0SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

- X

PETER LENGYEL-FUSHIMI

Plaintiff,

v.

ANTHONY BELLIS, ZACHARY KINNEY, and
KINGS COUNTY BREWERS COLLECTIVE, LLC

Defendants.

- X

BRIEF MEMORANDUM OF LAW IN SUPPORT TO MOTION TO REARGUE PURSUANT TO CPLR §2221(d)(2) and for a **TRO PURSUANT TO CPLR §6301**

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SUMMARY OF ARGUMENT and FACTS

Defendants move pursuant to CPLR §2221(d)(2) to reargue the decision of the Court on July 15, 2021 (NYSCEF Doc. 20; the "Decision" Exhibit "A"[1]) that granted in part the plaintiff's injunction based on a misapprehension of Section 10.1 of the Operating Agreement ("OA" Exhibit "B") which is in conflict with the rest of the document-- although this is a Pyrrhic victory for Plaintiff at best. The effect is to change nothing, except to make Plaintiff a Class "A" member while removing most of the other 18 Class C and one Class B investors (and their funds) since all members did not approve the investments. This invalidates 7 years of tax filings and causes other major problems with the SLA and TTAB and lenders, since the decision conflicts with itself and with the conduct of the Class "A" Members that make up the parties in this action. This is throwing out the wheat to save the chaff, is inequitable and improper as a matter of law.

Thankfully, the Court's reasoning in granting the injunctive relief was clearly flawed and is easily remedied: since the Decision identified only Plaintiff's loss of the ability to manage and operate the company as the "immediate and irreparable harm" required to satisfy the second prong for injunctive relief (Ex. "A" Page 5), the injunctive relief immediately fails as a matter of law and must be reversed and vacated. The Court failed to consider Section 4.3, which allows the majority of the Class A to remove Plaintiff as an officer/manager/employee, which was done officially in April 2021 after Plaintiff left the company in December 2020. (Ex. "B" **"Officers shall serve at the pleasure of the Class A Members"**. (OA, Section 4.3))

[1] This Decision actually denies the Plaintiff's relief on Page 6, but it seems this is an error by the Court corrected by NYSCEF Doc. 21.

A temporary restraining order on the terms of the Decision, *pendente lite* pursuant to CPLR §6301, including any enforcement of the Decision, should be entered until this is resolved as it prejudices the company and its members and causes confusion.

The Court must hear re-argument and reverse its decision, vacating the relief excepting as to the status of Plaintiff as a Class "A" Member – while also incorrect, that ruling is not wrong as a matter of law. Since the OA was only signed by three members on January 14, 2014 there are only three members of entity Kings County Brewers Collective LLC ("KCBC") – and those members hold the only assigned equity in the company of 34.6% divided by three, or 11.53% each. The rest of the equity is not issued and not assigned and there has never been a writing that formally amended the OA to allow for the Class B and Class C members into the company. By failing to do this, even if they all agree, the Decision necessarily causes the removal from KCBC of all members excepting the Plaintiff, PETER LENGYEL-FUSHIMI ("LENGYEL") and the Defendants, ANTHONY BELLIS and ZACHARY KINNEY. This also has tax implications (Exhibit "C") and requires 7 years of amendments. This further causes serious harm as the LLC has to refund the investments of these non-members it has held for years, likely with interest, or face litigation as a result of the failure to take these actions. The Court surely did not intend these outcomes and must reconsider its Decision, since 10.1 destroys the company while a modification to it allowing for a vote maintains the status quo and allows the LLC to continue in operation.

Furthermore, even if the injunctive relief is "granted" to Plaintiff, since the Court has ruled that matters in the regular course of business, including management of day to day operation is by vote of the majority of the Class A, pursuant to Article 4 and Article 6 of the same OA, then Mr. LENGYEL is restored as a "Class A Member" but is a lame duck with no rights to make decisions, including whether he is allowed to be employed or act as an officer, or receive a salary or draw. This

renders the following areas of "relief" moot: b); d) b., c., d., e.,;[2] g) as moot (Original Order, Exhibit "D", NYSCEF Doc. 28). The Court cannot Order that KCBC has to hire Petitioner, that goes against the terms of the OA that it has now upheld as not for interpretation.

Clearly Mr. LENGYEL can be removed as an officer by the majority (Section 4.3) or employee and 4.1 and 6.1) as employment is a day to day and regular business decision. This "relief" that causes a tsunami of harm to the entity but provides no actual change to the status quo at this time.

This action should have been dismissed per the cross-motion, which was summarily denied and seemingly not considered. Moreover, the action is improperly filed and the Court failed to take notice of these arguments or to rule on these essential points of procedural law, which also bars the relief sought by the Plaintiff as it is not clear whether this is a direct, derivative or some combination of both, without the proper procedures of the LLCL being followed for such claims.

LEGAL STANDARD

The elements for a motion to reargue are codified in CPLR §2221(d)(2), which states:

"A motion for leave to reargue: (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion"

--CPLR §2221(d)(2)

In the instant action, it seems clear that the Court overlooked or misapprehended the facts and reason mistakenly arrived at its earlier decision without full review of the documentary evidence, specifically the Operating Agreement, the affidavits and the overall effect such ruling would have in destroying the status quo of KCBC. (See, Foley v. Roche, *supra,* E.W. Howell Co. Inc. v. S.A.F. LaSala Corp., 828 N.Y.S.2d 212 (2nd Dept. 2007); and, generally, CPLR 2221(d).).

In regards to the TRO, **CPLR §6301** empowers this Court to grant a preliminary injunction where it "appears that the [non-moving party] threatens or is about to do, or is doing... an act in

[2] Plaintiff used letters twice in the OSC

violation of the [moving party's] rights." (See CPLR §6301). This can be granted without notice if the injury is "immediate and irreparable, and loss or damages will result" without such restraint. (See CPLR §6301 (a).)

The Court should enter the TRO allowing the *status quo* to continue as it has for the last 9 months since Petitioner left the LLC. The Decision causes serious turmoil, and ironically in itself may cause the "imminent harm" that Petitioner is worried about, as is set forth herein – perhaps most importantly that other than the first signatories of the OA on April 20, 2015 (John Kinney, Erin Kinney and Scott Davis and Andrea Davis) all subsequent subscriptions are void as those initial shareholders did not also sign the subsequent consents, so the status of 17 of 19 Class C and the one Class B members are in question – as are the equity holdings of the Class A and the unassigned interests, which would make up a majority of the equity.

ARGUMENT

A. THE DECISION MUST BE REVERSED TO ALLOW AMENDMENT OF THE OPERATING AGREEMENT ON MAJORITY CONSENT

Respectfully, it was in error for the Court to grant the motion of Plaintiff as it is in conflict with the conduct of the parties as Class A members and the rest of the OA, and the Decision fails to provide any specifics for how it is expected that this declaratory ruling is being made, nor that it is a declaratory ruling or whether this relief is temporary or permanent.

1. Article 4 and Article 6 Have Provisions that Render the Relief Moot

> **"In the event of a dispute between Members, final determination shall be made by a vote of the majority of the Class A Members"** (OA Section 4.1)

> **"Unless otherwise stated in this Agreement or under New York law, the vote of the Class A Members holding a majority of the Class A Membership Interests shall be required to approve or carry an action"**(OA Section 6.1)

The Decision conflicts with itself the same way the clauses in the Operating Agreement are in conflict. The Court cannot uphold Section 10.1 of the Operating Agreement as set in stone while not

giving the same credence to Article 4 Section 4.1 and 4.3 and Article 6, Section 6.1 which operate to the contrary. Even if the Court upholds 10.1 as unique, Plaintiff cannot get any relief except to be a figurehead "Class A" Member status, which changes nothing practically for him.

The Court seemingly has issued two a declaratory judgment on the merits: 1) that the majority of the Class A has the right to vote and make all decisions in the course of regular business and the day to day operations; 2) that the OA cannot be amended unless all Members sign and agree.

If this is accurate, then Plaintiff is in largely the same position he was in without the "relief." The clauses relating to management of KCBC in Article 4, at Section 4.1 ("Management") allows that in the **"event of a dispute between Members, final determination shall be made by a vote of the majority of the Class A Members".** Clearly, this is a dispute and the language conflicts with that of Section 10.1. The Court gives no reason why 10.1 – an odd duck of a clause – should be read to have more prominence over Section 4.1 (or 4.3 or 6.1).

2/3 of the Class A Members have voted and stated that believe that they can amend the Operating Agreement and remove Plaintiff, Mr. LENGYEL. 1/3 says otherwise. Clearly, the 2/3 vote is enough to prevail per Article 4 or Article 6. The Court cannot override this clause because it finds it inconvenient or unfair in favor of Section 10.1 – but even if it does, Plaintiff gets no real relief.

There is no real effect to the "injunction".

"Officers shall serve at the pleasure of the Class A Members". (OA, Section 4.3)

Mr. LENGYEL was terminated by 2/3 of the Class A Members in April 2021 by letter referencing that section (NYSCEF Doc. 26) If he does not like this, it is a "dispute" and he loses per the majority vote at Section 4.1 (above); if this is not sufficient, LLCL §414 allows this to occur.

The Court cannot override these sections and compel KCBC to allow Mr. LENGYEL to manage or participate in "a business he started which cannot be quantified" (Decision at Page 5) – he is not going to be an employee, manager or participate as an officer. Since he is not a manager, he

does not satisfy the second prong of "irreparable harm" since monetary relief would be sufficient. -- **therefore, the TRO/injunction cannot be granted to Plaintiff since this is the sole reason given by the Court in its decision to grant the injunctive relief (page 5).**

Furthermore, there are the clauses relating to all other corporate actions being carried by a majority of the Class A in Article 6.1 ("Members and Voting Rights") which gives the right to the Class A members for all **"day to day operations".** If not already covered by Section 4.3's provisions regarding termination of an officer, employment of personnel is a day to day operational decision. Mr. LENGYEL does not work at KCBC by vote of 2/3 of the Class A members.

The balance of the equities does not "favor[s] the Plaintiff" (Page 6, Decision) nor does that short sentence explain why this would be true legally. There is no chance Plaintiff can prevail here, and if he does, it is by destroying his Company and causing the loss of the Class B and C members – truly a Judgment of King Solomon[3] whereby Mr. LENGYEL has shown his interest is greater than that of the LLC at large, despite the likelihood that this decision will destroy the LLC that would pay dividends to him while he literally did nothing, regardless of the membership class.

At the decision and injunction can only restore Mr. LENGYEL as a Class A member, without any right to manage, be employed, act as an officer or otherwise – he may simply cast a vote against the 2/3 Class A. This is a fool's errand.

The Court's reasoning for granting the TRO and injunctive relief has nearly no actual effect except to cause chaos – and "relief" that ironically threatens to decimate this entity imminently with the threat of Mr. Lengyel, who left the Company in December 2020 due to his behavior.

2. The Court's Interpretation of Article 10 Is Untenable; It Must Be Modified Or The LLC Will Be Destroyed

[3] 1 Kings 3:16-28 CEV

The Court has effectively issued a declaratory judgment that Article 10, Section 10.1 does not allow for amendment of the Operating Agreement without written consent of all members. This seems to be a decision on the merits that goes not to the TRO but to the claims in the Complaint directly, If this is not modified, this permanently damages the entity and goes against over 7 years of the operation of KCBC. That Article 10.1 was a poorly drafted standard "no modification" clause that requires all changes to be in writing, with a clumsy addition that does not fit the rest of the agreement. Unfortunately, like many small and closely-held companies, KCBC did not follow this clause for the last 7 years, and has done a number of things without ever amending the OA in writing.

"Where an operating agreement … does not address certain topics, a limited liability company is bound by the default requirements set forth in the Limited Liability Company Law." Matter of 1545 Ocean Ave. LLC, 72 AD3d 121, 129 [2d Dept 2010]). Defendants-Movants argue that the specific situation here is not addressed, because it is in opposition to the "dispute" language in Article 4 (4.1) and the Article 6 language about majority of Class A votes. Since the LLCL would allow for a majority vote, and LLCL §414 allows removal of a manager by vote (similar to Article 4.3 of the OA) and Article 10.1 is not clear, the interpretation should revert back to the LLCL.

In the absence of fraud or the "circumstances warranting the equitable intervention, it is the duty of a court to enforce rather than reform the bargain struck" (Grace v. Nappa, 46 NY2d 560, 565 [1979]). If the Court abides by this, then while the rest of the terms in the OA are clear, it must intervene to prevent the harmful outcome that will occur with the Decision as to Section 10.1. Even when an OA is expressly drafted to require certain actions, Courts have found such clauses to be unwieldy and created a new result (Ross v. Nelson 54 Ad3d 258 [1st Dept. 2008]) when the language allowed for certain action (i.e. voting by majority) in other areas but was not clear as to the disputed area. That is the situation here – it cannot be believed that an OA where only a majority vote is needed for all other decisions requires the vote of over 20 people to make any change to the OA. If the Court

modifies its decision as to the member status only of Petitioner – nothing changes except he has a vote – but his removal as a manager/officer also terminates the Court's decision as to the second prong required for injunctive relief due to Section 4.3 – thus, he fails to demonstrate **monetary award alone will not be adequate compensation**. (See, Walsh v. Design Concepts, Ltd. 221 A.D. 2d 454 (2nd Dept, 1995); McLaughlin, Piven, Vogel v. W.J. Nolan & Co., 114 A.D.2d 165 (2nd Dept 1986).

The only correct outcome based on the facts and law here is to modify the meaning of Section 10.1 to mean a majority of the Class A (or even all of the Class A) since it is in conflict with the terms of the agreement and the conduct of the LLC since 2014, or to read it as being in harmony with Article 4 and Article 6, and just worded awkwardly as to the required voting needed to amend.

If the Court does not reconsider its Decision, the effects are dire. There is no further writing by the members until the FAROA was drafted in 2021. That means that at a minimum:

- The Class "A" holds only 34.6% total equity collectively in equal thirds at 11.53%;
- The other 19 (some of which are couples) investors that now make up the Class B and Class C were taken on as an *ultra vires* act and are not members of KCBC;
- The substantial monetary investment of Class B and Class C must be returned, likely with interest and perhaps other costs, fees and damages;
- Additional lawsuits against KCBC (including Mr. LENGYEL) are likely;
- The "treasury shares" are back in effect and 42.3% of the equity is "Non-Issued Units"
- The remaining 23.10% is held for Class B and Class C but is not issued;
- The tax returns are wrong from 2014-2020 and must be amended;

The practical effect of this declaratory ruling is to cause the company to fundamentally be changed since at the time of the signing of the "Original Operating Agreement" – which seems to be printed from the internet – there were only three members who each held partial equity in the LLC, and the majority of the equity resides in non-issued units. This cannot be the intention of the Court. The tax returns for 2014 initially showed 33.3% for each of the Class A – not the bizarre tangle of equity shown on the OA; that changed in 2015 to admit the Class B and C and has been mostly the same since 2016 when other Class C members were admitted.

Does the Court really intend to upend a profitable and successful LLC by shoehorning a throw-away clause from an internet document that is poorly drafted and does not fit with the rest of the document and that is in complete conflict with the conduct of the actual members for 7 years?

In summary, the "relief" as granted practically has no effect except to cause further turmoil and chaos. Making Mr. LENGYEL a Class A member changes nothing for him from when he was a Class "D" member except for the letter itself.

There is no likelihood of success on the merits. The balance of equities favors KCBC over Mr. LENGYEL individually and he cannot demonstrate any harm. The Court cannot compel KCBC to accept Mr. LENGYEL as an employee or officer since it is the OA that allows the Court to rule he must be a Class A member—and since he cannot operate as a manager, he does not have the right to the injunctive relief sought.

Respectfully, the Court misapprehended or overlooked the substantial documentary evidence. Upon review of the exhibits and documents resubmitted with this motion the Court will not only realize its error, but as a matter of law must also grant the motion to dismiss.

B. Petitioner Cannot Get Injunctive Relief as a Matter of Law

In the case at bar, the Plaintiff cannot meet any of these requirements and thus the relief must be denied. There is no action that is threatened or about to occur. All of the actions complained about have already occurred, and Plaintiff continues to hold the exact amount of equity he had before the amendments. If the Court rules on the merits that Section 10.1 cannot be interpreted, that does not require an injunction.

In fact, **Defendants would suffer more than the Plaintiff would absent the injunction**, the greater harm is imposed on the Defendants by the granting injunction (Fisher v. Deitsch, 168 AD2d 599 [2d Dept 1990]) and therefore it must not be granted. The balance of equities is in favor of the Defendants since granting the injunction will not cause any actual or permanent harm to

Plaintiff, but is likely to permanently damage the Defendants and the LLC. Therefore, the TRO must be granted *pendente lite*.

C. The Defendant's Cross-Motion to Dismiss Should Have Been Granted

Where a defendant seeks to dismiss a Verified Complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Goshen v. Mutual Life Ins. Co. of NY, 98 NY2d 314, 326 (2002); Leon v. Martinez, 84 NY2d 83, 88, [1994]. It seems the Motion to Dismiss was not read by the Court at all, as much of it must be granted as a matter of law. Clearly the CPLR §6301 relief is unavailable, and the Compliant otherwise cannot survive.

The Court must at least partially dismiss "Count Two: Breach of Contract" since there can not be any dispute that the original version of the OA, particularly the SAROA, allows for the Plaintiff to be removed as a Managing Member/Officer and employee, by vote of the majority of the Class "A"; thus, there cannot be any breach of contract claimed.

As for "Count Three: Breach of the Implied Covenant of Good Faith and Fair Dealing". This also must be dismissed as duplicative and unavailable. "For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract, or to withhold its benefits from the plaintiff." (Aventine Inv. Mgmt., Inc. v Canadian Imperial Bank of Commerce, 265 AD2d 513, 514 [2d Dept 1999]). Otherwise, this is deemed to be duplicative with the breach of contract claim and cannot be cross-pleaded. (MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287, 297 [1st Dept 2011].) This claim cannot be maintained where "it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract." (MBIA Ins. Corp. v Merrill Lynch, 81 AD3d 419, 419-420 [1st Dept 2011]. Furthermore, "no obligation can be implied that 'would be inconsistent with

other terms of the contractual relationship'" (Dalton v Educational Testing Serv., 87 NY2d 384 at 389 [1995], quoting Murphy v American Home Prods. Corp., 58 NY2d 293, 304 [1st Dept. 1993]).

Clearly, it is inconsistent with the Class "A" majority voting rights if Plaintiff can seek damages and recission for decisions he is not happy with. The claim does not provide any actual facts and such is in conflict with the LLC operating agreements; it is also duplicative of the breach of contract claim.

Plaintiff's claim under LLCL §409 "Count Four" is duplicative of "Count Five: Breach of Fiduciary Duty" since LLCL 409 is just a statutory statement of fiduciary duty (see, Nathanson v. Nathanson, 20 AD3d 403 [2nd Dept. 2005]). This is not a valid cause of action even if it were not duplicative. The individual Defendants, as the Managing Members of the LLC (although not named as such, and this action is not styled as a derivative action, which perhaps the Court will forgive and allow amendment of in the future) do not deny their obligations under LLCL 409. At least one of these must be dismissed.

CONCLUSION

WHEREFORE, the Court is asked to issue an Order:

A. Granting reargument and reconsidering Motion Sequence 1 pursuant to CPLR §2221(d)(2); and,
B. Reversing its prior Decision as to the injunctive relief sought as such is not available to the Plaintiff as a matter of law and vacating any such Order; in the alternative,
C. Modifying and clarifying the declaratory rulings and their effects, and/or vacating any other "relief" granted; AND,
D. Issuing a TRO pursuant to CPLR §6301 until such new Order is granted to avoid harm and confusion to the LLC and its members;
E. Dismissing in whole or part Counts 2, 3, 4 and 5 of the Complaint;
F. Such other relief as the Court may deem appropriate.

Dated: July 22, 2021
New York, New York

____/s_____
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Certification: This Brief is under 15 pages of text and under 5,000 words in total, including all tables and captions. It is written in Garamond 12 point type.

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CERTIFICATION PURSUANT TO 22 N.Y.C.R.R. §130-1.1a

Kevin Sean O'Donoghue, hereby certifies that, pursuant to 22 N.Y.C.R.R. §130-1.1a, the foregoing is not frivolous nor frivolously presented.

Dated: July 22, 2021
New York, New York

_____/s_____
Kevin O'Donoghue

PLEASE TAKE NOTICE

* *that the within is a true copy of a entered in the office of the clerk of the within named Court on .*
that a of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court at