

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CIVIL DIV. : PART 3

-----X  
TRIBOSS BROOKLYN, LLC, :

Plaintiff, :

- against - :

Index No.  
654282/21

MICHAL KURAS, MIKE GHORAYEB, and :  
WILLIAM GREEN REAL ESTATE, :

Defendants. :

-----X  
MICHAEL KURAS AND MIKE GHORAYEB, :

Third-Party Plaintiffs, :

- against - :

DENNIS MCCORMACK, :

Third-Party Defendant. :

**MOTION**

-----X VIA TEAMS

OFFICIAL ADDRESS: 60 Centre Street  
New York, New York  
October 6, 2021

B E F O R E :

HON. JOEL M. COHEN,  
Justice

(Appearances on the following page.)

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ROBERT PORTAS, R.P.R., C.R.R.  
SENIOR COURT REPORTER

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A P P E A R A N C E S :

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## PROCEEDINGS

1 THE COURT: Okay, good afternoon, counsel. Let's  
2 start with appearances, Robert. Let's go on the record.  
3 Starting with the plaintiff.

4 MR. KAFAFIAN: Good afternoon, Your Honor. My  
5 name is Martin Kafafian, with the law firm Beattie  
6 Padovano. And I have with me all three of my colleagues,  
7 Kimberly Brunner, who's a member of the bar, and Evan  
8 Kappatos, who just recently took the New York State bar  
9 exam and is awaiting admission.

10 THE COURT: Okay. Make sure you make a good  
11 example today.

12 MR. KAFAFIAN: Yes, Your Honor.

13 THE COURT: And you're for the plaintiff in the  
14 original action; correct? And the counter -- Well, are you  
15 for Triboss or are you for Mr. McCormack or who exactly?

16 MR. KAFAFIAN: I represent Dennis McCormack. My  
17 adversary, Mr. Stratton, represents the other two members.  
18 Michal Kuras and Mike Ghorayeb.

19 I commenced this action as counsel for Triboss  
20 Brooklyn LLC, who's the main plaintiff. Mr. McCormack,  
21 who's the third-party defendant, certainly was the  
22 managing member at the time the complaint was filed. I  
23 guess the reason we're here today is to determine whether  
24 he still is the managing member. Our contention is that  
25 he still is. I hesitate to say that I represent Triboss  
Robert Portas, RPR, CRR

## PROCEEDINGS

1 Brooklyn LLC. I would caveat it --

2 THE COURT: I understand. I just wanted to make  
3 sure, because I know we're here today on the third-party  
4 complaint, so calling people "Plaintiff" and "Defendant" is  
5 a little confusing, I realize.

6 So, for purposes of today, you represent  
7 Mr. McCormack in the third-party action; yes?

8 MR. KAFAFIAN: That's correct, Your Honor.

9 THE COURT: Okay.

10 And, for the third-party plaintiffs?

11 MR. STRATTON: Good afternoon, Your Honor,  
12 Nicholas Stratton, Stratton Ashtyani, LLP, on behalf of  
13 Mr.~Kuras and Mr. Ghorayeb.

14 THE COURT: So, Mr. Stratton, this is your  
15 motion -- I believe for preliminary injunction; correct?

16 MR. STRATTON: Yes, sir.

17 THE COURT: I've read the papers, but why don't  
18 you go ahead and put your argument -- you know, highlights  
19 that you think are most important for me to hear and then  
20 I'll have your adversary respond.

21 MR. STRATTON: Sure.

22 So it's our application for declaratory judgment  
23 confirming that the actions taken by Mr.~Kuras,  
24 Mr. Ghorayeb on July 14<sup>th</sup> removing Mr. McCormack as the  
25 managing member is valid.

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## PROCEEDINGS

1 As I mentioned in my papers, on July 14<sup>th</sup>  
2 Mr.~Kuras and Mr. Ghorayeb voted. The corporation LLC is  
3 governed by an operating agreement, the operating  
4 agreement is silent as to the issue of removal of the  
5 managing member. Because the operating agreement is  
6 silent as to the issue of the removal, Section 414 of  
7 New York LLC law controls. The partner -- members,  
8 rather, voted to remove Mr. McCormack pursuant to that  
9 statute, and we believe it's a valid removal.  
10 Mr. McCormack has asserted through counsel that he's not  
11 going to honor his removal. And that's why we're here  
12 today, Your Honor. I think that is the long and the  
13 short of our position.

14 THE COURT: Okay.

15 And what is the argument that the statute  
16 supplies the relevant procedure for removing a managing  
17 member?

18 MR. STRATTON: The statute states, "Except as  
19 provided in the operating agreement," so in this case there  
20 is nothing provided in the operating agreement. Any or all  
21 managers of the LLC may be removed by vote of the majority  
22 in interest. So we had a vote of the majority in interest  
23 to remove him because there was nothing in the operating  
24 agreement that speaks to his removal.

25 THE COURT: Now, the only case that is cited is  
Robert Portas, RPR, CRR

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1 the Ross case. And I'm bringing that up because there were  
2 two commercial division cases that were not cited which my  
3 clever law clerk found. But the Ross case seems to turn on  
4 the fact that that agreement referenced expulsion of the  
5 managing member and, so, therefore, the Court was  
6 comfortable that the possibility of expulsion existed and  
7 it was clear in the contract. So, in that setting, the  
8 Court permitted the statute to fill the gap. But we don't  
9 have that.

10 MR. STRATTON: Well, the operating agreement  
11 speaks to circumstances where Mr. McCormack would not be  
12 the managing member. For example, you know, if he were to  
13 voluntarily reduce by his ownership, he would -- there are  
14 provisions for what happens if there is no --

15 THE COURT: That's not -- that's not removal --

16 MR. STRATTON: Correct, Your Honor.

17 THE COURT: -- of a managing member, that's a  
18 managing member removing him or herself.

19 MR. STRATTON: Correct.

20 THE COURT: And the theory, and I'll -- the two  
21 cases that I have in mind, one was by Justice Kornreich and  
22 one was by Justice Ramos, I mean the theory is that the  
23 agreement names Mr. McCormack by name and there's no  
24 specific reference to getting rid of him, other than by  
25 unanimous revision of the agreement.

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## PROCEEDINGS

1           Now, I understand the point. It seems odd in  
2           some sense to have a -- an organization where the  
3           majority doesn't rule. And the statute certainly gives  
4           some support for that. But these two cases read Ross to  
5           be limited to a situation in which the agreement  
6           references removal.

7           And, just for the record, the two cases that  
8           I -- we found -- and by "We" I mean my law clerk -- if  
9           you look through cases citing Ross, one of them is  
10          Friedman versus Ridge Capital, 2010 Westlaw 5799429,  
11          that's Supreme Court, New York County, 2010. And,  
12          following that was Goldstein versus Pikus, P-I-K-U-S,  
13          which the cite is 2015 NY Slip Op. 31483U, New York  
14          Supreme Court, New York County, 2015.

15          And -- But, again, the principle indicates in  
16          this opinion that the lack of any -- reading from  
17          Friedman, "The lack of any language in the agreement  
18          contemplating a change or removal of managers prevents  
19          the triggering of LLCL 414, the default mechanism for  
20          changing or removing managers." And Justice Kornreich in  
21          that case distinguished Ross by noting that the agreement  
22          in Ross contained a provision allowing dissolution.  
23          That's the reference to expulsion.

24          And, so, two judges at least have read it as  
25          that Ross is limited and the gap filler is limited to  
            Robert Portas, RPR, CRR

## PROCEEDINGS

1 situations where the agreement explicitly talks about  
2 removal or expulsion but doesn't say how to do it.

3 MR. STRATTON: I apologize --

4 THE COURT: No, I just -- that's where I'm left  
5 with, because I understand your reading of the words of the  
6 statute. And, on a blank slate, you know, I can see how  
7 one could go either way on that. But we do have Ross which  
8 reads a slightly different way and those other two cases  
9 which read directly a different way.

10 MR. STRATTON: I think that Ross speaks to -- it  
11 doesn't say -- state that 414 only applies where expulsion  
12 is considered; it states that in Ross expulsion was  
13 considered, and, therefore, it fills the gap. But, even  
14 there -- you know, here the statute is fairly straight  
15 forward. There's nothing provided in the operating  
16 agreement for removal. So if we ignore -- if we ignore  
17 that provision and say, "Well, we have to first have a  
18 provision that talks about removal before this can fill the  
19 gap," well that's not what the statute says. The statute  
20 says there has to be -- if there's nothing provided in the  
21 operating agreement then this controls. Otherwise you  
22 would never be able to remove a member.

23 THE COURT: The reasoning is that, you know, this  
24 agreement, like others, names a human being, Mr. McCormack,  
25 a specific person, as the managing member and refers to him  
Robert Portas, RPR, CRR



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1 throughout, including using the pronoun "He." So -- well,  
2 I guess in this case it wouldn't matter, but the theory is  
3 is that that is a statement that this is the managing  
4 member. There's no provision made for removing that  
5 person, and, therefore, the -- the view is that is not a  
6 situation where you need a gap filler.

7 I'm just looking for the language in Ross that  
8 people have cited.

9 Yeah, here's a quote from Ross which I think is  
10 what the Courts have been looking at: Quote, "The  
11 operating agreement under which the parties worked was,  
12 by its terms, guided by the limited liability company  
13 law."

14 And, then, this is the key passage: "Even  
15 though the agreement lacked a specific provision for  
16 removal of a member-manager, it clearly and unambiguously  
17 allowed for same by the language of Article 6 which  
18 called for the dissolution of the LLC and its  
19 reorganization upon, among other events, the," quote,  
20 "expulsion," closed quote, "of the manager member.  
21 Lacking a specific mechanism in the operating agreement  
22 for such expulsion the parties relied on Section 414 of  
23 the limited liability company law which allows for  
24 removal of a manager by a majority vote of the members."

25 And -- so I think the question, you know, that  
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1 remains from that is did Ross go that way because of the  
2 reference to expulsion or was that just sort of  
3 background. And -- and there are two Commercial Division  
4 judges who say that was necessary.

5 MR. STRATTON: I think that if we read into the  
6 statute the requirement that there be some other provision  
7 of the operating agreement that speaks to removal, we're  
8 now adding to what the statute requires. Right?

9 The -- the belief that Ross says -- or the  
10 condition that Ross says, "There must be a provision for  
11 removal and then we can fill the gap," well that's not  
12 what the statute says. The statute says that if the  
13 operating agreement is silent on the issue of removal.

14 THE COURT: It doesn't quite say that. The  
15 statute says, "Except as provided in the operating  
16 agreement, any or all managers of the limited liability  
17 company may be removed or replaced, with or without cause,  
18 by a vote of the majority in interest of the members  
19 entitled to vote thereon." So it comes down to what did  
20 they mean by, "Except as provided in the operating  
21 agreement."

22 MR. STRATTON: Right.

23 THE COURT: And, so, that the reading that at  
24 least I'm seeing in a couple cases is that if the operating  
25 agreement provides for removal at all, then the -- the --

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1 then you can move on to consider how to do it. But where  
2 all the operating agreement does is name someone, that --  
3 the argument anyway -- look, I can see it both ways.  
4 Because, you know, I would imagine the vast majority of  
5 operating agreements set forth how exactly this works, how  
6 you remove, how you elect, how you do all of that. This  
7 agreement doesn't -- doesn't do that, it just names this  
8 person as the managing member and references nowhere in the  
9 agreement other than by his own volition that he would be  
10 removed.

11 So I get it. So let's take a step back.

12 Is there something about the surrounding  
13 circumstances of the agreement and how this all came  
14 together that would make it reasonable to read the  
15 operating agreement as permitting his removal? Because  
16 there's no reference to his removal, there's references  
17 to him removing himself.

18 MR. STRATTON: Well --

19 THE COURT: I meant the business context. You  
20 know, is there some reason to believe, when you look at how  
21 this business came together, that, well, you know -- the  
22 other side, I think, makes the point that this was  
23 McCormack's deal and he brought other people in and paid  
24 their way in and that kind of thing; it was his company,  
25 that they were just kind of living in it.

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1 MR. STRATTON: No, so Mr. McCormack and Mr. Kuras  
2 have several different -- you know, they're in business on  
3 several matters. And this operating agreement, the form of  
4 this operating agreement, to the best my recollection, is  
5 nearly identical on each one. And, so, the fact that --  
6 you know there's nothing special about this particular  
7 deal. Right? This is just one of the deals. Right? So  
8 there's nothing one way or the other about specific removal  
9 or specific non-removal -- Right? -- except that it's  
10 totally absent. Right?

11 THE COURT: Who put up the money to buy the  
12 property?

13 MR. STRATTON: So the -- I believe -- and  
14 Mr. Kafafian can correct me if I'm wrong here -- I think  
15 that money came from another company that Kuras and  
16 McCormack are part of. And I think Mr. Ghorayeb put in  
17 some money.

18 Is that right, Mr. Kafafian?

19 MR. KAFAFIAN: Where the cash flow came from I'm  
20 unsure, but I do know that the funds were Mr. McCormack's,  
21 they were lent or forwarded to Mr. Kuras. I believe that  
22 at some point Mr. Kuras paid Mr. McCormack back for those  
23 funds over the last seven years, but the affidavit that's  
24 in the record I think shows that the money was  
25 Mr. McCormack's.

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## PROCEEDINGS

1 THE COURT: Okay.

2 Well, look, that's the conundrum I have here, is  
3 the agreement names him, doesn't talk about selection and  
4 election and the like.

5 So it's -- it's an interesting statutory  
6 interpretation question, you know, what does the statute  
7 mean by except as provided in the operating agreement.

8 So, Mr. Kafafian, just to switch to you for a  
9 second.

10 I'll come back to you, Mr. Stratton.

11 I think Mr. Stratton makes some good points. It  
12 seems odd that you'd have a system where the statute is  
13 seeming to make a default rule of majority rules, which,  
14 you know, has at least some force behind the idea that  
15 there has to be some way, perhaps, of removing a -- a  
16 managing member who the majority no longer have  
17 confidence in.

18 So how do you read the statute to go your way?

19 MR. KAFAFIAN: Well, Your Honor, I think that the  
20 we're dealing with an LLC. And an LLC's, you know, we have  
21 the primacy of contract. And, while the background rule  
22 may be that majority rules, in this case the parties  
23 negotiated and agreed to a contract that says that  
24 Mr. McCormack can only be removed by unanimous consent.

25 Now, there's, you know a whole line of --  
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1 THE COURT: Where does it say that?

2 MR. KAFAFIAN: It says that in the amendments  
3 paragraph. And, I'm sorry, I'm paraphrasing, but it says  
4 that the operating agreement which names Mr. McCormack as  
5 the managing member --

6 THE COURT: Yeah, it's just about the amendment  
7 can't be altered without consent. It doesn't talk about --  
8 it doesn't focus on removing him as the managing member, it  
9 just says the whole thing can be changed.

10 MR. KAFAFIAN: The whole thing. Which our  
11 contention is includes the clause which says he is the  
12 managing member.

13 THE COURT: Right. I mean, if you had a paragraph  
14 that said the managing member may be removed only upon  
15 unanimous consent, we wouldn't be here.

16 MR. KAFAFIAN: That's correct.

17 THE COURT: You're implying that. So -- but this  
18 is why this is a horserace. Right? Because the agreement  
19 arguably doesn't talk about forcible removal at all  
20 anywhere.

21 MR. KAFAFIAN: That's right.

22 THE COURT: It also doesn't talk about -- it  
23 doesn't provide for any particular way of removal, which,  
24 you know, the argument is "Isn't that what Section 414 is  
25 about?"

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1 MR. KAFAFIAN: We understand that it's a -- you  
2 know, this is not a -- there's no Court of Appeals decision  
3 on this issue, and this is not, you know, a slam dunk in  
4 either direction. I think our big position here is that  
5 this is a preliminary injunction. In terms of irreparable  
6 harm, you know, we don't really see any. In terms of  
7 balancing of the equities, the record shows incredibly  
8 inequitable conduct by the defendants.

9 THE COURT: All right.

10 Well, I want to -- I want to -- so I wanted to  
11 start with this back and forth on the statute. Now I'm  
12 going to go back to Mr. Stratton on the rest of the  
13 irreparable harm and -- and the balance of the equities  
14 and then I'll let you respond to that part.

15 MR. KAFAFIAN: Thank you, Your Honor.

16 MR. STRATTON: So, Your Honor, before -- I take  
17 that you're asking me about those two provisions. Before I  
18 get into that, in -- I just want to point out that in  
19 Friedman and, I guess "Goldstein" it looks like, the  
20 phrasing that Friedman cites is, "Ross would not be  
21 triggered if the operating agreement had not otherwise  
22 allowed for a change or removal of the manager."

23 So, in our operating agreement it does allow for  
24 a change. Right? If Mr. McCormack were to reduce by --  
25 down to, I believe below 20 percent, then there would be  
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1 a change. So it does allow for a change. It may not  
2 allow for his specific removal, it's totally silent on  
3 involuntary removal, but it does allow for a change.

4 Okay, so that's the last thing I'll say on that  
5 point.

6 Irreparable harm, Your Honor: I cited a case  
7 where control of one's business -- if you cannot control  
8 your business, that is irreparable harm. I don't know  
9 that -- I think it's clear that we're talking about  
10 control of the business. So that is the irreparable harm  
11 here.

12 And, the balancing of the equities: If the  
13 members have the right under 414 to vote to remove and  
14 that right is taken away from them, that is irreparable  
15 harm. That is my argument here. Yes, Mr. McCormack's  
16 client could be harmed if my client does something  
17 against the LLC, my clients could be harmed if  
18 Mr. McCormack does something against the LLC, but that's  
19 equal. Right? What we're talking about here is we don't  
20 have the right to vote. If we have the right, but the  
21 Court doesn't allow us to honor that vote, then we've  
22 lost that right, and that is irreparable harm and that  
23 would weigh in our favor.

24 THE COURT: The point being that it's -- in the  
25 business control context, you know, it's going to be hard  
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1 to after the fact unscramble the eggs and say, "Well, if I  
2 had the control I would have done this, and, therefore, you  
3 owe me \$100."

4 Now, you talk in the papers about, you know, the  
5 concern with Mr. McCormack was that he was going to sell  
6 this property in kind of a an odd way. Why don't you  
7 talk about that a little bit more. Is that -- is that a  
8 live issue right now? I know the -- the papers indicate  
9 that the buyer who purportedly was on the hook is no  
10 longer there. Is -- is there something going on like,  
11 you know, today, tomorrow, next week that you're aware  
12 of?

13 MR. STRATTON: I'm not aware of any pending sale  
14 or any pending offer right now. We don't know anything  
15 about this purported offer. We asked. We didn't see a  
16 contract, we didn't see an offer. We asked to meet with  
17 this person, we never got that opportunity. My clients  
18 asked to meet with Mr. McCormack to discuss everything  
19 beforehand, they never got that opportunity.

20 So the harm here is -- and I apologize for my  
21 speakers -- the harm here is -- Right? -- the total  
22 blackout on one end. Right? Mr. McCormack wants to run  
23 it as his own fiefdom to do whatever he wants, as his  
24 own. And, so, that is the immediate. Right? I don't  
25 know if there's another buyer, I don't know if anyone's

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1 going to come down the pike. Right? But, alternatively,  
2 we don't know if someone -- some positive offer will come  
3 down the road on our end we would want to take that would  
4 be best for the LLC. The unknown is unknown.

5 THE COURT: What is the information flow like in  
6 this company? Because, you know, a lot of cases I get in  
7 the LLC context involves in the transparency where the  
8 minority -- in this case the majority membership are  
9 complaining that they don't know what's going on, and  
10 typically the LLC laws would sort of logically permit the  
11 other owners of the company to know what's going on. So  
12 I'm not sure that that's the focal point of this particular  
13 motion, but I'm just wondering whether, you know, an  
14 alternative to removal, if removal is not permitted, would  
15 be greater transparency.

16 MR. STRATTON: I think that, to this point, it's a  
17 little backwards in this case than what it would normally  
18 be. Right? I think that we would normally imagine that  
19 the managing member had all of the information. Right?  
20 But, in this case, Mr. Kuras and Mr. Ghorayeb --  
21 Mr. Ghorayeb lives in the property. Right? He's managing  
22 the property. Mr. Kuras was the broker for the property.  
23 You know, the fact that Mr. McCormack, as a managing  
24 member, never asked for -- he didn't care about the leases  
25 until he was ready to sell it for -- allegedly sell it. I

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1 don't know that Mr. McCormack has ever done anything for  
2 the property other than be there in the background. Right?  
3 He's almost a passive member of this, other than, you know,  
4 wanting to have control when he wants control.

5 THE COURT: Well, look, the agreement you're your  
6 client signed, certainly at the beginning, gives him by  
7 name an enormous amount of discretion to do, you know,  
8 virtually anything with this, including sell it whenever he  
9 wants to. Right? So that that -- wasn't that part of the  
10 deal going in, that, "Yeah, I know one of your guys is a  
11 real estate broker and..." But the -- the structure of  
12 this agreement is whoever's the managing member can kind of  
13 do this transaction, which is the fundamental transaction  
14 that you're talking about, is selling -- this is the only  
15 property that the LLC has -- Right? -- is the building?

16 MR. STRATTON: This LLC only has this property.  
17 Yes, sir.

18 And I would say that this operating agreement  
19 was entered into -- this is a classic example of when  
20 things are good, everything's fine and everyone doesn't  
21 care about what the document says and "Let's just sign  
22 whatever and do whatever and we're all making money, it's  
23 great." And then we have a pandemic and things fall  
24 apart and people start losing money and, all the sudden,  
25 here we are.

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1 THE COURT: Welcome to my world.

2 MR. STRATTON: Yes, sir. I imagine. And  
3 Mr. Kafafian and I have been involved in wishing that our  
4 clients -- our respective clients in various matters had  
5 done a better job of drafting and honoring operating  
6 agreements.

7 That's all. If you have a question for me, Your  
8 Honor...

9 THE COURT: No, I think I was -- I was still sort  
10 of circling around what the real issue here is, because,  
11 again, you know -- and I know right now it's a wrestle for  
12 control, because, you know, just like it's irreparable harm  
13 to you to be out of control, you know, removing  
14 Mr. McCormack as managing member then imbues your client  
15 with those same dictatorial powers, hopefully benignly  
16 operated, that you argue he has.

17 But the one thing the operating agreement does  
18 absolutely say is that there was going to be a member who  
19 runs the place. And, so -- but I'm kind of curious what  
20 the information requirements are. I was puzzled by the  
21 fact that the one-third member, even if they're the  
22 managing member, could keep material information away  
23 from the rest of the -- from the other members, which  
24 seem to be the core of some of your claims, is that you  
25 weren't -- your clients weren't even aware of what was  
Robert Portas, RPR, CRR

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1 going on on what one would say is the fundamental issue  
2 of selling the property.

3 Is that right?

4 MR. STRATTON: That's correct, Your Honor. And if  
5 we imagine -- we can't go back in time, but I imagine if  
6 more information had been shared we never would have gotten  
7 to this point; we would have analyzed the offer, we would  
8 have made a decision. Mr. McCormack didn't want to do  
9 that. He didn't want my clients to have any say.

10 I will also clarify that the operating agreement  
11 does consider the fact that there is more than one  
12 managing member. Section 11, one, two, three, the fourth  
13 paragraph suggests the time where multiple people. Just  
14 to clarify the record, that that's could --

15 THE COURT: That could happen. But that provision  
16 did not get triggered. Nobody questions that. Everybody  
17 has more than 9 percent.

18 Yeah, I mean, look, there's a section of the  
19 agreement about books, records and tax returns, and it  
20 talks about the managing member has to give the other  
21 members, you know, an annual report, a profit and loss  
22 statement, statement of balance, amount of each member's  
23 share, you know.

24 All right, well let me -- Mr. Kafafian, let me  
25 move to you on the irreparable harm.

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## PROCEEDINGS

1 I think it is true, the cases do find that in a  
2 battle like this, if you prove likelihood of success,  
3 it's hard to repair or to compensate for the loss of  
4 decision-making authority, because how can everybody --  
5 how could anybody after the fact undo that.

6 MR. KAFAFIAN: I think there are a line of cases  
7 that are -- there is a line of cases that say just that. I  
8 think this business is a little bit different; this is an  
9 apartment building where there are leased tenants so there  
10 are really not a lot of decisions to be made. To the  
11 extent a decision is made that people don't like, it's very  
12 easy to quantify that decision.

13 Say a unit's leased for a below market rate,  
14 let's say the building sold at a discount, these are  
15 all -- these are all, you know, claims that can be  
16 resolved with money.

17 THE COURT: Well, no, not really. But let's use  
18 this as an example: The reason for the advantage of  
19 deciding this issue before that sale event happens, rather  
20 than after, is, let's say there were three or four  
21 different paths one might go down. You know, it's -- it  
22 would be very difficult to actually have a -- a lawsuit  
23 about, "Well, why did you pick this one instead of the one  
24 I wanted? If we had done that we would have done better  
25 for the following seven reasons." And you'll never be able

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## PROCEEDINGS

1 to figure it out because you're trying to create a but for  
2 world that is speculative.

3 So that's the theory behind those cases is, if I  
4 should be entitled to make the decision in the first  
5 place, then it is irreparable for me not to have that  
6 option.

7 It's not 100 percent, and each case is  
8 different, but that's the idea here, is that, you know,  
9 whoever makes the final decision--and this agreement is a  
10 dictatorship about that--it's going to be hard to unravel  
11 that as to what would have happened if somebody else had  
12 been.

13 And, yeah, you can sue for breach of fiduciary  
14 duty and the like, but, you know, once the sale is made,  
15 it's going to be hard to undo.

16 And it's, frankly, hard to -- to prevail on a  
17 breach of fiduciary duty claim in light of the normal  
18 rules about business judgment deference and the like.

19 MR. KAFAFIAN: I understand. And I take the  
20 Court's point about business judgment. I guess I will say  
21 that constructing the but for world in a real estate  
22 holding entity is far easier than constructing the but for  
23 world of should 3M have stopped making KN-95 masks in  
24 January 2020 or, you know, business decisions in a major  
25 company that makes widgets and has to, you know, direct a  
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1 business, fire a CEO. Very different than the case we have  
2 here.

3 But I take Your Honor's point as to what the  
4 case law says about control. We think -- even with the  
5 control issue, we think there's insufficient grounds to  
6 find that there's a likelihood of success. And we think  
7 the equities also are a problem.

8 Your Honor, if I could pivot to the transparency  
9 issue that you asked my adversary about, I'd just like to  
10 put a few facts on the record.

11 There historically has always been lots of  
12 transparency in this company. Mr. Stratton's client,  
13 Mr. Kuras, actually prepares tax returns and interfaces  
14 directly with the company's accountant. And I think he  
15 signed them pursuant to Mr. McCormack's authority to  
16 delegate that -- that task under the operating agreement.

17 Mr. Ghorayeb, the other member, lives on  
18 premises and he's also involved with day-to-day.

19 This is not a company where one member has been  
20 withholding information from other members; this was --  
21 this is a company where there has been beyond -- in my  
22 experience, beyond what is the normal transparency in  
23 terms of finances and -- and all that.

24 This came to loggerheads when Mr. Kuras refused  
25 to provide leases. And my client had been asking for  
Robert Portas, RPR, CRR



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1 those leases for a long time. Mr. Kuras' relationship  
2 with my client broke down, I'd say about eighteen months  
3 ago. So over the last eighteen months my client's been  
4 asking for those leases; he didn't get those leases. He  
5 was finally approached by a 1031 exchange buyer in the  
6 spring of this year, he says, "Michal, give me the  
7 leases. I need the leases. I can't even --" you know,  
8 "this guy wants to offer us a lot of money; I can't even  
9 decide if that would yield us a good cap rate." And  
10 that's where this -- this eventually, you know, wound up  
11 before Your Honor.

12 You know, we talked about my role in this case  
13 from the beginning. This case was initially filed as an  
14 order to show cause to compel the production of those  
15 leases. That's what is that's about.

16 And, to answer Your Honor's question, I think  
17 it's in the papers, but the 1031 buyer is gone and the  
18 property's not being marketed currently for sale, so  
19 there is no imminent decision that's going to be made  
20 next week, next month. It's just not on the table.

21 THE COURT: Well, look, I mean, for what it's  
22 worth, I think -- I think your point is well taken that  
23 transparency works in -- in this particular organization  
24 should work in both directions or could work in both  
25 directions, I guess. You know, even assuming one or more

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## DECISION

1 of the partners or of the members have greater information  
2 in a concern area, it would certainly, in my experience,  
3 make for less tension if there was transparency.

4 I suspect Mr. Stratton will tell me that he  
5 didn't want to give you the leases because he thought you  
6 were going to sell the apartment building out from under  
7 them.

8 So there's not a lot of trust going on here, but  
9 it seems to me that, you know, the fundamental  
10 transaction in this LLC is if and when to sell the entire  
11 corpus of the business, which I think is, you know, maybe  
12 where transparency is more important.

13 But, I get your point. There's -- there is  
14 information that's being hoarded here in a way that's not  
15 very productive.

16 Well, let me tell you my view on the motion.  
17 I -- focusing mostly on the likelihood of success, I  
18 think that, while the third-party plaintiff's offer a  
19 construction of the statute that is not unreasonable and  
20 that construction is that the statute should supply the  
21 default rule of majority of members can replace the  
22 managing member, that is not the way currently it has  
23 been interpreted, at least by the cases that have  
24 addressed it. I think that the Ross case doesn't  
25 explicitly go into it but does rely heavily on the fact  
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1 that the LLC agreement in that case referenced expulsion  
2 of the managing member. And, therefore, when you look at  
3 the agreement as a whole, there seems to have been an  
4 intent to provide for removal. And, in that setting, the  
5 Court found that it was reasonable to apply the gap  
6 filler of Section 414.

7 Two of my colleagues afterward determined that  
8 the reference to expulsion in the agreement at issue in  
9 Ross was critical to the result and that what the statute  
10 really means is that if the agreement can be read  
11 reasonably to provide for removal, that's fine, but if  
12 there is no reference to removal -- and I use that term  
13 advisedly, because I know there is reference to the  
14 managing member changing based on share ownership, but  
15 nothing about removal -- then the Friedman and Goldstein  
16 cases suggest that in that situation the default rule is  
17 the other way, because if the contract names a specific  
18 person, doesn't talk about forcibly removing them against  
19 their will, then that's it.

20 And, you know, I think it would be helpful to  
21 have, perhaps, Appellate guidance on this, but, as I read  
22 the law as it is right now, I cannot conclude that the  
23 third-party plaintiff has shown a likelihood of success  
24 on that issue.

25 So I, therefore, do not believe that a  
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1 preliminary injunction mandating that Mr. McCormack not  
2 hold himself out as the managing member of the LLC or  
3 enjoining Mr. McCormack from taking any action on behalf  
4 of the LLC. I don't -- I don't think that an injunction  
5 like that has been established, or grounds for an  
6 injunction have been established, because, based on my  
7 reading of the law, there is certainly a strong argument,  
8 based on the case law, that the only way for him to be  
9 removed as the managing member is through the specific  
10 provisions in the agreement that provide for either his  
11 replacement in the event of his share ownership going  
12 below 20 percent or unanimous consent.

13 So, therefore, I -- I'm going to deny the motion  
14 for a preliminary injunction.

15 And, I just would add, I think I made this point  
16 during the course of the argument, that the parties'  
17 agreement read in light of the case law and just on its  
18 own certainly can reasonably be read as indicating that  
19 the parties intended for Mr. McCormack to serve as the  
20 managing member for an unlimited term and did not provide  
21 any way for possibility of expulsion or removal.

22 The parties could easily have added to  
23 Section 11 a provision for removal, they could have had a  
24 whole section on how to elect a managing member, none of  
25 which they did. And I think, while I understand the

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## PROCEEDINGS

1 third-party plaintiff's reliance on the language in  
2 Section 11 in which the share ownership -- if the share  
3 ownership dips below a certain percentage, that shows  
4 some intention to permit removal, I think it actually  
5 cuts the other way; it shows that really the only thing  
6 the company -- that the parties provided for was that  
7 situation where if, essentially voluntarily -- or, it  
8 doesn't really matter, if Mr. McCormack fell below  
9 9 percent that was really the only reason that the  
10 agreement suggests for removing him.

11 So, in light of all of that, the motion for  
12 preliminary injunction is denied.

13 I don't have in front of me particular requests  
14 for relief about transparency and whether information  
15 flow should be of a certain type. And, if and, you know,  
16 when this arises again, I will just give you the -- my  
17 general thinking on these things is that when you have a  
18 three-person LLC and 66 percent of the ownership wants to  
19 know what's going on with respect to a potential sale,  
20 there's going to be some gravitational pull in favor of  
21 them having at least some basic information about a  
22 transformational transaction, so -- but that's just  
23 guidance rather than holding.

24 So, in light of this ruling, can -- I'd like to  
25 step back and tell me what the status is of this

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1 litigation. Because it's been a while since I've seen  
2 you, I think.

3 So the original case about the leases, is that  
4 disposed or is that still kicking around somewhere in my  
5 closet?

6 MR. KAFAFIAN: Your Honor, we filed a complaint in  
7 July on that issue and other issues. Mr.--- the defendants  
8 filed a counterclaim -- sorry, a third-party complaint  
9 against Mr. McCormack and Mr. McCormack just answered that  
10 and asserted counterclaims, I think last Friday. So --

11 THE COURT: So is that the main relief sought in  
12 the original complaint, just to force him to give copies of  
13 the leases to your client?

14 MR. KAFAFIAN: It was slightly more broad than  
15 that, but that was one of the core issues. One of the  
16 other issues is, you know, the damages that have flowed  
17 from the, what we see to be the improper interference with  
18 the 1031 exchange transaction.

19 THE COURT: I see.

20 MR. KAFAFIAN: We've now asserted that in  
21 counterclaims derivatively by Mr. McCormack. There was  
22 previously a demand to drop the initial complaint by the  
23 LLC. Mr. Stratton relied on the majority consent, which  
24 Your Honor has denied preliminary injunctive relief with  
25 respect to.

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## PROCEEDINGS

1           You know, I don't think Mr. Stratton or I are  
2 interested in fighting who -- who the proper parties are  
3 here, it's really Mr. McCormack versus Mr. Ghorayeb and  
4 Mr. Kuras. So, you know, as long as all the issues can  
5 be adjudicated, we don't have -- I'll say at least my  
6 side doesn't really care whether it's directly by  
7 Triboss, the LLC, or directly by Mr. McCormack. I'll say  
8 that's an issue that has to probably ironed out.

9           THE COURT: Why don't we just talk about what's  
10 actually still left, because presumably, whether it's by  
11 normal operation of the business or by discovery, Mr. Kuras  
12 is going to be producing the leases in one way or the  
13 other. I don't see, Mr. Stratton, how that -- how that  
14 doesn't happen.

15           MR. STRATTON: Your Honor, they've already been  
16 produced.

17           THE COURT: Right. I figured that as much.  
18 So, in light of that, wouldn't that claim be  
19 moot?

20           MR. KAFAFIAN: So that claim -- Well, there's a --  
21 I guess the declaratory judgment aspect of it would be  
22 moot, but there's a damages aspect of it, which is, "You  
23 withheld the leases and we lost the deal."

24           THE COURT: I know. I'm just making progress  
25 getting rid of one thing at a time. So give me my -- my  
Robert Portas, RPR, CRR

## PROCEEDINGS

1 victories where I find them.

2 So there is a claim that the transaction went  
3 away. Again, that would be whether -- that would either  
4 be on behalf of the company or derivative. So that  
5 claims' still live. But the 1031 transaction was gone  
6 and Mr. McCormack, on behalf of Triboss, is -- has got  
7 some claim against the other two. I got that.

8 And, so, what about the third-party complaint?  
9 Is there anything, Mr. Stratton, that you seek, other  
10 than the removal?

11 MR. KAFAFIAN: Your Honor, if I can just interject  
12 briefly?

13 THE COURT: Okay.

14 MR. KAFAFIAN: There's one other claim, and that  
15 is that Mr. Ghorayeb, the other defendant, has been a  
16 tenant in possession of a large portion of this property  
17 for a long time, but he stopped paying rent about two years  
18 ago or a year and a half ago, so there is also a damage  
19 claim that is going to flow from that.

20 THE COURT: Is there an amended complaint or just  
21 a single complaint?

22 MR. KAFAFIAN: Well, there was a -- on, maybe it  
23 was October 4<sup>th</sup>?

24 MS. GRUTTER: Monday.

25 MR. KAFAFIAN: Just a day or two ago we filed a  
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## PROCEEDINGS

1 counterclaim.

2 THE COURT: My clever intern who is sitting here  
3 with me noticed that none of the counts seem to be against  
4 Mr. Ghorayeb.

5 MR. KAFAFIAN: I have to look at them, your Honor.  
6 I apologize, I don't know if we have that handy.

7 THE COURT: Okay.

8 Well, so, but in terms of what you're describing  
9 to me now, the live issues in your case, the original  
10 case, are a claim against the other two for -- I'm not  
11 sure what the exact theory is, but for scuttling the  
12 transaction. And, for Mr. Ghorayeb -- I mean, I assume  
13 there is -- either some agreement that he would pay rent  
14 while he was there -- Is that the idea? -- or was that  
15 going to be part of his compensation?

16 MR. KAFAFIAN: No. I mean, there was an agreement  
17 and he paid rent for five years and that stopped, so...

18 THE COURT: Okay.

19 And, so, Mr. Stratton, in terms of the  
20 third-party complaint, is there any other relief sought  
21 other than what we've been talking about today?

22 MR. STRATTON: Just the breach of fiduciary duty.  
23 Again, breach of fiduciary duty against Mr. McCormack as  
24 the manager.

25 THE COURT: And what is the nature of the claim?  
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1 What's the --

2 MR. STRATTON: The failure to keep my clients  
3 involved, to share information, has, you know, caused  
4 damages to the LLCs and my clients by extension.

5 THE COURT: So, but now that that transaction is  
6 no longer here, what is -- what's the live controversy at  
7 this point? What damage was actually done that the sale  
8 didn't happen?

9 MR. STRATTON: Well, the sale didn't happen.  
10 That -- depending on who is at fault for that happening,  
11 you know, maybe there was damage, maybe there wasn't. I  
12 don't have a specific -- you know, there's no one thing I  
13 can point to here. Right? The sale didn't happen. Right?  
14 No other sale happened. Mr. McCormack, you know, his  
15 failure to share information caused that deal to fall  
16 through, in our opinion.

17 THE COURT: Well, yeah. But, I mean, you have to  
18 have a theory that traces alleged conduct to actual harm.  
19 So is your theory now that that deal that your client was  
20 uncertain about should have actually occurred or is it some  
21 other deal that you don't know about that could have  
22 occurred?

23 MR. STRATTON: We don't know whether that deal was  
24 a real deal. If it was a real deal --

25 THE COURT: Then how do you know you have a claim?  
Robert Portas, RPR, CRR

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1 MR. STRATTON: To the extent that Mr. McCormack's  
2 claim against my clients -- Right? Mr. McCormack is  
3 saying, "We had this deal and it fell through because of  
4 your action." Well, if that's true, we have the same claim  
5 against Mr. McCormack. So either that claim does not exist  
6 for anyone or it exists for both parties until we figure  
7 out what the damages are, if there were damages.

8 THE COURT: All right. I'm not sure I follow  
9 that, but it's not right for me to know now.

10 But, so, those are the two claims that we have.  
11 And they're third-party claims because the original  
12 plaintiff was Triboss and not Mr. McCormack, right?

13 MR. STRATTON: Correct.

14 THE COURT: Now, if you were suing Mr. McCormack  
15 on the theory that you just described, wouldn't that have  
16 to be a derivative claim? Because the money would go to  
17 Triboss and then you would receive -- your clients would  
18 receive their portion of it.

19 MR. STRATTON: I think you're correct, Your Honor.

20 THE COURT: So your clients can't sue him for  
21 breach of fiduciary duty, I don't think. Again, I'm  
22 freelancing a little bit here without -- without -- but,  
23 generally speaking, the principle of derivative actions in  
24 LLCs is you look at where would the money go. And, you  
25 know, even if -- I'm not saying this happened -- if

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1 Mr. McCormack walked away with \$100,000 of the  
2 corporation's money, your clients are only entitled to  
3 two-thirds of it, not 100 percent of it. So the money  
4 would go to the company and then be doled out.

5 MR. STRATTON: I don't have the answer for you on  
6 that, Your Honor.

7 THE COURT: All right.

8 So I think we all need to figure it out and see  
9 what the case looks like in light of two things: One,  
10 the resolution of this motion, which, again, at this  
11 point is -- I'm denying a preliminary injunction. And,  
12 you know, these aren't final rulings, but, you know, the  
13 wind is blowing in a certain direction. And the fact  
14 that the sale didn't happen, which animates at least some  
15 of the original complaint.

16 So -- Have we had a preliminary conference  
17 already to set a discovery schedule? Was that already  
18 done?

19 MR. KAFAFIAN: We have not, Your Honor. I  
20 think -- Nick, I think we should advise the Court that  
21 Mr. Stratton and I are engaged in a number of other  
22 litigations between these two parties in different  
23 jurisdictions, including Triple-A. Mr. Stratton and I are  
24 actively seeking a mediator to happen within the next week  
25 for a global resolution.

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## PROCEEDINGS

1 So, while we very much appreciate the Court's  
2 attention to this case, it may be worth putting things on  
3 hold for thirty days to allow that process to happen.

4 THE COURT: Okay. That was going to be my next  
5 topic, so I won't get into that.

6 But I want to schedule -- I want to put  
7 something on the calendar, because if I don't have a next  
8 date I get yelled at by somebody within the building. So  
9 I want to set a preliminary conference date so you can  
10 meet the person who found the cases that I cited today,  
11 Ms.~Klinger. And let's make it after that thirty-day  
12 period so that it will have the effect of essentially  
13 putting things in a quiet period for that.

14 Tiffany, what will be a good date in a month,  
15 roughly?

16 (Brief pause.)

17 THE COURT: All right, well, I'm going to be on a  
18 five-week jury trial all of November, so you get whatever  
19 day you want from you and Ms.~Klinger to talk.

20 Why don't we -- shall we say November 9<sup>th</sup>? At  
21 10:00 a.m. And just let's assume that that's a date for  
22 preliminary conference. And you can advise us in advance  
23 if there's no need to do it, but I -- I'm not going --  
24 I'm not typically one who would just keep things on hold  
25 for a mediation that's just sort of generally in the

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1 ether. If there's -- if there's nothing actually going  
2 on I don't want the case to drift.

3 So there's two options. One is to just go ahead  
4 and have the conference and talk through schedule.

5 Another option is: I have a standard form on my website  
6 on the -- on the Commercial Division website, where if  
7 the parties agree to the schedule guidelines that I have  
8 in there, you can just agree to it, send it in as a  
9 proposed order and we can adjourn the conference. Or you  
10 can tell me that there's something very concrete that's  
11 about to happen and that we don't have to waste our time.

12 So, if you can let us know a week in advance or  
13 so, or a few days in advance, that would be helpful so we  
14 know whether to keep the time blocked. Okay?

15 And, so, I would ask you to stay on with Robert  
16 to get the -- order the transcript, and my order will  
17 just refer back to it. So I think it will be useful to  
18 have that -- actually, necessary to have that so that my  
19 order makes sense, because it's going to refer to it.

20 Anything else I can do?

21 (Continued on the following page.)

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23  
24  
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PROCEEDINGS

1 MR. STRATTON: I don't think so, Your Honor.

2 THE COURT: All right. Thank you. I hope you all  
3 stay safe and healthy, please. And I will see you next  
4 time. And, if I hear from you in late October or early  
5 November that you no longer need my services, I promise not  
6 to be upset.


7 MR. KAFAFIAN: Thank you.

8 THE COURT: Thank you.

9 (Whereupon, the above-captioned proceedings  
10 were concluded.)

11 oOo

(It is hereby certified that the  
12 (foregoing is a true and accurate  
13 (transcript of the proceedings.

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( ROBERT PORTAS, RPR, CRR  
15 ( Senior Court Reporter

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