., Exh. A at 14). In addition, the new language expressly permitted a Member to pledge his interest and further stated that "Any Membership transfer permitted by this section shall not be subject to any Right of First Refusal as provided below" (Li Aff., Exh. A at 14).

The execution of the Second Amendment occurred at a meeting which was attended by all parties and their attorneys in the office of Mr. Shao's attorney, Mr. Zou, on the evening of December 8, 2010 (Li Aff., ¶ 21; Chang Aff., ¶ 7; Leagh Aff., ¶ 4). Everything was transparent and, indeed, highlighted (Li Aff., ¶ 21). When Mr. Shao, assisted by his counsel, Mr. Zou, reviewed the Second Amendment, they spoke to each other at length in Chinese (Li Aff., ¶ 21; Leagh Aff., ¶ 4). Mr. Zou, a New York lawyer, is, of course, fluent in English and undoubtedly carefully explained each proposed change to the agreement to Mr. Shao (Li Aff., ¶ 21). Mr. Zou conferred privately with Mr. and Mrs. Shao, made changes to the agreement and printed the final, execution version from his office computer. Id.

In Mr. Shao's affidavit, he states "Chang explained that if Li and I were in disagreement, Chang would be able to act as the deciding vote, which he would exercise only in the Company's best interests." (Shao Aff. ¶13). That conversation never occurred (Chang Aff., ¶ 8). By this time, Mr. Chang had lost confidence in Mr. Shao who had mismanaged the Company's construction project resulting in massive delays and cost overruns, public safety hazards and violations of the law. Id. In addition, Mr. Shao had a serious conflict of interest because he also had a significant financial and/or controlling interest in the LLC's subtenants. Id.

Mr. Chang was unavailable to run the day-to-day management of the LLC and trusted Mr. Li to do so (Chang Aff., ¶ 9). Mr. Li advanced to Mr. Chang a sum necessary for Mr. Chang to recover his capital contributions plus $50,000 per month through the expiration date of the LLC's lease with its own landlord.[2] Id. In return, Mr. Chang provided Mr. Li with a pledge, proxy and power of attorney because Mr. Chang believed Mr. Li was the most qualified person

[2] In his affidavit, Mr. Shao asserts that since the term of Mr. Li's agreement with Mr. Chang includes "all renewal terms" for the Alexander's Lease, the agreement could be "in perpetuity" (Shao Aff., ¶ 8). However, the Alexander's Lease only provides for a single ten year renewal term from January 30, 2027 through January 30, 2037 (see Sections 2.01 and 19.29) (Li. Aff., ¶ 22 n. 2).

to run the Company. Id. Mr. Chang did not sell or otherwise transfer his Membership Interest in the LLC to Mr. Li. Id. Mr. Chang continues to have an interest in the mall's success because if the Company is dissolved, he will not receive his monthly payments since Mr. Li is only obligated to make these payments if the Company collects 5% of the rent roll every month (see Shao Aff., Exh. C, Articles VIII and X). Mr. Shao's assertion that Mr. Chang told him and his wife that Mr. Chang entered into his agreement with Mr. Li because Mr. Chang was in financial difficulty and needed the money (Shao Aff., ¶ 21) is untrue (Chang Aff., ¶ 10).

Mr. Chang's record ownership in the Company did not change (Li Aff., ¶ 23; Chang Aff., ¶ 9). If the Company is sold or dissolved prior to the expiration of Mr. Chang's agreement with Mr. Li, Mr. Chang will be entitled to (or liable for) his 50.1% share of the net profits or losses (Li Aff., ¶ 23). The LLC's annual tax returns reflect the fact that Mr. Chang's company, NWM Member LLC, remains a 50.1% member of the LLC (Li Aff., Exh. C). Since Mr. Chang's Membership Interest in the LLC was neither sold nor otherwise transferred to Mr. Li, the right of first refusal under the Second Amendment was not triggered.

In the months after the execution of the Second Amendment, it became even more apparent that Mr. Shao was favoring the interests of the Subtenants to the LLC's detriment (Li Aff., ¶ 24). For example, on or about March 30, 2011, when the Company obtained its temporary certificate of occupancy, Mr. Shao was required to open the mall for business and start collecting rent from the Subtenants. Id. Instead, Mr. Shao intentionally delayed the opening for an additional month costing the LLC in excess of $500,000 in rent. Id. When the mall did finally open on April 29, 2011, Mr. Shao asserted that this opening did not trigger the payment of rent which he instead claimed would only begin starting May 22, 2011 when there was a ribbon cutting ceremony at the mall. Id. As a result, the LLC lost additional revenue

during this period in the amount of approximately $500,000. Id. Mr. Shao's actions on behalf of the Subtenants to the detriment of the LLC constitute an egregious breach of his fiduciary duties and duty of undivided loyalty to the LLC.

Based upon Mr. Shao's misconduct and conflict of interest, on or about May 25, 2011, the LLC properly removed Mr. Shao as a Manager (Li Aff., ¶ 25). In response, Mr. Shao embarked upon a course of conduct designed to harm the LLC and prejudice its interests. Id. Thus, Mr. Shao improperly caused and/or directed the Subtenants to withhold rent, commit numerous defaults and engage in illegal activities creating a public safety hazard. Id. Among other things, Mr. Shao and/or his wife, Tai Li Huang, permitted Grand Restaurant and/or KTV to sell liquor without a license, including to minors, leading to drunken brawls at the premises and injury to innocent bystanders. Id. Mr. Shao's actions placed the Alexander's Lease in jeopardy and risked closure of the mall by the New York City Buildings Department ("DOB"). Id.

In or about January, 2012, the LLC received a Thirty (30) Day Notice To Cure from its landlord, Alexander's of Flushing, Inc., in connection with DOB violations predominantly caused by Mr. Shao and the Subtenants (Li Aff., ¶ 26). In order to preserve the Alexander's Lease, the LLC was compelled to commence an action against its landlord and move for a Yellowstone Injunction (see New World Mall LLC v. Alexander's of Flushing, Inc., Supreme Court, New York County, Index No. 605477/12 (Honorable Charles E. Ramos)). Id. On February 23, 2012, Your Honor granted a temporary restraining order tolling the notice to cure and staying termination of the Alexander's Lease. Id. To date, however, the Subtenants still have not cured all of the DOB and ECB violations or paid penalties arising from their work. Id. In addition, Mr. Shao has caused or directed the Subtenants to create numerous new potential violations including, but not limited to, the improper installation, without plans or DOB permit

approvals, of metal gates on the third floor and cellar level blocking access to exit stairways and elevators thereby placing the Alexander's Lease at further risk. Id.

In addition, Mr. Shao and his wife caused the LLC to incur significant legal expense by directing the Subtenants not to pay rent (Li Aff., ¶ 27). In an action commenced by four of the Subtenants entitled New World Food Court, Inc. v. New World Mall, LLC, Supreme Court, New York County, Index No. 651779/11 (Honorable Charles E. Ramos), Your Honor granted a temporary restraining order in connection with an application for a Yellowstone Injunction on June 28, 2011 on condition that the Subtenants pay the full amount of the outstanding rent on or before July 19, 2011. Id. Thereafter, the Subtenants paid the LLC in excess of $1,200,000. Id.

Similarly, in an action entitled Grand Restaurant Corp. v. New World Mall LLC, Supreme Court, Queens County, Index No. 19071/11 (Honorable Robert J. McDonald), the Court granted a Yellowstone Injunction on October 28, 2011 on condition that Grand Restaurant pay the base rent into escrow (Li Aff., ¶ 28). Thereafter, the Court granted a temporary restraining order in connection with another application for a Yellowstone Injunction on December 22, 2011 on condition that no liquor be kept, warehoused or sold at the premises. Id. Unfortunately, however, Grand Restaurant repeatedly violated both orders. Id. On May 24, 2012, Judge McDonald ordered that the sum of $345,000 be released to the LLC; that a court approved monitor be hired to oversee and monitor the premises for alcohol; and that Grand Restaurant pay the full amount of rent directly to the LLC commencing June 1, 2012. Id.

In his affidavit, Mr. Shao objects to the "legal action[s] to terminate the subleases" on the grounds that they are "the Company's only asset and its only source of cash flow" (Shao Aff., ¶ 20). However, the LLC properly took necessary legal actions to protect the Alexander's Lease, collect rent and compel the Subtenants to cure violations (Li Aff., ¶ 29). Indeed, to date, the

LLC's legal actions have resulted in the collection of approximately $1,900,000 in unpaid rent from the Subtenants and orders requiring that rent be timely paid each month. Id. By opposing these actions, Mr. Shao simply highlights the conflicted position which he finds himself. Id.

While serving as Manager, Mr. Shao failed to maintain adequate books and records for the LLC (Li Aff., ¶ 30). After being removed as Manager, Mr. Shao wrongfully refused to turn over records which he did maintain. Id. Thereafter, Mr. Li was shocked to discover that Mr. Chang had wrongfully misappropriated the Subtenants' security deposits to pay their construction costs. Id. To make matters worse, Mr. Shao has now caused four of the five Subtenants to commence an action against the LLC based upon the missing security deposits. Id. In addition, Mr. Shao has caused and/or directed the Subtenants to withhold approximately $1,000,000 in additional rent charges such as operating expenses and electricity charges. Id.

Mr. Shao's wrongful actions simply highlight his conflict of interest and confirm the soundness of Mr. Li's business judgment in removing him as Manager (Li Aff., ¶ 31). Indeed, if Mr. Li had not removed Mr. Shao as Manager, the LLC would undoubtedly have suffered significant losses as a result of Mr. Shao's mismanagement and creation of public safety risks. Id.

After Mr. Shao was removed as Manager, Mr. Li closed the LLC's bank account and transferred the funds totaling approximately $300,000 to a new LLC bank account which Mr. Shao did not have access to in order to prevent further defalcations (Li Aff., ¶ 32). Notwithstanding Mr. Shao's insinuation to the contrary (Shao Aff., ¶ 20), there was nothing nefarious about this (Li Aff., ¶ 32). Indeed, Mr. Shao conspicuously fails to advise this Court that Mr. Li has consistently provided Mr. Shao with the monthly bank statements for the new account confirming that the funds have been used solely for the LLC's business. Id.

Significantly, Mr. Shao first raised the issue of the $300,000 transfer in connection with his prior unsuccessful application for appointment of a receiver (Li Aff., ¶ 33). At the August 9, 2011 oral argument before Your Honor, Mr. Li's counsel agreed to provide the bank statements to Mr. Shao to prove that there had been no unlawful misappropriation. Id. Nevertheless, Mr. Shao continues to make this same false accusation against Mr. Li. Id.

Unlike Mr. Shao, Mr. Li has served the LLC honestly, diligently and conscientiously (Li Aff., ¶ 34). Since removing Mr. Shao as Manager, Mr. Li has worked tirelessly, without a salary, to remedy the problems created by Mr. Shao and make the mall a success. Id. As a result of Mr. Li's efforts, both the LLC and its individual members, including Mr. Shao, have benefitted greatly. Id.

Mr. Shao asserts that he invested more than $1 million in the LLC between the time that he executed the Second Amendment in December 2010 through the date of his removal in May 2011 (Shao Aff., ¶ 18). However, both Mr. Shao and Mr. Li each obligated themselves to loan $2 million to the Company pursuant to promissory notes, dated October 8, 2010 (Li Aff., ¶ 35). The $1 million which Mr. Shao claims that he invested during the period December 2010 through May 2011 was actually the funding of one-half of his pre-existing loan commitment. Id. Mr. Li's initial $2 million loan was in place as of December 2010 and he subsequently loaned an additional sum in excess of $1 million to the LLC. Id. Since Mr. Shao remains a 23.7% owner of the Company, he clearly benefits from these loans. Id.

Mr. Shao's assertion that the assignment to Mr. Li of the rights associated with Mr. Chang's Membership Interest triggered a right of first refusal is incorrect (Li Aff., ¶ 36). Pursuant to the Second Amendment, a right of first refusal is only triggered by a sale or transfer

of a Membership Interest. Here, there was no such sale or transfer and Mr. Chang's company, NWM Member LLC, remains a 50.1% member of the LLC (see Li Aff., Exh. C).

ARGUMENT

THE MOTION SHOULD BE DENIED

Simply put, Mr. Shao's assertion that he was deprived of a right of first refusal is nothing more than a red herring. Mr. Shao's true complaint is that the provisions of the Second Amendment resulted in his being removed as Manager of the LLC. However, this was a risk which Mr. Shao, a sophisticated counseled businessman, expressly assumed pursuant to the clear and unambiguous terms of the agreement.

Where, as here, a provision in a contract is clear and unambiguous, the court may not make a new contract under the guise of interpretation. Rather, so long as the provision does not contravene any principle of public policy, the courts may not relieve a party from disadvantageous terms by a process of interpretation. See Seifert, Hirshorn and Packman, Inc. v. Insurance Company of North America, 36 A.D.2d 506, 508, 321 N.Y.S.2d 815, 817 (1st Dep't 1971); John Doris, Inc. v. Solomon R. Guggenheim Foundation, 209 A.D.2d 380, 381, 618 N.Y.S.2d 99, 100 (2d Dep't 1994) ("The language of the contract is clear and unambiguous, and the courts may not rewrite the agreement to relieve a sophisticated contracting party from terms that it later deems disadvantageous"); Shoretz v. Shoretz, 186 A.D.2d 370, 372, 588 N.Y.S.2d 274, 275 (1st Dep't 1992) ("[A] court should not, in guise of interpretation, nullify part of an agreement simply because one of the parties may have discovered, after several years, that a term originally agreed to has produced disagreeable results in practice.") (citation omitted); Switzer v. 1326 Restaurant LLC, 2008 WL 5485209 (Supreme Court, New York County December 30, 2008) (court rejected defendant's argument that he would not have agreed to the LLC's

Operating Agreement if he knew that the supermajority provisions could be terminated stating that the written agreement was between "sophisticated, counseled businessmen [and] is unambiguous on its face").

Needless to say, Mr. Shao could easily have provided for a right of first refusal which was triggered not only by a "sale" of a "Membership Interest" but also by an assignment of beneficial ownership, management, control or voting rights. Not having done so, however, Mr. Shao cannot now seek to be relieved of his bargain. See United Commodities-Greece v. Fidelity International Bank, 64 N.Y.2d 449, 455 (1985) ("If the parties intended the page one documents to be applicable to the "Special Conditions" eventuality, they could readily have included the necessary language. It is not the function of the court to insert such a provision") (citations omitted); Slamow v. Delcol, 174 A.D.2d 725, 726, 571 N.Y.S.2d 335, 336 (2d Dep't 1991), *aff'd*, 79 N.Y.2d 1016 (1992) ("The interpretation the defendant urges is contrary to the plain words utilized in the contract and language to give effect to that interpretation was readily available had it been the intention of the parties to include such a limitation"); Cellular Telephone Company v. 210 East 86th Street Corp., 44 A.D.3d 77, 83, 839 N.Y.S.2d 476, 480 (1st Dep't 2007) ("Had Cellular wished to make the intra-corporate right of assignment absolute, it could have so negotiated and drafted the appropriate language. The Court will not presume to rewrite the plain language of the lease that was negotiated between sophisticated business entities").

In George Backer Management Corp. v. Acme Quilting Co., Inc., 46 N.Y.2d 211, 218 (1978), a lessor brought an action against its lessee to recover amounts due under the rent escalation provisions of the lease. The Court of Appeals stated:

> [T]he lease contains no requirement that rent escalations be measured by actual costs as opposed to the common industry-

> wide criterion chosen by the parties here. Had that been their intention, surely no problem of draftsmanship would have stood in the way of its being spelled out. Language as simple as that in the first sentence of this paragraph would have served the purpose...
>
> Nor was the operation of the clause unconscionable. [Defendant] assumed the precise risk of which it now complains that the [Realty Advisory Board] labor rate would rise so as to substantially increase its monthly rental payments. But parties are free to make their own contracts...
>
> Once a contract is made, only in unusual circumstances will a court relieve the parties of the duty of abiding by it. By no means did such circumstances exist here... [T]he wage rate clause here contravened no principle of public policy or is its effect so onerous as to shock the conscience. Hence, judicial interpretation will not relieve [defendant] of what it may now regard as a burdensome bargain. (emphasis added) (citations omitted)

See also In re Matco-Norca, Inc., 22 A.D.3d 495, 496, 802 N.Y.S.2d 707 (2d Dep't 2005) ("[A] court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning"); Arfa v. Zamir, 63 A.D.3d 484, 880 N.Y.S.2d 635 (1st Dep't 2009) ("Contrary to the intervenors' contention, this contractual provision is unambiguous and therefore must be given its 'plain and ordinary meaning'... We will not 'rewrite the terms of an agreement under the guise of interpretation'") (citations omitted); Urban Archaeology Ltd. v. Dencorp Investments, Inc., 12 A.D.3d 96, 103, 783 N.Y.S.2d 330, 335 (1st Dep't 2004) (" '[T]he detailed partnership agreement [was] a complete expression of the partners' intentions' and thus the court was without power to rewrite its terms"); Blonder & Co., Inc. v. Citibank, N.A., 28 A.D.3d 180, 182, 808 N.Y.S.2d 214, 217 (1st Dep't 2006) ("'[W]here the intention of the parties is clearly and unambiguously set forth in the agreement itself effect must be given to the intent as indicated by the language used without regard to extrinsic evidence'") (citation omitted); In re Grande' Vie, LLC (Estate of Panaggio), 93 A.D.3d 1281, 940 N.Y.S.2d 740 (4th Dep't 2012)

("Where an agreement is clear and unambiguous, a court is not free to alter it and impose its personal notions of fairness"); Will of Ault, 207 A.D.2d 312, 314, 615 N.Y.S.2d 681, 684 (1st Dep't 1994) ("It is well-settled law that absent ambiguity, and none exists here, the interpretation of a contract is a question of law to be resolved by the court. Further, evidence outside of the four corners of the Agreement as to what was really intended is generally inadmissible to vary the terms of that Agreement").

Mr. Shao was a sophisticated, counseled businessman and the contract which he freely entered into did not violate public policy. Accordingly, Mr. Shao should be held to the terms of his bargain. See Quantum Chemical Corporation v. Reliance Group, Incorporated, 180 A.D.2d 548, 548-49, 580 N.Y.S.2d 275, 276 (1st Dep't 1992) ("There is a presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties; such a presumption should apply with even greater force when the instrument is between sophisticated, counseled businessmen"); Wallace v. 600 Partners Co., 86 N.Y.2d 543, 548 (1995) (Court of Appeals held that a ground lease provision should be enforced as written stating "[W]here, as here, the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length... 'it is not the function of the judiciary to change the obligations of a contract which the parties have seen fit to make'").[3]

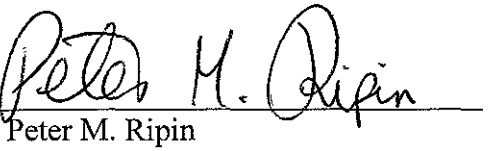
[3] Since the contract is clear and unambiguous, this Court should search the record and award partial summary judgment to Defendants. See CPLR 3212(b) ("If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion"); Fineman Family LLC v. Third Avenue North LLC, 90 A.D.3d 549, 551, 936 N.Y.S.2d 132, 134 (1st Dep't 2011); Siegel Consultants, Ltd. v. Nokia, Inc., 85 A.D.3d 654, 656-57, 926 N.Y.S.2d 82, 84-85 (1st Dep't 2011).

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the motion be denied in its entirety and partial summary judgment awarded to Defendants.

Dated: New York, New York
June 13, 2012

DAVIDOFF HUTCHER & CITRON LLP

By: 
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