SUPREME COURT OF THE STATE OF NEW YORK
COUNTY WESTCHESTER

WILLIAM M. COSTELLO, individually and as a member of and suing in the right of CURIS PARTNERS LLC, Plaintiff, -against- RONALD M. MOLLOY and CURIS PARTNERS LLC, Defendants.	Index No. 51797/2021 Motion Sequence: 1

DEFENDANTS' MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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Defendants Curis Partners LLC (the "Curis Partners") and Ronald M. Molloy ("Mr. Molloy") (collectively, the "Defendants") submit this memorandum of law in opposition to Plaintiff's motion for a preliminary injunction.

PRELIMINARY STATEMENT

Plaintiff William Costello was the Chief Operating Officer of Curis Partners, a home healthcare company that was started in 2015 with just four people. These four individuals—Mr. Costello, defendant Ronald Molloy, and two others—agreed to be "working members" of the LLC. That is, each member would contribute their time and effort to the business on an ongoing basis and each would be compensated along the way with distributions from the company.

Mr. Costello worked for the company and collected these distributions for more than five years. He enrolled in the company's employee healthcare benefit plan, and he received distributions worth nearly $1 million. In 2020, however, he stopped doing any work. After Mr. Costello refused to re-engage with his responsibilities despite a plea from his colleagues, Curis Partners expelled him from the membership at the end of 2020. He responded two months later with this lawsuit.

Before the Court now is Mr. Costello's motion for a mandatory preliminary injunction in which he seeks, among other things, an order putting him back into the company. Mr. Costello has the burden of demonstrating with clear and convincing evidence that an injunction is warranted. He falls short in every respect.

To begin with, Mr. Costello is not at risk of imminent, irreparable harm because the injury about which he is concerned—his expulsion from the company—happened two months before he filed suit. Preliminary injunctions are meant to preserve the status quo pending trial, not un-do what has already been done.

In any event, Mr. Costello's loss of his minority, non-controlling interest in Curis Partners is not irreparable harm. Mr. Costello's argument otherwise relies on cases where members at risk of losing their ability to control a closely-held business obtained an injunction pending the resolution of their claims. That is not Mr. Costello's situation: he never had the ability to control or even veto Curis Partners' strategy. His interest in the company, if any, is purely financial and his harm, if any, can be remedied with money damages.

That is hardly the only flaw in Mr. Costello's motion. He has no likelihood of success on any of his claims in his lawsuit, which are premised on his assertion that he has no duties to the company yet remains entitled to receive distributions and employee healthcare benefits. This is both illogical and directly at odds with the plain language of the Operating Agreement, which in unmistakable terms provides for the expulsion of members who are terminated from the company.

Nor do the balance of equities tilt in Mr. Costello's favor. Curis Partners, a tiny business, that has had to hire staff to do the work Mr. Costello refused to do, will be disrupted if it is compelled to reinstate a member who will not work. Mr. Costello, on the other hand, will not suffer any irreparable harm if his preliminary relief is denied.

Finally, if the Court were to order Curis Partners to reinstate Mr. Costello, it should order Mr. Costello to make an undertaking sufficient to protect the Defendants from the damages they will incur as a result of the injunction.

FACTS

Curis Partners is a home healthcare company that Mr. Molloy founded in May 2015. May 6, 2021 Affidavit of Ronald M. Molloy ("Molloy Aff.") ¶ 2. Mr. Molloy invited Mr. Costello and two other individuals to join him in this business venture. *Id.* Curis Partners was a start-up, and each of the four initial members had a specific role to play in making the business work. Molloy

Aff. ¶ 3. As the Chief Operating Officer, Mr. Costello was charged with overseeing the day-to-day operations that made the business function, including managing payroll and overseeing the critical task of scheduling clinical visits to elderly and home-bound patients. Molloy Aff. ¶ 4. Mr. Molloy was the Managing Member and the business's CEO. Molloy Aff. ¶¶ 1, 5. Mr. Molloy runs the company and one of his many responsibilities is client development. Molloy Aff. ¶ 5.

The four members were joined in November 2015 by a financial partner named John Foster. Molloy Aff. ¶ 8. Unlike the four founding members, Mr. Foster was not a working member. Molloy Aff. ¶ 8. He was a financial member available to provide financial security to the company if needed. Molloy Aff. ¶ 8. Mr. Foster's interest came from Mr. Molloy's share and neither Mr. Costello nor the other two founders were diluted when Mr. Foster joined. Molloy Aff. ¶¶ 9–10.

Mr. Costello Is Paid Almost $ 1 Million for His Work for Curis Partners

The relationship among the four working members was initially a good one, and the company achieved early success. Since its inception, the company has made more than $3,204,500 in distributions to its members. Molloy Aff. ¶ 10. Mr. Costello, in particular, was paid very well for his work: to date, he has received distributions worth $984,000, including the return of his $40,000 capital contribution. Molloy Aff. ¶ 11. In the same period, Mr. Molloy received just a fraction more, $1,034,000, and Scott Petersen, one of the other members, received $949,000. Molloy Aff. ¶¶ 13–14. Consistent with Curis Partners' philosophy of making distributions in amounts commensurate with the time and effort each member contributed to the company, the remaining partner, Dr. George Stivala, who in the early stages worked only part-time for the company, made substantially less: $237,500. Molloy Aff. ¶ 14. Mr. Foster, the non-working,

financial partner, received just one distribution: $100,000 in 2019, four years after he joined. Molloy Aff. ¶ 15.

The Operating Agreement

At the time of the company's formation, the four initial members divided their interest in the business equally among themselves, but they agreed to give Mr. Molloy, as Manager, broad authority to run the company and manage its affairs. *E.g.*, Exhibit A to the May 5, 2021 Affirmation of John P. Curley ("Curley Aff.") (Compl. Ex. A, Operating Agreement § 2.5.2); *id*. at § 6.1.2(a) ("Except as otherwise stated herein, or required by law, the Manager shall make all decisions and take all actions for the Company . . .."). Some strategic actions, including merging, selling, or liquidating the business required approval by members holding at least two-thirds of the company. *Id*. at § 6.1.2(b)). At all times prior to his termination, Mr. Costello had only a 25.1% interest in the company. Curley Aff. Ex. A (Compl. Ex. B, First Amendment to the Operating Agreement, Schedule A).

Mr. Molloy also had discretion to cause Curis Partners to make distributions. The Operating Agreement required the company to make certain true-up distributions in an amount equal to each member's tax liability. *See* Curley Aff. Ex. A (Compl. Ex. A, Operating Agreement § 5.21). After that, Mr. Molloy as manager had discretion to make distributions: "[T]he Manager may make distributions at any time or from time to time to Members as determined by holders of more than 50.1% of the Percentage Interests and the Manager." Curley Aff. Ex. A (Compl. Ex. B, First Amendment to the Operating Agreement § 5.2.2).

The Expulsion Provision

The members also agreed to give Mr. Molloy the authority to expel a member who was no longer willing or able to perform work on behalf of the company. Section 11.3 of the Operating Agreement provided:

> **11.3 Incapacity and Termination of Employment.** Upon termination of employment (with or without cause) or Incapacity (a "Withdrawal Event") of a Member ("Withdrawn Member"), the Withdrawn Member shall be deemed to offer for sale (the "Withdrawal Offer") to the Company of all of the Withdrawn Member's Units whether owned of record or beneficially by the Withdrawn Member (the "Withdrawn Interest") and the Company shall be deemed to accept the Withdrawal Offer. … In exchange for the Withdrawn Interest the Company shall pay to the Withdrawn Member or its representative, in cash or pursuant to a promissory note with a maturity date of not more than five (5) years and with an interest rate equal to the applicable federal rate in effect when the Withdrawal Event occurred, an amount equal to the outstanding balance in the Withdrawn Member's Capital Account on the Withdrawal Closing Date.

Curley Aff. Ex. A (Compl. Ex. A, Operating Agreement § 11.3); *see also* Molloy Aff. ¶ 6.

This was a critical aspect of the company's organization, and Mr. Molloy specifically called this provision to the other members' attention before they signed the document because he wanted them to be aware that, as Manager, he would have the right to expel a member and the only recourse would be the return of the expelled member's capital contribution. Molloy Aff. ¶ 7.

Mr. Costello Stops Working for Curis Partners

Although the relationship among the four working members worked well in the beginning, by early 2020 it was clear that Mr. Costello was no longer interested in contributing his efforts to help the business succeed. Molloy Aff. ¶ 16. He did not show up at the office and did no work for the company between March and September of that year, forcing Curis Partners to hire another employee to handle the work Mr. Costello declined to do. *Id.* In that same timeframe, Mr. Costello

complained that Mr. Molloy had received $10,000 more than he did when Curis Partners made a distribution in July 2020. Molloy Aff. ¶ 17. Mr. Costello was the only member to object to this distribution. Molloy Aff. ¶ 18.

In September 2020, Mr. Molloy and the other working members convened a conference call to try to clear the air. Molloy Aff. ¶ 19. They offered Mr. Costello an opportunity to move forward with the company if he would re-engage with his responsibilities. Molloy Aff. ¶ 20. Mr. Costello agreed to do so, but in the weeks that followed he did nothing to change his attitude or his behavior. Molloy Aff. ¶ 21. He made no effort to come up to speed on Curis Partners' affairs and he did nothing to help the company. Molloy Aff. ¶ 22.

Curis Partners Expels Mr. Costello

Given Mr. Costello's unwillingness to fulfill his obligations (despite pleas from the other members that he do so), Curis Partners expelled Mr. Costello from the company at the end of 2020. Molloy Aff. ¶ 23. Mr. Molloy informed Mr. Costello orally of the decision on October 12, 2020 and followed the discussion with a written notice of termination on December 8, 2020. Molloy Aff. ¶ 24; Curley Aff. Ex. B (Compl. Ex. C, Notice of Termination). Under Section 11.3 of the Operating Agreement, Mr. Costello's interest in the company was deemed sold back to Curis Partners and, because Mr. Costello's capital account had a negative balance, Mr. Costello was not entitled to a payout of any kind. Molloy Aff. ¶ 25. Upon his departure from the company, Mr. Costello received a COBRA notice, but he did not elect to continue participating in Curis Partners' employee healthcare plan. Molloy Aff. ¶ 26 & Ex. A (COBRA Letter).

Effective January 1, 2021, Mr. Costello's interest in the company was re-allocated among the remaining members. Molloy Aff. ¶ 27; *see also id.* Ex. B (Feb. 11, 2021 Second Amendment to the Operating Agreement).

This Litigation

Mr. Costello sued Mr. Molloy and Curis Partners on February 17, 2021. *See* NYSCEF Doc. 1. In addition to his direct claims against the Defendants, he also asserts several derivative claims purportedly on behalf of Curis Partners against Mr. Molloy even though he did not make a derivative demand until April 28, 2021, more than two months after he filed suit. *See* Curley Aff. Ex. C.

On March 4, 2021, the Court granted in part and denied in part Mr. Costello's application for a temporary restraining order. *See* Curley Aff. Ex. D (Mar. 4, 2021 Order to Show Cause at 3). The Court entered an order directing Curis Partners not to take any action "that diminishes or otherwise adversely affects Plaintiff's rights or interest in [Curis Partners]." *Id*. at 2. Upon learning that Mr. Costello was receiving healthcare coverage from another source, the Court denied Mr. Costello's request for a TRO requiring Curis Partners to restore Mr. Costello to the company's healthcare plan. *See id*.

The Preliminary Injunction Motion

Before the Court now is Mr. Costello's motion for a mandatory preliminary injunction that would:

- require Curis Partners to restore his membership percentage and voting rights;
- require Curis Partners to provide him with access to books and records;
- prohibit Curis Partners from taking action or amending the Operating Agreement in a way that reduces his rights in the company;
- require Curis Partners to make distributions to Mr. Costello "as required by [the] Operating Agreement"; and
- require Curis Partners to restore Mr. Costello to the company's employee healthcare plan.

Discovery in the case has begun. The parties have exchanged document demands, and Mr. Costello has already received Curis Partners' financial information for 2020 and 2021. Curley Aff. ¶ 2.

ARGUMENT

Mr. Costello's motion seeks drastic and extraordinary relief—an order compelling Curis Partners to reinstate Mr. Costello—and it should be denied in all respects. Mandatory preliminary injunctions are an extreme remedy, only to be granted in "extraordinary circumstances." *SHS Baisley, LLC v. Res Land, Inc.*, 18 A.D.3d 727, 728 (2d Dep't 2005); *see also Board of Managers of Wharfside Condominium v. Nehrich*, 73 A.D.3d 822, 824 (2d Dep't 2010). To prevail, movant must demonstrate by clear and convincing evidence: "(1) the likelihood of success on the merits [of its claims], (2) irreparable injury absent a granting of the preliminary injunction and (3) a balancing of the equities in the movant's favor." *MacIntyre v. Metropolitan Life Ins. Co.*, 221 A.D.2d 602, 602 (2d Dep't 1995); *see also Greystone Staffing, Inc. v. Warner*, 106 A.D.3d 954, 954 (2d Dep't 2013).

The bar is especially high for mandatory injunctions like the one sought here. Mandatory injunctions are "extraordinary and drastic" relief and are appropriate only in "unusual circumstances where such relief is essential to maintain the status quo pending trial of the action." *Ho v. Yen*, No. 709235/2017, 2017 N.Y. Misc. LEXIS 5168, *4 (Sup. Ct. Queens Cty. Nov. 13, 2017) (citing *Matos v. City of New York*, 21 A.D.3d 936, 937 (2d Dep't 2005); *Zoller v. HSBC Mortg. Corp.*, 135 A.D.3d 933 (2d Dep't 2016)). *See also Emanuel Mizrahi, DDS, P.C. v. Angela Andretta, DMD, P.C.*, 170 A.D.3d 1120, 1123 (2d Dep't 2019); *Shake Shack Fulton St. Brooklyn, LLC v. Allied Prop. Grp., LLC*, 177 A.D.3d 924, 927 (2d Dep't 2019). "[I]njunctive relief should

be prospective and ordinarily should not be granted to operate on acts already performed." *Ho*, 2017 N.Y. Misc. LEXIS at *5 (citation omitted).

I. MR. COSTELLO IS NOT AT RISK OF IMMINENT OR IRREPARABLE HARM

Whether a movant is at risk of imminent, irreparable harm is the most important factor in determining whether to grant a preliminary injunction. *See County of Suffolk v. Givens*, 106 A.D.3d 943 (2d Dep't 2013); *Trump on the Ocean, LLC v. Ash*, 81 A.D.3d 713 (2d Dep't 2011); *Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738 (2d Dep't 2010). Mr. Costello faces neither imminent nor irreparable harm and his motion should be denied on this basis alone.

A. Mr. Costello Faces No Risk of Imminent Harm

Preliminary injunctions are meant to preserve the status quo by preventing imminent, future harm. *See Givens*, 106 A.D.3d at *943; *Trump on the Ocean*, 81 A.D.3d at 716; *Family-Friendly Media*, 74 A.D.3d at 739. Mr. Costello was expelled from Curis Partners in December 2020, but he waited until mid-February to ask the Court to compel Curis Partners to put him back into the company. "[I]njunctive relief should be prospective, and ordinarily should not be granted to operate on acts already performed." *Ho*, 2017 N.Y. Misc. LEXIS at *3 (citing *Allen v. Pollack*, 289 A.D.2d 426, 427 (2d Dep't 2001); *Flaum v. Birnbaum*, 115 A.D.2d 1004, 1006 (4th Dep't 1985)). *See also Scialdone v. Stepping Stones Assoc., L.P.*, 148 A.D.3d 950 (2d Dep't 2017) (affirming denial of plaintiff's request for a preliminary injunction after finding that plaintiff failed to show irreparable injury because plaintiff had already suffered the alleged injury). Mr. Costello's motion asks not to maintain the status quo but rather to un-do what has already been done. This is not proper grounds for a mandatory preliminary injunction. *See Ho*, 2017 N.Y. Misc. LEXIS at *3-4 (denying expelled LLC member's motion for preliminary injunction for, among other things, reinstatement to the LLC).

In the same vein, the relief Mr. Costello is seeking on this motion mirrors the ultimate relief he is seeking in this lawsuit. "The purpose of a motion for a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties." *Ho,* 2017 N.Y. Misc. LEXIS at *6-7. This is not the "extraordinary case" where the Court should award Mr. Costello, at this early stage, the ultimate relief to which he might be entitled were he to prevail at trial. *See SHS Baisley, LLC*, 18 A.D.3d at 728 (2d Dep't 2005); *see also Nehrich*, 73 A.D.3d at 824.

Mr. Costello's delay in seeking relief confirms there is no emergency here. As noted already, Mr. Costello was told in October and then again in December that he was being terminated from Curis Partners, yet he waited until mid-February to file this motion. Delay can be reason alone to deny a preliminary injunction. *Tough Traveler, Ltd. v. Outbound Prod.*, 60 F.3d 964, 968 (2d Cir. 1995) (holding that delay may "preclude the granting of preliminary injunctive relief") (citation omitted). At the very least, Mr. Costello's delay demonstrates that even he does not believe he is at risk of imminent harm. *See, e.g., Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) ("[p]reliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiff's rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action."). *See also Mercury Svc. Sys., Inc. v. Schmidt*, 50 A.D.2d 533 (1st Dep't 1975).

B. The Loss of Mr. Costello's Minority, Non-Controlling Interest Is Not Irreparable Harm

Mr. Costello's motion should also be denied because he has not, and cannot, show that he is at risk of suffering irreparable harm. An injury that can be remedied with money damages is not irreparable and not grounds for an injunction. *Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739-740 (2d Dep't 2010); *Di Fabio v. Omnipoint Commc'ns*,

Inc., 66 A.D.3d 635, 636-637 (2d Dep't 2009); *Mar v. Liquid Mgmt. Partners, LLC*, 62 A.D.3d 762, 763 (2d Dep't 2009); *Betesh v. Jemal*, 209 A.D.2d 568, 569 (2d Dep't 1994).

Mr. Costello relies on the proposition that a "loss of control of a closely held corporation" can be irreparable harm that can justify an injunction in certain cases. Pl. Br. 16. The rationale for decisions Mr. Costello cites in his brief is that members who contract for a right to participate in company decision-making could be irreparably harmed if the remaining decisionmakers altered the course of the business while the member was sidelined. *See Spivak v. Bertrand*, No. 653712/2015, 2016 WL 469639 (Sup. Ct. N.Y. Cnty. Feb. 8, 2016); *Rise Above Capitol Partners, LLC v. Long Island Fiber Exch., Inc.*, No. 41207/2009, 2010 WL 2897848 (Sup. Ct. Suffolk Cnty. July 14, 2010); s*ee also Wisdom Import Sales Co., LLC v. Labatt Brewing Co., Ltd.*, 339 F3d 101, 114 (2d Cir. 2003*)* ([t]he denial of a *controlling* interest in a corporation may constitute irreparable harm" (emphasis added)). In these circumstances, an injunction to maintain the status quo and preserve the member's ability to help determine corporate strategy might be appropriate. *See Spivak*, 2016 WL 469639 at *8 (granting movant's request to enjoin the sale of a company's assets where movant had a contractual right to unilaterally prevent such a sale).

This logic does not apply to minority, non-controlling members who, like Mr. Costello, can neither make decisions nor exercise a veto. *See Abbey v. Montedison S.p.A*, 143 Misc. 2d 72 (Sup. Ct. N.Y. Cnty. 1989). Curis Partners' Operating Agreement makes clear that Mr. Molloy, as Manager, has broad authority over the business and its affairs. *See* Curley Aff. Ex. A (Compl. Ex. A, Operating Agreement § 6.1.2(a)). The Agreement delineates only a few situations where two-thirds membership approval is needed—for example, decisions to merge or sell the business, *see id*. at 6.1.2(b)—and even then, Mr. Costello had less than the 33.1% that would have been necessary to block a decision he did not like. *See* Curley Aff. Ex. A (Compl. Ex. B, First

Amendment to the Operating Agreement, Schedule A). By contrast, in *Spivak*, on which Mr. Costello relies heavily, the movant was the Managing Partner and had further contracted for the right, despite being a minority shareholder, to unilaterally prevent the sale of the company's assets. *Spivak*, WL 469639, at *1 and *4.

Mr. Costello's alleged non-controlling membership interest in Curis Partners is monetary only and not grounds for an injunction. *Abbey v. Montedison S.p.A* illustrates the point. 143 Misc. 2d at 82. In *Abbey*, the minority shareholders of a corporation sought a preliminary injunction enjoining a tender offer. *Id* at 73. In denying the preliminary injunction, the court noted that because the minority shareholders never exercised control over the corporation, the sole value of their shares was monetary and thus easily compensable. *Id.* at 82. Like the minority shareholders in Abbey, Mr. Costello "never controlled the corporation; the value to [him of his equity interest] . . . was purely monetary." *Id.* Because the value of his equity interest is purely monetary, Mr. Costello has failed to establish a risk of irreparable injury.

All of Mr. Costello's cases are inapposite for the same reasons as *Spivak*: the movant in each case had actual participation in the management and control of the company. In *Wisdom Import*, for example, the court affirmed a finding of irreparable harm where the movant had contracted for a "minority veto" power over fundamental matters, such as the company entering or materially modifying any related-party agreements. *Wisdom Import Sales Co.*, 339 F.3d at 105. The court was explicit that control over management was key to the inquiry:

> "This is not to say that all bargained-for contractual provisions provide a basis for injunctive relief upon breach or threatened breach; such a broad holding would eviscerate the essential distinction between compensable and non-compensable harm. We hold only that the denial of bargained-for minority rights, standing alone, may constitute irreparable harm for purposes of obtaining preliminary injunctive relief *where such rights are central to preserving an agreed-upon balance of power (*e.g., *preserving the*

> *management role of the minority directors) in corporate management*."

Id. at 114 (emphasis added).

Mr. Costello's remaining cases are similarly distinguishable. *See Yemini v. Goldberg*, 60 A.D.3d 935, 936 (2d Dep't 2009) (movant had control of a 50% interest in the company); *Casita, LP v. MapleWood Equity Partners (Offshore) Ltd.*, 60 A.D.3d 488, 488 (1st Dep't 2009) (movant was the controlling shareholder with over 60% of the company's shares); *Rise Above Capitol Partners*, No. 41207/2009, 2010 WL 2897848, at *3-*4 (Sup. Ct. Suffolk Cnty. July 14, 2010) (movant managed and controlled the company, in his capacity as sole director, and absent a preliminary injunction would have lost said ability to control and manage the company); *Matter of Madelone v. Whitten*, No. 9929-2007, 18 Misc. 3d 1131(A), at *7 (Sup. Ct. Albany Cty. July 11, 2008) (movant's participation in the company was more than a pecuniary interest, instead giving him an active "role in the management and affairs of the company"); *Louis Foodservice Corp. v. Vouyiouklis*, No. 24890/02, 2002 WL 31663230, *2 (Sup. Ct. Kings Cnty. Aug. 26, 2002) (movant was one of company's two directors and shareholders).

C. Mr. Costello Cannot Show Irreparable Harm as to the Other Aspects of His Motion

Because the loss of his non-controlling interest in Curis Partners is not irreparable harm, Mr. Costello's request for a mandatory preliminary injunction reinstating him to the company should be denied. Mr. Costello has not shown a risk of imminent, irreparable harm with the respect to the other aspects of his motion, either.

He seeks an order compelling access to Curis Partners' books, but he has already received financial information for 2020 and 2021. Curley Aff. ¶ 2. And to the extent he believes he needs to see additional, relevant data he can obtain that through discovery in the normal course.

He seeks an order prohibiting Curis Partners from amending the Operating Agreement to further affect his interest in the company, but as discussed above, the Operating Agreement was amended to re-allocate Mr. Costello's interest before he initiated this lawsuit, and a preliminary injunction is not the way to un-do what has already been done. *See* Section I.A, *supra*.

He seeks an order requiring Curis Partners to make distributions "as required by [the] Operating Agreement" but this request on its face seeks a pecuniary remedy that can be addressed with money damages. *See Family-Friendly Media*, 74 A.D.3d at 740 (denying the preliminary injunction where plaintiff "failed to demonstrate that any harm it would suffer would not be compensable by money damages").

Mr. Costello argues that the failure to receive distributions is irreparable harm, but his cases do not apply to the facts of this case. For example, Curis Partners' working members' distributions have been based on each member's contribution to the company unlike the payments at issue in *Matter of Kemp* and *Chrysler*. *See Matter of Kemp & Beatley*, 64 N.Y.2d 63, 67 (1984) (movants had reasonable expectations of receiving dividends based on stock ownership); *Chrysler Corp. v. Fedders Corp.*, 63 A.D.2d 567, 569 (1st Dep't 1978) (holding that movant had established grounds for an injunction due to the "statutory and certificate of incorporation obligation entitling [movant] to . . . payment"). Mr. Costello also erroneously relies on *Feinberg*, a case that actually recognizes the compensable nature of withheld payments. *See Feinberg v. Silverberg*, No. 3120/2001, 2011 N.Y. Misc. LEXIS 4201, *10-11 ("the withholding of a salary . . . creates . . . compensable damages for any payments that have been wrongfully withheld").

The other cases cited by Mr. Costello are similarly inapposite. *See Blass v. Cuomo*, 154 A.D.2d 416 (2d Dep't 1989) (generally upholding the trial court's decision but not making a specific finding as to irreparable harm); *Gibouleau v. Society of Women Engrs.*, 127 A.D.2d 740,

741 (2d Dep't 1987) (directing defendant to continue payment of insurance premiums where movant was suffering from lymphatic cancer and "would have been unable to obtain alternate medical coverage"); *Matter of Brenner v. Goldsmith*, 114 A.D.2d 363 (2d Dep't 1985) (finding irreparable harm, not because of withheld payment, but because movant would have lost the ability to oversee the company's finances).

Finally, he seeks an order requiring Curis Partners to restore him to the employee healthcare plan. This, too, is compensable with money damages. And, as the Court has already recognized when it denied this aspect of Mr. Costello's TRO application, Mr. Costello receives healthcare benefits from another source and is not at risk of being without coverage. *See* Curley Aff. Ex. C (Mar. 4, 2021 Order to Show Cause striking healthcare from the proposed TRO).

II. MR. COSTELLO IS NOT LIKELY TO SUCCEED ON THE MERITS OF HIS CLAIMS

Even if Mr. Costello were able to establish a risk of imminent, irreparable harm, his motion should be denied because he is not likely to prevail on the merits of his claim. Preliminary injunctions are only justified where plaintiff has "establish[ed] a clear right to that relief under the law and the undisputed facts." *Radiology Assocs. of Poughkeepsie, PLLC v. Drocea*, 87 A.D.3d 1121, 1123 (2d Dep't 2011) (quoting *Omakaze Sushi Rest., Inc. v. Ngan Kam Lee*, 57 A.D.3d 497, 497 (2d Dep't 2008)).

Mr. Costello cannot make such a showing because he was duly expelled from Curis Partners in accordance with Operating Agreement, which by its terms requires the revocation of a member's interest upon the member's termination from the company:

> **11.3 Incapacity and Termination of Employment.** Upon termination of employment (with or without cause) or Incapacity (a "Withdrawal Event") of a Member ("Withdrawn Member"), the Withdrawn Member shall be deemed to offer for sale (the "Withdrawal Offer") to the Company of all of the Withdrawn Member's Units whether owned of record or beneficially by the

> Withdrawn Member (the "Withdrawn Interest") and the Company shall be deemed to accept the Withdrawal Offer. … In exchange for the Withdrawn Interest the Company shall pay to the Withdrawn Member or its representative, in cash or pursuant to a promissory note with a maturity date of not more than five (5) years and with an interest rate equal to the applicable federal rate in effect when the Withdrawal Event occurred, an amount equal to the outstanding balance in the Withdrawn Member's Capital Account on the Withdrawal Closing Date.

Curley Aff. Ex. A (Compl. Ex. A, Operating Agreement § 11.3). An expulsion clause need not include any magic words. *Garcia v. Garcia*, 187 A.D.3d 859, 862 (2d Dep't 2020) (interpreting company's operating agreement to allow for removal of a member).

Mr. Costello argues that the plain language of Section 11.3 does not apply to him because he was not an "employee" of Curis Partners. Pl. Br. at 7–8, 14. This is not a credible position. Mr. Costello received $984,000 over five years as Curis Partners' Chief Operating Officer and received benefits under the company's employee healthcare plan. Molloy Aff. ¶¶ 11–12. Equally as significant, all four initial members were "working members" because the company operated from day one as a working membership. Molloy Aff. ¶ 3.

Mr. Costello argument is premised on a laundry list of factors that might bear on whether someone was an employee under a common law test—*e.g.*, whether he had a set schedule or paid time off—but that are legally irrelevant in interpreting the Operating Agreement. *See* Pl. Br. at 7–8. In New York, contracts are interpreted to give effect to the plain and ordinary meaning of the language used, *Herbert v. Schodack Exit Ten, LLC*, 107 A.D.3d 1119, 1120-21 (3d Dep't 2013), and "employment" means simply "an occupation by which a person earns a living," *Employment*, (last visited May 3, 2021), https://www.dictionary.com/browse/employment. Curis Partners was how Mr. Costello earned his living and his health insurance, and there can be no serious question

that his role as Chief Operating Officer was "employment" within the plain language of the Operating Agreement.

Mr. Costello's attempt to treat a member's employment separately from his membership interest—and his argument that his membership interest is "inviolable," Pl. Br. at 5—is also at odds with a logical reading of Section 11.3 as a whole. *See Tomhannock, LLC v. Roustabout Res., LLC*, 33 N.Y.3d 1080, 1082 (2019) (under New York law, contracts should be read as a whole). That provision is clear that members will lose their interest if their work for the company is terminated, with or without cause. Curley Aff. Ex. A (Compl. Ex. A, Operating Agreement § 11.3). The Operating Agreement is obvious that the members' interests were not, in fact, "inviolable." Mr. Costello apparently recognizes this shortcoming in his argument because he suggests, with no basis, that he was a "founding" member and has "founding" interest. Pl. Br. at 7, 10. There is nothing in the Operating Agreement or elsewhere to support his view that the founders' interests had any special protection.

Finally, to the extent Mr. Costello believes Section 11.3 is ambiguous, the Defendants can offer extrinsic evidence of the parties' intent. As Mr. Molloy and the other initial members can testify, Mr. Molloy explained the Operating Agreement to each member in detail before they signed it and he specifically called each member's attention to the termination provision that gives him, as manager, the discretion to expel members. in which the members agreed and understood that the Operating Agreement vested Curis Partners with discretion to remove a member and revoke their interest. *See Fattorusso v. RJR Mechanical, Inc.*, 131 A.D.3d 1098, 1101 (2d Dep't 2015) (admitting extrinsic evidence to help interpret ambiguous contract term); Molloy Aff. ¶ 7.

At minimum, these issues "subvert the plaintiff's likelihood of success on the merits in this case to such a degree that it cannot be said that the plaintiff established a clear right to relief."

Radiology Assoc. of Poughkeepsie, 87 A.D.3d at 1124 (citing *Matter of Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co. Ltd.*, 53 A.D.3d 612, 613 (2d Dep't 2008); *Milbrandt & Co., Inc. v. Griffin*, 1 A.D.3d 327, 328 (2d Dep't 2003). *See also Setter Capital, Inc. v. Chateauvert*, 69 Misc. 3d 377, 381 (Sup. Ct. N.Y. Cnty. 2020).

III. THE EQUITIES DO NOT FAVOR MR. COSTELLO

The balance of equities also do not favor an injunction. In determining the balance of equities, courts weigh the harm to plaintiff if the preliminary injunction is denied versus the harm to defendant if the preliminary injunction is granted. *See Keller v. Kay*, 170 A.D.3d 978, 981-82 (2d Dep't 2019); *Greystone Staffing, Inc. v. Warner*, 106 A.D.3d 954, 954 (2d Dep't 2013); *Edgeworth Food Corp. v. Stephenson*, 53 A.D.2d 588, 588 (1st Dep't 1976). Curis Partners, a tiny business, that has had to hire staff to do the work Mr. Costello refuses to do, will be disrupted if it is compelled to reinstate a member who refused to do any work. Molloy Aff. ¶ 16. By contrast, Mr. Costello will not suffer any irreparable harm if preliminary relief is denied. *Lombard v. Station Square Inn Apartments Corp.*, 94 A.D.3d 717, 721-22 (2d Dep't 2012) (holding that a balance of the equities did not favor plaintiff because plaintiff failed to show irreparable harm thus failing to "show that the irreparable injury to be sustained is more burdensome . . . than the harm that would be caused to the defendant through the imposition of the injunction"); *Marsh & Mclennan Cos., Inc. v. Feldman*, No. 652284/2019, 2019 WL 4750381, at *5 (Sup. Ct. N.Y. Cnty. Sept. 30, 2019) (holding that plaintiffs' failure to establish irreparable harm meant that "the harm to the plaintiffs from denial of the injunction as against the harm to [defendants] from granting it does not tip in plaintiffs' favor") (citing *Edgeworth Food Corp.*, 53 A.D.2d at 588); *see also* Section I, *supra*.

Additional considerations weigh against an injunction. In balancing the equities, courts also consider whether the relief would determine the "ultimate rights of the parties'." *See Keller*, 170 A.D.3d at 981–82 (citation omitted). As discussed already, reinstatement is the chief relief

Mr. Costello seeks in this lawsuit. *See* Section I, *supra*. Similarly, New York courts typically find that the balance of equities weighs against plaintiff where plaintiff requests a mandatory injunction, disrupting the status quo, rather an injunction maintaining the status quo. *See Shake Shack Fulton Street Brooklyn, LLC v. Allied Prop. Grp., LLC*, 177 A.D.3d 924, 927-28 (2d Dep't 2019) (partially reversing the trial court's order in favor of the preliminary injunction where plaintiff sought a disruption of the status quo but upholding the aspects of the preliminary injunction that merely sought to maintain the status quo). As noted already, Mr. Costello seeks to disrupt, not maintain, the status quo. *See* Section I.A, *supra*.

IV. ALTERNATIVELY, THE COURT SHOULD REQUIRE MR. COSTELLO TO POST A SUBSTANTIAL UNDERTAKING

In the alternative, if the Court were to grant Mr. Costello's motion, it should make any injunction contingent on Mr. Costello's posting an undertaking that would insure he can pay the Defendants their damages and costs incurred by the injunction. N.Y. C.P.L.R. § 6312(b); *Keneally, Lynch & Bak, LLP v. Salvi*, 190 A.D.3d 961, 963-64 (2d Dep't 2021) (observing that the undertaking requirement "may not be waived"). The Defendants submit that a rational undertaking should be $35,000, which is three years of healthcare premiums Curis Partners would have to incur if Mr. Costello were ordered back onto the company healthcare plan. *See* Molloy Aff. Ex. A (COBRA letter referencing $956.92 monthly premium for single employee).

CONCLUSION

For the foregoing reasons, the Defendants respectfully ask the Court to deny Plaintiff's motion for a mandatory preliminary injunction in its entirety.

Dated: New York, New York
May 7, 2021

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ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, John P. Curley, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because it contains 6,078 words, excluding the parts of the document exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare the Memorandum of Law.

Dated: New York, New York
May 7, 2021

_/s/ John P. Curley_____