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

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JONATHAN ROSEN,

Plaintiff,

- against -

GEORGE TRIEBENBACHER,

Defendant.

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Index No. /2020

SUMMONS

Plaintiff Designates New York County as the place of trial. The basis of venue is that New York County is place of residence.

TO THE ABOVE NAMED DEFENDANT:

PLEASE TAKE NOTICE THAT YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer on Plaintiff at the address set forth below within 20 days after the service of this Summons (not counting the day of service itself) or within 30 days after service is complete if the Summons is not delivered personally to you within the State of New York.

YOU ARE HEREBY NOTIFIED THAT should you fail to answer or appear, a judgment will be entered against you by default for the relief demanded below.

Dated: New York, New York
November 20, 2020

COZEN O'CONNOR
Attorneys for Plaintiff

By: _____
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Jesse R. Loffler
45 Broadway Atrium, Suite 1600
New York, New York 10006
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TO:

Defendant George Triebenbacher
10 Cider Mill Circle
Armonk, New York 10504

-and-

110 West South 34th Street
Long Beach Township, New Jersey 08008.

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

JONATHAN ROSEN, *Plaintiff*, v. GEORGE TRIEBENBACHER, *Defendant.*	Index No. _____ **VERIFIED COMPLAINT**

Plaintiff Jonathan Rosen ("Plaintiff" or "Rosen"), by his attorneys, Cozen O'Connor, for his complaint against Defendant George Triebenbacher ("Triebenbacher" or "Defendant"), alleges as follows:

NATURE OF THE ACTION

1. This is a case of seller's remorse. Rosen and Triebenbacher are the 50/50 co-owners and co-Managers of Barrier Island Enterprises, LLC ("BIE"), which (through a subsidiary) owns several unique parcels of property in the heart of the summer resort town of Long Beach Island, New Jersey, both of which are only a block or two from the beach, on the main boulevard of the island, and operates a restaurant and bar, together with a liquor store. At stake is a simple and straightforward contract, formed in classic manner, with an offer made by Defendant Triebenbacher, accepted by Rosen, acted on by the parties, and, finally, acknowledged by Triebenbacher both to Rosen and to numerous other third-parties, including employees and the accountant of the business.

The Offer

2. After several months of discussions between the parties considering whether and how to split up the business or for one partner to buy the other out, Triebenbacher wrote to Rosen on October 12, 2020, at 4:19 p.m.: "I present you with an offer in writing" and "I am willing to

purchase your ownership interest in BIE for $1,900,000.00 or sell you all my ownership interest in BIE for $1,800,000." A true and correct copy of this email is attached hereto as Exhibit A.

The Acceptance

3. Two hours later, Rosen responded: "I accept your offer, and agree to purchase all of your interest in Barrier Island Enterprises for the purchase price of $1.8 million." See Exhibit B. This offer and acceptance was not made subject to or conditioned to the execution of formal documentation, and Rosen indicated that he would have his counsel reach out to Triebenbacher's counsel to paper the agreement. Accordingly, at this time, the parties entered into a binding and fully enforceable contract pursuant to which Triebenbacher was and is obligated to sell his interest in BIE to Rosen and Rosen was and is obligated to purchase that interest.

4. Rosen subsequently deposited ten percent (10%) of the $1.8 million purchase price, or $180,000, into escrow with his counsel as an earnest money deposit.

Acknowledgement of the Offer and Acceptance by Triebenbacher

5. Both that same day and in the days that followed, Triebenbacher repeatedly acknowledged this agreement both in writing (by email and text, see Exhibits C-E, as hereinafter described) and orally, including sitting down with BIE's accountant on the morning of October 17, 2020 to transition the business — at which meeting Triebenbacher expressly acknowledged to the company's accountant that a deal had been struck — and even going so far as informing employees of the restaurant and bar that Rosen was buying him out and would be assuming full control of the business.

Triebenbacher Disavows and Tries to Back Out of the Contract, and Blocks Rosen from Any Decisions and Information About the Business

6. However, subsequently, on October 21, 2020, without explanation or justification, Triebenbacher abruptly changed his mind and expressly disavowed his obligation to sell his

interest in the business to Rosen.

7. What is more, in breach of BIE's Operating Agreement (as defined below), he improperly usurped control of BIE by, among other things, (a) refusing to provide Rosen with any of the information he needed in order to exercise the management rights specifically given to him under BIE's Operating Agreement (rights Rosen had regardless of the parties' agreement for Triebenbacher to sell to him); and (b) making and implementing unauthorized unilateral decisions with respect to the management of BIE.

8. These decisions by Triebenbacher included, but were not limited to, a decision to keep the restaurant, bar, and liquor store open (rather than close them for the winter "off-season," from November through March), despite Rosen's repeated and express objection that they should instead be closed for that period because (a) even under normal circumstances, the business loses money during that period; and (b) at this moment in time, in light of the COVID-19 pandemic which is now raging in New Jersey at fever pitch and escalating, as an ethical and responsible businessman Rosen personally and absolutely objected to keeping the business open and putting the health and safety of its employees and customers at substantial risk.

9. Triebenbacher's actions violated Rosen's rights under BIE's Operating Agreement even if Triebenbacher had not agreed to sell his interest in BIE to Rosen. But in light of that agreement, Triebenbacher's actions are that much more egregious: Triebenbacher has usurped unilateral control over a business that Rosen actually now has the exclusive right to control by reason of having an agreement to buy Triebenbacher out (with the price of the purchase firmly fixed). In these circumstances (and as further detailed below), Triebenbacher should not be allowed to continue to harm the value of the business, cause it to lose money, expose it to liability, and/or damage its good will.

10. As a result, Rosen brings this action for declaratory relief and specific performance of Triebenbacher's obligation to transfer his interest in BIE to Rosen in exchange for $1.8 million. In addition, Rosen seeks preliminary and permanent injunctive relief to enforce his management rights – including his right to take the steps necessary to protect the business in light of the COVID-19 pandemic.

THE PARTIES

11. Rosen is an individual residing in the State of New York, County of New York.

12. Triebenbacher is an individual who, upon information and belief, resides in the State of New York, County of Westchester.

JURISDICTION AND VENUE

13. This Court has jurisdiction over Triebenbacher because he resides in this State.

14. Venue is properly laid in this Court pursuant to CPLR § 503 inasmuch as Rosen resides in New York County. In addition, the Operating Agreement of BIE (attached hereto as Exhibit F) provides in Section 14(b) that any proceeding arising under or in connection with it may be brought in this Court.

FACTS COMMON TO ALL CAUSES OF ACTION

The Parties Enter Into the Operating Agreement for BIE

15. On or about September 26, 2017, Rosen and Triebenbacher executed an Operating Agreement for BIE (the "Operating Agreement"). A copy of the Operating Agreement is attached as Exhibit F, and its terms are incorporated herein by reference.

16. BIE was created in order to (through one or more subsidiaries) acquire, own and manage Kubel's Too Restaurant and Bar, which includes an adjacent liquor store, located at 8200 Long Beach Avenue, Long Beach Township, New Jersey 08008 (collectively, "K2") and the

property located at 13301 Long Beach Blvd., Long Beach Township, New Jersey 08008, which is the location on which a business known as M&M Steam Bar formerly operated (the "M&M Property"). Operating Agreement, ¶ 4.

17. Prior to the formation of BIE, Triebenbacher was the owner of the M&M Property. Operating Agreement, ¶ 6.

18. As part of forming BIE, Triebenbacher contributed the M&M Property (which the parties valued at $900,000) along with $650,000 in cash, and Rosen contributed $1,550,000 in cash. Operating Agreement, ¶ 6.

19. After the formation of BIE, and based upon the contributions made by Triebenbacher and Rosen, BIE acquired ownership of K2 on or about April 18, 2018.

20. BIE's Operating Agreement provides that Rosen and Triebenbacher are 50/50 owners of BIE and are to share equally in the profits, expenses, debts and distributions of BIE. Operating Agreement, ¶ 5.

21. Similarly, the Operating Agreement provides that Rosen and Triebenbacher are co-equal Managers of BIE. It states in pertinent part:

> **8. Management.**
>
> (a) General. The full management and control of the Company, its business, affairs and assets shall be vested exclusively and entirely in the Managers, who shall initially be Rosen and Triebenbacher. Except as otherwise expressly provided herein, only the Managers, jointly, or a person expressly authorized by the Managers, in writing, to do so shall have the power to execute any agreements, contracts, deeds or other instruments or to otherwise represent or act as an agent of or for the Company and shall have the power to bind the Company.
>
> * * *
>
> (b) Authority of Managers. Except as otherwise expressly stated in this Agreement, whenever in this Agreement an action or decision is specified to be taken or made by "the Managers," and whenever in the

> Operating Company Agreement action is to be taken or a decision is to be made by the Company as manager thereof, so long as the Company has two Managers the action or decision shall be authorized and approved only if approved or consented to by both Managers.

Operating Agreement, ¶ 8 (emphasis added).

22. While the Operating Agreement also provides that "each Manager, acting alone, shall have full power and authority" with respect to certain specified matters, including the "day-to-day business and administrative affairs of the Company," and that "each Manager acting alone shall have authority" to take actions that are "reasonably advisable in the event of an emergency threatening life, material damage to a Property [that is, K2 or the M&M Property] or the property of others," the Operating Agreement (a) gives this authority to both Managers; and (b) makes clear that for any matter other than those specified, neither Triebenbacher nor Rosen may act unilaterally. Operating Agreement, ¶ 8(b).

23. The Operating Agreement also provides in Section 11 that in the event of a "Deadlock" — defined as a failure to "agree upon any decisions for which Managers' unanimous approval is required" — between Rosen and Triebenbacher in their capacity as Managers of BIE, within ninety (90) days of the failure to agree, either one may (as the "Initiating Member") deliver an "Election Notice" to the other (as the "Responding Member"), initiating the "Buy-Sell Procedure" under the Operating Agreement.

24. Under the Operating Agreement, such an Election Notice was to "state an amount (the 'Stated Amount') to be used in computing the Net Equity" as calculated under Section 11(c) of the Operating Agreement, for purposes of determining the price, and such Election Notice "shall constitute an irrevocable offer by the Initiating Member either: (1) to purchase all, but not less than all, of the membership interest in the company of the Responding Member and Responding Members Successors (as hereafter defined), or (2) to sell all, but not less than all, of its membership

interest in the Company of the Initiating Member and the Initiating Member's Successors to the Responding Member." Operating Agreement, ¶ 11(b).

25. Under Section 11(b), the Election Notice and Stated Amount were to be delivered to the Company's accountants to compute Net Equity under Section 11(c).

26. "Net Equity" is calculated by the company's accountants as though all of the assets of BIE were sold for the Stated Amount "on the Election Date," excluding cash and amounts held in reserve, receivables, and amounts in money market accounts on the Election Date, and the Stated Amount plus the cash were used to pay off the debts of BIE and certain transaction costs as stated in Sections 11(c) and 13 (which provides for the normal distribution of funds upon dissolution or liquidation).

27. Thereafter, following the determination of Net Equity and assuming there is no resolution of the Deadlock, the Responding Member has the option either to purchase the Initiating Member's membership interest at the "Buy-Sell Price" or to sell his own membership interest to the Initiating Member. Operating Agreement, ¶ 11(d).

28. Within ten days of such decision or election, the Purchasing Member was required to deposit ten percent (10%) of the purchase price, and the closing procedure under Section 11(f) moves forward. Operating Agreement, ¶¶ 11(e-f).

The Parties' Relationship and Triebenbacher's Demands To Either Be Bought Out By Rosen, Buy Out Rosen's Interest In BIE, Or Split Up The Assets Of BIE

29. After executing the Operating Agreement as of September 26, 2017, Rosen and Triebenbacher commenced their new venture and, by April 18, 2018, acquired K2.

30. Consistent with Section 8 of the Operating Agreement, and with Rosen's knowledge and consent, the parties agreed to initially have Triebenbacher make decisions on the day-to-day financial operations of K2, although the parties agreed that no significant expenditures

would be made without the approval of both Rosen and Triebenbacher (which Triebenbacher acceded to for a time).

31. Then, despite that the venture had been active for well under a year and only three weeks after BIEs acquisition of K2, Triebenbacher suddenly suggested to Rosen that one of them should buy the other out, expressing the view that the business should only have "one voice."

32. This suggestion took Rosen by surprise, and he responded that (a) he had just spent years working on finding property in the area, bringing in Triebenbacher to acquire and consolidate the assets and properties, developing BIE to accomplish just that, and the recent acquisition of K2; and (b) in any event, he had no interest in being bought out.

33. As a result, discussion of any buyout ceased at that time and, for a time, business continued as Rosen had hoped and planned.

34. For the next year-and-a-half, the parties, through BIE, jointly owned and operated K2, and while Triebenbacher was primarily involved in the day-to-day operations, Rosen was not excluded from the decision-making or from unfettered access to the books and records of the business. Indeed, Rosen and Triebenbacher frequently discussed major decisions and long-term planning for the business.

35. For example, by the Fall of 2019, Rosen and Triebenbacher had numerous discussions concerning undertaking substantial renovations to K2.

36. These discussions evolved into a joint decision by Rosen and Triebenbacher to build a new restaurant on the M&M Property, close K2, and transfer K2's liquor license to the new restaurant.

37. Demonstrating this agreement, BIE engaged the services of an architect, Craig Brearley ("Brearley"), of CWB Architecture located at 799 Route 72, Manahawken, NJ, 08050, to

plan and design a new restaurant to be built on the M&M Property.

38. BIE paid Brearley $10,000 for his services.

39. Then, on February 13, 2020, Rosen and Triebenbacher met for dinner at The Polo Bar in Manhattan. At this dinner, Triebenbacher abruptly announced to Rosen that he had changed his mind and did not want to move forward with the plan to build a new restaurant on the M&M Property despite that BIE had already spent time and money on their plans. Instead, Triebenbacher said he now wanted to build a new restaurant on the K2 property.

40. Although Rosen was surprised and disappointed at this change after spending the money on the architect, Rosen agreed to discuss these new development plans.

41. These discussions were derailed about a month later because the COVID-19 pandemic effectively shut down K2's restaurant and bar.

42. Although K2's liquor store was able to remain open for the entire period, as it was considered an essential business per the applicable Executive Order(s) issued by Governor Philip Murphy, the restaurant and bar remained closed until approximately about June 15, 2020.

43. On or around that date, the restaurant and bar reopened as limited by the applicable Executive Order(s) of Governor Murphy, abiding by all governmental requirements and guidelines to safely operate a restaurant and bar for patrons and employees.

44. In August of 2020, Triebenbacher approached Rosen seeking to split up the assets of BIE, with one taking K2 and the other taking the M&M Property plus a cash payment.

45. Thereafter, and with the assistance and involvement of BIE's accountant, Raymond Ciccone ("Ciccone"), Rosen and Triebenbacher had numerous meetings and communications about how they might split up the assets of BIE.

46. At the end of September 2020, the parties were negotiating, with the assistance of

Ciccone, a plan by which (a) Rosen would take the M&M Property and receive $800,000 in cash from Triebenbacher, and (b) Triebenbacher would take K2 along with any cash in BIE's accounts, and would assume BIE's remaining debt. At this time, Triebenbacher told Rosen that he wished to review the September month-end reconciliations of K2, and would then reconfirm these discussions.

47. Soon thereafter, however, Triebenbacher changed his mind once again, saying that he did not want to go forward with the agreed-upon split of BIE's assets. It is unclear to Rosen the reasons for Triebenbacher's change of heart or if this was all some ploy.

Triebenbacher Attempts to Exercise the Buy-Out Provision of the Operating Agreement

48. On October 2, 2020, Triebenbacher's attorney, Adolf Sicheri, Esq. ("Sicheri") sent Rosen a letter stating that Triebenbacher was purportedly "exercising his right under Section 11 of the Operating Agreement," adding: "Please accept this letter as [Triebenbacher's] Notice of Election to Buy-Out your interest" (the "October 2 Letter") A true and correct copy of the October 2 Letter is attached hereto as Exhibit G.

49. Rosen was surprised to receive this letter given the discussions at the last meeting with Ciccone. Rosen also noted that the October 2 Letter did not contain a Stated Amount, or any amount for that matter, that could be used to compute Net Equity as contemplated by the provision Triebenbacher was purporting to exercise.

50. On October 5, 2020, Rosen's attorney, Matthew Danow, Esq. ("Danow") sent a letter to Sicheri in response to his October 2, 2020 letter (the "October 5 Response"). A true and correct copy of the October 5 Response is attached hereto as Exhibit H.

51. The October 5 Response stated that the October 2 Letter "is invalid and ineffective to effectuate the procedure described in Section 11 of the Operating Agreement" because, among

other things, (i) the procedure does not permit the Initiating Member to choose whether to be a buyer or a seller (and in fact expressly leaves that determination to the Responding Member); (ii) it was unclear what the purported Deadlock was for purposes of the October 2 Letter (which is important given certain opportunities to resolve Deadlocks through the Buy-Out process in Section 11); and (iii) the October 2 Letter did not contain a "Stated Amount," rendering it impossible for the company's accountant, Ciccone, to compute Net Equity as required by the formula in Section 11 of the Operating Agreement. See Exhibit H at 1-2.

52. Given that Triebenbacher's course of conduct over the prior few months called his good faith into question, the October 5 Response also stated that "because of the evident dispute between" Triebenbacher and Rosen, neither BIE nor any of its subsidiaries should "enter into any agreements or contractual arrangements, or otherwise incur or pay any sums or amounts," without "the express written consent of both Managers." Exhibit H at 2.

53. Triebenbacher never responded to the October 5 Response, and did not at any time purport to remedy the aforementioned deficiencies in the October 2 Letter.

54. Instead, Rosen and Triebenbacher — with the encouragement and assistance of Ciccone, the company's accountant — attempted to restart their discussions of a potential split or buyout from before Triebenbacher sent the October 2 Letter.

Triebenbacher Unconditionally Offers To Sell His 50% Interest In BIE To Rosen, Rosen Accepts, And The Parties Thereafter Repeatedly Acknowledge Their Agreement Orally And In Writings

55. On October 12, 2020, Triebenbacher made a written offer either to sell to Rosen his entire membership interest in BIE for $1.8 million or to buy Rosen's entire interest for $1.9 million. Specifically, Triebenbacher's email of that date to Rosen states:

> Jon, Ray [Ciccone] has suggested that I present you with an offer in writing to settle our dispute concerning Barrier Island Enterprises

> (BIE). I am willing to purchase your ownership interest in BIE for $1,900,000.00 or sell you all my ownership interest in BIE for $1,800,000.00. This offer is made without prejudice to my rights and in the hope of amicably settling all issues pertaining to BIE

Exhibit A.

56. On the same day, October 12, 2020, approximately two (2) hours later, Rosen unequivocally accepted Triebenbacher's offer to sell Rosen his entire interest in BIE. Specifically, Rosen responded by email stating:

> George, thank you very much for your email. I appreciate your trying to resolve our dispute amicably. I accept your offer, and agree to purchase all of your interest in Barrier Island Enterprises for the purchase price of $1.8 million. We will proceed to closing using the procedures in the Buy-Sell provisions of the operating agreement (with $1.8 million being agreed upon buy-sell price). I am prepared to close within 30 days, and will ask Matt [Danow] to reach out to your attorney to get the process going. Jon.

Exhibit B (emphasis added).

57. On the same day, October 12, 2020, and approximately ten (10) minutes later, Triebenbacher acknowledged Rosen's acceptance to his offer by responding: "I am sincerely pleased we are resolving this amicably. Thank you Jon…and thank you very much Ray." Exhibit C.

58. On the same day, approximately 15 minutes later, Ciccone — who had helped shepherd the discussions and the ultimate deal — responded to express his pleasure that a deal had been struck.

59. On October 14, 2020, Triebenbacher acknowledged acceptance of the offer yet again and sent Rosen an email with the subject "Transitioning," identifying various issues that needed to be addressed in light of Rosen's buyout of his interest in BIE and assumption of full responsibility for the financial operations of K2. Exhibit D.

60. In that email, Triebenbacher stated: "given you are taking over, if you would like to sign the checks going forward that is okay with me…let me know." He added: "I will be deferring to you on all decisions affecting the business at this point. I get the sense the staff is picking up on things changing already so I believe it is in our best interest to try and close on the deal so we can remove any confusion the team has. I will do anything you like me to do to help with the transition…" Exhibit D.

61. Rosen responded to Triebenbacher's "Transitioning" email on the same day, October 14, 2020. In that response, Rosen said (among other things) that he wished to cancel certain credit cards, close certain vendor accounts, and share check-signing responsibility "depending on who is physically there over the next 2 weeks." He also indicated that he wanted to close the restaurant and liquor store "for the entire off season" (that is, the period from roughly November 1 through March 31) "as of October 31st or November 1st," and to "address the staff Together on Sunday" to let them know "that we are closing for the season on October 31st." He added: "I don't think it's necessary to talk about a change in ownership or anything to do with our separation agreement as it probably won't be signed by that time. We can always tell them once it's signed if you would like to do that." Exhibit D.

62. In or around this same time period, Triebenbacher and Rosen had text communications as well. On October 15, 2020, Triebenbacher texted Rosen, stating in pertinent part:

> In my view we need to get the deal closed if you want to tell the team you want to close the business for the winter. Closing the business is not something I would do…and if our deal is not done I wouldn't want anyone to think I have anything to do with it. I'm not doubting your judgment with wanting to close…but I feel strongly that's something you should communicate once we close our deal. Having said that…given you are just buying out my interest…papering it is very simple.

Exhibit E.

63. Rosen responded that his lawyer was drafting the papers, to which Triebenbacher replied "Great." Exhibit E.

64. These written communications evidenced the parties' shared understanding that they had a "deal," subject only to a "clos[ing]" and not to any further negotiation of material terms — all of which had been agreed.

65. Triebenbacher separately and subsequently acknowledged and confirmed this understanding and agreement orally to numerous individuals within and outside the company.

66. For example, on the morning of October 17, 2020, Rosen and Triebenbacher met with Ciccone at Ciccone's office to discuss the transition of the business to Rosen, consistent with the agreed-to purchase of the interests in BIE by Rosen, and specifically to address the items raised in Triebenbacher's October 14, 2020 "Transitioning" email.

67. At this meeting, Triebenbacher expressly admitted to Ciccone, in front of Rosen, that he had made an offer, which Rosen had accepted, and thus had a deal to sell his interests in BIE for $1.8 million as set forth in Rosen and Triebenbacher's prior written communications.

68. During this meeting, Rosen and Triebenbacher went through each of the items identified in Triebenbacher's October 14, 2020 "Transitioning" email with the assistance of Ciccone — who, on information and belief, took notes of this meeting — to ensure that Rosen would have the information he needed on each such item in anticipation of closing.

69. Also during this meeting, Rosen and Triebenbacher also discussed, among other things, that they should wait until the transaction closed to inform K2's staff of Rosen's buyout of Triebenbacher's interest.

70. Also during this meeting, Rosen and Triebenbacher agreed that, moving forward,

all decisions concerning K2 would be made by Rosen exclusively.

71. Also during this meeting, Triebenbacher advised Rosen that, post closing, he would be available to assist Rosen in any way he could.

72. In addition to admitting to the existence of the agreement to BIE's accountant, Ciccone, Triebenbacher informed virtually all of the management level staff at K2 of the same (notwithstanding the parties' agreement to not tell the staff of K2 of Rosen's buyout of Triebenbacher's interest until after the transaction closed).

73. On that very same day, October 17, 2020, Rosen received a call from Andres Aquino ("Aquino"), the head chef at K2, who informed Rosen that Triebenbacher had just told him that Rosen was buying him out.

74. The next day, October 18, 2020, Rosen went to K2 and met with Aquino, who again confirmed to Rosen that Triebenbacher had informed Aquino that Rosen was buying him out. Rosen advised Aquino that if he had any questions, that they could get together to address them.

75. On the same day, October 18, 2020, Rosen met with Bobby Ferringo ("Ferringo"), K2's bar manager, who also confirmed to Rosen that Triebenbacher had informed Ferringo that Rosen was buying him out. Rosen also advised Ferringo that if he had any questions, that they could get together to address them.

76. On the same day, October 18, 2020, Rosen also met with Marna Smith ("Smith"), K2's restaurant manager, who also confirmed to Rosen that Triebenbacher had informed Smith that Rosen was buying him out. Rosen also advised Smith that if she had any questions, that they could get together to address them.

77. On the same day, October 18, 2020, Rosen also met with Gina, K2's liquor store manager, who also confirmed to Rosen that she had been told that Rosen was buying

Triebenbacher out. Gina informed Rosen that she would make an inventory of the liquor store and Rosen advised her not to order any more liquor based upon the ample inventory already on hand.

78. Clearly, notwithstanding the parties' understanding on October 17, 2020 not to inform K2's staff of the agreed to buy-out, Triebenbacher informed the staff causing much uncertainty and unrest for the staff and, as a result, disruption of the business, which was already experiencing the impact of COVID on the business.

Triebenbacher Disavows His Agreement, Refuses To Close His Agreement To Sell Rosen His Interest In BIE, and Has Systematically Excluded Rosen From the Operation and Books and Records of the Business

79. The next morning, October 19, 2020, Rosen communicated by text with Triebenbacher to arrange a meeting so that they could further discuss certain items that would need to be addressed and transitioned in the ordinary course in connection with Rosen's buyout of Triebenbacher's interest, and later that afternoon Rosen's counsel circulated an initial draft of an assignment agreement memorializing the parties' agreement.

80. Although Triebenbacher delayed meeting Rosen for a couple of days, the two finally met at K2 on October 21, 2020, at 8:30 a.m.

81. During this meeting, Triebenbacher informed Rosen that he did not want to go through with the deal the parties struck on October 12 — without any reference to the subsequent acknowledgements and confirmations of that deal, the discussions regarding transitioning the business, or the draft of the assignment — and proposed that the parties explore a different deal. Rosen disagreed and told Triebenbacher that they had settled on the deal and had a binding agreement.

82. The next day, October 22, 2020, Rosen again confirmed to Triebenbacher via text message that they had a "binding agreement" and "expect[ed] we will see it through."

83. On the same day, October 22, 2020, Rosen wired a 10% earnest money deposit of $180,000 into the trust account of his counsel's firm and emailed Triebenbacher to advise him of same and to further advise that the closing would take place on November 11, 2020.

84. Also on the same day, October 22, 2020, Triebenbacher responded to Rosen's text refusing to close, saying: "I disagree Jon. It's not happening. Not sure who is telling you otherwise."

85. Also on the same day, October 22, 2020, Triebenbacher's counsel sent an email to Rosen's counsel claiming that "no contract was signed," but did not dispute that the parties had in fact reached agreement on all of the material terms in writing, which had been acknowledged by Triebenbacher multiple times.

86. In fact, the parties did have a binding agreement pursuant to which Triebenbacher had agreed to sell his interest in BIE to Rosen and Rosen agreed to buy Triebenbacher interest for $1.8 million, which Rosen's counsel so stated to Triebenbacher's counsel that same day.

87. Moreover, in reliance on Triebenbacher's assurance that the parties had a binding agreement based on the emails exchanged between them (and on Triebenbacher's subsequent words and actions affirming that assurance), Rosen took all of the actions set forth above regarding transitioning the various operational tasks to himself and moved the necessary funds to close the transaction (including wiring $180,000 in anticipation of closing).

88. At no time did Triebenbacher ever state that a deal was contingent on reducing the agreement to further documentation above and beyond the written offer, acceptance, and acknowledgements set forth above.

89. While Rosen's counsel was working on documentation necessary to close and transfer Triebenbacher's interests in BIE to Rosen, there were no material terms outstanding, as

agreement on the material terms were set forth in the written, offer, acceptance, and acknowledgements set forth above. All tasks and documents were, at that point, purely ministerial.

90. Triebenbacher's repeated and unequivocal admissions regarding the deal to BIE's accountant, Ciccone, and the entirety of K2's management level staff only supports and confirms this conclusion.

91. To date, Triebenbacher refuses to move forward with Rosen's buyout of his interest in BIE for $1.8 million.

Triebenbacher Usurps Unilateral Control Of BIE and Of Its Books and Records, and Systematically Excludes Rosen from the Business

92. Meanwhile, in addition to refusing to close and despite having agreed that going forward Rosen would have exclusive decision-making rights until the sale and transfer of Triebenbacher's interest was fully consummated, Triebenbacher has systematically excluded Rosen not only from those rights, but also from the basic management rights to which Rosen is expressly entitled under the Operating Agreement.

93. In particular, on October 26, 2020, Rosen emailed Triebenbacher to (a) ask him for "immediate access to all of the books, records and ledgers for BIE, the restaurant and the other subsidiaries (from April 2018 to present day)"; and (b) remind him that "going forward for day-to-day operations, none of BIE, the Restaurant or subsidiaries should pay or incur any expense of more than $1,000 without the approval of both managers, and any expenses outside of the ordinary course of business should require approval of both managers regardless of amount."

94. After replying "[n]o problem Jon" and after requesting some clarification, Triebenbacher agreed to do so.

95. Yet, like every other agreement he had made, Triebenbacher subsequently went back on his word.

96. Triebenbacher has to date failed to comply with any of the foregoing requests and continues to stonewall Rosen and subvert his rights even under the Operating Agreement (and despite that Rosen should at this point own the entirety of BIE outright).

97. On October 27, 2020, Rosen emailed Triebenbacher to initiate discussions concerning a plan for the off-season (that is, the months of November through March). In that email, Rosen pointed out that the business loses money during the off-season every year, and noted that this year they were also "dealing with COVID-19 and the prospect of only opening a small portion of our indoor restaurant [due to governmental restrictions] as well as putting both our customers and our employees at risk of getting sick." Rosen concluded: "I strongly believe we need to close the restaurant and liquor store soon for the off-season until at the very least the end of March. If we don't, it puts us in a position to lose more money, take greater liability risks and potentially be stuck with inventory that we won't be able to use."

98. On the same day, Triebenbacher responded that he agreed, adding: "It's just a matter of when and how....so it's done and [sic] a logical and thoughtful manner and impacts all involved thoughtfully. I am more than willing to talk and come up with a plan that works for both of us. I do not feel we are wide apart on this issue. Lets [sic] not get others involved...the two of us should talk."

99. Yet again, Triebenbacher failed to follow through and continues to thwart Rosen's rights vis-à-vis BIE and the business. Triebenbacher has refused to engage meaningfully with Rosen about actually closing for the off-season.

100. Further, despite having agreed to give Rosen access to the business's books and records and approval rights over the business's expenditures (to which Rosen is entitled under the basic terms of the Operating Agreement, and is all the more entitled in light of the agreement to

acquire Triebenbacher's interest and thereby become the sole owner of the business), Triebenbacher has failed and refused to give Rosen any of that material or those approval rights — let alone the additional decision-making rights he had previously agreed to give Rosen in light of Triebenbacher's agreement to sell his interest to Rosen.

101. Accordingly, on November 5, 2020 Rosen emailed Triebenbacher again, saying in part:

> I wish to remind you that not only have you sold your interest to me, but that I am also an equal partner in the business. Given these overlapping interests, I have a very great vested stake in the restaurant.
>
> It is for these reasons that I have repeatedly asked you (i) to agree to a closing date for the contract; (ii) to agree to a date on which to close the restaurant (which is the product, among other things, of my concerns over keeping the restaurant open while COVID-19 rages and the fact that the restaurant has always lost money during the winter when you have kept it open); and (iii) to give me full and complete access to all of the books and records of the business. You have essentially stonewalled all of my requests, either ignoring them or giving non-substantive responses.
>
> Let me be clear: I hereby demand that by Wednesday, November 11, you provide me with the following:
>
> 1. the checkbook used to pay expenses of the restaurant;
> 2. all of the books and records of the business from April 2018 to the present, including but not limited to, general ledgers, cash receipts reports, bank account records, records of beverage sales, records of liquor store sales, records of food sales, profit and loss statements, financial statements, payroll information and expense reports;
> 3. the usernames and passcodes to any and all computers used and software utilized, including the Aloha system, to run, operate and manage the restaurant and any other BIE asset;
> 4. all relevant contact information for each of the restaurant's vendors;
> 5. all information regarding and access to both of our house accounts, and all the information and accounting to support them from the moment the we opened the restaurant;
> 6. a current inventory for not only the restaurant & bar, but also the liquor store;
> 7. all property tax information concerning BIE's properties;

8. an accounting relating to the tenancies of the cooking staff that live in the apartments both at Kubel's Too and at the M&M property;

9. all passcodes and/or combinations to the safe locks where the registers and money are put every night;

10. confirmation as to the number and location of all security cameras and audio devices at the restaurant and all passcodes for such security cameras and devices;

11. a copy of all relevant insurance policies concerning any of BIE's assets;

12. a copy of the Liquor License;

13. identification of any outstanding debt or liens against any of the assets of BIE, other than the mortgage with the seller of the restaurant; and

14. contact information for all staff at K2.

In addition, I also demand that by November 11, you also agree to a plan to close the restaurant for the winter.

As you know, I have commenced a lawsuit against you in federal court in New Jersey. Should you fail to comply with all of the foregoing demands by November 11, I will immediately ask the Court for appropriate relief.

102. Triebenbacher responded by having his counsel send a letter dated November 9, 2020, to the attorney who was representing Rosen in the then-pending Federal Action, as described below (in which Triebenbacher had not yet appeared), stating in part: "[M]y client has received a communication from yours with regard to the pending litigation, as well as, to make certain demands as to the current operations of the subject business. Kindly request that Mr. Rosen cease all direct communications with my client and require that all future communications be made exclusively through counsel."

103. It comes as no surprise that nothing came of any of this, and Rosen remains in the dark and excluded from any decision-making or basic information about the state of the business and its finances as requested above.

104. Instead, even when Triebenbacher copies Rosen on messages to the employees of

K2, it is clear that Triebenbacher is unilaterally making the decisions and refusing Rosen's input.

105. For example, on November 12, 2020, Triebenbacher sent a group text to Rosen and various members of the restaurant's management team stating that he had "looked over the numbers for Monday thru Wednesday this week" and proposing that the team "consider closing Mondays and Tuesdays the rest of November" and "evaluate further changes to the schedule after thanksgiving." Triebenbacher added: "Let's make sure we are not over ordering for the kitchen or the store … and let's also make extra sure we are being very careful to not over staff the hours that we are open." This instruction to K2's management-level employees was made without consultation with Rosen and in direct contravention of Rosen's specifically-expressed wishes and Triebenbacher's express agreement to resolve these issues with Rosen before "get[ting] others involved."

106. Moreover, as a decision to close for two days a week (rather than to close entirely, to remain open entirely, or to close for a different portion of the week) was not a matter of "day-to-day operations," it was one that could not be made without the unanimous approval of both Triebenbacher and Rosen. Accordingly, Triebenbacher's action in proposing it to the restaurant's management team without Rosen's approval — and, in fact, with knowledge (based on Rosen's repeated statements) that Rosen wanted to close the business entirely for the whole off-season — violated the Operating Agreement.

107. In other words, as has become the norm, Triebenbacher responded to Rosen's attempt to exercise his management rights — which, again, would exist by virtue of the Operating Agreement even if Triebenbacher had not agreed to sell his interest, but were all the more critical in light of the fact that Rosen would soon be the *sole* owner of the business — by first telling him to deal only through counsel, and then announcing and implementing critical decisions that

Triebenbacher had made against Rosen's expressed wishes.

108. Having been directly contacted by Triebenbacher, Rosen responded on November 13, 2020. He did so on a separate text thread, addressing only Triebenbacher and not copying the management team. Rosen reiterated to Triebenbacher: "I remain steadfast in my view that the restaurant should be shut down for the off season months due to the loss of money to the business, the raging coronavirus and its danger to our staff and customers as well as the new policies prohibiting bar service completely, the business closing hour of 10 pm and only 25 percent capacity in the dining rooms."

109. The references to "new policies" were to restrictions imposed statewide in New Jersey by Executive Orders 183 (issued September 1, 2020) and 194 (issued November 10, 2020). Among other things, those Executive Orders expressly cite an outbreak at a New Jersey restaurant as a justification for their issuance, and collectively limit indoor dining to 25% of a restaurant's capacity, require restaurants to close at 10 p.m., and prohibit the seating of patrons in any bar area.

110. These limits are particularly onerous — and the risks particularly great — for a restaurant like K2, which to this day describes itself on its website as "a bustling tavern and liquor store located in the heart of LBI."

111. Triebenbacher has made no meaningful response to any of the foregoing demands for access and consultation, and has usurped all decision-making authority in which Rosen shares equally under the Operating Agreement.

112. Rosen is now in the position that he is not even being afforded basic informational rights as required under the Operating Agreement that would allow him insight into the current financial condition of the business, including potential losses and the propriety of any expenditures of the business. It is evident that Triebenbacher is intent on destroying the business that, as a result

of their agreement, belongs to Rosen.

The Federal Action

113. Due to Triebenbacher's refusal to close on the parties' agreement and his obvious exclusion of Rosen from the business in violation of Rosen's rights under the Operating Agreement, on October 28, 2020, Rosen brought suit against Triebenbacher in the United States District Court for the District of New Jersey, seeking (among other things) a declaration that the parties have a binding agreement that obligates Triebenbacher to sell his interest in BIE to Rosen for $1.8 million (the "Federal Action").

114. Rosen, a New York resident, sued in federal court based on diversity jurisdiction given his understanding that Triebenbacher resided in New Jersey, where, on information and belief, Triebenbacher owned a home and where the Operating Agreement identified as Triebenbacher's notice address.

115. On November 11, 2020, however, Triebenbacher responded to the Federal Action by moving to dismiss it on the ground that the federal court lacked subject matter jurisdiction because (contrary to the understanding Rosen had at the time he commenced suit) Triebenbacher is a resident of New York – such that there is no diversity of citizenship between him and Rosen.

116. Prior to filing this motion on November 11, 2020, Triebenbacher made no effort to resolve the jurisdictional issue more quickly and amicably by simply notifying Rosen's counsel that Triebenbacher is a resident of New York. Had he done so, Rosen would have promptly discontinued the Federal Suit and commenced suit in this Court.

117. Instead, at every step of the way, Rosen has been confronted with a complete lack of good faith by Triebenbacher.

118. After securing New York counsel, Rosen voluntarily discontinued the Federal

Action on November 23, 2020, and filed this action.

FIRST CAUSE OF ACTION
(Declaratory Judgment / Breach of Contract to Sell Interests in BIE to Rosen / Specific Performance)

119. Rosen repeats and realleges each of the allegations set forth in paragraph 1 through 118, above, as though fully set forth herein.

120. As set forth above, Triebenbacher made a written offer to sell his interest in BIE to Rosen for $1.8 million.

121. The very same day, Rosen issued a written acceptance of Triebenbacher's offer, agreeing to purchase Triebenbacher's interest in BIE for $1.8 million.

122. Triebenbacher acknowledged Rosen's acceptance, again in writing, multiple times thereafter. Furthermore, Triebenbacher also confirmed this acknowledgement orally to a number of third parties including BIE's accountant and the management-level employees of K2.

123. All material terms were embodied in these written communications, and based on these writings, there is a binding and fully enforceable contract for Rosen to purchase Triebenbacher's interest in BIE for $1.8 million.

124. Moreover, in light of Triebenbacher's actions as set forth more fully above and Rosen's reliance thereon, he is estopped from denying that the parties made a binding agreement pursuant to which he is obligated to sell his interest in BIE to Rosen for $1.8 million.

125. No provision of the Operating Agreement requires any particular form of agreement in which one Member commits to sell his interest to the other.

126. As set forth above, Triebenbacher refuses to close on the parties' agreement, and is in breach thereof.

127. Thus, an actual controversy exists over whether the parties have a binding

agreement pursuant to which Triebenbacher is obligated to sell Rosen his interest in BIE for $1.8 million.

128. As to this controversy, which requests specific performance and the compelled transfer of Triebenbacher's interests in BIE — a unique asset (particularly, but not exclusively, because the acquisition of such interest would give Rosen full control over BIE and its business and because the combined beachside restaurant, bar, and liquor store are an unmatched business on Long Beach Island, a small island community where both properties are only a block or two from the beach and on the main boulevard of the island) — Rosen has no adequate remedy at law.

129. By reason of the foregoing, Rosen is entitled to a judgment (i) declaring that he and Triebenbacher have a binding and fully enforceable agreement pursuant to which Rosen is entitled to purchase, and Triebenbacher is obligated to sell, Triebenbacher's interest in BIE for $1.8 million, (ii) that Triebenbacher has breached that agreement; and (iii) for specific performance compelling Triebenbacher to sell his interest in BIE to Rosen for $1.8 million as the parties agreed.

SECOND CAUSE OF ACTION
(Declaratory Judgment / Breach of the Operating Agreement / Specific Performance)

130. Rosen repeats and realleges each of the allegations set forth in paragraph 1 through 118, above, as though fully set forth herein.

131. In the alternative to the foregoing First Cause of Action, in the event the October 12, 2020 offer, acceptance, and subsequent acknowledgement and ratification was not a binding and enforceable contract, Triebenbacher's email of October 12, 2020 filled in certain missing information from the October 2 Letter and/or constituted an "Election Notice" under Section 11(b) of the Operating Agreement. More particularly, the inclusion in that email of a specific price at which Triebenbacher would buy Rosen's interest or sell his own interest — after consultation specifically with Ciccone, BIE's accountant, following Triebenbacher's October 2 Letter and

apparent desire to trigger the Buy-Out provision of Section 11 — constituted Triebenbacher's conclusion of Net Equity under Section 11(c) of the Operating Agreement, which conclusion Rosen agreed to, thus setting the Net Equity under Section 11.

132. In turn, Rosen's response of October 12, 2020 constituted both an acceptance of Triebenbacher's offer and conclusion with respect to the purchase price under the valuation provisions of Section 11 and a "Purchase Notice" under section 11(d) of the Operating Agreement, making Rosen the "Purchasing Member" entitled and obligated to purchase Triebenbacher's interest in BIE at the agreed price of $1.8 million.

133. Therefore, under Section 11(d) of the Operating Agreement, at such time, Rosen was "obligated to purchase the entire membership interest of the Initiating Member … and [Triebenbacher] … shall be obligated to sell its entire membership interest and/or economic rights to [Rosen] for the Buy-Sell Price" of $1.8 million.

134. Thus, in accordance with and pursuant to Section 11(e) of the Operating Agreement, Rosen timely submitted a deposit of ten percent (10%) of the $1.8 million purchase price.

135. Pursuant to Section 11(f), the parties were required to close on this transaction on a date not later than ninety (90) days after the Election Period, as defined in the Operating Agreement, and Rosen suggested November 11, 2020 as the closing date.

136. Notwithstanding the foregoing, Triebenbacher takes the position that he is not obligated to sell his interest in BIE to Rosen, and is thus in breach of his obligations under the Operating Agreement.

137. As a result, an actual controversy exists over whether Triebenbacher is obligated to sell Rosen his interest in BIE for $1.8 million.

138. As to this controversy, which requests specific performance and the compelled transfer of Triebenbacher's interests in BIE — a unique asset (particularly, but not exclusively, because the acquisition of such interest would give Rosen full control over BIE and its business and because the combined beachside restaurant, bar, and liquor store are an unmatched business on Long Beach Island, a small island community where both properties are only a block or two from the beach and on the main boulevard of the island) — Rosen has no adequate remedy at law.

139. By reason of the foregoing, Rosen is entitled to a judgment declaring that Triebenbacher is in breach of his obligations under the Operating Agreement and is obligated to sell his interest in BIE to Rosen in accordance with the provisions of the Operating Agreement.

THIRD CAUSE OF ACTION
(Breach of the Operating Agreement / Injunctive Relief)

140. Rosen repeats and realleges each of the allegations set forth in paragraph 1 through 139, above, as though fully set forth herein.

141. As set forth more fully herein, Triebenbacher has improperly usurped the authority to manage BIE, undertaking unilateral acts over the objection of Rosen and refusing even to allow Rosen access to the company's books and records.

142. In addition to preventing Rosen from exercising his rights under the Operating Agreement, Triebenbacher refuses to abide by the prior agreements, discussed above, on a buyout or split of the business. In other words, Triebenbacher refuses to allow Rosen access to the business, to which he is contractually entitled, and refuses to agree (or live up to any agreement Triebenbacher himself made) to any mechanism that would resolve this matter, whether that be by buyout of the partnership or otherwise.

143. Rosen is being damaged on an ongoing basis by Triebenbacher's actions, which deprive Rosen not only of the exclusive management rights to which he is entitled by virtue of

Triebenbacher's agreement to sell Rosen his interest in BIE, but also of even the coequal management rights that he has under the Operating Agreement until the point at which that transfer occurs.

144. Because Rosen has been effectively shut out of the business, he is unable to state with certainty at this time all of the ways in which he is being damaged. However, they include at a minimum the fact that Triebenbacher is keeping the restaurant open over Rosen's objection, thereby (among other things) putting the business, its employees, and the surrounding community at risk for the reasons detailed above and in Rosen's numerous written communications to Triebenbacher.

145. With respect to his inability to exercise his rights under the Operating Agreement due to Triebenbacher's misconduct, Rosen has no adequate remedy at law.

146. Accordingly, Rosen is entitled to preliminary and permanent injunctive relief in the form of an order and/or judgment:

a. restraining Triebenbacher from unilaterally taking any actions respecting the management of BIE;

b. restraining Triebenbacher from interfering with Rosen's management rights;

c. directing Triebenbacher to give Rosen access to (i) the checkbook used to pay K2's expenses, (ii) all of the books and records of the business from April 2018 to the present, including but not limited to general ledgers, cash receipts reports, bank account records, records of beverage sales, records of liquor store sales, records of food sales, profit and loss statements, financial statements, payroll information and expense reports, (iii) the usernames and passcodes to any and all computers used and software utilized, including the Aloha system,

to run, operate and manage K2 and any other BIE asset, (iv) all relevant contact information for each of K2's vendors, (v) all information regarding, and access to, both of the business's house accounts, and all the information and accounting to support them from the date BIE opened K2, (vi) a current inventory for K2's restaurant, bar, and liquor store, (vii) all property tax information concerning BIE's properties, (viii) all passcodes and/or combinations to the safe locks where the registers and money are put every night, (ix) confirmation as to the number and location of all security cameras and audio devices at the restaurant and all passcodes for such security cameras and devices, (x) a copy of all relevant insurance policies concerning any of BIE's assets, (xi) a copy of K2's Liquor License, (xii) identification of any outstanding debt or liens against any of the assets of BIE, other than the mortgage with the seller of the restaurant, and (xii) contact information for all staff at K2; and

d. directing the orderly closure of K2 (including the restaurant, bar and liquor store) due to both the pendency of the COVID-19 pandemic and that it is currently the off-season, both generating risk to the business, its employees, and its patrons, until at least March 31, 2021 (and subject to all regulations, laws, rules, and ordinances relating to opening the business), with either party entitled to petition the Court to either vacate or extend such order, as the case may be, should there be a material change warranting such a change.

WHEREFORE, Plaintiff seeks judgment as follows:

(1) On Plaintiff's First Cause of Action, a judgment in favor of Plaintiff and against Defendant (i) declaring that Plaintiff and Defendant have a binding and fully enforceable agreement pursuant to which Plaintiff is entitled to purchase, and Defendant is obligated to sell, Defendant's interest in BIE for $1.8 million, (ii) that Defendant has breached that agreement; and (iii) for specific performance compelling Defendant to sell his interest in BIE to Plaintiff for $1.8 million as the parties agreed;

(2) On Plaintiff's Second Cause of Action, a judgment in favor of Plaintiff and against Defendant declaring that Defendant is in breach of his obligations under the Operating Agreement and is obligated to sell his interest in BIE to Plaintiff in accordance with the provisions of the Operating Agreement;

(3) On Plaintiff's Third Cause of Action, preliminary and permanent injunctive relief in favor of Plaintiff and against Defendant relating to Defendant's breach of the Operating Agreement in the form of an order and/or judgment as set forth above; and

(4) Such other and further relief in favor of Plaintiff as this Court deems just and proper.

Dated: New York, New York
November 20, 2020

COZEN O'CONNOR
Attorneys for Plaintiff

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VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JONATHAN ROSEN, being duly sworn, deposes and says:

I am the Plaintiff in this action. I have reviewed the foregoing Verified Complaint and the factual allegations contained therein are true to my own knowledge and belief, except as to those matters alleged upon information and belief and, as to those matters, I believe them to be true.

JONATHAN ROSEN

Sworn to before me this
30th day of November, 2020

Jessica D Yannetta
Notary Public

OFFICIAL SEAL
JESSICA D. YANNETTA
NOTARY PUBLIC - NEW JERSEY
My Comm. Expires June 3, 2021