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

KRISTEN L. EIKENBERRY, Plaintiff, - against - RICHARD JOSEPH LAMSON, Defendant.	Index No. 516653/2020 Mot. Seq. 001

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ORDER TO SHOW CAUSE FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, ACCESS TO PARTNERSHIP DISTRIBUTIONS, AND RELATED RELIEF

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Plaintiff Kristen L. Eikenberry ("Eikenberry"), by her counsel, respectfully submits this memorandum in support of her motion for an order pursuant to (a) New York Civil Practice Law and Rules ("CPLR") Article 63 restraining and enjoining Defendant Richard Lamson ("Lamson") (i) from transferring or otherwise depriving Eikenberry of partnership assets without her knowledge and consent, (ii) from cancelling Eikenberry's health insurance and use of the automobile currently in her possession(iii) to restore electronic data he deleted from Eikenberry's smartphone, and (b) New York Partnership Law § 75 providing Eikenberry access to distributions to pay expenses, all pending disposition of this case.

PRELIMINARY STATEMENT

This emergency motion is filed in response to Lamson's actual and attempted seizure and transfer of assets belonging to the twenty-five year business partnership he has with Eikenberry. He is also continuing to spend down partnership assets and incur debts without Eikenberry's knowledge or consent, all of which threaten to render any judgment in favor of Eikenberry in this matter ineffectual. Eikenberry and Lamson formed their partnership in 1996 (the "EL Partnership") as equal partners, to develop and sell residential real property. The Partnership's current assets include real property in New York and New Jersey and funds located in numerous bank and investment accounts held in Lamson's and/or Eikenberry's name, or in the name of companies beneficially owned by the Partnership. In recent months and weeks, Lamson has transferred and concealed or attempted to transfer millions of dollars belonging to the EL Partnership, and taken steps to deprive Eikenberry of access to necessary resources to live, including cutting off credit and distributions to pay expenses, and threatening to cut medical insurance and use of an automobile. Meanwhile, he continues to spend partnership assets unabated.

In early May 2020, the relations between Eikenberry and Lamson deteriorated. Since that time, Lamson, who controls most of the Partnership assets, has cut off Eikenberry's access to regular EL Partnership distributions and credit. Moreover, Lamson, without Eikenberry's knowledge or consent, has transferred significant amounts of EL Partnership assets out of bank or investment accounts and without any accounting for them. Lamson has also attempted, and continues to attempt, to transfer other Partnership assets out of Eikenberry's reach, including by submitting falsified documents to financial institutions. As discussed below and in the accompanying Affidavit of Ms. Eikenberry, Lamson has taken these steps to try to make it impossible for Eikenberry in the short term to function on a day to day basis, and in the long term to satisfy any judgment on her claims for accounting, breach of fiduciary duty, breach of contract, unjust enrichment, constructive trust, fraudulent conveyance, and Partnership dissolution. Lamson should be restrained and enjoined from further dissipating EL Partnership assets during the pendency of this action, or cutting off her benefits of being a partner without Eikenberry's knowledge or consent.

Eikenberry satisfies all of the requirements under CPLR § 6301 for a temporary restraining order and preliminary injunction against Lamson. First, she is likely to prevail on the merits of her claims for a money judgment against Lamson. Lamson's unauthorized seizure and transfer of EL Partnership assets to his personal bank accounts and other unknown locations constitutes a breach of fiduciary to duty to Eikenberry, breach of their partnership agreement, and fraudulent conveyance under Debtor and Creditor Law. Lamson has been unjustly enriched by these transfers and Eikenberry will succeed on her claims as the evidence demonstrates that Lamson is using the EL Partnership assets at Eikenberry's expense.

Second, Eikenberry faces irreparable harm as Lamson's transfer of partnership assets creates the risk of permanent loss of those assets, including property necessary to sustain her, without any recourse. Eikenberry has requested that Lamson agree not to transfer assets and to account to her for them, but he has refused and has expressly told her and her lawyers that she will receive nothing from their twenty-five-year partnership. Thus, without the requested restraint, Lamson's improper transfer of Partnership assets will frustrate (and he has stated that he intends to frustrate), Eikenberry's ability to obtain relief in this case.

Finally, third, the balance of equities, including the need to preserve the status quo pending a fair distribution of partnership assets, tips decidedly in her favor. Before their dispute the partners mutually agreed to appropriate expenses, and partnership distributions were available to both partners for those expenses. Now, Lamson effectively controls all available partnership assets and has, or has threatened to, cut Eikenberry off from access to them, all designed to force her to capitulate to his demands. He has done so including by engaging in subterfuge and by harassment of Eikenberry.

Preliminary injunctive relief is also appropriate under CPLR Article 63 because in the last three weeks, Lamson deleted and possibly copied all of Eikenberry's personal and business information from her iPhone, including contacts, emails, texts, pictures and other evidence relevant to this case. The improperly accessed information likely includes privileged communications with Eikenberry and her counsel which discuss this case. Eikenberry has requested that Lamson return this information to her, but he has failed and refused to do so. Lamson should, therefore, be ordered to restore this information to Eikenberry immediately and to destroy any copies of this information, particularly any privileged information.

Finally, as Lamson's actions have deprived Eikenberry of access to necessary Partnership distributions, she seeks an interim order permitting her such access, including funds in specified accounts at Morgan Stanley, to pay expenses. Lamson's efforts to appropriate those funds for himself, including his providing false documentation to Morgan Stanley to do so caused that firm to freeze accounts to which Eikenberry otherwise had access. Lamson has taken other steps to ensure that Eikenberry is cut off from Partnership credit, distributions, and other assets. As a result, Eikenberry has been forced to obtain loans from family members, including to cover expenses Lamson previously paid in the past, such as their children's school tuition. With Eikenberry's access to Partnership distributions diminished and now cut off entirely, with Lamson otherwise controlling the bulk of the assets, Eikenberry has no source of income to pay expenses. An interim order under the Partnership Law permitting her access to funds is necessary and appropriate under the circumstances.

FACTUAL BACKGROUND

The relevant facts are detailed in the accompanying Affidavit of Kristen Eikenberry ("Eikenberry Aff."), dated October 19, 2020.[1]

Briefly, in or around June 2020, when the partner's dispute leading to this suit developed, Lamson began taking aggressive actions to seize partnership funds for himself, transfer them away from Eikenberry, and to deprive her from access to them. (Eikenberry Aff. ¶¶ 71-73.) For example, on or around July 14, 2020, and without Eikenberry's knowledge or consent, Lamson transferred, via certified check, the full account balance of approximately $1.2 million out of a Partnership account, the "Fairmont Industries Account". (*Id.* ¶ 79.) As of March 2020, Lamson

[1] Unless otherwise defined, capitalized terms have the meaning given to such terms in the Eikenberry Aff.

had accumulated approximately $500,000 in cash. (*Id.* ¶¶ 13, 90.) The location of any of those funds is now unknown to Eikenberry. (*Id.* ¶ 13.)

In another example, Lamson has been attempting to gain control of accounts at Morgan Stanley holding millions of dollars of partnership funds, including accounts held in Eikenberry's name or requiring her signature. On or about June 30, 2020, Lamson sent an email to Morgan Stanley impersonating Eikenberry and requesting that Morgan Stanley transfer over a million dollars from a Partnership account in the name 330 Atlantic LLC (the "330 Atlantic Account"), which was controlled solely by Eikenberry, to a separate non-partnership account controlled solely by Lamson. (*Id.* ¶ 73.) When Morgan Stanley called Eikenberry to confirm whether she had made the transfer request, she informed them that she had made no such request. (*Id.* ¶ 74.) As a result of Lamson's false email, Morgan Stanley "flagged" (*i.e.* froze) the account and Eikenberry has not been able to access funds in that account since then. (*Id.* ¶ 74.) Lamson thereafter has attempted on multiple occasions to trick Morgan Stanley into releasing funds in the 330 Atlantic Account to him including by submitting altered and false documents to Morgan Stanley indicating that he, not Eikenberry, is the owner of that company. (*Id.* ¶ 75.)

On or about July 5, 2020, Lamson similarly demanded that Morgan Stanley release to him the million plus dollars that had been held in the Easy Wind Account, another Partnership account for which Eikenberry is the authorized signatory. (*Id.* ¶ 81.) Lamson then unsuccessfully attempted to withdraw funds, without Eikenberry's knowledge or consent, from this account by writing large checks to their children. (*Id.* ¶ 83.) On or about July 16, 2020, in response to Lamson's efforts to seize Partnership assets from the Easy Wind account, and as a protective measure to preserve the assets, Eikenberry caused the funds in this account to be transferred to her personal account, also at Morgan Stanley. (*Id.* ¶ 84.)

On or about August 7, 2020, attempting to overcome the records at Morgan Stanley showing that Eikenberry is the owner and authorized signatory of the Easy Wind Account, Lamson created through BizFilings.com, a fake amended Easy Wind operating agreement listing himself as the sole owner which he then submitted to Morgan Stanley. (*Id.* ¶¶ 85-86.) Thereafter, Morgan Stanley froze Eikenberry's personal account which then held the Easy Wind funds based on Lamson's submission of fake documents and claim to the Easy Wind funds in that account. (*Id.* ¶ 87.)

Lamson has also taken other actions to deprive Eikenberry of Partnership credit, funds and distributions to which she is entitled as a partner of the El Partnership. In June 2020, Lamson cancelled the Partnership credit card Eikenberry used for her expenses and paid from Partnership distributions. (*Id.* ¶ 71.) Further, Lamson has cashed large checks, sometimes in the tens of thousands of dollars, made out to EL Partnership companies and used the cash or otherwise transferred the funds to entities in which Lamson solely has an interest, for Lamson's personal benefit, and to prevent Eikenberry from accessing the funds. (*Id.* ¶¶ 89-90.) Lamson has also removed and destroyed and/or is attempting to remove or destroy EL Partnership books and records. (*Id.* ¶ 88.)

Since the partners' dispute began, Lamson has expressly told Eikenberry that he intends to ensure that she receives nothing for going against his wishes. (*Id.* ¶ 92.) He has so far been successful in that effort, in that Eikenberry's access to EL Partnership funds has been cut off, and Partnership assets have been diverted. (*Id.* ¶¶ 12, 71.) He has also threatened to cancel Eikenberry's health insurance and use of an automobile she currently possesses. (*Id.* ¶¶ 4, 108-109, Exh. O.) Meanwhile, Lamson continues to spend partnership assets on himself and others, all without Eikenberry's knowledge or consent. (*Id.* ¶¶ 79, 81, 83, 96.) Given Lamson's seizure,

transfer and spending of Partnership assets and expressed intentions that he will continue to do so, unless Lamson is restrained from transferring them, or continuing to spend or incur debt without Eikenberry's knowledge or consent, there is a high risk he will continue to do so. (*Id.* ¶¶ 96, 112.)

Moreover, a few weeks ago, after this law suit was filed, Lamson remotely deleted Eikenberry's contacts, emails, texts messages, photographs and other business and personal information from her iPhone and may have retained a backup of that data for himself. (*Id.* ¶¶ 16, 98.) This deleted and/or copied information likely contains privileged attorney-client communications and attorney work product from her email account. (*Id.*) Despite Eikenberry's verbal and written requests, including through counsel, Lamson has failed and refused to restore that information to her. (*Id.* ¶ 99.) Rather, Lamson indicated he is acting out of spite: "I have a good deal for you to get the AppleID. You must be sooo angry." (*Id.*) Lamson should be ordered to restore this information immediately and to destroy any copies in his possession.

ARGUMENT

POINT I

A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION IS NECESSARY TO PREVENT LAMSON FROM FRUSTRATING THE JUDGMENT EIKENBERRY IS LIKELY TO OBTAIN AGAINST HIM IN THIS ACTION

Eikenberry seeks an order from this Court, pursuant to CPLR § 6301, restraining Lamson from transferring any Partnership assets pending the disposition of this dispute. A preliminary injunction may be granted where:

> [I]t appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may

> be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

CPLR § 6301. Thus, the "purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual." *Ruiz v. Meloney*, 26 A.D.3d 485, 486 (2d Dep't 2006) (internal citation omitted). To obtain preliminary relief under CPLR § 6301, a movant must establish "(1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor." *Arcamone-Makinano v. Britton Prop., Inc.*, 83 A.D.3d 623, 624 (2d Dep't 2011) (internal citations omitted). In addition, temporary relief "may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result" unless such relief is granted before a hearing can be held. CPLR §§ 6301 and 6313. Eikenberry easily satisfies these elements.

A. <u>Eikenberry Is Likely To Succeed On Her Claims</u>

Eikenberry has asserted claims against Lamson for accounting, partnership dissolution, breach of fiduciary duty, breach of contract, unjust enrichment, constructive trust, fraudulent conveyance, and constructive trust. (*See* Verified Complaint, NYSCEF No. 2.)

1. <u>Breach of Fiduciary Duty</u>

Eikenberry has satisfied each element of a cause of action for breach of fiduciary duty and is likely to succeed on her claim. Specifically, Eikenberry alleges and has shown "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." *Cupcake & Boomboom, LLC v. Aslani*, No. 515757/2015, 2016 N.Y. Misc. LEXIS 4330, at *35 (Sup. Ct. Kings Cnty. Nov. 22, 2016).

Eikenberry and Lamson have an established partnership which automatically gives rise to a fiduciary relationship under New York law. "A partnership is an association of two or more persons to carry on as co-owners a business for profit . . . ." PTR § 10; *Le Bel v. Donovan*, 96 A.D.3d 415, 417 (1st Dep't 2012) ("[u]nder New York law, partners owe each other a fiduciary duty"). Since about 1996, Eikenberry and Lamson have been business partners in an at-will partnership, which primarily concerns acquiring real property in New York and New Jersey, developing and/or renovating it into residences, and then selling the improved properties. (*See* Eikenberry Aff. ¶¶ 6, 8.) The partners share equally in profits and losses in the Partnership and, until recently, had joint control of Partnership assets. (*Id.* ¶¶ 6, 29, 31.) *See Kamel v. Aghelian*, No. 517828/2017, 2019 N.Y. Misc. LEXIS 2545, *4 (Sup. Ct. Kings Cnty. May 15, 2019) (listing elements of partnership or joint venture as: "an agreement manifesting the intent of the parties, to be associated as joint venturers, a contribution by the co-venturers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses"). As Eikenberry's partner, Lamson owes Eikenberry a fiduciary duty.

Lamson's transferring of Partnership funds, including to other bank accounts, and removing or spending other Partnership assets without Eikenberry's knowledge or consent constitutes a breach of fiduciary duty to act in good faith with respect to the Partnership and its assets. (*See* Eikenberry Aff. ¶¶ 4, 11, 79.) *Miltland Raleigh-Durham v. Myers*, 807 F. Supp. 1025, 1058 (S.D.N.Y. 1992) (fiduciary duties are breached where partner "uses or obtains the benefit of partnership credit or assets for himself . . .") (applying New York law). Here, Lamson's improper self-dealing and secreting assets has damaged Eikenberry by depriving her of access to them,

including receiving regular distributions. Accordingly, Eikenberry will prevail on her Second Cause of Action for Breach of Fiduciary Duty.

2. Breach of Contract

A cause of action for breach of contract requires the "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 803 (2d Dep't 2010). Eikenberry and Lamson entered into an agreement whereby each promised to provide services to the Partnership. (*See* Eikenberry Aff. ¶¶ 21-28.) The partners agreed that they would share equally all profits and losses generated during the Partnership. (*See id*. ¶ 22.) The partners further agreed that they would share equally in all partnership assets, even those held in Lamson's name, including, Birdsong Farm and 297 Pacific Street. (*See id.* ¶ 29.) Lamson breached the parties' agreement by concealing and diverting funds away from the Partnership, including, not accounting for condominium unit sales proceeds, recently transferring approximately $1.2 million from the Fairmont Industries Account, dissipating $500,000 in cash, and refusing to allow Eikenberry access to and sharing in Partnership assets. (*See id.* ¶¶ 13, 90, 94.) Eikenberry has thus been damaged in the millions of dollars. Accordingly, Eikenberry will prevail on her Third Cause of Action for Breach of Contract.

3. Unjust Enrichment

A claim for unjust enrichment, requires a plaintiff to show that "(1) the [defendant] was enriched, (2) at [the plaintiff's] expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered." *Cruz v. McAneney*, 31 A.D.3d 54, 59 (2d Dep't 2006) (internal citations and quotation marks omitted).

Lamson has been unjustly enriched by using Partnership funds to which Eikenberry is entitled. (*See* Eikenberry Aff. ¶ 13.) It would be against equity and good conscience for Lamson to retain these funds as Lamson's enrichment came at the expense of Eikenberry, who has made considerable investments of time and money to the Partnership and shares equally in the assets and losses and expenses of the Partnership. (*See id*. ¶¶ 21, 24, 26.) Accordingly, Eikenberry will prevail on her Fourth Cause of Action for Unjust Enrichment.

4. Fraudulent Conveyance

The elements of a fraudulent conveyance action are "(1) a conveyance was made with (2) actual intent to hinder, delay or defraud present or future creditors." *Seidler v. Workable Atl. LLC*, No. 518713/2019, 2020 N.Y. Misc. LEXIS 1844, at *13 (Sup. Ct. Kings Cnty. May 6, 2020) (citing Debtor and Creditor Law § 276). "Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on 'badges of fraud' to support his case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent." *Wall St. Assocs. v. Brodsky*, 257 A.D.2d 526, 529 (1st Dep't 1998) (internal citations and quotation marks omitted). "Among such circumstances are: a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance." *Id.*

Eikenberry satisfies this test. The parties have shared a close relationship as both business partners and significant others. As discussed above, Lamson has diverted assets away from the Partnership and Eikenberry. (*See* Eikenberry Aff. ¶¶ 79-80, 89-90.) These transfers were not in the Partnership's usual course of business, the Partnership did not receive anything in return for

these transfers, and Lamson currently retains control over these funds or received benefit from them which he has not shared with Eikenberry. (*See id*.) Moreover, Lamson has cut Eikenberry off from partnership assets and made statements that he intends to prevent Eikenberry from receiving or accessing any of them, further demonstrating that Lamson is purposefully hindering and delaying Eikenberry. (*Id.* ¶¶ 92-93.) Accordingly, Eikenberry will likely prevail on the Sixth Cause of Action for Fraudulent Conveyance.

B. Lamson's Transfer and Blocking of Partnership Assets Is Causing Immediate Irreparable Harm to Eikenberry

Eikenberry is facing irreparable harm absent injunctive relief prohibiting Lamson from transferring Partnership assets. New York courts recognize that the deprivation of a parties' income constitutes irreparable harm. *See Laker v. Ass'n of Prop. Owners of Sleepy Hollow Lake, Inc.*, 172 A.D.3d 1660, 1663 (3d Dep't 2019) (finding irreparable harm where loss of "income stream" would jeopardize plaintiffs' ability to pay for their homes); *Turnage v. Match Eyewear*, No. 601971/2015, 2015 N.Y. Misc. LEXIS 6383, at *18 (Sup. Ct. Nassau Cnty. Aug. 19, 2015) (finding party's inability "to earn a living" absent injunctive relief demonstrates "sufficient irreparable harm"); *Matthews v. Barrios-Paoli*, 178 Misc. 2d 602, 614, 676 (Sup Ct. N.Y. Cnty. 1998) (finding irreparable harm where plaintiffs' "very survival incomes . . . will be impacted" absent injunctive relief). *See also Arkin Kaplan Rice LLP v. Kaplan*, 120 A.D.3d 427, 428 (1st Dep't 2014) (affirming order requiring signatures from each side of the partnership dispute to withdraw funds from partnership account and finding violation of preliminary injunction limiting partner's use of funds in the partnership account to pay certain partnership expenses).

As discussed, Eikenberry has regularly received distributions from the Partnership for the past twenty-five years for expenses, and for the majority of those years, including recent years, this is the only means by which she can support herself. (*See* Eikenberry Aff. ¶¶ 94, 104.)

Lamson's blocking Eikenberry from access to these resources and diverting Partnership assets as demonstrated herein is preventing her from meeting financial obligations and, as Lamson expressly intends, will ultimately deprive Eikenberry of her equitable share of the assets in the long term. Eikenberry has thus demonstrated irreparable harm.

Moreover, a plaintiff will suffer irreparable harm where a defendant has indicated an intent to dissipate assets, and in such instances restraint of the defendant is "highly appropriate." *Wimbledon v. Fin. Master Fund, Ltd. v Bergstein*, No. 150584/2016, 2016 N.Y. Misc. LEXIS 3061, at *22-24 (Sup. Ct. N.Y. Cnty. Aug. 19, 2016) (finding irreparable harm where defendant indicated intent to dissipate funds and had used company funds to pay for personal expenses); *Li Gang Ma v Hong Guang Hu*, 2009 NY Slip Op 30607[U] (Sup Ct. Queens Cnty. 2009) (enjoining third-party defendants, their agents, and employees from spending, selling, transferring, encumbering or wasting any assets). Here, Lamson has indicated on multiple occasions to both Eikenberry and her business counsel that he intends to ensure that she receives nothing and has taken affirmative, and sometimes fraudulent, actions to wrest control of the funds to which Eikenberry had previously had access. (Eikenberry Aff. ¶¶ 92-93). Lamson continues to spend Partnership funds on a daily basis, without Eikenberry's knowledge or consent, presumably including the $1.2 million in funds he transferred from the Fairmont Account and the $500,000 in cash that he accumulated without accounting to Eikenberry for it. (*Id*. ¶ 13.) Lamson's transferring and blocking Eikenberry from any partnership resources to maintain her livelihood is causing her immediate harm as this is now occurring and continues. *See Turnage*, 2015 N.Y. Misc. LEXIS 6383 (noting temporary restraining order granted in addition to preliminary injunction where plaintiff would suffer immediate and irreparable harm in form of loss of income absent restraint and injunction).

Finally, the loss of health insurance is an irreparable harm that the courts can protect against. *See Glauber v. G & G Quality Clothing, Inc.*, No. 24318/2012, 2014 N.Y. Misc. LEXIS 6172, *9-11 (Sup. Ct. Kings Cnty. Mar. 24, 2014) (granting injunction and finding that "[t]he irreparable injury that may arise from cancellation of health care coverage is self evident. Gaps in coverage can result in conditions that pre-exist any replacement policy and for which coverage can not be obtained at any reasonable cost.") Eikenberry faces this immediate threat. (Eikenberry Aff. ¶¶ 4, 108-109, Exh. O.)

C. The Equities Balance In Favor Eikenberry

Finally, the equities weigh in Eikenberry's favor as she has shown that she will "lose [her] livelihood if the injunction does not issue" and Lamson cannot show that he will "suffer any hardship during the pendency of a preliminary injunction." *Reuschenberg v. Town of Huntington*, 16 A.D.3d 568, 570 (2d Dep't 2005). Lamson's (1) transfer of Partnership assets to locations unknown to Eikenberry; (2) attempt to transfer Partnership assets away from Eikenberry; and (3) cancellation of Eikenberry's distributions and credit card are depriving Eikenberry of her sole source of income, leaving her dependent on relatives to provide loans for support. (*See* Eikenberry Aff. ¶¶ 15, 104.) Conversely, Lamson currently has control over substantially all of the Partnership's assets, has taken steps to transfer and secret them away from Eikenberry, and has expressly stated on multiple occasions that he intends to ensure that Eikenberry will never receive the benefit of any of them. (*Id.* ¶¶ 92-93.) Thus, while Eikenberry has been entirely cut off from access to Partnership distributions, Lamson has access to and use of Partnership assets to pay expenses without Eikenberry's knowledge or consent. (*Id.* ¶ 112.)

On these facts, balancing of the equities tips decidedly in favor of injunction restraining Lamson from dissipating Partnership assets as a means of preserving the status quo as to the

Partnership's finances. Restraining and enjoining Lamson from transferring those assets outside of the Partnership pending disposition of this case will not prejudice Lamson as bona fide partnership expenses can be made, after disclosure to and consent of Eikenberry. Finally, restraining Lamson from cancelling Eikenberry's health insurance and use of the automobile she currently possesses does nothing more than preserve the status quo.

POINT II

INJUNCTIVE RELIEF IS NECESSARY TO PROTECT EIKENBERRY'S STOLEN DATA AND TO PREVENT SPOLIATION AND MISUSE OF THAT INFORMATION

Eikenberry is also entitled to preliminary injunctive relief requiring Lamson to restore and return the information he wiped from Eikenberry's iPhone and Gmail account and to destroy any copies misappropriated, including any of her attorney client privileged data. (Eikenberry Aff. ¶¶ 16, 98.) Preliminary injunctive orders pursuant to CPLR § 6301 are appropriate under these circumstances where a party is spoliating or otherwise depriving another party of access to information. *See, e.g.*, *Zacharias v Wassef*, No. 654548/2016, 2016 N.Y. Misc. LEXIS 3679, at *18 (Sup. Ct. N.Y. Cnty. Oct. 16, 2011) (ordering defendant to provide plaintiffs with the passwords and any other information necessary to access [its] computer systems" after defendant changed passwords and implemented other technical devices to have plaintiff's information routed to defendant); *see also Lipin v. Bender*, 84 N.Y.2d 562, 569 (1994) (affirming remedial measure of dismissing complaint where plaintiff intentionally and improperly obtained defendant's documents including privileged information and failed to fully return it after being ordered to do so by trial court).

Here, Lamson should be ordered (1) to provide Eikenberry with the Apple ID and associated password, so she can attempt to access her "wiped" data through the cloud, and (2) to return data taken from her Gmail account. Lamson should be further ordered to thereafter destroy

any data that he may have taken from Eikenberry's iPhone or Gmail account.[2] Mandatory injunctive relief under these circumstances is "essential to maintain the status quo pending trail of the action." *Zacharias* at N.Y. Misc. LEXIS 3679, at *15.

D. Eikenberry Has Demonstrated Probability of Success on the Merits

For the reasons set forth in Point I (A) *supra*, Eikenberry will prevail on each of her claims for a money judgment.

E. The Loss of Evidence and Improper Use of Privileged Information Constitutes Irreparable Harm

The data taken from Eikenberry's Gmail account and iPhone contains evidence relating to this case, including text messages and e-mail communications with Lamson and various financial institutions. A party suffers irreparable harm where evidence relevant to the claims in an action "has been or will be spoliated." *See Toussie v. Allstate Ins. Co.*, No. 14-cv-2705, 2017 U.S. Dist. LEXIS 174251, at *12 (E.D.N.Y. Nov. 6, 2017) (considering "possibility of irreparable harm to the defendants if evidence were to be lost") (internal citation omitted); *Andres v. Town of Wheatfield*, No. 17-cv-00377, 2017 U.S. Dist. LEXIS 167465, at *16 (W.D.N.Y. Oct. 6, 2017) (noting that the "destruction of evidence may . . . rise to the level of irreparable harm") (internal citation omitted).

Lamson has wiped Eikenberry's iPhone, which stored information to which she no longer has access. (*See* Eikenberry Aff. ¶ 16.) Without recovery of this data, Eikenberry's ability to use

[2] Eikenberry reserves her right to seek an appropriate order for sanctions or remedial measures, should it be determined that Lamson permanently spoliated or misused any of this information. CPLR § 3103 (permitting court to fashion appropriate remedies including suppression or protective orders where information is "improperly or irregularly maintained"); *Lipin*, 84 N.Y.2d at 569. *See, e.g.*, *Crocker C. v. Anne R.*, 66 Misc. 3d 1211(A), (Sup. Ct. Kings Cnty. Jan. 14, 2020) (imposing sanctions where party installed spyware onto opposing party's devices).

this information, including as evidence for the prosecution of her claims is lost. Eikenberry has thus demonstrated that she will suffer irreparable harm absent injunctive relief.

Further, the data Lamson took from Eikenberry's iPhone and Gmail account contains privileged communications with counsel, which if viewed by Lamson, is causing her irreparable harm and prejudice in this action. *See Lipin*, 84 N.Y.2d at 572 (holding that plaintiff's review of defendant's privileged documents, which plaintiff wrongly obtained caused irreparable prejudice to defendant.) Lamson presently has unfettered access to these documents, and given his recent malicious actions and comments toward Eikenberry, the possibility of harm is not only irreparable, but also immediate. (Eikenberry Aff. ¶¶ 92-93, Exh. O.) Thus, the Court should require Lamson to return this privileged information to Eikenberry and destroy all copies, including any notes he or any third party made about them, and allow for an inspection of the data base to ensure Lamson has complied.

F. The Equities Favor Eikenberry

Lamson's wiping of Eikenberry's data was unauthorized and malicious. Common sense and decency dictate that the information should be restored and returned immediately and yet Lamson has refused, out of spite. (*See id*. ¶ 99.) Even worse, Lamson's use and misuse of such information, which likely includes attorney client communications and work product, is causing tremendous prejudice to Eikenberry in prosecuting this case. On the other hand, Lamson will suffer no prejudice from such an order. He is not entitled to the information in the first instance. Accordingly, Eikenberry is entitled to a preliminary order (a) requiring Lamson to provide his Apple ID and associated password to her so she can attempt restore the deleted data to her iPhone, and (b) restraining Lamson from copying, using or otherwise accessing any of the misappropriated information, including privileged information and requiring him to destroy any copies he may have

retained, and (c) permitting Eikenberry an appropriate inspection to ensure that Lamson has complied with the order.

POINT III

EIKENBERRY IS ENTITLED TO CONTINUING PARTNERSHIP DISTRIBUTIONS

By this motion, Eikenberry also seeks an interim order from this Court, pursuant to Partnership Law § 75, requiring that EL Partnership distributions to continue to be paid to Eikenberry for her expenses during the pendency of this action, in which she seeks an accounting from Lamson and dissolution of the EL Partnership. New York Partnership Law § 75 provides:

> In an action brought to dissolve a partnership, or for an accounting between partners . . . the court may, in its discretion, by order, authorize the partnership business to be continued, during the pendency of the action by one or more of the partners . . . .

PTR § 75. A Court has "[c]onsiderable discretion" pursuant to "Partnership Law § 75 in directing an accounting and supervising the winding-up of a dissolved partnership." *Zari v. Zari*, 155 A.D.2d 452, 453 (2d Dep't 1989). Continuation of a partnership's business pursuant to § 75 may include periodic withdrawal of funds for payment to a partner during the wind down period. *See Savio v. Del Bello*, 267 A.D. 950, 950 (1st Dep't 1944) (indicating that PTR § 75 could be used for weekly payments to partner as continued compensation). This is appropriate, since a partnership "continues until the winding up of partnership affairs is completed." PTR § 61. As demonstrated herein and in the Eikenberry Affirmation, an order requiring ordinary distributions to continue to be made during the wind down process is necessary and appropriate. *See Andersen v. Weinroth*, Index No. 602339/2003, 2006 NYLJ LEXIS 4708, at *84 (Sup. Ct. N.Y. Cnty. Sept. 28, 2006) (winding up of partnership includes distributions).

An order enabling Eikenberry to receive continued Partnership distributions to pay for her expenses during the pendency of this action should issue. Since 1996, when the Partnership was

formed, EL Partnership distributions have regularly been made to Eikenberry to pay expenses, as she and Lamson agreed. (*See* Eikenberry Aff. ¶¶ 10, 33, 94.) Over the years Eikenberry has used these distributions to pay for both personal expenses and to provide for her children. (*Id.*)

As alleged herein, because of Lamson's deliberate and malicious acts, Eikenberry has been cut off from Partnership credit and assets, including distributions with which she has paid her monthly expenses. (*See id.* ¶¶ 4, 106 and Exh. N.) Meanwhile, Lamson controls the vast majority of the Partnership assets and he is refusing to distribute any of them to Eikenberry for her expenses, out of spite. (*See id.* ¶ 95.) In comparison, Lamson continues to freely spend partnership assets on himself and others, without Eikenberry's knowledge or consent. (*Id.* ¶ 96)

Eikenberry is now without any source to pay her ongoing expenses. (*See id.* ¶¶ 123-24.) Thus, Eikenberry seeks an order from this Court, pursuant to Partnership Law § 75, for an order authorizing her to access Partnership distributions in accounts at Morgan Stanley to pay her expenses during the pendency of this action.

CONCLUSION

For the foregoing reason, Eikenberry respectfully requests that the Court grant her motion for an order: (a) restraining and enjoining Lamson (i) from transferring any Partnership assets pending the disposition of this matter without Eikenberry's knowledge or consent, (ii) from cancelling Eikenberry's health insurance and access to and use of the automobile she currently possesses, and (iii) to provide Eikenberry the Apple ID and associated password of their shared account so she can seek to restore and access the data that was deleted from her iPhone, (iv) from accessing or using any of Eikenberry's data, including privileged data he may have taken, requiring him to destroy any copies he may have made of such data, and ordering an inspection of Lamson's digital devices to ensure Lamson has so complied, (b) authorizing Eikenberry to access accounts

at Morgan Stanley for distributions to pay expenses during the pendency of this litigation, and (c) granting other and further relief it deems appropriate and just.

Dated: New York, New York
October 20, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the 7,000 word limit set forth in Commercial Division Rule 17(i). This document contains 5,897 words, excluding the caption, table of contents, table of authorities and signature block. I have relied on the word count of the word processing system used to prepare this document.

Dated: New York, New York
October 20, 2020

James W. Perkins