SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ARIEL X. BURT, individually and derivatively on behalf of FORSYTHE LTD.,
Plaintiff,
-against-

LLUIS TORRENT JEREZ,

Defendant.

Index No. 910717/2023

DEFENDANT'S BRIEF FOLLOWING HEARING ON PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION

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Following two days of testimony before the Court, Defendant Lluis Torrent respectfully submits this memorandum of law in opposition to Plaintiff Ariel Burt's application for a mandatory injunction, in which Burt seeks to divert corporate revenues of Atlas Renewables LLC ("Atlas") into an escrow account, and to compel Torrent to pay significant sums to Atlas.

Testimony has confirmed that Plaintiff's entire application – indeed, her entire case – is founded on several ambiguous emails which suggest that ownership of Atlas was, contrary to the truth of the matter, transferred from Torrent to Forsythe, Ltd. ("Forsythe"), a company in which Burt has a fifty percent stake.

But, as revealed by testimonial and documentary evidence, the Membership Interest Transfer Agreement (MITA) executed between the parties in September 2020, which provided for the transfer of Torrent's ownership of Atlas to Forsythe, never went into effect, and the closing at which such interests were to be transferred never took place. Numerous communications from several lawyers, received by Burt without any protest, leave no doubt that Atlas remained in Torrent's hands at all times after. Indeed, as was revealed during the hearings, Burt herself sent documents – all vetted by Forsythe legal staff – confirming that Torrent was and remained Atlas' sole member. Burt's testimony – consisting of repeated, incredible claims that all such legal communications were "mistakes," which she, as CEO of Forsythe, somehow "overlooked" -- did nothing to rebut the reality that Torrent remained and remains the sole member of Atlas, and that this understanding was shared by all involved.

Because Burt cannot establish a likelihood of success on the merits, the Court should deny the entirety of the injunctive relief sought. But, should the Court deem some type of injunctive relief appropriate, no affirmative, mandatory relief should be ordered, as Burt has fallen woefully short of the "heightened standard" governing applications for such extraordinary

and onerous relief, which in this case would involve Torrent's payment of millions of dollars, well before the conclusion of discovery (let alone trial).

Without rehashing, to the extent possible, ground already covered in prior briefing on this application, Torrent now submits this brief, incorporating evidence introduced over two days of hearings before this Court.[1]

FACTS

In January 2020, Torrent met with Burt in London, to discuss more formally his entry into the U.S. renewables market, and her potential role in the venture. Over lunch at a Japanese restaurant in London, Torrent told her that he would be focusing on generating renewable power in New York, and would be incorporating Atlas, a new, U.S.-based LLC. Consistent with Torrent's announcement, Atlas was incorporated the day after the London meeting. Day 2, 34:17-18.

In June 2020, the parties entered into a Cooperation Agreement, which envisioned that Forsythe, owned 50/50 by Torrent and Burt, would hold a 100 percent interest in Atlas. NYSCEF Doc. No. 23 at para. 6.

The Parties Agreed that Both Would be Funding their Venture

At all times, it was understood and agreed that any venture between Torrent and Burt – including Atlas -- would be a true partnership, with both parties contributing capital, and shouldering their proportionate share of expenses and liabilities. Torrent had no interest in an arrangement where one party shoulders expenses and liabilities in perpetuity, while another enjoys the benefits of partnership without corresponding duties. Torrent Aff., ¶21. Burt has

[1] Torrent submits this brief without prejudice to any argument that Burt's action, brought derivatively on behalf of Forsythe, a Bermuda corporation, and implicating that corporation's internal affairs, falls under the jurisdiction of Bermuda Courts, applying Bermuda law.

argued that no document reflects this understanding.

But that is plainly incorrect, as evidenced by several documents generated in 2020, prior to any contemplated transfer of Atlas to Forsythe, and prior to September 2020 Atlas Membership Interest Transfer Agreement (MITA).

First, paragraph 4.2 of the Forsythe Shareholders' Agreement ("Paragraph 4.2"), executed by Burt and Torrent in March 2020, and addressing the issue of corporate funding, provided that "[i]n the short term, the Shareholders unanimously agree that they will be providing finance in different proportions" but that eventually, Torrent and Burt, as 50/50 owners, would have to match each others' contributions: "the Shareholders shall each provide such further finance in their respective Shareholding Proportions." NYSCEF Doc. No. 65 Torrent testified that, had Atlas been transferred to Forsythe, the same rules would have, logically, applied to Atlas. Day 2, 16:22-17:2.

Second, the minutes of Forsythe's Director meeting from August 14, 2020 further memorialize this understanding, stating "once the ownership of Atlas is transferred to the company [Forsythe] that the costs of Atlas will be borne by the Company and that Atlas will be capitalized by the Company [Forsythe]." NYSCEF Doc. No. 97 at Section 4. Capitalization of Atlas through Forsythe means its capitalization on terms applicable to Forsythe, including Paragraph 4.2's matching mechanism. By August 2020, five months had passed since the execution of the Forsythe Shareholders' Agreement in March 2020, and so Paragraph 4.2's provision for unequal funding of Forsythe in the "short term" was of decreasing (if any) relevance. Any transfer of Atlas to Forsythe pursuant to the Membership Interest Transfer Agreement (MITA) that is the subject of this action, would have involved equal funding of Atlas (through Forsythe) by the parties.

Finally, even Burt admitted that "millions" were required to fund Atlas operations, which "required significant capital." Burt Testimony, 22:15-18. As testified by Burt, Atlas operations involved utility interconnection costs, and "costly" spending on various surveys and contractors. Burt Testimony, 20:12-21:1. Nor, as confirmed by Burt, as well as Torrent, did outside investors, including banks, provide funding to the company. Burt Testimony, 22:19-23; 23:9-15; Torrent Testimony, 13:16-21. Thus, by recognizing the critical need for insider financing of Atlas' million-dollar operations, Burt cannot claim that the issue of financing was tangential or not central to her business relationship with Torrent. Thus, Burt cannot claim that her documented inability to fund Atlas operations would have been overlooked or forgiven by Torrent, her contemplated partner in the venture.

In September 2020, Torrent Executes the Atlas Membership Interest Transfer Agreement, but Burt Insists that She Cannot Go Through With the Deal

On September 4, 2020, Torrent executed the MITA that is the subject of this action. *See* Torrent Aff., **Ex. 11**. Pursuant to the MITA, Torrent agreed to transfer his interest in Atlas to Forsythe, in exchange for Forsythe's payment of $1,000 (the "Purchase Price") at the closing to be held on September 10, 2020. But that closing, and the transfer of my interest, never took place. Nor was the Purchase Price ever paid. Torrent Aff., ¶44.

Instead, as explained by Torrent, on or about September 7, 2020, Burt called to inform him that, following a breakup with her fiancé, she was leaving her home in Switzerland, was moving to Bermuda, was not in a position to commit funds to Atlas, and thus could not proceed with the MITA. For Burt, the move from Switzerland was a momentous event – a low point of sorts -- as the break with Switzerland meant also a break with the business contacts she had established in that country, and who would have been in a position to provide her with financial backing. Torrent Testimony, 9:12-10:12. However, as testified by Torrent, Burt assured him

that in Bermuda, her new home, she would be developing new contacts with cryptocurrency investors, who could act as additional sources of funding, replacing the sources lost as a result of her departure from Switzerland. Torrent Testimony, 11:13-10:21. The outcome of the September 7, 2020 phone call was, as previously stated in Torrent's affirmation, and as he testified, that the Purchase Price was not paid, and the MITA did not go into effect, and would remain void while Burt located financial resources to invest in Atlas. Torrent Testimony, 11:24-12:4. As agreed, the $1,000 would be paid only when Burt located resources to fund Atlas. Torrent Testimony, 12:20-25. But that never happened.

In her affirmation, Burt disputes the non-payment of the Purchase Price, claiming that "[u]pon information and belief, following execution of the MITA Torrent caused Forsythe to transfer to Torrent the nominal $1,000 Purchase Price." NYSCEF Doc. No. 22 at ¶20. But this claim lacks all credibility.

There is no reason, and no coherent reason was provided by Burt at the hearing, as to why this important statement is made on "information and belief." *See* Burt Testimony, 84:7-14. Burt testified, somewhat incoherently, that a certain email, called a "distribution draft," evidenced payment of the Purchase Price as part of a larger distribution to Torrent. Burt Testimony, 86:1-18. Tellingly, this purported all-important email, as admitted by Burt, is nowhere referenced in the affirmation (and does not appear in the record), and itself, by Burt's admission, fails to reference the Purchase Price or payment of any $1,000 amount. Burt Testimony, 86:19-87:4. Yet, as CEO of Forsythe, Burt had access to all of its financial records, and so could have easily produced evidence of such payment, had it taken place. Burt Testimony, 85:1-7.

As for the actual payment, Torrent could not have single-handedly authorized for $1,000

to be paid from Forsythe's account, as Forsythe's bank required the approval of both directors (Torrent and Burt) to effectuate such payment – as is evident from Forsythe's bank application (NYCEF Doc. No. 64, section H), the minutes of the Forsythe Director meeting from August 2020 (NYSCEF Doc. No. 97 at Section 2), and as testified by Torrent. Torrent Testimony, 47:21-48:8. Thus, the failure to pay the $1,000 reflected a joint decision reached by Torrent and Burt to forego paying the $1,000, entering into the MITA, and transferring Atlas to Forsythe. Finally, unlike Torrent, Burt never executed the MITA on September 4, 2020, but only got around to signing it nearly two months later, on October 21, 2020 – a reflection, no doubt, of her reluctance to commit to the MITA and her unstable personal life. *See* MITA, NYSCEF Doc. No. 24, Official Certification page; Torrent Testimony, 15:1-5.

Tellingly, during the first "crisis" in the parties' relationship in September 2021, when Torrent, upset by Burt's failure to contribute to the business, terminated the June 2020 Cooperation Agreement – which contemplated Forsythe's ownership of Atlas -- no mention of the MITA was made. Burt's response to Torrent's termination, though one of the longest emails to be written by her, made no mention of MITA whatsoever. NYSCEF Doc. No. 77 at 4. Such omission of any appeal to the MITA makes sense only if by then it was understood that the MITA was not in effect. Torrent Testimony, 128:4-12.

Forgoing entry into the MITA had another important effect – it meant that Burt would not be funding Atlas, contrary to the parties' understandings, and to the Forsythe Shareholders' Agreement and the Forsythe August 14, 2020 Director meeting. And indeed, Burt does not contest that she contributed virtually nothing to Atlas or Forsythe. As is eloquently illustrated in a chart contained in an email to Forsythe accountants from February 9, 2021, as of year-end 2020, no investments of any kind into Forsythe (or Atlas) were made by Burt, with all funds for

the company coming from Torrent or Torrent-controlled entities. *See* chart, NYSCEF Doc. No. 26. There is simply no better illustration of the grace period granted to Burt, than Torrent's one-sided funding of Atlas, and Torrent refraining, at least for a period in 2020-2021, from confronting Burt over her lack of funding Atlas.

The only funding to which Burt can point is an alleged investment of some $250,000 from StandArt Capital Ltd., a purported Burt-controlled entity. Burt Testimony, 24:14-22. But as is demonstrated in a chart found in an email to Forsythe accountants dated March 16, 2021, those investments were made in 2016 and 2017. NYSCEF Doc. No. 109 at 3. No investments were made by Burt since that time, and she cannot point to any. Simply put, it would have been inconceivable for Torrent to effectively turn over 50 percent of his capital-intensive business, starved of outside funding, to someone without any ability to contribute any funds – and this, despite contractual understandings obligating the shareholders to fund Forsythe (and, by extension, Atlas), in matching amounts. The only conceivable explanation for this anomalous state of affairs is provided by Torrent, in the form of the grace period agreed-to by the parties. Simply put, effective co-ownership of Atlas was off the table while Burt was getting her house in order.

Torrent's Cross-Examination Fails to Discredit Him

Much of the cross-examination of Torrent focused on two issues: first, his apparent representations, made to various third-parties, that Forsythe owns Atlas, and second the lack of any explicit written mentions of various relevant facts.

As to the first issue, Torrent has made clear that his representations were, in essence, forward-looking, and reflected the aspiration of the parties to eventually enter into a partnership to develop solar farms in upstate New York. *See, e.g.*, Torrent Testimony, 73:17-18. As Torrent

made clear, there was simply no advantage to be gained from advertising what was essentially the parties' "dirty laundry" to third-parties. Torrent Testimony, 72:21-73:3; 74:4-5. No commercial benefit is to be had from informing the world that Torrent's business partner was impecunious and essentially waiting for better times before fully committing to the business. And, in any regard, Torrent held out hope that Burt, with her advertised cryptocurrency connections, would be able to deliver on her promises. There was thus no reason for Torrent to embarrass Burt, and endanger his relationship with a potential source of funds, by revealing her travails to others. Torrent Testimony, 73:12-14; 79:18-22, 80:18-21.

It is also telling that practically all of the emails at issue are to vendors and service providers, not to counterparties or to potential customers. *See, e.g.*, NYSCEF Doc. No. 105, NYSCEF Doc. No. 26, NYSCEF Doc. No. 30. The same could not be said of emails to counterparties and business partners such as Onyx Development Group LLC and Kruger Energy USA. In those emails, as discussed below, Atlas is represented, correctly, as an entity solely owned by Torrent. While aspirational structures were fit for discussion internally, as it were, truly important transactional emails reflected the truth – that Torrent continued to solely own Atlas. Also revealing are the dates of all such emails, with none dated after the summer of 2021. Such dating is consistent with Torrent's position in this matter that Burt was granted two grace periods, lasting until September 2021. *See* Torrent Aff., NYSCEF Doc. No. 58 at ¶77.

As to the second issue, namely the lack of emails explicitly discussing the forbearance period, or the non-payment of the $1,000, such lack is explained by the fact that the parties often communicated via WhatsApp or Skype calls. Reflecting this practice, in September 2021, a frustrated Burt wrote to Torrent, after he terminated the parties' June 2020 Cooperation Agreement, "[w]hy did I not just call you like I always do?" NYSCEF Doc. No. 77 at 4. Burt

herself referenced various calls the parties allegedly held in the summer of 2023 – in lieu of exchanging emails – regarding critical matters going to the very nature of their relationship, including the status of the MITA. Burt Testimony, 79:7-14. There was thus nothing unusual about important matters being discussed over phone calls.

Burt's Cross-Examination Reveals Her as Lacking in Credibility

Burt's cross-examination revealed a witness lacking all credibility. Presented with email after email, and document after document – all of which were received by Burt – and all spelling out, in no uncertain terms, Torrent's sole ownership of Atlas, Burt could not explain her silence, over many years, to such representations. Tellingly, she did not claim confusion or misunderstanding on her part. Instead, she would have the Court believe, in what turned into an all-purpose explanation repeated *ad nauseam* by Burt, that each of these representations was a "mistake" that she somehow failed to notice.

On October 20, 2020 (not long after the parties' September 7, 2020 phone call) Torrent wrote to Steve Bieber, an environmental scientist, to state that "[c]urrently, the only member of Atlas Renewables LLC is myself." NYSCEF Doc. No. 110 at #106326.5. Andreas Escher, a Swiss lawyer who is part of Burt's network and whom she had known for a long time (Burt Testimony, 30:16-31:1), was copied on the email, with Burt copied on subsequent emails in the chain. No objection from Burt was forthcoming, with Burt claiming at the hearing that this email was a "mistake" that she "missed." Burt Testimony, 38:24-39:2.

On March 16, 2021, Burt forwarded a package of documents to Clarien Bank, in connection with the opening of Atlas' bank account. NYSCEF Doc. No. 111. In the cover email, Burt writes that "[t]he documents are certified copies, seen in original by the legal department, legal head, Andreas Escher." During her testimony, Burt claimed that it was a

"mistake" for her to have called Escher head of Forsythe's legal department. Burt Testimony, 41:23-24. Indeed, every page of every document in this packet is hand-signed by Escher, in his capacity as head of Forsythe's legal department. Several documents indicate that Torrent is sole member of Atlas, including: a) Statement of Authorized Person, Bates #103172.2 (Torrent as "initial member" of Atlas; b) Clarien Bank indemnity form, Bates #103316.2 (Torrent listed as 100 percent owner of Atlas); c) Bates #103340.1 (Torrent listed as 100 percent owner of Atlas). Repeatedly, Burt took no responsibility for the review of the very documents she forwarded, terming each of these representations, all certified by Escher, a "mistake." Burt Testimony, 46:11, 50:9, 51:20.

Burt took a similar approach to explaining why she raised no objection in connection with representations made during the negotiation of a Membership Interest Purchase Agreement (MIPA) with Kruger Energy USA in the fall of 2021.

On November 30, 2021, in connection with the negotiation of the MIPA, multiple emails were exchanged between (among others) Torrent, Atlas' counsel at Nixon Peabody LLP, and Kruger's counsel at Preti, Flaherty, Beliveau & Pachios. Burt, as one of Atlas' service providers, was copied on all emails. At least five emails, which Burt received, and to which she did not object, leave no doubt that Torrent was the sole member of Atlas:

a. An email chain, with the most recent email from Torrent (and copying Burt) attaching a certain Atlas Minutes of Special Meeting dated November 29, 2021, signed by Torrent only, which state in relevant part that "[t]he meeting was called to order by Lluis Torrent Jerez, the only member of [Atlas]" and that Torrent alone was present at the meeting, with Torrent "being all the Members of [Atlas]." Torrent Aff., NYSCEF Doc. No. 78;

b. An email chain, with the most recent email from Torrent (and copying Burt) attaching a certain Atlas Minutes of Special Meeting dated November 30, 2021, unsigned, which state in relevant part that "[t]he meeting was called to order by Lluis Torrent Jerez, the only member

of [Atlas]" and that Torrent alone was present at the meeting, with Torrent "being all the Members of [Atlas]." NYSCEF Doc. No. 79;

c. An email chain, with the most recent email from Rue Toland, Esq. (and copying Burt) attaching clean and redlined versions of a certain Atlas Minutes of Special Meeting dated November 30, 2021, unsigned, which state in relevant part that "[t]he meeting was called to order by Lluis Torrent Jerez, the only member of [Atlas]" and that Torrent alone was present at the meeting, with Torrent "being all the Members of [Atlas]." NYSCEF Doc. No. 80;

d. An email chain, with the most recent email from Torrent (and copying Burt), attaching a certain Atlas Minutes of Special Meeting dated November 30, 2021, signed by Torrent only, which state in relevant part that "[t]he meeting was called to order by Lluis Torrent Jerez, the only member of [Atlas]" and that Torrent alone was present at the meeting, with Torrent "being all the Members of [Atlas]." NYSCEF Doc. No. 81;

Finally, another email from November 30, 2021, from David Brown of Nixon Peabody, LLP, and copying Burt (NYSCEF Doc. No. 80) contained the following attachments: a) Atlas Opinion Certificate in which Torrent is listed as "sole manager" (para. 1) and "sole member" (para. 8), and in which Atlas' January 2020 Operating Agreement is described as having "not been modified, revised, amended or rescinded in any way as of the date hereof" (para. 8); b) Atlas Certificate of Manager in which Torrent is listed as "sole manager"; c) a copy of Atlas' January 2020 Operating Agreement, in which Torrent is listed as sole member; and d) a certain Atlas Minutes of Special Meeting dated November 30, 2021, signed by Torrent only, which state in relevant part that "[t]he meeting was called to order by Lluis Torrent Jerez, the only member of [Atlas]" and that Torrent alone was present at the meeting, with Torrent "being all the Members of [Atlas]."

Thus, on November 30, 2021, Burt was copied on no less than **five emails** between attorneys, attaching **eight Atlas corporate documents**, that left no doubt that Torrent was the sole owner of Atlas.

At hearing, Burt's approach was to deflect, claiming that she did not "read" or "see" any of these numerous emails in question, despite having been copied on all of them. Burt Testimony, 55:7, 56:21, 57:9, 57:20, 58:9-10, 60:2, 63:18, 64:15. At the same time, Burt claimed that as CEO, it was her job to make sure that the Kruger deal was "properly documented." Burt Testimony, 61:1-2.

Two factors make Burt's explanations incredible. First is the sheer number of emails which she purported to ignore. But the second factor is the sheer audacity of Torrent's claimed inequity. That is, Burt would have the Court believe that Torrent was willing to repeatedly have sent, to his partner, emails confirming that she had no interest in Atlas, even though he knew (in this version) that she believed otherwise. For Torrent to have authorized such emails would have been sheer folly, and a straight path to a lawsuit – unless, that is, all parties were aware that he was, in fact, the sole owner of Atlas. It would have also been incredibly stupid for Torrent to have authorized such emails in the context of a major transaction, which would have surely been compromised had Burt raised concerns about alleged misrepresentations in legal documents. It would have been one thing for Torrent to have secretly sent such emails to third-parties, leaving out Burt. But here, Burt is repeatedly copied on emails that spell out, in no uncertain terms, the truth about Atlas' ownership structure. That Torrent was willing to include Burt on such emails is further proof that all parties were on the same page regarding his ownership of Atlas.

In 2023, additional emails, reflecting Torrent's status as sole member of Atlas, were generated with respect to a second transaction. By early February 2023, Torrent was in contact with Onyx Development Group LLC, a New York-based investor interested in acquiring community solar projects in upstate New York.

On May 8, 2023, Torrent sent an email to Jordan Dansby, Onyx's attorney, copying Burt,

in which he stated that "I will be signing [the MIPA] as the Seller (Atlas Renewables LLC) only member and manager." NYSCEF Doc. No. 83 at 3. Later that day, Torrent re-confirmed, again copying Burt, that "[t]he operating agreement of Atlas Renewables LLC reflects [me] individually as sole member/manager." *Id.* at 3. As with Kruger, Burt raised no objections at all. At the hearing, Burt claimed that these emails put her in "shock," and yet she took some time to confront Torrent about them. Burt Testimony, 69:16-10. And yet, despite this "shock" at having been, as she claims, cut out of the business, Burt continued communicating with Torrent as if nothing had taken place, sending perfectly pleasant emails to him on May 13, 2023 ("Dear Lluis, Welcome back!") (NYSCEF Doc. No. 112), and June 14, 2023 (NYSCEF Doc. No. 113), shortly after this May 8, 2023 "discovery." Such communications simply discredit any claim of "shock" or surprise on the part of Burt.

Burt only started to claim a piece of Atlas in July 2023, around the time when Atlas and Onyx were about to close their transaction. That is when Burt demanded a 5% success fee for her alleged work on the transaction. In response, Torrent explained to Burt over the phone that her involvement on the transaction was minimal, and that she was not entitled to that compensation. After that phone call, Burt changed her tune and began claiming that the MITA went into effect, and that Forsythe owns Atlas, triggering this case. Torrent Affirmation, NYSCEF Doc. No. 58, ¶91.

ARGUMENT

A preliminary injunction is designed to accomplish the opposite of 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). Plaintiff fails on all three fronts.

Likelihood of Success on the Merits

There is no likelihood of success on the merits, for several reasons.

First, paragraph 1(b) of the MITA creates a condition precedent to the transfer of Torrent's interest, providing that the "Purchase Price shall be payable by Buyer to Seller, and the Transferred Membership Interest shall be transferred by Seller to Buyer, at 10:00 a.m. EST on September 10, 2020 (the 'Closing.')." It is undisputed that the Purchase Price was never paid, and the Closing was never held, and thus, the MITA never went into effect. *See Jobin Org., Inc. v. Bemar Realty, LLC*, 165 A.D.3d 904, 906 (2d Dep't 2018).

Second, for all the reasons spelled out above and in the other papers submitted on this motion, the parties behaved at all times as if MITA, in fact, never went into effect. *Gulf Ins. Co. v. Transatlantic Reins. Co*., 69 A.D.3d 71, 85, (1st Dep't 2009) ("The parties' course of performance under the contract, or their practical interpretation of a contract for any considerable period of time, is the most persuasive evidence of the agreed intention of the parties."). Indeed, consistent with the MITA having never gone into effect: 1) Burt contributed zero dollars to the business; 2) Burt never raised the issue of the MITA when Torrent terminated the Cooperation Agreement; and 3) Burt never objected to – and indeed, forwarded – a variety of legal documents showing Torrent as sole owner of Atlas.

Danger of Irreparable Harm and Balance of the Equities

The danger of irreparable harm is non-existent. "[P]laintiff seeks money damages" in this action (*see* Complaint at p. 25), triggering the well-established doctrine that "economic loss, which is compensable by money damages, does not constitute irreparable harm." *Matter of Rice*, 105 A.D.3d 962, 963 (2d Dep't 2013).

As for the balance of the equities, that is surely on the side of Defendant. Plaintiff's sought remedy, which would escrow the proceeds of Atlas' transactions, and would require Forsythe's consent as to key transactions, has the effect of granting Plaintiff some of the ultimate relief sought in this action – control over Atlas' affairs. That is not the purpose of a preliminary injunction. *Berman v. TRG Waterfront Lender, LLC*, 181 A.D.3d 783, 784-785 (2d Dep't 2020) ("[A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment."). Instead of preserving the status quo, it would disrupt it, limiting Atlas to needed funds, and hampering its successful operation. When her relations with Torrent were cordial, and true to her status as a service provider, Burt was content with retention of a five percent "success fee" or of a $10,000 monthly salary. Now that she is in litigation, she seeks to sequester Atlas' funds in escrow. Such remedy will operate like an attachment, and is improper on the facts as adduced above. *Mammoth Ent., Inc. v. Global Poverty Project, Inc.*, 2018 N.Y. Misc. LEXIS 33167, at *3-4 (Sup. Ct. N.Y. County Apr. 26, 2018) ("[T]he retention of the Escrowed Funds is operating in substance like an attachment, since it is restricting defendant's property, so that it can be applied to the plaintiff's judgment in the action, should the plaintiff prevail") (internal citation omitted). Indeed, "[a]n order of attachment directs the sheriff to take constructive and sometimes actual hold of a defendant's property, so that it can be

applied to the plaintiff's judgment in the action, should the plaintiff prevail." *VisionChina Media Inc. v. Shareholder Representative Servs., LLC*, 109 A.D.3d 49, 59 (1st Dep't 2013). As a "harsh" remedy, attachment "is construed narrowly in favor of the party against whom the remedy is invoked" and is thus certainly inappropriate here. *Id.*

In the alternative, should the Court grant the relief sought (and it should not), it should require Plaintiff (and not Defendant) to furnish an undertaking. *See Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp.*, 69 A.D.3d 212, 224 (4th Dep't 2009). Indeed, "CPLR 6312 (b) clearly and unequivocally requires the party seeking an injunction to give an undertaking" -- not the party against whom the injunction is being entered. *Griffin v. 70 Portman Rd. Realty, Inc.*, 70 A.D.3d 883, 884 (2d Dep't 2008); *Spinal Dimensions, Inc. v. Chepenuk*, 2007 N.Y. Misc. LEXIS 5691, at *41 (Sup. Ct. Albany County Aug. 9, 2007) ("In general, courts must require a party seeking an injunction to post an undertaking.") (Platkin, J.).

To the extent that Plaintiff seeks the return of funds paid out from Atlas to Torrent's companies as repayment of financing, the Court should readily rejects such application. While a "preliminary injunction is an extraordinary provisional remedy," (*Harris v. Patients Med., P.C.*, 169 A.D.3d 433, 434 (1st Dep't 2019)) a "heightened standard" applies where the injunctive relief sought is of an affirmative, mandatory nature, with Plaintiff seeking to force Defendant to do something, not to desist from acting. *Roberts v. Paterson*, 84 A.D.3d 655, 655 (1st Dep't 2011). Indeed, such mandatory injunction, "is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action." *Zoller v. HSBC Mtge. Corp. (USA),* 135 A.D.3d 933, 934 (2d Dep't 2016); *Board of Mgrs. of Wharfside Condominium v. Nehrich,* 73 A.D.3d 822, 824 (2d Dep't 2010) ("The circumstances presented in this case are not of such an

extraordinary nature as to warrant mandatory injunctive relief pending the resolution of the litigation."). There are no "extraordinary" circumstances requiring any payment of funds returned to Torrent and his investors (wherever they may be located). In light of the above, Burt cannot demonstrate that Forsythe owns any part of Atlas. And, the return of millions of dollars would be an impossible undertaking for Torrent – effectively imposing irreparable harm on him on highly dubious grounds.

CONCLUSION

For the reasons stated above, the Court should deny the Order to Show Cause in its entirety. Notwithstanding, an alternative remedy that would allay any of Plaintiff's concerns without destroying Atlas or imposing a *de facto* attachment, would consist in the following injunctive relief:

1. Torrent to provide Burt with term sheet or LOI for any prospective deal promptly upon receipt; Burt has five business days to consent;
2. Burt to provide consent in a form reasonably satisfactory to the counterparty and Torrent as required;
3. Prior to any deal closing, upon generation of the first draft MIPA, Torrent will circulate draft MIPAs and deal documentation on a weekly basis;
4. Lenders to Atlas (Horizon, Quantum, Torrent) to be repaid by Atlas according to loan terms as an ordinary business expense;
5. All other third-party expenses are to be paid in normal course by Atlas;
6. All distributable proceeds go into escrow with the understanding that up to 50% of the distributable proceeds will be available for funding operating expenses for future Atlas deals;

7. Burt provides a bond in favor of Torrent with reasonable and typical commercial terms, in the amount of $500,000.

Dated: November 8, 2024
New York, NY

Respectfully submitted,

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