SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

PETER LENGYEL-FUSHIMI, Plaintiff, –against– ANTHONY BELLIS, ZACHARY KINNEY, and KINGS COUNTY BREWERS COLLECTIVE, LLC, Defendants.	Index No.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
ORDER TO SHOW CAUSE

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Plaintiff Peter Lengyel-Fushimi respectfully submits this memorandum of law in support of his Order to Show Cause seeking a temporary restraining order and preliminary injunction to preserve the status quo and prevent Defendants – his business partners in Defendant Kings County Brewers Collective, LLC ("KCBC" or the "Company"), a brewery – from excluding Plaintiff from Company management in blatant violation of its Operating Agreement, and from effectively squeezing Plaintiff out of the Company he co-founded, co-managed, and co-owns.

Though KCBC has always been, and remains, a striking success, over the past several months, the Company's three managing members – Plaintiff, and Defendants Anthony Bellis and Zachary Kinney – have sharply disagreed over employee hiring and employee management, as well as over KCBC's strategy for future growth. Most recently, Defendants have seized on these disagreements as an opportunity to disrupt the status quo and squeeze out Plaintiff, who holds a significant minority stake, out of a Company valued at $7.5 million, to their advantage.

At the heart of this case is section 10.1 of KCBC's Operating Agreement, which permits its modification only via the unanimous written consent of all of KCBC's members. Section 10.1 provides that the Agreement "shall not be modified or amended **in any respect** except by a written instrument executed by all of the Members" – namely, KCBC's 24 non-managing members holding, together, 24 percent of KCBC, plus its three managing members in the persons of Plaintiff Lengyel-Fushimi and Defendants Bellis and Kinney, each of whom has a 25.33 stake in the Company.

In late April 2021, without obtaining the consent of Lengyel-Fushimi or the 24 non-managing members, Bellis and Kinney unilaterally "amended" – or, rather, rewrote – the Operating Agreement, to suit their personal needs. As part of this rewriting, they have purported to downgrade Lengyel-Fushimi's membership to that of a "Class D" member, stripping him of

his management rights, cutting off his access to the Company's credit cards, management tools, and its books and records, terminating him from his position as a Company officer, and freezing his right to transfer his shares. Having cut off Plaintiff from his only source of income, Defendants then "offered" to purchase Plaintiff's 25.33 stake in KCBC at a knockdown price.

Defendants' objective is apparent. On an April 5, 2021 conference call, responding to Lengyel-Fushimi's accusation that "you two are trying to out me from this Company," Bellis responded in no uncertain terms, "that's true, I mean, that's clear," with Kinney seconding Bellis with a "yep." Thus thrown to the proverbial curb, Lengyel-Fushimi brings this action.

FACTS

Lengyel-Fushimi Leaves His Day Job to Start KCBC with Defendants

In 2011, Lengyel-Fushimi, then 37 years-old, was employed as a molecular biologist. However, his real passion, to which he devoted all his spare time, was craft beer. In 2013, deciding that he wanted to dedicate his life to beer, Lengyel-Fushimi took the plunge, left his six-figure position, and started working a series of low-paying jobs at breweries, learning the ropes of the trade – from cleaning kegs to concocting beer recipes. *See* Affidavit of Lengyel-Fushimi ("Pl. Aff.") at ¶2.

In 2012, four years before KCBC opened in Bushwick, Lengyel-Fushimi formed KCBC with his acquaintance Bellis and some other partners who have since left the Company. Kinney was brought in later. Lengyel-Fushimi, Bellis, and Kinney each made a capital contribution of $33,333. And to generate about $700,000 in startup capital, the three attracted 24 investors, mostly friends and family, all of whom became non-managing members of KCBC. *Id.* at ¶3.

KCBC is Governed by the Operating Agreement, Amendable Only Via Members' Unanimous Written Consent

In forming the LLC, the members entered into the Operating Agreement dated January 15, 2014 (the "Agreement", attached as Ex. 1 to Pl. Aff.), drafted by the Company's lawyer. Under the Agreement's section 6.1(1), each of Lengyel-Fushimi, Bellis, and Kinney are explicitly classified as "Class A Members," it being understood, under the terms of the Agreement, that other individuals would become Class B or Class C Members of the Company. Though initially granted some 11 percent, each Class A Member grew to hold 25.33 percent of the LLC's equity, for a total of 76 percent. The rest, comprising 24 percent, are held by 23 Class C members and one Class B member. Pl. Aff. at ¶4.

Class A Members, including Lengyel-Fushimi, enjoy special rights not accorded other members. Thus, under the Agreement (Pl. Aff., Ex. 1), among other things:

- Management rights are vested in Class A Members, with Section 4.1 providing that only such persons are entitled to manage "[t]he business of the Company," and Section 6.1(1) specifying that Class A Members control the Company's daily operations as follows: "Class A Members will have sole voting rights on Company day-to-day operations," and the approval of a majority of Class A Members is required "to approve or carry an action" related to management, "[u]nless otherwise stated in the Agreement."

- As for access to corporate books, under section 5.1, "[c]omplete books of account of the Company's business" are available without limitation to Class A Members, while Class B or C Members can only view such books on a more limited basis.

- Corporate banking functions are vested in Class A Members, with section 4.2 providing that the "Class A Members . . . are authorized to execute any banking resolution provided by the [banking] institution where the [bank] accounts are being set up."

- Coverage of tax obligations is provided under Section 5.1, which states that "any and all draws taken by Class A Members will be equal and sufficient to cover their tax obligations as created by this entity."

In addition, while KCBC officers, under section 4.3, are to "serve at the pleasure of the Class A Members," the Agreement's Exhibit B specifically provides that KCBC's three officers are Lengyel-Fushimi as Operating Manager, Bellis as Treasurer, and Kinney as Secretary. It was understood that Class A Members were required to perform day-to-day work at the Company. As such, as reflected in section 7.6 of the Agreement, Class A member retirement would set in only after "20 years of work." Pl. Aff. at ¶5. With regard to compensation for work performed, as also reflected in section 7.6, Class A members were to take a "draw," with such draws, pursuant to section 5.1, to be "equal and sufficient to cover their tax obligations as created by [KCBC]." Pl. Aff. at ¶6.

Finally, under section 10.1, the Agreement "shall not be modified or amended **in any respect** except by a written instrument executed by all of the Members" of the Company – of whatever class (emphasis added).

KCBC Proves a Success Despite its Managers' Disagreements

KCBC opened for business in 2016 as a brewery with a taproom, selling exclusively KCBC-branded beers. With Lengyel-Fushimi's tireless labor, focus on quality, commitment to excellence and innovation, and the signature KCBC brand art and aesthetic that he brought to the table, KCBC was an immediate, recognized success. In 2017, *New York* magazine nominated KCBC as one of five "absolute best brewery taprooms" in New York City, and the online publication *Thrillist* named it New York City's best brewery in 2018. In 2020, the Company generated almost $4 million in revenue. Enjoying consistent year-over-year double-digit growth in revenue, by 2020 KCBC was employing over 20 workers. Pl. Aff. at ¶8.

With Lengyel-Fushimi in charge of operations, the Company developed a robust online presence, an extensive distribution network, and a canning line, allowing it to sell cans of beer

off its website (as well as at its taproom) for delivery all over the U.S. and the world. The Company was thus well positioned to weather the COVID-19 pandemic. *Id.* at ¶9.

Despite the Company's success, personality and philosophical differences plagued relations between the three Class A Members, with Lengyel-Fushimi favoring a more aggressive approach to expanding KCBC's business than his two partners. Other disagreements arose over employee-related decisions, as well as over Bellis' and Kinney's willingness to tolerate disorder on Company premises, and their penchant for self-promotion. *Id.* at ¶10.

None of these disagreements impaired the Company's profitable functioning. KCBC remained and remains a successful brewery, its brand increasingly recognized around the world. As of February 2021, according to a valuation performed by the Company's CPA, KCBC was worth about $7.5 million. Contractually speaking, disagreements could not derail the day-to-day functioning of the Company, as Section 6.1(1) of the Agreement specifies that a mere "majority" of Class A Members was required "to approve or carry an action" related to management, "[u]nless otherwise stated in the Agreement." Thus, as regards day-to-day management, Bellis and Kinney were able to override Lengyel-Fushimi whenever they wanted. *Id.* at ¶11.

Disagreement did, however, create an unpleasant working environment for the three partners, who were no longer on friendly terms. By the fall of 2020, the three Class A Members were often at loggerheads and began discussing ways of engineering a business divorce. *Id.* ¶12.

In Late 2020, KCBC's Managers Discuss a Separation

At first, the three discussed a sale of KCBC. Then, discussions centered on a separation that would not involve the liquidation or sale of KCBC, including the idea of KCBC opening a second location that could be managed by one or two of the managing Members. *Id.* at ¶13.

However, in December 2020, Bellis and Kinney started pushing for Lengyel-Fushimi to leave the Company. One scenario involved Lengyel-Fushimi going off to start his own brewery in Kingston, New York, while continuing to retain his interest in KCBC as a non-managing member, and receiving a $50,000-a-year stipend for ten years, to provide him with minimal income while he would be setting up his new operation. *Id.* at ¶14.

Lengyel-Fushimi was a reluctant participant in these conversations. Leaving the Company meant foregoing his manager's $84,000 annual draw – the only source of income for his family, which included his wife and young son. (By contrast, Bellis and Kinney, both of whom could rely on income generated by their spouses, were not as wedded to draws collected from KCBC.) And, the new "plan" involved his abandonment of the brewery he had built up, in exchange for a speculative venture in an unfamiliar market, involving a long commute to Kingston. But he was willing to seriously entertain the notion to avoid a sale or liquidation of KCBC, and he felt pressured by Bellis and Kinney's growing insistence – soon escalating into outright threats – that he depart the Company. *Id.* at ¶15.

Bellis and Kinney Pressure Lengyel-Fushimi to Leave the Company and Reject any Compromise

Then, starting in late January 2021, Bellis and Kinney began to push for what was essentially an expulsion of Lengyel-Fushimi. Around this time, to avoid negatively impacting staff morale with management disagreements, Plaintiff stopped physically reporting to work at KCBC, and began working from home. However, Bellis and Kinney then stopped all communication with him about day-to-day affairs, removed him from the Company Slack channel, and created new production and packing tools, which they deliberately did not share with him. All these steps made Plaintiff's continued involvement in the Company's day-to-day operations impossible. And, as part of this push, they rejected the idea – which they had

previously entertained – of any guaranteed payment or stipend to Lengyel-Fushimi in exchange for his departure from the Company, even though such scenario would leave Lengyel-Fushimi's family, in which he is the sole breadwinner, without any income or health benefits. *Id.* at ¶16.

At the same time, in the winter of 2020, Bellis and Kinney, who had spent Company monies to pay for its expansion, began discussing the possibility of KCBC taking a Small Business Administration (SBA) loan to fund operations. It was understood among the managing members that SBA regulations required all owners of at least 20 percent equity to personally guarantee an SBA loan. Lengyel-Fushimi made clear that he was not willing to make such guarantee when his future at the Company was in serious question and he was deeply concerned about the ability of Bellis and Kinney to manage the Company without his involvement. However, Lengyel-Fushimi sought to accommodate the business by seeking to sell a part of his equity to a third party so as to bring his ownership stake to below 20 percent. *Id.* at ¶17.

After weeks of wrangling, things came to a head on April 5, 2021, during a conference call held by the partners to discuss their ongoing dispute. About 30 minutes before the scheduled call, Kinney sent out a purported meeting "agenda," "on behalf of Tony [Bellis] and" him, listing a proposed "vote to amend the KCBC Operating Agreement" to "transfer" Lengyel-Fushimi's equity to a new "Class D," which would have no management rights at all. *Id.* at ¶18.

Of course, no such move was possible under the terms of the Agreement's section 10.1, which mandates the unanimous written consent of all 27 Company members – including Lengyel-Fushimi – to amend the Agreement "in any respect."

During the conference, Lengyel-Fushimi announced that, as he had revealed to Bellis the day before, Gregor Rothfuss, the Company's sole Class B member, was interested in purchasing 5.5 percent of his equity for $420,000 so as to bring Plaintiff's ownership stake below 20 percent

and ease the way for the Company to take on an SBA loan. This solution would eliminate the only issue affecting KCBC's continued smooth operations. Pl. Aff. at ¶19.

Yet two weeks after the April 5 call, Bellis and Kinney rejected the offer. *Id*. at ¶20. This rejection was grounded in section 7.2 of the Agreement, under which a member "may not transfer Membership Interests to any other Person without the consent of all Class A Members." Yet Defendants' refusal to allow Plaintiff to transfer his shares to Rothfuss was not exercised in good faith, and lacked any legitimate business justification.

In truth, Defendants realized that, by selling only some of his units to Rothfuss, Plaintiff would still remain a member of the Company, and would be enriched by $420,000. Such an outcome would get in the way of their actual goal – that of depriving Plaintiff of all income so as to squeeze him entirely out of the Company valued at $7.5 million. Indeed, when, during the April 5 call, Lengyel-Fushimi accused his partners of "trying to out me from this Company," Bellis responded in no uncertain terms, "that's true, I mean, that's clear," and Kinney chimed in with a "yep." Pl. Aff. at ¶20.

Bellis and Kinney Seek to Radically Alter the Status Quo by Expelling Lengyel-Fushimi from KCBC and "Freezing" Members' Shares

The April 5 conference had concluded with the understanding that, by April 19, 2021, Lengyel-Fushimi would present his offer of a path forward, with Bellis and Kinney then having two weeks to respond. But no such good-faith exchange took place. *Id*. at ¶21.

On April 19, as agreed, Lengyel-Fushimi wrote to propose a sale of 5.5 percent of his shares to Rothfuss for $420,000 in cash. Bellis and Kinney, acting through their personal attorney Kevin O'Donoghue, responded by letter dated April 26, 2021 (attached as Ex. 2 to Pl. Aff.) in which they unilaterally, on their own accord, purported to announce the downgrading of Lengyel-Fushimi's Class A shares to a "Class D," non-managing status, his "termination" as an

officer of the Company, his removal from management, and the cessation of any further compensation payments to him. Bellis and Kinney attempted to accomplish these changes without bothering, under Section 10.1 of the Agreement, to obtain the consent of all members required to amend the Agreement's terms, even though, *pursuant to the terms of the Agreement*, Plaintiff is a Company officer, is a holder of Class A units, is a managing member, and is entitled to draws as compensation for his work. *Id*. at ¶22.[1]

Then, on May 10, 2021, Bellis and Kinney circulated a so-called "First Amendment to Operating Agreement" (the "First Sham Amendment") (attached as Ex. 3 to Pl. Aff.), and followed this up on May 21, 2021 with a so-called Second Amended & Restated LLC Operating Agreement of KCBC (the "Second Sham Amendment", attached as Ex. 4 to Pl. Aff., and together with the First Sham Amendment, the "Sham Amendments"). Though the Sham Amendments were designed to replace the Agreement, both Sham Amendments were signed by only two members of KCBC -- Bellis and Kinney, with Plaintiff never agreeing to these changes. And at least two non-managing members of KCBC (Jeff Lengyel and Evangelo Pefanis) objected in writing to the amendment of the Agreement. *See* Pl. Aff., Ex. 5, Ex. 6.

Pursuant to the Sham Amendments, Bellis and Kinney purported, as majority equity holders, to "modify" and replace KCBC's Agreement with a new arrangement that excludes Plaintiff by:

- Taking over KCBC's management (Pl. Aff., Ex. 3 at section 8, para. 6.1);

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[1] While under the Agreement's section 4.3, officers are to "serve at the pleasure of the Class A Members," – and presumably, may be removed by a majority of the Class A members as part of their day-to-day management functions – that provision cannot apply to the situation where specific individuals, such as Plaintiff, are named as officers of the Company in the Agreement. To remove such individuals as officers requires an amendment of the Agreement, which can only be done pursuant to the unanimous consent provision of Section 10.1.

- Downgrading Lengyel-Fushimi's Class A shares to "Class D" status (Pl. Aff., Ex. 3, p. 1);

- In connection with this downgrade, barring Lengyel-Fushimi from any management role, and denying him all the privileges of Class A membership by denying him (Pl. Aff., Ex. 3, p. 1):

  i. the right of involvement in the Company's day-to-day operations;

  ii. the right to access the Company's books and records; and

  iii. the right to receive draws sufficient to cover his tax obligations

- Under the First Sham Amendment, instituting a three-year freeze on all transfers of members' units (never mind that the non-managing members had invested about $700,000 in KCBC) (Pl. Aff., Ex. 3, section 8, para. 6.1(A)(6)), a provision that was replaced in the Second Sham Amendment with the requirement that all transfers of members' units be "subject to the consent of" Bellis and Kinney (Pl. Aff., Ex. 4, para. 8.7) – all in order to deny Plaintiff the right to sell his equity to Rothfuss.

Pl. Aff. at ¶23.

As is especially obvious from the Second Sham Amendment, Bellis and Kinney seek to entrench themselves as owners and controllers of KCBC, essentially free to run it as they please, with Lengyel Fushimi, a Company co-founder and leader, relegated to a passive, third-class role:

- Distributions shall be "made to the Members at such times and in such amounts as [Bellis and Kinney] determine[] in their sole discretion." (Pl. Aff., Ex. 4, para. 6.1)

- The Company's "management and control" is to be "vested exclusively" in Bellis and Kinney, who "shall have the exclusive right to manage the business of the Company" (Pl. Aff., Ex. 4, para. 7.1, 7.4)

- Bellis and Kinney "may charge to the Company" "all reasonable out-of-pocket [expenses] incurred" by them. (Pl. Aff., Ex. 4, para. 7.7)

- Bellis and Kinney are to be paid a "management fee" set "in the discretion of" Bellis and Kinney (Pl. Aff., Ex. 4, para. 7.10);

- "[A]ll [share] transfers shall be subject to the consent of [Bellis and Kinney] at [their] sole discretion." (Pl. Aff., Ex. 4, para. 8.7);

- The Company may be dissolved upon "the determination of [Bellis and Kinney] to dissolve" (Pl. Aff., Ex. 4, para. 9.1(a));

- Non-managing members may inspect KCBC books and records only "at reasonable times and on reasonable notice" to Bellis and Kinney, with any "accounting" to take place at the non-managing member's expense and not more "than one time per fiscal year." (Pl. Aff., Ex. 4, para. 11.1).

Further, at or about this time, Bellis and Kinney blocked Plaintiff from access to Company credit cards, cancelled his family's health insurance and Company-paid cell phone service, and announced the imminent shut down of his KCBC email account. Pl. Aff. at ¶23. And, as part of their "termination" of Plaintiff, and having deprived him of income, Bellis and Kinney, through their attorney O'Donoghue, offered to refund Lengyel-Fushimi his initial $33,333.33 investment in KCBC, in exchange for all of his equity and a release of claims (Pl. Aff., Ex. 2). This "offer" represented a shameless "squeeze out." (Ironically, it was made in violation of the invalid First Sham Amendment's "three-year freeze" clause, under which "[a]ll [m]embers' [u]nits will have a 3 year freeze before they can sell or assign their shares." Pl. Aff., Ex. 3 at section 8, para. 6.1(A)(6)). And, given that the last valuation of the Company assessed that it was worth about $7.5 million, the $33,333.33 offer for a 25.33 percent stake cannot be taken seriously. Of course, this "offer" was made with the cynical expectation that it would be accepted by a desperate Plaintiff, a man deprived of all income, and denied the right to receive draws sufficient to cover his tax obligations.

In the meantime, further reflecting Defendants' bad faith, at least one of the Company's non-managing members has been informed by Bellis and Kinney that Lengyel-Fushimi "left" or "retired" from KCBC to "focus[] on a new project" (Pl. Aff., Ex. 6) – a complete lie that obscures the obviously involuntary nature of his removal from the Company. Bellis and Kinney also apparently repeated this lie to KCBC staff. Pl. Aff. at ¶24.

Lengyel-Fushimi, his family's sole breadwinner, has been left without work, without income, without access to the Company he had built, and without any funds with which to cover his looming tax liabilities. He now brings this action, seeking, by his Order to Show Cause, a temporary restraining order and preliminary injunction preserving the KCBC status quo by (among other things):

a) Restraining Defendants from removing or attempting to remove Plaintiff as a Class A member of KCBC or as an officer of KCBC;

b) Declaring that KCBC is governed by the Agreement and that each and every provision of Agreement is valid and is in effect;

c) Declaring that the Sham Amendments, including each and every provision thereof, are invalid, void, and are of no force or effect; and

d) Restoring Plaintiff's access to all corporate credit cards issued in the name of KCBC.

ARGUMENT

A preliminary injunction is designed to accomplish what Plaintiff seeks here -- to preserve the relative positions of the parties until a trial on the merits can be held. *Nature's Best Group, Inc. v. CPC Int'l, Inc.*, 269 A.D.2d 578, 579 (2d Dep't 2000); *Heisler v. Gingras*, 238 A.D.2d 702, 703 (3d Dep't 1997). To succeed on an application for preliminary injunction, the moving party generally must show: (1) a likelihood of success on the merits; (2) danger of irreparable harm in the absence of an injunction; and (3) a balance of the equities in its favor. *See, e.g., Nobu Next Door, LLC v. Fine Arts Hous, Inc.*, 4 N.Y.3d 839, 840 (2005); *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990); *WT Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981).

Issuance of a temporary restraining order is governed by a similar standard: "A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." CPLR §§ 6301, 6313(a). To obtain a TRO, a

plaintiff must satisfactorily establish a likelihood of success on the merits, irreparable injury and a balancing of the equities in its favor. *Griffin v. King (In re Estate of Wang)*, 8 A.D.3d 10, 10 (1st Dep't 2004) (granting temporary restraining order to maintain status quo during litigation). This standard is easily satisfied by Plaintiff, a managing member and 25.33 percent share owner of the Company, who has been wrongfully excluded from KCBC.

I. Plaintiff is Likely to Succeed on the Merits in this Action

The standard for satisfying the first prong on an application for a preliminary injunction is not overly onerous; "all that must be shown is the likelihood of success; conclusive proof is not required." *Moy v. Umeki*, 10 A.D.3d 604, 605 (2d Dep't 2004). Plaintiff asserts two sets of claims, comprising five claims in total – the first set stemming from Defendants' breach of the Agreement (including a claim for declaratory judgment and a breach of contract claim), and the other set grounded in Bellis' and Kinney's bad faith actions (including a claim for breach of the implied covenant of good faith and fair dealing, a claim for violation of N.Y. LLCL § 409, and a claim for breach of fiduciary duty).

Plaintiffs' five claims are meritorious and are likely to succeed. Further, because Plaintiff seeks to simply preserve the status quo, his burden on this prong is lessened: he is "entitled to a reduced degree of proof with respect to this issue, since the denial of a preliminary injunction in this case would disturb the status quo and likely render the final judgment ineffectual." *Masjid Usman, Inc. v. Beech 140, LLC*, 68 A.D.3d 942, 943 (2d Dep't 2009); *see also Ma v. Hu*, 2009 N.Y. Misc. LEXIS 4827, at *6 (Sup. Ct. Queens County Jan. 5, 2009) ("[W]here the purpose (of a preliminary injunction) is only to preserve the status quo, the strength and clarity of plaintiff's showing in support of the application as to his or her probabilities of success in the action, are not so important") (internal citation omitted).

Indeed, the OSC seeks nothing more than the preservation of the status quo – that reality in which (among other things) the Agreement remains KCBC's undisputed corporate governance document, in which Plaintiff is acknowledged as a holder of Class "A" shares entitled to participate in Company management and as a KCBC officer, and in which Plaintiff enjoys access to corporate credit cards and books and records.

By Seeking to Exclude Plaintiff from KCBC, Defendants Breached the Company's Operating Agreement

Where, like here, an LLC operating agreement requires the unanimous consent of members to undertake some corporate action, an action attempted without such unanimous consent is invalid and results in liability for breach of contract. *See Behrend v. New Windsor Group, LLC*, 180 A.D.3d 636, 636 (2d Dep't 2020) (no transfer of membership interest occurred where the LLC's operating agreement allowed for transfers only upon the members' unanimous consent, but where such consent was lacking); *Vays v. 139 Emerson Place, LLC*, 2010 N.Y. Misc. LEXIS 2405, at *6-7 (Sup. Ct. N.Y. County Feb. 19, 2010) (breach of contract claim stated where operating agreement required defendants to obtain unanimous consent of all LLC members before involving the LLC in a development project, but where defendants failed to obtain such consent when they used LLC to acquire interest in development project.); *Advanced 23, LLC v. Chambers House Partners, LLC*, 2017 N.Y. Misc. LEXIS 5037, at *12 (Sup. Ct. N.Y. County Dec. 15, 2017) (banking-related actions taken by manager "would not be in accordance with the Operating Agreement because any amendment to the Operating Agreement, such as changing the banking requirements of Operating Agreement [], would require the unanimous consent of the Members."); *Tic Holdings v. Hr Software Acquisition Group*, 194 Misc. 2d 106, 109-110 (Sup. Ct. N.Y. County 2002) (finding attempted transfer of LLC assets void, where the

operating agreement "required the affirmative vote of its members" for such transfers, and where affirmative vote was lacking).

Courts thus grant preliminary injunctions in favor of corporate officers who, like Plaintiff, were wrongfully excluded from management as a result of corporate actions taken in violation of governing corporate documents. *See, e.g., Brenner v. Hart Systems, Inc.*, 114 A.D.2d 363, 366 (2d Dep't 1985) (granting preliminary injunction in favor of officer voted out from company in violation of the shareholder agreement's provisions on voting); *Davis v. Rondina*, 741 F. Supp. 1115, 1116 (S.D.N.Y. 1990) (finding likelihood of success on merits on the part of plaintiff minority shareholder, where majority shareholder breached shareholder agreement by interfering with plaintiff in the performance of her presidential duties and removing her from the management of the company).

Here, Plaintiff seeks a declaratory judgment declaring, principally, the Sham Amendments void, the Agreement as valid, and that he remains a Class A member of KCBC. Plaintiff's breach of contract claim is grounded in the fact that Defendants' attempt to replace the Agreement, impose the Sham Amendments, and remove him from Company management, has been undertaken in violation of the Agreement's Section 10.1, which provides that it "shall not be modified or amended **in any respect** except by a written instrument executed by all of the Members" of the Company (emphasis added).

Under the Agreement's section 6.1(1), Plaintiff was explicitly classified as a "Class A Member," with that section providing that "Class A Member Units – Consists of 34.6% of total Company Units, equally owned by Founding and Funding Members, Anthony Bellis, Peter Lengyel and Zachary Kinney." In addition, Plaintiff is a Company officer pursuant to the terms of the Agreement's Exhibit B. As regards Class A Membership, the Agreement provides that:

- "The business of the Company shall be managed by the Class A Members" (Section 4.1);
- "Class A Members will have sole voting rights on Company day to day operations" (Section 6.1(1));
- "Complete books of account of the Company's business . . . shall be kept at the Company's principal executive office and available to Class A Members." (Section 5.1);
- "Class A Members . . . are authorized to execute any banking resolution provided by the [banking] institution where the [bank] accounts are being set up." (Section 4.2);

In addition, it was understood that, as part of their management duties, Class A Members were required to work at the Company. While not explicitly spelled out in the Agreement, this understanding was reflected in section 7.6, pertaining to retirement, which provides that "Company policy on Class A Member retirement requires 20 years of work by that individual." Only at that point, as provided under Section 7.6, "[t]he retired Class A Member will no longer be required to perform any day to day work." It was further understood that, in exchange for working at KCBC, a Class A Member would be entitled to take a salary, or a "draw." This entitlement is reflected, in part, in section 7.6, which provides that upon retirement, a Class A Member "will get distributions, not draw." As for draw amount, under section 5.1, "any and all draws taken by Class A Members will be equal and sufficient to cover their tax obligations."

Yet in in effectuating the Sham Amendments that downgraded Plaintiff's Class A shares to "Class D," terminated Plaintiff as a manager and an officer of the Company, denied Plaintiff access to corporate books and records, and cut off his entitlement to any further draws, Bellis and Kinney acted unilaterally, failing to obtain the written consent of *all* KCBC members to the Sham Amendments – all in breach of section 10.1 of the Agreement.

The Sham Amendments are signed by only two members – Bellis and Kinney. Certainly Plaintiff never consented, in word – let alone in writing – to the Sham Amendments, and has no intention of consenting to them. Pl. Aff. at ¶20. And at least two other members, Jeff Lengyel and Evangelo Pefanis, wrote to Bellis and Kinney to object to the Sham Amendments and refuse their consent. Given these facts, Plaintiff is likely to succeed on the merits of his declaratory judgment claim declaring the Sham Amendments – and his attendant exclusion from Company management and termination– invalid, and will likewise be successful on his claim for breach of contract stemming from this violation of the Agreement's Section 10.1 (and other sections).

Bellis and Kinney Breached the Implied Covenant of Good Faith and Fair Dealing

New York law implies a covenant of good faith and fair dealing in all contracts, which prevents a defendant from doing anything to destroy or injure the right of the other party to receive the fruits of the contract – even when the defendant enjoys wide discretion under the contract. Thus, "even where one has an apparently unlimited right under a contract, that right may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract." *Richbell Information Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 (1st Dep't 2003); *see also Pleiades Publ., Inc. v. Springer Science + Bus. Media LLC*, 117 AD3d 636, 637 (1st Dep't 2014) (contractual discretion cannot be exercised "in such a way as to frustrate plaintiff's rights under the agreement, deprive plaintiff of the value of its [assets], or benefit itself at plaintiff's expense.").

Applying this law, the Court upheld a claim for breach of the implied duty of good faith even though defendant "had the right under the operating agreement to call for an additional capital contribution," in light of plaintiff's "allegation that [defendant] called for the additional capital contribution in bad faith and for an improper purpose." *21st Century Diamond, LLC v.*

Allfield Trading, LLC, 110 A.D.3d 615, 616 (1st Dep't 2013); *Marbo Holdings Corp. v. Fulton Capitol, LLC*, 2017 N.Y. Misc. LEXIS 3395, at *11 (Sup. Ct. N.Y. County Sept. 8, 2017) (under Delaware law, finding that "even though [party] has broad discretionary authority under the [] Operating Agreement, that broad discretion must be exercised in good faith.").

Plaintiff adequately pleads that Bellis and Kinney breached their duty of good faith and fair dealing under the Agreement by refusing to consent, under section 7.2 of the Agreement, to Plaintiff's sale of 5.5 percent of his equity to Rothfuss, one of the Company's non-managing members, for $420,000 in cash. As plead by Plaintiff, such refusal was part of Bellis and Kinney's plan, undertaken in bad faith and for an improper purpose, to squeeze Plaintiff out of the Company and force him to agree to the sale of all of his shares to Bellis and Kinney for the paltry sum of $33,333.33.

Indeed, Bellis and Kinney's bad faith colors all of their actions toward Plaintiff. Bellis and Kinney had no legitimate reason to expel Plaintiff out of the Company, with KCBC remaining profitable, valued at $7.5 million as of February 2021, and unaffected by any management deadlock, given that Bellis and Kinney could continue, pursuant to the Agreement, to manage day-to-day affairs by simple majority vote. And, Plaintiff's reluctance to personally guarantee any contemplated SBA loan (understandable, given his "partners'" threats to expel him) should not have gotten in the way of KCBC's ability to take out such loan once Lengyel-Fushimi obtained Rothfuss' agreement to purchase 5.5 percent of his equity for $420,000 in cash. That Defendants "terminated" Plaintiff and rejected his equity sale offer can only be explained by their desire to remove him entirely from KCBC via a two-step plan that is remarkable for its deviousness.

First, Defendants deprived Lengyel-Fushimi, his family's breadwinner, from all sources of income by "terminating" him as officer of the Company, cutting off his access to corporate credit cards, denying him the right to receive draws sufficient to cover his tax obligations, and rejecting his offer to generate $420,000 by selling a part of his equity.[2] Afraid of rocking the boat with the non-managing members (whose capital contribution equaled some $700,000), Bellis and Kinney have not hesitated to lie to at least one investor, and KCBC employees, by framing this expulsion as some sort of voluntary departure.

Second, having reduced Plaintiff to desperation, Bellis and Kinney – in violation of their own First Sham Amendment's "freeze" on share sales – offered to purchase all of Lengyel-Fushimi's shares for $33,333.33.

In this way, Bellis and Kinney have sought not just to isolate Plaintiff from Company management, but to eliminate him entirely as member of KCBC. At a time when KCBC's business remains promising, its brand is gaining worldwide recognition, and the Company had been valued at $7.5 million, Plaintiff's 25.33 stake looks like an increasingly attractive slice of a growing pie. To Bellis and Kinney, grabbing those shares for the bargain price of $33,333.33 would be a coup indeed.

[2] To be sure, section 7.2 of the Agreement states that "no Member, except for Class A Members or their heirs, may own individually or collectively, more than Eight (8%) percent of Company units." Plaintiff's proposed transfer of 5.5 percent of his equity to Rothfuss would have been in violation of this provision, as it would have resulted in Rothfuss, a Class B member, owning more than eight percent of KCBC. Yet this limitation was never put forth as a reason for Bellis and Kinney's rejection of Plaintiff's offer in April 2021. Nor was this an insurmountable obstacle, as the Agreement could have easily been amended to allow Rothfuss to own more than eight percent of shares.

Bellis and Kinney Breached their Fiduciary Duties and Violated N.Y. LLCL § 409

It is well-established that "managing members and members of closely held entities. . . owe fiduciary duties to each other." *Arfa v. Samir*, 2008 N.Y. Misc. LEXIS 10582, at *9 (Sup. Ct. N.Y. County Jan. 7, 2008) (citing *Salm v Feldstein,* 20 AD3d 469 (2d Dept 2005)); *Verkhoglyad v. Benimovich*, 2017 N.Y. Misc. LEXIS 3416, at *10-11 (Sup. Ct. Kings County Sept. 14, 2017) (parties' relationship was a "fiduciary" one where they were managing members and equal owners of the LLC pursuant to an operating agreement). Further, under LLC Law § 409, managers of an LLC – including Bellis and Kinney – have a statutory duty to perform their duties "in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." Under New York law, this language represents "the same fiduciary standard applied to corporate directors." *In re Die Fliedermaus LLC*, 323 B.R. 101, 110 (Bankr. S.D.N.Y. 2005).

Bellis and Kinney's attempt to squeeze out Plaintiff out of Company management – in blatant violation of the Agreement – and their denial of Plaintiff's right to sell a part of his equity for $420,000, all undertaken in bad faith and in secret from other KCBC members and staff, are classic examples of conduct undertaken in violation of managers' fiduciary obligations. *21st Century Diamond, LLC*, 110 A.D.3d at 616 (complaint "states a cognizable claim against [defendant], as majority member of [LLC], for oppression of [plaintiff], as minority member, by freezing the latter out of the business and depriving it of the benefit of its interest"); *SBE 44 Wall, LLC v. New 44 Wall St., LLC*, 2013 N.Y. Misc. LEXIS 4011, at *16-17 (Sup. Ct. N.Y. County Aug. 29, 2013) (breach of fiduciary duty claims upheld where plaintiff alleged that defendants engineered scheme to "freeze out the plaintiffs, the minority shareholders of [the LLC], without compensation. . ."); *Shatz v. Chertok*, 2019 N.Y. Misc. LEXIS 4310, at *1-2 (Sup.

Ct. N.Y. County July 30, 2019) (a "limitation on an apparently unfettered contract right may be grounded [] on the construction of the parties' fiduciary obligations . . .").

II. Plaintiff Will Suffer Irreparable Harm If Injunctive Relief is not Granted

A wrongful seizure of KCBC and the removal of Plaintiff from management is precisely the type of irreparable injury for which the preliminary injunction remedy was designed. Time and again, Courts find irreparable harm, and issue preliminary injunctions, in favor of plaintiffs finding themselves in the situation faced by Lengyel-Fushimi.

It is "well-settled" that where, as here, the harm alleged is "an opportunity for defendants to shift the balance of power and assume management and control of the corporation, [the harm alleged] may properly be viewed as irreparable injury." *Louis Foodservice Corp. v. Vouyiouklis*, 2002 N.Y. Misc. LEXIS 1490, at *12-13 (Sup. Ct. Kings County Aug. 26, 2002) (citing *Vanderminden v. Vanderminden*, 226 A.D.2d 1037, 1041 (3d Dep't 1996)). Moreover, in the circumstances found here, where Plaintiff seeks to continue enforcement of the Agreement, the "request to maintain the status quo by continuing to enforce [an] existing [] agreement through the pendency of the action is proper **even if the injury were purely monetary**." *Vanderminden*, 226 A.D.2d at 1041 (emphasis added). Likewise, just as with the Sham Amendments, irreparable harm was found, and preliminary injunctions were issued, where defendants attempted to improperly amend an operating agreement and remove plaintiff as an LLC member, and where defendants attempted to deprive plaintiff of the right to inspect the corporate books. *Matter of Madelone*, 2008 N.Y. Misc. LEXIS 462, at *20-21 (Sup. Ct. Albany County Feb. 15, 2008) ("[T]he Court concludes that restraints against amendments to [the LLC] operating agreement and the removal of petitioner as a member of [the LLC] are warranted."); *Brenner v. Hart Systems, Inc.*, 114 A.D.2d 363, 366 (2d Dep't 1985) ("[I]rreparable injury would result

from a denial of the motion because Brenner would then be voted out of office by the other shareholders and thus lose his absolute right to inspect the corporate books."); *Walker & Zanger v. Zanger*, 245 A.D.2d 144, 144 (1st Dep't 1997) (finding irreparable harm, and granting preliminary injunction barring defendants from electing directors in a manner inconsistent with a shareholder agreement and restraining the shareholders from amending the by-laws to authorize them to remove officers).

Plaintiff stands to lose much more than access to corporate books. Under this extensive precedent, irreparable harm – not compensable with monetary damages – will surely result from Bellis and Kinney's upending of KCBC's status quo in the form of their seizure of the Company to the exclusion of Plaintiff, their wrongful rewriting of the Agreement, their termination of Plaintiff and removal of Plaintiff from management, and the denial of Plaintiff's access to corporate credit cards or books and records. As is evident from the Second Sham Amendment, Bellis and Kinney intend to seize decisive control over KCBC affairs, abrogating for themselves the right to dispose of the Company as they please, reserving the right to make distributions, charge expenses to the Company, pay themselves a "management fee," decide whether members may transfer shares, and limit access to corporate books and records. Yet Lengyel-Fushimi, through his sweat and determination, was instrumental to KCBC's success to-date. A monetary award could not compensate him in the event of a successful hijacking of the Company.

III. The Balance of the Equities Favors Plaintiff

The balancing of the equities favors Plaintiff. After all, he seeks nothing more than to preserve the status quo, which had been in place until its disruption some few weeks earlier. In the OSC, Plaintiff does not seek the removal of Bellis and Kinney, who will in no way be prejudiced by having to continue abiding by the Agreement they had executed in 2014. On the

other hand, a denial of the injunction threatens Plaintiff with the loss of the Company he was instrumental in building and managing. *Vanderminden*, 226 A.D.2d at 1042 (balance of the equities favored plaintiff where defendants "would lose nothing as a result of the preliminary injunction which has the purpose of maintaining the status quo" while plaintiff risked "los[ing] control and ownership of the company."); *Nesconset ZJ 1 LLC v. Nesconset Acquisition, LLC*, 2016 N.Y. Misc. LEXIS 3628, at *28 (Sup. Ct. N.Y. County Oct. 4, 2016) (preliminary injunction "is proper to assure the efficacy of any declaratory or specific performance judgment affirming [defendants'] obligations under the agreements.").

CONCLUSION

For the reasons stated above, the Court should grant the Order to Show Cause in its entirety.

Dated: May 27, 2021
New York, NY

Respectfully submitted,

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