

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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In the Matter of the Application of John M. :  
Ferolito, the Holder of More Than 20 Percent of : Index No.  
All Outstanding Shares of Beverage Marketing : RJI No.  
USA, Inc. and Hornell Brewing Co., Inc., : Assigned to:

Petitioner, :

For the Dissolution of Beverage Marketing :  
USA, Inc. and Hornell Brewing Co., Inc., Two :  
Domestic Corporations. :

VERIFIED PETITION

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Petitioner, John M. Ferolito, by and through his undersigned attorneys, Boies,  
Schiller & Flexner LLP, hereby alleges the following for his Verified Petition pursuant to  
Section 1104-a of the New York Business Corporation Law (“BCL”).

**JURISDICTION AND VENUE**

1. John M. Ferolito (“Ferolito”) owns 26 percent and his son, John M. Ferolito, Jr.  
owns 24 percent of the outstanding common shares of Beverage Marketing USA, Inc. (“BMU”).  
Domenick Vultaggio (“Vultaggio”) owns 26 percent of the shares of BMU, and his two sons,  
Wesley Vultaggio and Spencer Vultaggio, each own the remaining 12 percent of the shares of  
BMU. Ferolito and Vultaggio each own 50 percent of the shares of Hornell Brewing Company,  
Inc. (“Hornell”). (Collectively, BMU and Hornell are referred to herein as “the Corporations.”)  
Ferolito and Vultaggio each have a 50 percent vote in each of the Corporations.

2. Section 1104-a provides a special remedy that allows holders of at least 20 percent of the voting shares of a corporation to petition for the involuntary dissolution of the corporation if “[t]he directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders.” N.Y. Bus. Corp. L. § 1104-a(1) (McKinney 1998).

3. BCL Section 1112 provides, in pertinent part, “An action or special proceeding under this article shall be brought in the Supreme Court in the judicial district in which the office of the corporation is located....” N.Y. Bus. Corp. L. § 1112 (McKinney 1962).

4. This Court has jurisdiction over this proceeding because the principal place of business of each of the Corporations is located in Nassau County, New York.

#### **PRELIMINARY STATEMENT**

5. The Corporations are part of a group of twenty-one corporations known as the AriZona Entities, which are engaged in the business of manufacturing, marketing and distributing the AriZona Iced Tea line of products and other beverages. The Corporations are the two primary entities of the twenty-one corporations that comprise the AriZona Entities. The Corporations generate the overwhelming majority of the operating income of the AriZona Entities. Ferolito started this business approximately 20 years ago, and through his hard work and business acumen the Corporations were built into some of the most respected and profitable beverage companies in the world.

6. Ferolito is the President and a Director of the Corporations. Vultaggio is the Secretary and Treasurer and a Director of the Corporations, and he currently manages the day-to-day operations of the Corporations.

7. Each of the AriZona Entities is owned 50 percent by Ferolito, his relatives, and related entities (the “Ferolito Group”) and 50 percent by Vultaggio, his relatives, and related entities (the “Vultaggio Group”).

8. Pursuant to a 1998 Owners’ Agreement between the Ferolito Group and the Vultaggio Group, all decisions regarding “material matters” of the Corporations are to be resolved jointly by the “mutual agreement” of Ferolito and Vultaggio, and any payment or financial benefit one owner group receives from the Corporations, defined under the Owners’ Agreement in the broadest possible fashion (*e.g.*, compensation, dividends, distributions, commissions, etc.), is to be shared equally with the other owner group.

9. Vultaggio has designed and carried out a scheme intended to deny Ferolito the financial benefit from his equity ownership in the Corporations to which he is entitled, despite the fact that hundreds of millions of dollars of corporate profits are being generated annually by the Corporations, which generate almost \$1 billion in sales per year. While Ferolito receives no distributions, Vultaggio and other members of the Vultaggio Group are being paid substantial sums by the Corporations in other forms, including, but not limited to, the interest payments on above-market loans that Vultaggio has provided to the Corporations, despite their lack of financial need. Vultaggio has also excluded Ferolito from significant corporate decision-making so that he may make corporate decisions unilaterally without any input from Ferolito.

10. This pattern of conduct presents a classic case for dissolution under BCL Section 1104-a. BCL Section 1104-a was designed as a mechanism to mitigate the power imbalance that can occur among shareholders in closely held corporations, and it is a direct—not a derivative—action based on the petitioner’s status as shareholder. “As the stock of closely held corporations generally is not readily salable, a minority shareholder at odds with management policies may be

without either a voice in protecting his or her interests or any reasonable means of withdrawing his or her investment.” *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 72 (1984).

11. One ground for dissolution under BCL Section 1104-a involves “oppression” of a shareholder who holds at least 20 percent of the shares of the corporation. N.Y. Bus. Corp. L. § 1104-a. Decisional law under BCL Section 1104-a defines oppression to involve conduct that defeats a shareholder’s “reasonable expectations” of a return on his investment or of reasonable participation in corporate affairs. *See Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 72 (1984); *see also Gimpel v. Bolstein*, 477 N.Y.S.2d 1014, 1018 (N.Y. Sup. Ct. 1984). Actions that have been held to constitute oppression and thus form a proper basis for involuntary dissolution under BCL Section 1104-a include discontinuing regular corporate dividends, exclusion of the shareholder from significant corporate decisions, failure to disseminate corporate information, and denial of access to corporate books and records. *Kemp* at 74-75 (upholding dissolution based on abrupt change to pattern and practice of distributing *de facto* dividends to all shareholders).

12. Ferolito has been subject to oppression by Vultaggio as defined under BCL Section 1104-a and New York’s jurisprudence. For well over a decade, the Corporations made substantial monthly and annual distributions of corporate profits to Ferolito and the Ferolito Group. Vultaggio unilaterally discontinued this practice in 2008, without any input from Ferolito and over his objections, for no legitimate corporate reason. Instead, during these two years, the Corporations have been stockpiling their cash profits and currently have available cash or cash equivalents of over \$300 million.

13. Vultaggio’s strategy is transparent. Because the Corporations are Subchapter S corporations, their shareholders must individually pay taxes on the Corporations’ annual profits.

Those profits totaled approximately \$110 million and \$151 million in 2008 and 2009, respectively. Vultaggio knows that cutting off all annual and monthly corporate distributions from the Corporations has exerted tremendous financial pressure on the Ferolito Group to meet its tax payments. Vultaggio is using this pressure to try to force the Ferolito Group to sell their shares in the Corporations to the Vultaggio Group at a price substantially below their fair value. Each of these actions by Vultaggio, standing alone, establishes oppression under BCL Section 1104-a which entitles Petitioner Ferolito to have the Corporations dissolved.

#### **History of BMU, Hornell, and the AriZona Entities**

14. The Corporations are New York corporations with their principal place of business located at 60 Crossways Park in Woodbury, Nassau County, New York.

15. The Corporations are not registered as investment companies under the Investment Company Act of 1940.

16. No shares of the Corporations are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national and/or an affiliated securities association.

17. Ferolito is entitled to vote on the election of directors of the Corporations.

18. Ferolito holds the title of President and is a Director of the Corporations.

19. Ferolito was a co-founder of the Corporations and has been an employee since their inception in 1992. Ferolito was instrumental in growing the Corporations through generating sales and developing new products and business.

#### **Management of the AriZona Entities**

20. Ferolito began a beverage business in the summer of 1972 and brought Vultaggio into the business in 1973. After many years of hard work, Ferolito and Vultaggio launched and

began marketing the AriZona Iced Tea brand of beverages in 1992. Ferolito and Vultaggio founded the Corporations in 1992 to conduct the preponderance of the AriZona Iced Tea business.

21. Throughout the early 1990s, Vultaggio and Ferolito each had his own area of responsibility within the Corporations: Vultaggio in the warehouse, and Ferolito in the corporate office. This arrangement proved successful, and Vultaggio and Ferolito maintained a close personal and professional relationship.

22. In or around December 1994, at Vultaggio's urging, he and Ferolito relocated the Corporations' office from Brooklyn, New York, to Lake Success, New York, notwithstanding that the relocation required Ferolito to commute two hours each way between the office and his residence at the time in New Jersey.

23. At that point, Vultaggio left the warehouse and joined Ferolito in the corporate office. For the first time, Vultaggio and Ferolito were working under the same roof—indeed, in the same office—and their relationship soon became strained. Substantial differences in their approaches to management and decision-making created tension and led to increasingly intense disputes. Moreover, Vultaggio began to mistreat Ferolito, refusing to meet with him or take his calls, and deliberately avoiding him at the office.

24. By late 1996 or early 1997, the situation had become unbearable for Ferolito, and it was clear to both Vultaggio and to Ferolito that they could no longer productively share responsibility for day-to-day management of the AriZona Entities. They agreed that due to their differences there could “only be one captain of the ship.” Vultaggio was unwilling to relinquish day-to-day management of the AriZona Entities. Ferolito, on the other hand, felt somewhat

more comfortable relinquishing day-to-day management because he was confident that they had developed a strong product that would continue to be successful in the future.

25. Thus, rather than continue with the unworkable “two captains” structure, Ferolito agreed to allow Vultaggio to assume responsibility for day-to-day management. The decision for Ferolito to step back was a very difficult one. However, Ferolito acted in the best interests of the Corporations to prevent near-constant disagreements with Vultaggio and the inevitable deadlock concerning day-to-day management issues that would have ensued.

26. As part of this arrangement, Ferolito and Vultaggio also agreed that Richard Adonailo (“Adonailo”), the Chief Financial Officer of the Corporations at the time, would keep Ferolito informed as to the operations of the business, and that Ferolito would retain his rights as co-owner of the Corporations to participate in corporate decision-making, especially with respect to “big picture” business decisions.

27. By allowing Vultaggio to assume responsibility for day-to-day management of the AriZona Entities, Ferolito had no intention of relinquishing his voting rights or his control over significant corporate decisions, nor did he do so at any point. Through the retention of his voting rights, Ferolito expected to be able to ensure that he would achieve the same financial return on his investment as when he was involved on a day-to-day basis.

28. As the founding shareholder representing the Ferolito Group, which has always held and continues to hold a 50 percent equity stake in the Corporations and the other AriZona Entities, Ferolito has always expected that his involvement with the overall management of the Corporations, and thus his management fees, bonuses, and other compensation would continue as long as the AriZona Entities (including the Corporations) continued their operations.

29. This expectation was codified in a 1998 Owners' Agreement entered into between Ferolito and Vultaggio and the shareholder-members of their respective families, which governs the management and ownership of the AriZona Entities.

30. The Owners' Agreement, attached as Exhibit A, stipulates that all material decisions regarding the Company be made by mutual assent (Owners' Agreement § 3.1) (“[A]ll material matters respecting the AriZona Rights or the AriZona Entities ... shall be resolved by mutual agreement of the Ferolito Owner Group and the Vultaggio Owner Group.”) and that all profits of the Company distributed to the shareholders shall be distributed equally (*id.* § 2) (“[A]t all times each of the Ferolito Owner Group and the Vultaggio Owner Group shall, in the aggregate as to each, receive 50% of all AriZona Payments....”).

31. In the years both prior to and after the execution of the 1998 Owners' Agreement, Ferolito's involvement in the day-to-day management of the Corporations remained limited, as Vultaggio made it difficult for Ferolito even to come to the office. Though he reduced his day-to-day management role in late 1996 or early 1997, Ferolito never relinquished his rights as a shareholder in the Corporations and the other AriZona Entities.

32. As late as April 2008, the AriZona Entities, through their in-house counsel, appropriately continued to seek Ferolito's approval of and signature on resolutions for the AriZona Entities, in his capacity as a member of the Board of Directors of the AriZona Entities, including the Corporations,. Those proposed resolutions identified Ferolito as the President of the AriZona Entities and authorized him to conduct transactions, for and on behalf of the AriZona Entities, with respect to their bank accounts.

### **Vultaggio's Oppression of Ferolito**

33. Despite the fact that Ferolito has never relinquished his voting rights or his right to participate as a director and manager of the AriZona Entities, since 2008 Vultaggio has used his control over the day-to-day operations of the AriZona Companies to wage a campaign designed to oppress Ferolito as defined by BCL Section 1104-a in an effort to force Ferolito to sell his shares at substantially below fair market value to Vultaggio.

34. Vultaggio's oppression of Ferolito has employed multiple strategies.

- i. First, abandoning a longstanding and mutually agreed-upon pattern and practice of distributing cash to the shareholders on a monthly and annual basis in an effort to create onerous financial pressure on Ferolito due to the tax obligations (described in greater detail below) that arise from being a significant shareholder in a very profitable Subchapter S corporation;
- ii. Second, thwarting Ferolito's attempts to sell some or all of his interests in the AriZona Entities for fair market value either to a third-party purchaser or to Vultaggio.
- iii. Third, expressing that Ferolito is physically unwelcome on the premises of the AriZona Entities;
- iv. Fourth, actively excluding Ferolito from participating or voting in material decisions of the Corporations;
- v. Fifth, refusing Ferolito access to corporate information that would enable him to remain apprised of the activities of the Corporations so that he can meaningfully participate and exercise his rights as a shareholder.

35. In 2008, Vultaggio ordered the Corporations to stop their long-standing practice of conducting regular audits of their financial records. There was no legitimate business reason

for this decision. Rather, the decision was a transparent ploy to (1) make it more difficult for the Corporations to engage in discussions with third parties interested in purchasing the shares of the Ferolito Group; and (2) make it more difficult for Ferolito to gain access to the necessary information to determine whether Vultaggio was properly conducting the day-to-day operations of the Corporations. Vultaggio continues to withhold the distributions to which Ferolito and the Ferolito Group are entitled.

36. Vultaggio has sought to exclude Ferolito from having necessary access to information about the Corporations. Vultaggio has refused and continues to refuse to allow Ferolito to exercise his rights as an owner to fully and properly inspect the books and records of the Corporations, and has even tried to sever Ferolito's contact with Corporation employees. Since late 2007, Vultaggio has also effectively barred Ferolito from the offices of the Corporations.

37. During this time period, Vultaggio has refused to permit Ferolito to participate in significant decision-making relating to the Corporations, including with respect to "big picture" decisions in which Ferolito always historically participated even after Ferolito stepped back from day-to-day management, including the distribution of profits from the Corporations.

38. For example, Vultaggio is currently undertaking a unilateral plan to restructure the AriZona Entities without consulting Ferolito or seeking his approval, despite Ferolito's repeated protests and good faith requests for information concerning the restructuring. Vultaggio's repeated refusals to include Ferolito in the restructuring process, as required by the Owners' Agreement, demonstrate a large-scale attempt to exclude Ferolito from all decision-making regarding the AriZona Entities and to deprive Ferolito of the value of his investment.

39. Vultaggio has also unilaterally made financial commitments for the Corporations without obtaining Ferolito's consent.

40. Vultaggio's abuse of his control of the day-to-day management of the Corporations has resulted in a total breakdown of the Corporations' intended managerial structure. After arrogating to himself absolute decision-making authority, Vultaggio has used and continues to use that authority to harm the Ferolito Group and to compromise the Ferolito Group's ability to receive the financial benefits of its stock ownership in the Corporations either through distributions or through the sale of the Ferolito Group's interest in the Corporations.

41. As a consequence, Vultaggio's actions have repeatedly deprived the Ferolito Group of the return on its continued investment in the Corporations to which it is entitled denied Ferolito a meaningful say in the affairs and governance of the Corporations.

#### **Vultaggio's Unprecedented and Unilateral Decision to Withhold Owner Distributions**

42. The Corporations are organized as Subchapter S corporations, which means that they are not subject to tax. Rather, the Corporations' shareholders pay the tax on the Corporations' profits, whether or not those profits are actually distributed to the shareholders.

43. Since 1994 and continuing uninterrupted through 2007, the Corporations' profits have been paid out to Vultaggio and Ferolito on an annual basis in monthly management fees and year-end bonuses. As a result, during that time period Vultaggio and Ferolito received tens of millions of dollars annually, and they pay their taxes out of those distributions.

44. In 2002, the Corporations distributed over \$36 million in corporate profits to Ferolito and Vultaggio. Ferolito received a total of \$18.3 million in shareholder distributions in 2002, which were comprised of a salary of \$1.3 million and a year-end bonus of \$17 million. Vultaggio received virtually identical shareholder distributions in 2002.

45. In 2003, the Corporations distributed over \$40 million in corporate profits to Ferolito and Vultaggio. Ferolito received a total of \$20.3 million in shareholder distributions in 2003, which was comprised of a salary of \$1.3 million and a year-end bonus of \$19 million. Vultaggio received virtually identical shareholder distributions in 2003.

46. In 2004, the Corporations distributed over \$67 million in corporate profits to Ferolito and Vultaggio. Ferolito received a total of \$33.9 million in shareholder distributions in 2004, which were comprised of a salary of \$1.3 million and a year-end bonus of \$32.6 million. Vultaggio received virtually identical shareholder distributions in 2004.

47. In 2005, the Corporations distributed over \$108 million in corporate profits to Ferolito and Vultaggio. Ferolito received a total of \$54 million in shareholder distributions in 2005, which were comprised of a salary of \$1.3 million, a management fee of \$12 million, and a year-end shareholder payment of \$44 million. Vultaggio received virtually identical shareholder distributions in 2005.

48. In 2006, the Corporations distributed over \$99 million in corporate profits to Ferolito and Vultaggio. Ferolito received a total of \$49.8 million in shareholder distributions in 2006, which were comprised of a salary of \$1.3 million, a management fee of \$15 million, and a year-end bonus of \$33.5 million. Vultaggio received virtually identical shareholder distributions in 2006.

49. In 2007, the Corporations distributed over \$120 million in corporate profits to Ferolito and Vultaggio. Ferolito received a total of \$60.3 million in shareholder distributions in 2007, which were comprised of a salary of \$1.3 million, a management fee of \$15 million and a year-end bonus of \$44 million. Vultaggio received virtually identical shareholder distributions in 2007.

50. Each year-end bonus from 2002 through 2007 was approved by the directors of the Corporations, and approval was memorialized in a written resolution signed by the directors. Each resolution recognized the “extraordinary efforts” of both Vultaggio and Ferolito, and each recognized Ferolito’s position as President of the Corporations.

51. In 2007, however, tensions with the Vultaggio Group continued to increase as a result of Vultaggio’s unwillingness to enter into good faith negotiations regarding the sale of the Ferolito Group’s shares. In 2007, Vultaggio determined that, despite consistently issuing year-end bonuses for over a decade through the use of signed resolutions by the directors of the Corporations, Ferolito no longer had a right to vote on the year-end bonuses. This unilateral decision was in violation of the Owners’ Agreement which requires mutual agreement on all material issues between Ferolito and Vultaggio (*see* Owners’ Agreement § 3.1).

52. Despite Vultaggio’s improper and unauthorized actions, he and Ferolito were able to negotiate a settlement agreement that provided that by December 21, 2007 each Owner Group would receive a shareholder distribution from the Corporations’ profits similar to those of previous years.

53. In February 2008, Ferolito filed a lawsuit in an attempt to settle a dispute regarding a provision of the Owners’ Agreement that prohibited him from transferring his shares of the Corporations. In retaliation for the filing of this lawsuit, Vultaggio unilaterally decided to end the practice of issuing monthly management fee payments, without consulting Ferolito or seeking his approval. From 2005 through 2007, the Corporations had paid Ferolito a total of \$42 million in management fees.

54. Vultaggio tried to justify this unilateral ploy by asserting that the Corporations were allegedly experiencing a “cash crunch” that caused them to reclassify the last monthly

management payment made to Ferolito and Vultaggio from January 2008 as a loan repayment. This claim by Vultaggio was pure pretext, as there was no “cash crunch,” nor was there any other legitimate business reason to take this action. Rather, this unilateral decision by Vultaggio was in direct violation of the Owners’ Agreement that requires mutual consent for material decisions and was implemented solely to put financial pressure on Ferolito.

55. At the end of the 2008 calendar year, Vultaggio took his strategy one step further by refusing to issue a year-end bonus to the shareholders from corporate profits, as had been standard corporate practice for over a decade. Ferolito emphatically expressed his disagreement with this action, which constituted a major decision on behalf of the Corporations from which Ferolito was excluded.

56. Ferolito was and is dependent on the monthly management fees and year-end bonuses in order to make his periodic tax payments resulting from his ownership interest in the Corporations, as the Corporations’ Subchapter S status requires him to do. The Corporations’ Subchapter S status led Vultaggio and Ferolito to the mutual understanding and expectation that they, as shareholders, would incur personal tax liability on the Corporations’ profits in exchange for a return in the form of periodic and consistent shareholder distributions of corporate profits. Thus, Vultaggio’s unilateral decision to halt all shareholder distributions completely defeated Ferolito’s understanding and expectation of a return on his investment in the Corporations and placed enormous financial pressure on Ferolito in light of massive annual tax payments he is forced to make as an individual due to his status as a shareholder in the Corporations.

57. In 2008, Ferolito received total shareholder distributions of only \$1.3 million for his salary—approximately \$59 million less than Ferolito received in 2007. Ferolito’s and the Ferolito Group’s tax liability for this same period as a result of their ownership of the

Corporations exceeded \$22 million. While Vultaggio cited an alleged “cash crunch” to explain the lack of distributions, the Corporations generated approximately \$110 million in corporate profits in 2008.

58. In 2009, while the litigation between Ferolito and Vultaggio continued before Justice Shulman, Vultaggio again withheld all shareholder distributions under the continued pretense of a “cash crunch.” To the contrary, the Corporations generated approximately \$150 million in corporate profits in 2009. Ferolito’s and the Ferolito Group’s tax liability for this same period as a result of their ownership of the Corporations exceeded \$30 million.

59. On November 11, 2009, Ferolito and Vultaggio negotiated a settlement of a litigation Vultaggio had brought against Ferolito in the Southern District of New York before Judge Marrero. As a term of the settlement, Vultaggio agreed to make total shareholder distributions of \$150 million by the end of 2009. Thus, despite claiming for the first ten months of 2009 that the Corporations were experiencing a “cash crunch” and thus could not make any shareholder distributions, in an effort to settle this litigation, Vultaggio agreed in early November to distribute \$150 million within the next six weeks.

60. In 2010, once the November 2009 litigation settlement was completed, Vultaggio made a \$7.5 million distribution in January and then returned to his scheme of withholding all shareholder distributions from Ferolito in an effort to financially squeeze him. Despite hollow promises from Vultaggio to issue quarterly distributions in 2010, Vultaggio has now twice refused to do so. Vultaggio has even cancelled Ferolito’s annual salary of \$1.3 million in 2010, and, as a result, Ferolito has not received a single shareholder distribution since January. Ferolito and the Ferolito Group expect to have in excess of \$30 million of tax liability based on this year’s projected profits.

61. There was no legitimate business purpose for Vultaggio's refusal to make shareholder distributions for 2008, when there were annual corporate profits of approximately \$110 million; in 2009 prior to the litigation settlement, when there were annual corporate profits of approximately \$150 million; or in the first three quarters of 2010, when the Corporations have again made substantial profits and have approximately \$300 million in working capital, including \$135 million in cash in their bank accounts.

62. As the shareholder distributions from 2002 through 2007 evidence, along with the substantial corporate profits in 2008, 2009, and 2010, the Corporations have consistently grown larger and more profitable.

63. There are two consequences of the increasing profitability of the Corporations. First, the Corporations' ability to pay distributions to Ferolito over that period of time has increased, not decreased. Second, Ferolito's need for distributions to meet his tax obligations has similarly increased over that period. Vultaggio's refusal to make those distributions has had the effect desired by Vultaggio: to impose maximum financial duress on Ferolito—to "squeeze" him—in the hope that he will abandon his efforts to sell the Ferolito Group's interest in the Corporations to a third party and rather be forced to sell that interest to Vultaggio at a reduced, concessionary price and to give up his voting rights in the Corporations.

64. Indeed, except for the \$7.5 million distribution in January 2010, the repayment of demand notes, and Ferolito's \$1.3 million salary, the only shareholder distributions that Ferolito has received since January of 2008 have been obtained solely as a part of negotiated settlements of various litigations pending between the Vultaggio and Ferolito. Indeed, without the stick of litigation, Vultaggio would continue to unilaterally deny Ferolito any return on his investment in the Corporations to which he is entitled.

65. While Ferolito has made many attempts to reason with Vultaggio over the past two years, Vultaggio's actions have made it clear that Ferolito is and will continue to be unable to reap any benefits from his ownership interest in the Corporations without enforcing his right to do so through the courts. Vultaggio's control of the Corporations leaves Ferolito with no other remedy against his oppressive and manipulative tactics than to seek dissolution under BCL Section 1104-a.

**Vultaggio's Actions to Prevent Ferolito from Selling His Ownership Interest for Fair Value**

66. In addition to refusing to distribute management fees or bonuses consistent with past corporate practices, and despite the Corporations' clear financial ability to do so, Vultaggio has deliberately thwarted several of Ferolito's good faith attempts to sell the Ferolito Group's ownership interest. Thus, while on the one hand Vultaggio has prevented Ferolito from receiving any investment return through traditional shareholder distributions, on the other, Vultaggio has also precluded Ferolito from achieving fair value for his investment through a sale. In short, Vultaggio has unilaterally cut off all avenues by which Ferolito might be able to obtain a fair return from the Corporations that he founded and in which he retains equal equity ownership.

67. From 2005 to 2008, Ferolito engaged in negotiations with certain potential strategic partners regarding a potential sale of all or a portion of the Ferolito Group's interest in the AriZona Entities. Ferolito negotiated with several of the world's largest manufacturers and distributors of beverages. Each time Ferolito was contacted by a potential purchaser, he presented Vultaggio with the opportunity for each owner to sell a portion of his respective interest in the Corporations, an opportunity that Vultaggio repeatedly declined. At every turn, however, Vultaggio has blocked Ferolito's efforts to sell the Ferolito Group's interests.

68. Ferolito first met resistance from Vultaggio regarding his efforts to sell his ownership interests to a large beverage industry company in 2005. Vultaggio was not at all interested in selling his shares to that company. Ferolito engaged in preliminary negotiations with that company, but the deal did not make it past the valuation stage because the company rejected the valuation of the AriZona Entities submitted by the investment bankers whom Vultaggio hired.

69. During subsequent negotiations with that company in 2007, Vultaggio proposed commercially unreasonable terms that he knew were unacceptable to the company (and would be to any potential buyer), which resulted in the company's withdrawal from negotiations.

70. Another large beverage industry company also approached the AriZona Entities in 2007 to negotiate a purchase of all or a part of the Ferolito Group's ownership interests in the AriZona Entities. That company placed a multi-billion dollar valuation on the Ferolito Group's interest, 50 percent of the shares of the AriZona Entities. In an effort to close the deal, the company agreed that Vultaggio and his team should continue to run the day-to-day operations of the business. However, after initially engaging that company in negotiations, Vultaggio later blocked that deal by again demanding commercially unreasonable terms that he knew would be unacceptable to that company, including a demand that Vultaggio earn a base salary—off the top—of 15 percent of the net profits of the AriZona Entities. That company's reaction to Vultaggio's 15 percent request was that it was clearly a deal breaker and could not even serve as a basis for negotiation. When Ferolito revived negotiations with that company in 2008, Vultaggio again thwarted a potential deal by claiming in January 2008 that Section 4.1 of the Owners' Agreement prohibited the sale and threatening in May 2008 to sue the company if the deal went forward.

71. During the fourth quarter of 2009, Vultaggio approached Ferolito with the option of selling his shares in the Corporations to a third large, multinational beverage company. Ferolito subsequently entered into negotiations with that company, which ultimately made a multi-billion dollar offer to purchase the Ferolito Group's shares. Once Ferolito notified Vultaggio that he had come to an agreement with the company, however, Vultaggio took several actions to frustrate the deal, including contacting the company directly to indicate that he would not discuss his part of the potential transaction with the company due to outstanding issues between Vultaggio and Ferolito. As pretext for delaying the deal, Vultaggio cited a lack of audited financial records, despite the fact that it was he who discontinued the practice of keeping audited records after 2006. After communicating with Vultaggio, the company has indicated that it will not enter into a deal with the Ferolito Group until the issues between Vultaggio and Ferolito have been resolved.

72. Vultaggio's resistance to Ferolito's good faith attempts to sell his interest in the AriZona Entities has often come only after Vultaggio has initially engaged the potential buyer only to later disengage on spurious grounds at the end of the negotiating process. For example, Vultaggio recently brought a third potential buyer to Ferolito only to disengage after the parties started negotiating a sale.

73. Vultaggio has tried to rationalize his brazen efforts to block a sale by claiming that a new partner would negatively impact the AriZona business. To the contrary, Vultaggio and the AriZona Entities would clearly benefit if Vultaggio allowed the Ferolito Group to sell its interests to a beverage company with a global presence. Potential buyers in the beverage industry would maximize the AriZona Entities' value because they have an international

platform for manufacturing, marketing, and distribution and vast knowledge of the worldwide beverage industry.

74. Ultimately, a transfer of all or some of the Ferolito Group's ownership interests to a global partner would have been and still would be excellent for the growth of the Corporations and for their employees. It is hard to understand Vultaggio's resistance to a sale of Ferolito's ownership interests, given that he has gone so far as to tell Ferolito's financial advisors working on potential transactions that Ferolito adds no value to the AriZona business.

75. In addition to thwarting Ferolito's good faith attempts to obtain a return on his investment in the Corporations by selling his interest to a third party, Vultaggio has also refused to purchase the Ferolito Group's shares at a fair market price himself. Ferolito has repeatedly made clear to Vultaggio his willingness to be bought out at a mutually agreed-upon fair market price, an arrangement that would leave Vultaggio in total control of all of the AriZona Entities. Instead of negotiating with Ferolito in good faith to purchase the Ferolito Group's equity share, Vultaggio has undertaken the oppressive acts set forth in the Petition in a transparent attempt to force Ferolito to sell to Vultaggio at a price significantly below fair market value. Thus, Ferolito is unable to obtain a return on his investment in the Company by any means whatsoever.

#### **Vultaggio's Restructuring of AriZona**

76. The Ferolito and Vultaggio Groups are currently in litigation pending before the Supreme Court of the State of New York, New York County, to determine the scope and meaning of the Owners' Agreement. On March 13, 2009, Justice Shulman ordered that Ferolito is entitled to "full access to any and all information with respect to the governance of the Arizona entities" for the pendency of the litigation and that the Owners' Agreement mandates that

Ferolito “has a role with respect to macro making decisions of the company.” Shulman aptly characterized the situation as follows:

In light of the transferability, the question becomes, do you want to take a step back and say, okay, we are forced to live with each other now...so what do we do? Treat [Ferolito] like a 50% shareholder, the way he should be treated. Whether he chooses to come to NY or not, that is his decision to come in. If he’s comfortable having a surrogate or a POA. You lived with it for so many years, then find someone else that would serve as his eyes and his ears, that would make it fair here. Give him an office. Give him access to data records. Let him be treated the way he was treated before the alleged sale. This all goes away now or if Mr. Ferolito truly can’t live with the situation, buy him out at a fair price.

Hearing before Justice Shulman, May 26, 2009, pp. 68-69, attached hereto as Exhibit B.

77. Despite Ferolito’s right under the Owners’ Agreement to participate in all decisions involving material matters of the Corporations, and Justice Shulman’s Order that during the pendency of that litigation Vultaggio must honor Ferolito’s right to participate equally in macro corporate decisions and to have equal access to the AriZona Entities’ books and records, Vultaggio has unilaterally devised and begun to implement a plan to restructure the AriZona Entities, including the Corporations. In connection with this corporate restructuring, Vultaggio has refused to share with Ferolito sufficient information regarding the restructuring so that Ferolito can participate in the decision-making process.

78. On September 9, 2010, the AriZona Entities announced this corporate restructuring. The announcement stated, “AriZona Iced Tea will be distributed by AriZona Beverages USA LLC. Our alcoholic brand products (Mississippi Mud/Crazy Stallion/Arnold Palmer Hard) will continue to be distributed by Hornell Brewing Company, Inc. . . . Similar type changes are envisioned for F & V Distribution Company, LLC and Arizona Beverage Company, LLC.”

79. Recent communications with Vultaggio and Menashi have revealed that the plans for the restructuring began as early as 2005. Restructuring is clearly the type of macro decision of the Corporations for which Ferolito's participation and approval is, and always has been, required by the Owners' Agreement. However, Vultaggio never provided Ferolito any information whatsoever regarding this major initiative and never consulted Ferolito or sought his approval for this project in any way, in direct contravention of Justice Shulman's March 13, 2009 order.

80. Ferolito first learned about this restructuring in early September. At this time, Ferolito and his representative Adonailo immediately attempted to gain information about Vultaggio's restructuring project, but those efforts have been repeatedly rebuffed by Vultaggio and his representatives. For example, on September 24, 2010 Adonailo sent an email to David Menashi ("Menashi"), whom Vultaggio appointed as the Chief Executive Officer of the AriZona Entities, expressing Ferolito's desire to be personally involved in understanding and deciding whether or not to approve the restructuring proposal. Adonailo also requested information regarding the restructuring so that Ferolito could make an informed decision, including a proposed post-restructuring organization chart, the director and officer composition of each entity, and the asset and liability flows in and out of the entities in connection with the restructuring.

81. In his response of September 29, 2010, Menashi indicated that the restructuring plans had proceeded without Ferolito's knowledge, consultation, or approval. He stated that Vultaggio's plans were already "off the ground" and informed Ferolito that "the restructuring has been timed to be effectuated during the slowest time of our business cycle, which is now." Menashi admitted that the restructuring efforts had been underway since 2005, despite the fact

that Ferolito was never consulted or given an opportunity to exercise his voting right on this clearly “big picture” issue. On information and belief, Vultaggio and Menashi plan to effectuate the restructuring of the AriZona Entities as early as later this month.

**Vultaggio’s Refusal to Provide Access to the AriZona Entities’ Books and Records**

82. Both Vultaggio and Menashi have consistently impeded Ferolito’s access to information about the Corporations, and to those employees who historically had provided him with the Corporations’ financial information.

83. Vultaggio, Menashi, and other personnel working at their direction have repeatedly ignored or rebuffed Ferolito’s requests for information about the Corporations, most of which have been made through Adonailo, who was formerly the Chief Financial Officer of the Corporations but resigned due to circumstances at the Corporations caused by Vultaggio and his associates in 2008. When they reluctantly provided information, it was incomplete and did not include crucial information about the Corporations. For instance, they consistently withheld financial information about BMU, the principal AriZona Entity.

84. Since the March 13, 2009 conference before the New York Supreme Court, Vultaggio has partially restored Ferolito’s access to information regarding the Corporations and has begun to provide some of the documents and information requested by Ferolito. Nevertheless, Vultaggio and those under his direction and control continue to refuse to provide certain important documents and information that have been requested.

85. Vultaggio has refused to provide any documents relating to the “cash crunch” that the Corporations supposedly have been experiencing, and he has refused Ferolito’s requests to meet with the Corporations’ current Controller, Patricia Catalina, to discuss the alleged cash crunch. Transparency into the supposed cash crunch is critical because Vultaggio has invoked it

to justify his unilateral decision, over Ferolito's objections, to stop the long-standing practice of annually paying out the Corporations' profits to the Ferolito Group as bonuses and shareholder distributions.

**Dissolution Is the Only Remaining Remedy by Which Ferolito May Obtain a Return on His Investment**

86. Over the course of over a decade, Vultaggio has created and perpetuated an environment of hostility and abuse of his position at the helm of the AriZona Entities, a role that he refuses to share in any respect with Ferolito in violation of their long-standing course of dealing and their Owners' Agreement. Through a persistent course of mistreatment, Vultaggio has attempted to affect a freeze-out to prevent Ferolito from participating in any meaningful respect in the Corporations that he co-founded nearly 20 years ago. Vultaggio continues to unapologetically disregard the agreed-upon corporate structure of the AriZona Entities. By withholding all distributions since 2008, Vultaggio has placed an enormous tax burden on Ferolito and has prevented Ferolito from reaping any return on his considerable and continuous investment in AriZona.

87. Ferolito has been totally frozen out of the management and decision-making for the Corporations. He has been denied his previously unfettered access to the books and records of the Corporations.

88. Dissolution of the Corporations is the only feasible means whereby the Petitioner may reasonably expect to obtain a fair return on his investment. Because the Corporations have historically compensated their shareholders exclusively through salary, bonus, and other financial distributions, and because Vultaggio has terminated these distributions to Ferolito without any legitimate business purpose, Ferolito cannot reasonably expect to obtain any further return on his investment.

89. Despite his equal share, Ferolito is not able to influence the management of the Corporations and is therefore without a voice to protect his interest in the Corporations. Moreover, as a result of being frozen out, the relationship between Ferolito and Vultaggio has deteriorated to the point where it is no longer feasible for them to reasonably discuss issues or work together. Liquidation of the Corporations is the only feasible means of protecting Ferolito's interest and rights in the Corporations.

90. No prior application for this relief has been made.

WHEREFORE, Petitioner prays for a final Order of this Court:

1. Appointing Joseph J. Ortego, Esq. as an independent examiner to conduct such examination as he deems necessary to effectuate the dissolution including, without limitation, inspecting and auditing the books and records of said corporations, obtaining audited financial statements from an independent public accounting firm for any period since 2006 for which said corporations do not have audited financial statements, and overseeing the orderly recommencement of shareholder distributions;

2. Ordering the Corporations to issue to Ferolito their most recent 2010 financial statements;

3. Ordering the Corporations to resume making distributions to each Owner Group consistent with past practice prior to 2008, including at least the amount, if any, by which the anticipated federal, city and state taxes payable on the share of total estimated taxable income allocable to such Owner Group in any given year from 2008 to the present exceeds the amount distributed to such Owner Group in such year;

4. Enjoining the Corporations or their agents from transferring any assets of the Respondent Corporations outside the ordinary course of business, selling shares in the Respondent Corporations or taking any other action outside the ordinary course of business, including, but not limited to, the proposed restructuring, material capital expenditures, or any related party transactions between Vultaggio and the Arizona entities, without the participation and consent of Ferolito and the other shareholders in the Ferolito Group;

5. Dissolving Beverage Marketing USA, Inc. and Hornell Brewing Co., Inc.; and

6. Such other and further relief as may seem just and proper, together with the costs of these proceedings, including Petitioner's attorneys' fees.

Dated: October 5, 2010

BOIES, SCHILLER & FLEXNER LLP

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Nicholas A. Gravante, Jr.  
Robert J. Dwyer  
Richard Birns  
575 Lexington Avenue, 7<sup>th</sup> Floor  
New York, New York 10022  
Telephone: (212) 446-2300  
Facsimile: (212) 446-2350

Philip J. Iovieno  
Ryan McAllister  
10 North Pearl Street, 4<sup>th</sup> Floor  
Albany, New York 12207  
Telephone: (518) 434-0600  
Facsimile: (518) 434-0665