

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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ALP, INC., and LIBRA MAX,

Plaintiffs,

- v -

LAWRENCE MOSKOWITZ, BENDER CICCOTTO & COMPANY CPA'S, LLP, ROBERT FRANK, ROBERT J. FRANK, GENE LUNTZ, LAUREN MOSKOWITZ, and ADAM MAX,

Defendants.

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INDEX NO. 652326/2019

MOTION DATE 12/9/2020

MOTION SEQ. NO. 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 506, 507, 508, 509, 510, 511, 512, 513, 515, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

This motion is determined in accordance with the attached memorandum Decision and Order.

06/11/2021

DATE

[Handwritten Signature]

NANCY M. BANNON, J.S.C. HON. NANCY M. BANNON

CHECK ONE:

SEQ 010

SEQ 010 X-MOT

APPLICATION:

CHECK IF APPROPRIATE:

[Grid of checkboxes for case disposition]

CASE DISPOSED

GRANTED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

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OTHER

OTHER

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REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 42

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ALP, INC., and LIBRA MAX,

Plaintiffs, DECISION AND ORDER

Index No. 652326/2019

- v -

LAWRENCE MOSKOWITZ, BENDER CICCOTTO &  
COMPANY CPA'S, LLP, ROBERT FRANK,  
ROBERT J. FRANK, GENE LUNTZ, LAUREN  
MOSKOWITZ, and ADAM MAX,

MOT SEQ 010

Defendants.

-----x  
**NANCY M. BANNON, J.:**

I. INTRODUCTION

In this action arising from a dispute over control of the plaintiff corporation ALP, Inc. ("ALP"), the plaintiffs, ALP and its President and CEO, Libra Max ("Libra"), move pursuant to CPLR 6301 and BCL §§ 706(d) and 716(c) for a preliminary injunction (1) enjoining defendant Adam Max ("Adam"), or anyone acting in concert with him, including nonparty Lawrence J. Flynn, Esq. ("Flynn"), from holding a special shareholders' meeting pursuant to BCL § 603(a) and (2) enjoining Adam from serving or acting as an officer or director of ALP or directly or indirectly controlling ALP's affairs until further order of this court. By order to show cause dated May 27, 2020, the

court granted the plaintiffs' application for a temporary restraining order staying a special shareholders' meeting, which had been noticed for May 29, 2020, pending the determination of this motion, and ordered Adam to provide the plaintiffs and the court with a copy of a voting trust agreement between him and Flynn.

Adam and Flynn oppose the plaintiffs' motion. Adam further cross-moves, *inter alia*, to vacate the temporary restraining order and to dismiss the second amended complaint pursuant to CPLR 3211(a)(8), CPLR 1003, and CPLR 305(a). For the following reasons, the plaintiffs' motion is granted and Adam's cross-motion is denied.

## II. BACKGROUND

A full recitation of the factual allegations in this action is contained in this court's orders dated October 30, 2020, and March 4, 2021, respectively. What follows is a brief summary of the facts relevant to this motion.

ALP is a corporation created by the artist Peter Max (Peter) for, *inter alia*, the production, maintenance, marketing, licensing, and commercialization of his artwork. Peter owns 20% of ALP, and his son, Adam, and daughter, Libra, each own 40%. In 2012, due to a decline in Peter's health, Adam assumed

control of ALP's day-to-day operations. According to the plaintiffs, Adam acted in concert with other parties, including his co-defendants in this action, to divert corporate assets and loot ALP of millions of dollars during Adam's tenure as President and CEO of ALP.

In 2015, Peter consented to the appointment of a property guardian to assist him in managing his assets. Flynn is the second property guardian appointed for Peter by the State of New York and has been in that role in December 2016. Among other things, Flynn is empowered to vote on Peter's behalf at ALP shareholder meetings. Pursuant to the Mental Hygiene Law and the judgment appointing Flynn as guardian, Flynn is required to exercise his powers (1) by considering Peter's personal wishes, preferences, and desires and (2) with the utmost care and diligence.

In September 2018, Flynn demanded a shareholders' meeting under BCL § 603 for the purpose of ousting Adam from control of ALP. Following this court's ruling in a related special proceeding entitled Libra Max v Adam Max and ALP, Inc., Index No. 156641/2017, the shareholders of ALP, consisting of Libra, Adam, and Peter, represented by Flynn, convened on December 10, 2018, to elect a new board of directors. The new board consisted of Libra, Adam, and Michael Anderson. On December 17,

2018, the new board appointed Libra as Chair and on January 11, 2019, it appointed her as President and CEO to replace Adam. Adam was appointed Executive Vice President and COO of ALP but was terminated from those roles in August 2019.

Following Adam's ouster as President and CEO, Adam commenced a proceeding seeking, *inter alia*, to invalidate ALP's newly elected board, captioned Adam Max v ALP, Inc. et al., Index No. 650618/2019. In opposition to Adam's emergency application to invalidate the board, Flynn submitted an affidavit in which he averred that Adam ran ALP "as his personal fiefdom," "mismanage[d]" ALP, and engaged in "dubious business transactions" as ALP's President. Flynn further stated that Adam acted with "unbridled greed" and sought to steal from Peter, calling Adam's actions a "classic case of 'elder abuse.'" According to Flynn, it would have been a breach of his fiduciary duty to Peter to allow Adam to continue his dominion over ALP. By order dated March 21, 2019, the court denied Adam's emergency application.

As part of Libra's efforts to undo the wrongs Adam allegedly committed while in control of ALP, Libra commenced this action and a related action captioned ALP, Inc. v Park West Gallery, Inc. et al., Index No. 153949/2019 (the "Park West action"). In the Park West action, Libra and ALP moved to

enjoin Park West Gallery, Inc. ("Park West"), from selling over 23,000 Peter Max artworks known as "Peter's Keepers," which Libra and ALP allege were wrongfully sold to Park West by Adam at fire sale prices. In support of that application, Flynn submitted an affidavit seeking the return of the Peter's Keepers to ALP and averring that Adam's transaction, if not undone, would cause "irreparable harm to Peter Max's interest in ALP." The court granted a temporary restraining order barring Park West from selling the Peter's Keepers. Park West later stipulated to a preliminary injunction pending a final determination in the Park West action.

The plaintiffs allege that in June 2019, Flynn informed ALP that he viewed Peter, and not ALP, as the rightful owner of all artwork Peter had ever created. Flynn commenced a proceeding in the guardianship court against ALP on Peter's behalf in December 2019, seeking the delivery of all of Peter's artwork and intellectual property to Flynn as Peter's property guardian, under the umbrella proceeding captioned Anonymous 1 and Anonymous 2 v Anonymous 3, Index No. 500198/2015 (the "guardianship proceeding"). In his petition, Flynn again confirms that he supported Libra's efforts to wrest control of ALP from Adam because he believed Adam and his advisors were acting improperly in many respects and were taking advantage of Peter. That proceeding remains pending.

On March 20, 2020, Adam called a shareholder meeting pursuant to BCL § 602 for the purpose of removing Libra and Anderson from the board. On March 30, 2020, Adam issued a further demand for a meeting pursuant to BCL § 603 "for the election of directors."

After this court directed Adam to turn over a purported voting agreement between Adam and Flynn, it was revealed that prior to Adam's calling for a special meeting, on March 13, 2020, Adam and Flynn did, in fact, enter into a written shareholders' agreement. The agreement and attached settlement agreement between Flynn, as Peter's representative, and Adam provides that, in exchange for Flynn's vote to remove Libra and Anderson from ALP's board and make Adam President and CEO, ALP, under Adam's control, would surrender all intellectual property rights, ALP's website and social media accounts, approximately 1,000 one-of-a-kind artworks allegedly valued at over \$70 million, and 60% of ALP's other inventory to Peter Max in the guardianship proceeding. Flynn further agreed to discontinue his proceeding claiming ownership of all of Peter's artwork, not to oppose the termination of ALP's pending actions against Adam's co-defendants in this matter, and to retain defendant Lawrence Moskowitz and his accounting firm to consult with ALP and Flynn to obtain additional insurance funds resulting from the destruction of artworks at ALP's New Jersey warehouse during

Superstorm Sandy. Adam further agreed to not object to Flynn's fees request in the guardianship proceeding.

On May 5, 2020, Adam noticed a special meeting of ALP's shareholders to be held on May 29, 2020. The instant motions ensued.

### III. DISCUSSION

A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing." 1234 Broadway LLC v West Side SRO Law Project, 86 AD3d 18, 23 (1<sup>st</sup> Dept 2011). A preliminary injunction may only be granted where the party seeking the injunction demonstrates, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor. See CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839 (2005); Aetna Ins. Co. v Capasso, 75 NY2d 860 (1990). If any one of these three requirements are not satisfied, the application must be denied. See Faberge Intl. v Di Pino, 109 AD2d 235 (1<sup>st</sup> Dept 1985).

In support of their motion, the plaintiffs submit, *inter alia*, the affidavits of Libra Max, Flynn's previous affidavits

in support of Libra and ALP's prior applications, as described above, underlying documents related to Peter's guardianship, and the verified pleadings in this case. The court also considers the agreement between Adam and Flynn submitted pursuant to this court's May 27, 2020 order. These submissions establish the plaintiffs' entitlement to a preliminary injunction.

A. Plaintiffs' Likelihood of Success on the Merits

The plaintiffs' submissions demonstrate a likelihood of success on the merits on at least some of their underlying claims against Adam. In this action, the plaintiffs have stated a claim against Adam sounding in breach of fiduciary duty. They further seek (i) a declaration that the voting agreement between Adam and Flynn is null and void and (ii) to remove Adam from the board of ALP for cause and enjoin him from being re-elected as a corporate officer or director.

The plaintiffs' submissions have demonstrated a likelihood that Adam breached his fiduciary duties to ALP by, *inter alia*, 1) causing ALP's insurance coverage to lapse, 2) violating a resolution by ALP's board of directors by making \$4.8 million in illegal payments to an unlicensed insurance adjuster, Lawrence Moskowitz, a defendant in this action who is also alleged to have conspired with Adam to divert ALP's assets, and 3) again

violating the board resolution by selling ALP's most valuable assets without approval. The submissions regarding Adam's alleged breaches of fiduciary duty also establish a likelihood of success on the plaintiffs' cause of action seeking to remove Adam from the board of directors for cause and to enjoin him from serving as director or officer pursuant to BCL §§ 706(d) and 716(c).

The plaintiffs' submissions as to their claim that the voting agreement between Adam and Flynn should be declared void for illegality further demonstrate their entitlement to a preliminary injunction. Where a contemplated action is so far opposed to the true interests of the corporation that it can be inferred that no one acting is motivated by an honest desire to preserve the interests of the corporation, but rather must be acting with an intent to serve an outside purpose, the court shall intervene. See Gamble v Queens Cty. Water Co., 123 NY 91 (1890). Moreover, where a majority of stock owners seek to use their power to prejudice the minority owners of a corporation, a court may "enjoin all contracts or conspiracies of the kind complained of." See Davidson v Am. Blower Co., 243 F. 167, 170 (2<sup>nd</sup> Cir. 1917). Here, the terms of the voting agreement between Adam and Flynn suggest that Adam has sought to trade ALP's most valuable assets in order to regain his position as President of ALP to oust Libra from ALP and resume his alleged improper

diversion of corporate assets, including by rehiring defendant Moskowitz for the same work the plaintiffs claim he improperly profited from in this action. For his part, Flynn states that the agreement is beneficial to Peter insofar as it will enable Flynn to fund Peter's guardianship, which is allegedly being starved by Libra. However, it remains wholly unclear how Flynn's agreement to reinstate the very individual he accused of gross misconduct and breach of fiduciary duty a short time ago, expressly permit that individual to engage in the same suspect activities as before, and transfer ALP's most valuable assets is in any way beneficial to ALP or its shareholders generally. Thus, the plaintiffs demonstrate a likelihood of success on their cause of action seeking to invalidate the voting agreement.

B. Irreparable Harm to the Plaintiffs and a Balance of the Equities in Their Favor

The plaintiffs have also demonstrated that they will be irreparably harmed absent an injunction. As discussed above, pursuant to the terms of the voting agreement between Adam and Flynn, should the shareholders' meeting be permitted to go forward, Adam would allow a significant amounts of ALP's inventory and other assets, including all intellectual property in Peter's artworks, to be transferred in exchange for a direct benefit to himself and his associates. This would not only harm

ALP by again permitting Adam to transfer significant amounts of ALP's assets for minimal consideration, but also Libra, who would again be shut out from ALP's financial dealings and see her interest in ALP reduced in value. Moreover, as the voting agreement contemplates Adam discontinuing this action against those who allegedly conspired with him to divert ALP's assets, it would effectively deprive ALP of any ability to recover both the artworks that Adam allegedly sold to Park West at significantly reduced prices and the millions in allegedly improper payments Adam made to his associates.

The plaintiffs have also demonstrated a balancing of the equities in their favor. Absent an injunction, ALP would again be run by Adam, who the plaintiffs allege has looted ALP. Adam's control would be acquired pursuant to a voting agreement that is both potentially illegal and voidable, and which agrees to surrender significant portions of ALP's rights to artwork and other assets in exchange for benefits to Adam and his associates, rather than ALP and its shareholders generally. This outweighs the harm to Adam or Flynn that may result upon the granting of preliminary relief.

C. Adam's Cross-Motion to Dismiss

Adam seeks to dismiss this action as against him, arguing

that because the plaintiff failed to seek leave of court to serve the second amended complaint pursuant to CPLR 1003, this court does not have jurisdiction over him. However, the plaintiffs did seek leave of court to serve the second amended complaint. In their proposed order to show cause, the plaintiffs sought an order that service of a copy of the order to show cause, together with the papers upon which it was granted, be deemed effective service of process not only for purposes of the motion but also with regard to the attached summons and amended complaint adding Libra as a plaintiff and Adam as a defendant. This court granted that application in its May 28, 2020 order and supplemental order dated June 3, 2020.

#### IV. CONCLUSION

Accordingly, it is hereby,

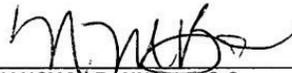
ORDERED that the plaintiffs' motion seeking a preliminary injunction pursuant to CPLR 6301 is granted to the extent that the defendant Adam Max and nonparty Lawrence J. Flynn, Esq., are hereby enjoined from commencing a shareholders' meeting pursuant to BCL § 603(a) for the purpose of restoring Adam Max as President and CEO of ALP, Inc., and the defendant Adam Max is enjoined from serving or acting as an officer or director of ALP, Inc., until further order of this court; and it is further

ORDERED that Adam Max's cross-motion is denied in its entirety; and it is further

ORDERED that the plaintiffs shall serve a copy of this order upon nonparty Lawrence J. Flynn, Esq., within 10 days.

This constitutes the Decision and Order of the court.

Dated: June 11, 2021

  
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NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**