To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN,
Justice.

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EDWARD RYAN a/k/a TED RYAN, individually and in the right and on behalf of RYAN ASSOCIATES TECHNOLOGY LLC,

Plaintiff,

-against–

CHARLES WALTERS and "Unknown Individuals and/or Entities 1-10", the names of which are currently unknown to Plaintiff, but intended to be those to which Defendant Charles Walters diverted assets belong to Ryan Associates Technology LLC as described in the Verified Complaint,

Defendants.

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Index No. 54978/12
Motion Date: 4/11/12
SEQ # 001

DECISION & ORDER

Scheinkman, J:

Plaintiff Edward Ryan ("Plaintiff" or "Ryan") moves, by Order to Show Cause, pursuant to CPLR 6301, for an order granting Plaintiff a preliminary injunction enjoining Defendant Charles Walters ("Defendant" or "Walters") from (1) selling, transferring, pledging, assigning, using, disposing diverting or encumbering the monies, assets or business opportunities of Ryan Associates Technology LLC ("RAT"), except for the acceptance of funds in payment of accounts receivable in the regular course of business, which funds are to be deposited for the benefit of RAT; (2) disbursing any funds of RAT or incurring any credit card charges or other debt in the name of RAT; (3) applying for any lines of credit, loans, credit cards other credit accounts in the name of RAT; (4) binding RAT to any agreements out of the regular course of business or in violation of fiduciary duties to RAT; and (5) accessing RAT's post office box to collect payments to RAT, unless such payments are endorsed in the name of RAT and deposited into RAT's bank account on the same day.

Plaintiff also seeks a mandatory injunction requiring that Defendant provide Plaintiff with full access to all documents relating to funds collected for RAT, all checking and other bank account records of RAT (as well as Defendant's personal accounts into which RAT

funds were deposited), and records relating to RAT funds withdrawn by Defendant. Plaintiff also seeks an injunction directing Defendant to return all monies taken by Defendant which were intended to be for the benefit of RAT.

Plaintiff further seeks, pursuant to CPLR 3101, 3102, 3104, and 3106, a direction that Defendant immediately appear for deposition and that Defendant produce documents, including records of funds collected by Defendant for RAT.

Defendant opposes the motion in its entirety.

PROCEDURAL BACKGROUND

This action was filed on April 4, 2012 via the Court's e-filing system ("NYSCEF"), as was Plaintiff's motion for injunctive relief. The Complaint contains a single cause of action, seeking a declaratory judgment to the effect that Plaintiff Ryan has certain rights and authority in respect of the management and operation of RAT, including, for example, a declaration that an attorney chosen by Plaintiff is to be the attorney for RAT.

On April 5, 2012, the Court heard argument from counsel for the parties with respect to Plaintiff's request for a temporary restraining order. The Court issued an order to show cause on that date which, pending the determination of the motion: (1) enjoined the selling, transferring, disposing, holding and encumbering of the assets of RAT without the written permission of both Plaintiff and Defendant, except that Walters and Ryan could, in the ordinary course of business, accept funds in payment of accounts receivable provided that all checks and funds were deposited in a mutually-agreed bank account; (2) enjoined the disbursement of funds of RAT or the incurring of debt in the name of RAT except with the written permission of both Plaintiff and Defendant; (3) enjoined the opening of any lines of credit, loans, credit cards or credit accounts except with the written permission of Plaintiff and Defendant; (4) enjoined binding RAT to any agreements without the written consent of both Plaintiff and Defendant; and (5) enjoined the accessing of RAT's post office box to collect payments unless the funds were deposited in RAT's bank account the same day, without the prior consent of Plaintiff and Defendant. The Court also ordered both parties to preserve all potentially relevant evidence.

Plaintiff's motion for injunctive relief was marked fully submitted on April 11, 2012.

THE OPERATING AGREEMENT

The parties do not dispute that RAT is a limited liability company that they jointly formed which provides computer consulting services to hedge funds, asset managers and prime brokers in the financial industry. The parties also do not dispute that they each executed an Operating Agreement for RAT, dated August 20, 2007 ("Operating Agreement", annexed to

the Complaint as Exhibit A). The Operating Agreement provides that Plaintiff holds 700,000 units of RAT and is the President of RAT, while Defendant holds 300,000 units of RAT and is the Vice President of the Company. RAT has some 40 well compensated employees.

The fundamental dispute between the parties involves who has the authority to take actions on behalf of RAT. In this regard, the Operating Agreement has two key, and distinct, provisions: Article 4.1 invests the management of RAT in its Members, defined as a person who acquires Membership Interests. RAT has two members: Plaintiff and Defendant. Specifically, the Members are authorized to set up bank accounts for RAT and all funds of RAT are to be deposited in accounts in the name of the Company (Operating Agreement, §4.2). Section 4.1 deals with management as follows:

> 4.1 **Management**. The business of the Company shall be managed by the Members. In the event of a dispute between Members, final determination shall be made by a vote of the majority of the Members (unless a greater percentage is required in this Agreement or under New York law). Any Member may bind the Company in all matters in the ordinary course of business.

Having given the Members the authority to manage the Company, the Operating Agreement provides separately for Membership meetings and voting. Section 6.1 states:

> 6.1. **Members and Voting Rights**. Members shall have the right and power to vote on all matters with respect to which this agreement or New York law requires or permits such Member action. Voting shall be based on Membership Interests. Unless otherwise stated in this Agreement or under New York law, the vote of the Members holding a majority of the Membership Interests shall be required to approve or carry an action.

THE CONTENTIONS OF THE PARTIES

A. Plaintiff's Claims

According to Plaintiff Ryan, the Operating Agreement was drafted by Defendant Walters or on his behalf and Ryan signed it without changes (Affidavit of Edward Ryan, sworn to April 4, 2012 ["Ryan Aff."], ¶12). Ryan claims that the parties began discussions in August 2009 to amend the Operating Agreement so as to re-align profit participation, management rights and Member rights but no agreement was reached (*id.* at ¶¶17-18). However, Ryan claims that he unilaterally began to pay Walters an additional 20% profit participation, recognizing that Walters was providing strong sales revenues and wanted to reward him (*id.* at ¶¶19-20). In recent times, Ryan told Walters that he, Ryan, wanted to reclaim the 20% he had ceded to Walters. Walters objected and the parties have since disagreed on the timing and amounts of profit distributions (*id.* at ¶¶21-22).

Ryan also avers that he wanted to preserve RAT's capital and use the cast to grow the Company while Walters wanted to sell RAT or take in a third party to fund anticipated growth. Allegedly because Walters was demanding access to RAT's Wells Fargo Bank account in order to fund a "large distribution", Ryan removed the "lion's share" of the funds from the Wells Fargo account and used the proceeds to purchase bank checks payable to RAT. Ryan says he put the bank checks in a safe deposit box (Ryan Aff. at 5 n3).

Ryan points out that, under Section 3.2 of the Operating Agreement, "[t]he timing and amount of distributions shall be determined by the Members in accordance with New York law."[1] He argues that under Section 6.1, membership voting is based on Membership Interests and that since he has 70% of the interest and Walters 30%, no distributions can be made without his express approval. Ryan also asserts that, under Section 4.1, management decisions require a majority vote and he construes Section 4.1 as requiring a majority based on Membership Interests (Ryan Aff., ¶¶24-30).

Ryan contends that starting in late 2007 or early 2008, RAT began to pay for an apartment for Walters' use in New York City (Ryan Aff., ¶31). While, for a time, RAT used the apartment as a business address, RAT later obtained separate space, though some clients remitted payments to Walters' apartment (*id*., ¶32). According to Ryan, Walters did not disclose the receipt of two checks (one for $11,528.75 and one for $56,421.25) and when Ryan inquired, Walters told him that it was not an issue for Ryan. Walters is claimed to have told Ryan in November 2011 that he, Walters, was not able to return to his home due to marital disputes, had been sleeping in different places, and that the checks had been in different places (*id.*, ¶¶36-37). When the checks had not been deposited for three months, Walters hired an attorney, Richard Feldman, Esq. of Feldman, Rosenberg, Smith LLP, and the missing checks were deposited (*id*., ¶39).

Ryan claims that Walters diverted at least another $258,000 from RAT by opening up a bank account at Sovereign Bank and depositing at least that amount of payments to RAT into the account, which Walters did not disclose to Ryan (*id*., ¶43). Ryan claims that Walters made "unauthorized" distributions to both Ryan and Walters, each for $129,000, by using the funds in the Sovereign Bank account (*id*). Ryan contends that Walters did not tell him about the account until one week after Walters made the payment to himself of $129,000 (*id*., ¶44). Ryan says that his checks were stuffed into his personal backpack, together with a note (*id.*, ¶45). Plaintiff states that he has not cashed or deposited the checks as the checks were unauthorized (*id.*, ¶46). He also alleges that on March 26, 2012, Walters took over the computer terminal of the office manager and, using her login password, backdated entries with respect to the two $129,000 distributions (*id.,* ¶49).

Plaintiff also alleges that on March 23, 2012, Walters, without Plaintiff's knowledge or authorization, wired $46,374.61 to himself. The wire transfer information suggest that the transfer was for the purpose of making reimbursement for expense (*id*., ¶48 and Ex.

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[1]Section 3.2 provides that the Company has the right to make distributions of cash and property but stipulates that such distributions are "pro rata based on the relative Membership Interests."

G). Ryan claims that Walters has not yet logged this transaction into RAT's books and records (*id.*, ¶50).

Ryan also alleges that his attempt to hire Feldman as counsel for RAT has been contested by Walters (*id.*, ¶50), as has Ryan's efforts to retain accounting firms for RAT (*id.*, ¶¶58-60). In this regard, Ryan claims that, under Section 5.4 of the Operating Agreement, he, and he alone, is the tax matters Member (*id.*, ¶¶63-66). Section 5.4 states as follows:

> 5.4. **Tax Matters Member**. Ted Ryan shall act as tax matters member of the Company to represent the Company (at the Company's expense) in connection with all examinations of the Company's affairs by tax authorities and to expend Company funds for professional services and costs associated therewith.

Ryan contends that he is entitled to injunctive relief because of Walters' violations of the Operating Agreement and Walters' improper acts which, according to Ryan, will destroy RAT's business and prevent it from meeting its payroll (*id.*, ¶¶74-75). Plaintiff also alleges that he is entitled to expedited discovery because he needs to have the ability to ascertain the full scope of the wrongful diversions of Defendant (*id.*, ¶¶86-88)

Plaintiff's counsel, Scott Markowitz, Esq., submits an affirmation, the most salient point of which is to attest to his putting Defendant's counsel on notice of Plaintiff's application for a temporary restraining order (*see* Affirmation of Scott Markowitz, Esq., dated April 4, 2012).

Plaintiff submits a memorandum of law in which it is contended that Plaintiff has met the standard for the granting of preliminary injunctive relief. Specifically, it is argued that Plaintiff is likely to succeed in establishing his entitlement to a declaratory judgment, that an injunction is necessary to prevent Defendant from destroying the Company, and that the equities favor Plaintiff.

B. Defendant's Opposition

Defendant submitted an affidavit in opposition to Plaintiff's request for a temporary restraining and, then, submitted fuller opposition papers on the return date.

In opposing the requested temporary restraining order, Defendant asserted that, pursuant to Section 4.1 of the Operating Agreement, management by members is per capita and, therefore, Ryan and Walters have equal rights (Affidavit of Charles Walters, sworn to April 4, 2012 ["Walters TRO Aff."], ¶¶7,8). Walters asserts that, contrary to Ryan's claim that Walters wrote the Operating Agreement, Walters simply used an online form from LegalZoom as the basis for the Agreement (*id.*, ¶9). Walters states that he has no legal training and had no legal representation when he entered into the Agreement, though Ryan is an attorney admitted in New York and Massachusetts (*id.*, ¶10).

Walters contends that, commencing in 2008, he and Ryan agreed to a 50/50 split of profits and losses and this occurred because Walters' personal efforts and contribution to the Company were significantly greater than Ryan's (*id.*, ¶12). Walters submits K-1 forms from 2008 through 2010 which show that he was reported as having an essentially 50% share of profits (*id.*, ¶13).[2]

Walters claims that after Walters' wife filed for a divorce in September 2011, Ryan refused to agree to any distributions as part of campaign to squeeze Walters out of the Company (*id.*, ¶¶21-23). Walters attributes Ryan's campaign as having been triggered by an incident in August 2011 in which he was unable to deposit RAT checks into the Company's operating account at Chase Bank because Ryan's wife had changed the taxpayer ID and company name of the account (*id*., ¶23). While this was corrected in September, Walters could not deposit the checks until November because he had left the checks in his marital residence and he had limited or no access at the time (*id.*, ¶¶24-25).

Walters claims that Ryan transferred $800,000 from RAT's Chase account and refused to tell him where it went (*id.,* ¶28). He claims that Ryan has said that if Walters does not leave the Company or accept a reduced role, Ryan will "blow up" the Company; that Ryan has attempted to engage accounting professionals to amend the Company's tax returns without Walters' consent; has removed Walters' name and contact information from the Company website; and has changed the lock on the Company's post office box and has refused to give Walters a key (*id.*, ¶30).

Walters states that the last distributions were made in September 2011 and that, in order to deal with his family expenses and potential tax liabilities, he had made proposals to Ryan in December 2011 for payment of distributions; however, Ryan did not agree (*id.*, ¶¶31-34). On March 13, 2012, Walters opened a new company account at Sovereign Bank and deposited $275,000 in RAT funds therein. He then wrote two equal checks ($129,000) to Ryan and himself. When Ryan found out about this, he froze the Sovereign account (*id.*, ¶¶35-36). While Walters thus essentially confirms Ryan's account of this episode, he does not deny that he left Ryan's check in a backpack and did not tell Ryan in advance either that he was opening this account or that he was intending to use the funds to pay distributions. Clearly, this was a ruse by Walters to evade Ryan's refusal to agree to the payment of distributions.

On March 26, 2012, Ryan withdrew $1.5 million of Company funds from the Wells Fargo account and has refused to return them. These are the funds Ryan attests to holding in his safe deposit box (*id.*, ¶37).

According to Walters, the Company has $2.3 million in cash (including the $1.5 million in bank checks held by Ryan), together with $100,000 in the Chase Bank account; $560,000 at the frozen Wells Fargo account; and $175,000 in the frozen Sovereign Bank

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[2]The 2008 K-1 shows Walters having a beginning profit share of 30% and an ending profit share of 47% but the 2009 and 2009 K-1s both show ending shares of 50% (Walters TRO Aff., Ex. 1).

account. Walters alleges that Ryan has no reasonable justification for "sitting on this huge pile of cash" in which Walters has, he says, a 50% interest (*id.*, ¶¶38-39).

While Walters states that no temporary restraining order should be granted, any such order should require Ryan to return the $1.5 million he is holding, that neither should be able to write checks or open any new accounts without the other's consent, both should be authorized on all RAT accounts, and all client checks should be deposited into the Chase Bank account.

In a further affidavit, Walters asserts that under Section 4.1 of the Operating Agreement the two Members have co-equal voting rights and only when it comes to voting on voluntary dissolution (under Section 8.1) is voting based on Membership Interests (Affidavit of Charles Walters, sworn to April 10, 2012 ["Walters Opp. Aff."], ¶¶8-11). Walters states that equality of voting is confirmed by the parties' conduct in that, for years, the parties made decisions collectively and Ryan's attempt to negotiate a different arrangement failed in 2009 (*id.*, ¶¶13-16).

Walters states that the $46,374.61 wire transfer referenced by Ryan was reimbursement for expenses, including expenses for the New York apartment that Walters states he owns but uses for business purposes (*id.*, ¶34). Walters submits documentation in connection with the action of Ryan's wife removing him from the Chase account (*id*., ¶36). He elaborates on his retrieval of the two client checks on November 19, 2011 and his deposit of them on November 21, 2011, the next business day (*id.*, ¶¶38-39). Walters protests that Ryan is seeking to justify his unilateral retention of Rosenberg based on the issue of the two "missing" checks (*id*., ¶¶40-52).

Walters contends that Ryan's role as Tax Matters Member is limited to situations where there is a pending or actual audit by a tax agency and does not extend to Ryan having the sole authority to prepare tax returns without Walters' approval (*id.*, ¶¶53-46). Walters alleges that Ryan acted unilaterally to engage two separate accounting firms to perform a "forensic" audit of RAT and that Ryan did not provide him with information regarding this engagement (*id*., ¶¶59-64).

Defendant also submits a Memorandum of Law. Defendant argues that Ryan has no or little chance of succeeding on his claim that the Members' voting power is based on upon their unit ownership. Walters contends that the Operating Agreement makes it plain that Ryan and Walters have co-equal voting rights. Walters also argues, as previously noted, that Ryan's status as Tax Matters Member applies only to actual or threatened audits and not to the preparation or amendments of returns. Walters contends that, though Section 3.2 of the Operating Agreement makes the timing and amount of distributions dependent on the determination of the Members, it does not require Ryan's consent as holder of a 70% interest. Walters also argues that the parties, orally and by their conduct (including an e-mail issued by Ryan), amended the Operating Agreement to increase Walters' profit share to 50% from 30%.

LEGAL DISCUSSION

THE GOVERNING LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

The standard for preliminary injunctive relief is well settled. Thus, the movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the injunction, and (3) a balance of equities in the movant's favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *Apa Sec., Inc. v Apa*, 37 AD3d 502 [2d Dept 2007]). While the existence of an issue of fact will not defeat a motion for injunctive relief which demonstrates the required elements (CPLR 6312[c]), the movant must show a clear right to relief which is plain from the undisputed facts (*Matter of Related Prop., Inc. v Town Bd. of Town/Village of Harrison*, 22 AD3d 587 [2d Dept 2005]; *Stockley v Gorelik*, 24 AD3d 535 [2d Dept 2005]). To the extent Plaintiff's application seeks a mandatory injunction, Plaintiff is required to demonstrate extraordinary circumstances and clear entitlement to the relief sought (*SHS Baisley LLC v Res Land, Inc.*, 18 AD3d 727 [2d Dept 2005]; *Rosa Hair Stylists, Inc. v Jaber Food Corp.*, 218 AD2d 793 [2d Dept 1995]).

The interpretation of an unambiguous contract is a question of law for the court (*Kass v Kass,* 91 NY2d 554, 566 [1998]*; Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [2004], *lv denied* 4 NY3d 707 [2005]; *1550 Fifth Avenue Bay Shore, LLC v 1550 Fifth Avenue, LLC*, 297 AD2d 781, 783 [2002], *lv denied* 99 NY2d 505 [2003]). In construing an unambiguous contract, "the intention may be gathered from the four corners of the instrument and should be enforced according to its terms" (*Beal Sav. Bank v Sommer,* 8 NY3d 318, 324 [2007]). A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning ...." (*Greenfield v Philles Records*, *Inc.*, 98 NY2d 562, 570 [2002]). Parol evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous (*Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368, 369 [1st Dept 2007], *affd* 10 NY3d 25 [2008]). "On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact and summary judgment should be denied" (*American Express Bank, Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1990], *lv denied* 77 NY2d 807 [1991]). "Where consideration of a contract as a whole resolves an ambiguity created by one clause, there is no occasion to consider extrinsic evidence of the parties' intent" (*Hudson-Port Ewen Assoc., L.P. v Kuo*, 78 NY2d 944, 945 [1991]).

The Court of Appeals has emphasized that "'when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms'" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004], *quoting W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157 [1990]). "'[W]here ... the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length'" (*id., quoting Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]) ... "'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include'" (*id., quoting Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978]).

"[T]he aim is a practical interpretation of the expressions of the parties to the end

that there be a 'realization of [their] reasonable expectations'" (*Brown Bros. Elec. Contr., Inc. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977], *quoting* 1 Corbin, Contracts § 1). In examining a contract to find the parties' intent as to a particular section, a court should read "the entirety of the agreement in the context of the parties' relationship," rather than isolating distinct provisions out of an entire agreement (*Matter of Riconda*, 90 NY2d 733, 738 [1997]). Thus, "[t]he rules of construction of contracts require [the court] to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect" (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]; *see also Excess Ins. Co. Ltd. v Factory Mut. Ins.,* 3 NY3d 577, 582 [2004] [a contract is to be interpreted so that no portion of the contract is rendered meaningless]*; Columbus Park Corp. v Department of Hous. Preserv. & Dev. of City of New York*, 80 NY2d 19, 31 [1992]; *Two Guys from Harrison-New York, Inc. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]).

Where there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls (*Aguirre v City of New York*, 214 AD2d 692, 693 [2d Dept 1995]). Likewise "a contract which confers certain rights or benefits in one clause will not be construed in other provisions completely to undermine those rights or benefits" (*Ronnen v Ajax Elec. Motor Corp*., 88 NY2d 582, 590 [1996]).

A. Success on the Merits

The premise upon which the requested injunction is sought is Ryan's complaints regarding Walters' unilateral acts. While the Court concludes that there are debatable issues as to whether voting by Members on membership and management issues is based on ownership percentages or simply per capita, there is no dispute that, under the Operating Agreement, neither party can act unilaterally. Indeed, Walters concedes as much.

For example, there is no question in this Court's opinion that Walters did not have the authority to unilaterally decide, without Ryan's approval, to pay a distribution to each of them. Section 3.2 of the Operating Agreement plainly leaves it to the Members to decide when to pay distributions and, if so, in what amounts: "The timing and amount of distributions shall be determined by the Members in accordance with New York law."[3]

As will be further discussed, there is a legitimate question as to whether Ryan is entitled to a 70% vote or a 50% vote. But there is no reasonable view – and Walters does not offer any – under which it could be said that Ryan has less than a 50% vote.[4] Walters' actions in depositing Company funds in a new bank account so that he could evade Ryan's refusal to

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[3]While Section 3.1 gives the Company the right to make distributions, it does not compel the Company to do so.

[4]While Walters argues that Ryan's refusal is unreasonable, the Court need not now consider whether, under the Operating Agreement or otherwise, Walters has any remedy on account of what he considers to be his co-member's arbitrary refusal to agree to pay distributions.

authorize a distribution and pay one[5] shows, by itself, the likelihood that Ryan will succeed in establishing Walters' violation of the Operating Agreement and entitlement to declaratory and permanent injunctive relief.

Walters' submissions make it clear that, after the breakdown of the relationship between the parties in September 2011, Walters engaged in unilateral actions, involving management of RAT without consent from Ryan.

Under the Limited Liability Company Law, management of a limited liability company is vested in its members unless the articles of organization provides for management by a manager or managers; however, the statute makes the management-by-member by default arrangement subject to any provision in the articles of organization or the operating agreement (Limited Liability Company Law §401 [subd. a]).[6] The Operating Agreement of RAT (Section 4.1) provides for management by the members, *i.e*., by Ryan and Walters.

Section 4.1 provides a method for resolving disputes between the Members. Since this dispute-resolving mechanism appears in the Section relating to management of the Company, the mechanism applies when there is a dispute over management. The method is for the Members to vote and the matter is decided by "a majority of the Members (unless a greater percentage is required in this Agreement or under New York law)." This means that the voting is per capita, each of the two Members having one vote, unless a greater percentage is required in the Operating Agreement or under New York law.

The first sentence of Section 6.1, dealing with membership issues, provides that Members have the right and power to vote "on all matters with respect to this agreement or New York law requires or permits such Member action." Since the Operating Agreement requires Member action with respect to the management of the Company, Section 6.1 also provides a mechanism for resolving member management disputes. Unfortunately, the method provided in Section 6.1 is not the same as the method provided in Section 4.1. While Section 4.1 provides for voting per capita, the second sentence of Section 6.1 provides that voting "shall be based on Membership Interests." But there is a third sentence: "Unless otherwise stated in this Agreement or under New York law, the vote of the Members holding a

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[5]In this regard, it does not matter that Walters paid himself a 50% distribution as opposed to a 30% distribution since he did not have the authority to unilaterally pay any distribution at all. Section 3.1 of the Operating Agreement states that distributions are to be in proportion to relative Membership Interests, meaning that under that language Walters' percentage of distributions would be 30%. However, Walters argues that the parties' effectively amended this language by e-mails and conduct reflective of any agreement for the parties to share distributions 50/50. Whether Walters succeeds on this is a matter for another day; it suffices for now to simply state that Walters could not pay any distribution without Ryan's consent.

[6] The statutory provision is also subject to Section 418 of the Limited Liability Company Law dealing with granting or withholding management powers of one or more members or classes of members, with Section 418 being inapplicable here.

majority of the Membership Interests shall be required to approve or carry an action."

If the third sentence of Section 6.1 did not exist, it could be contended that the absolute statement in the second sentence of Section 6.1 – voting shall be based on Membership Interests – overrides Section 4.1, which is permissible as Section 4.1 is, by its own terms, subject to any requirement in the Agreement that a greater percentage be utilized. But the third sentence exists and provides, in essence, that a majority based on Membership Interest is required to approve an action "[u]nless otherwise stated in this Agreement or under New York law." Thus, Section 6.1 can be read to give way to the contrary provision of Section 4.1, just as Section 4.1 can be read to give way to the contrary provision of Section 6.1.

While both Section 4.1 and Section 6.1 yield to New York law, applicable New York law does not provide a definitive answer to this quandary. Section 402(a) of the Limited Liability Company Law provides for voting rights of members:

> Except as provided in the operating agreement, in managing the affairs of the limited liability company, electing managers or voting on any other matter that requires the vote at a meeting of the members pursuant to this chapter, the articles of organization or the operating agreement, each member of a limited liability company shall vote in proportion to each member's share of the current profits of the limited liability company in accordance with section five hundred three of this chapter.[7]

Thus, Section 402(a) provides that, unless there is a contrary provision in the operating agreement, the voting strength of members is based on their respective shares of "current profits." Here, the "current profits" (at least those that were distributed prior to the September 2011 breakdown between the members) were divided equally, though there is a dispute as to whether that was done because of Ryan's sense of fairness (Ryan's view) or because the parties effectively agreed to change the profit sharing to 50/50 (Walters' view). But even if Section 402 (a) as applicable here means equal voting rights, it is subject to being overridden by the Operating Agreement.

The Court also notes that Section 408 of the Limited Liability Company Law provides that, except as provided in the operating agreement and in accordance with Section 419 of the Limited Liability Company Law[8], "the managers shall manage the limited liability company by the affirmative vote of a majority of the managers." Thus, Section 408, unless overridden by the Operating Agreement, provides for management by the affirmative vote of a majority of members, meaning equal voting rights for the two members.

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[7]Section 503 deals with the manner of sharing of profits and losses in the absence of a provision with respect to that matter in the operating agreement.

[8]Section 419 authorizes the articles of organization to provide for classes or groups of managers and to provide for their relative rights, powers, preferences and limitations.

The Court need not presently decide whether management disputes are to be decided by a vote based on Membership Interests or a vote based on per capita membership. It is enough to decide that Ryan has shown that it is either one or the other and that in no event can Walters (or Ryan) act unilaterally.

B. Irreparable Injury

The Court concludes that Ryan has shown that he will sustain irreparable injury unless preliminary injunctive relief is granted. While it is true that Ryan (or RAT, since some of the claims appear to be derivative in nature) may be able to obtain a judgment against Walters for sums improperly taken, the evidence before the Court shows that Walters persistently acted unilaterally in managing the Company prior to the issuance of the temporary restraining order by this Court. Moreover, as Walters states, because of the actions of both parties, the substantial cash assets of RAT are effectively frozen, with the result that, absent continuing judicial intervention, there is a substantial risk that the Company will not be able to use its considerable assets to pay its legitimate expenses, including the payment of its payroll to its employees. The evidence shows that both Ryan and Walters have acted unilaterally, each trying to gain control of RAT assets, and will revert to doing so absent judicial intervention. The Court concludes that Ryan has shown that he and RAT will suffer irreparable harm unless preliminary injunctive relief is granted. In this regard, the Court takes notes that, even if profits have been split 50/50, Ryan holds 70% of the equity and, thus, has much more to lose than Walters if Walters was left alone and unrestrained in his efforts to control the assets and affairs of this apparently very valuable company.

C. *Balancing of the Equities*

The balancing of the equities is a much closer call. While Walters' unilateral actions may have precipitated this lawsuit, Ryan has engaged in similar, if not even larger scale, actions. For example, while Ryan may well have had a legitimate concern that Walters would use the funds in the Wells Fargo account to pay distributions that Ryan objected to, Ryan effectively usurped unto himself the entire amount of that account. Likewise, the evidence shows that Ryan has unilaterally attempted to hire professionals to represent RAT, though his right to do so over Walters' objection has not been clearly established. In this regard, the Court is inclined to agree with Walters' contention that Ryan's role as Tax Matters Member is confined to the defense of pending and actually threatened governmental investigations; the contents of the Company tax returns, and any amendments thereof, appear to be a management issue.

Rather than leaving the parties to their own devices, the Court concludes that the appropriate way to balance the equities is to grant preliminary injunctive relief which requires the parties to manage the Company by mutual agreement – Ryan having shown that he is likely to prevail at least to this extent, if not more.

THE PRELIMINARY INJUNCTIVE RELIEF

The Court concludes that the appropriate scope of preliminary injunctive relief is, essentially, the relief granted in the temporary restraining order of April 5, 2012. In this regard, the Court has considered that the temporary restraining order prohibits either party from binding RAT to any agreements without the consent of the other, though the Operating Agreement permits either Member to bind RAT "in all matters in the ordinary course of business" (Operating Agreement, §4.1). While the Court could allow either member to bind RAT "in the ordinary course of business", the Court anticipates that both side will give the broadest possible construction to "ordinary course of business", with the result that there will be overlapping, and inconsistent, binding contracts. For example, it is not implausible that Walters and Ryan would each view it as being in the ordinary course of business to retain an accountant to prepare tax returns for RAT; each could view it as being in the ordinary course of business to retain an attorney to provide legal services for RAT. To avoid this result, neither party should be permitted to bind the Company without the consent of the other.

In addition, the Court will require that each party permit the other full access on an ongoing basis to all Company documents, including financial records, in his possession, custody or control.

THE UNDERTAKING

CPLR 6312 requires that, prior to the granting of a preliminary injunction, the plaintiff shall be required to give an undertaking, in an amount to be fixed by the Court, for all damages and costs that may be sustained by reason of the injunction. The only exception to the requirement that an undertaking be posted is found in CPLR 2512 which exempts the state, municipal corporations or public officers on behalf of such governmental entities from the requirement that an undertaking be posted. The Appellate Division, Second Department has consistently held that, given the clear and unequivocal mandate of CPLR 6312, there is no authority which permits the court to grant an injunction to a private party without requiring the giving of an undertaking (see, e.g., *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604 [2d Dept 2004]; *Livas v Mitzner*, 303 AD2d 381 [2d Dept 2003]; *Schwartz v Gruber*, 261 AD2d 526 [2d Dept 1999]; *Carter v Konstantatos*, 156 AD2d 632 [2d Dept 1989]; *Litwa v Litwa*, 89 AD2d 581 [2d Dept 1982]; *Smith v Boxer*, 45 AD2d 1054 [2d Dept 1974]).

The purpose of an undertaking is to provide a "ready source from which the defendant may recover for damages" sustained by reason of a preliminary injunction that is later found to have been improperly granted (*Margolies v. Encounter, Inc.*, 42 NY2d 475, 479 [1977]; *J.A. Preston Corp. v. Fabrication Enter., Inc.*, 68 NY2d 397 [1986]; *see also* CPLR 6312[b]). The amount of an undertaking must be rationally related to the amount of potential damages that defendants might sustain (*see, e.g., Ujueta v. Euro–Quest Corp.*, 29 AD3d 895 [2d Dept 2006]); *Blueberries Gourmet, Inc. v. Aris Realty Corp.*, 255 AD2d 348 [2d Dept 1998]).

While the Court is thus required to order Plaintiff to provide an undertaking to

secure Defendant's potential damages, the amount of damages Defendant is exposed to by reason of the preliminary injunction appear to be very limited. As noted, the most favorable likely outcome for Defendant is a determination that management voting is equal – which is what is protected by the preliminary injunction. It is not implausible that Plaintiff may yet prevail on his claim to voting strength in accordance with Membership Interests. Accordingly, the Court finds a $25,000 undertaking to be more than sufficient under these circumstances.

DISCOVERY

While Ryan's motion seeks to require Walters to submit to an immediate deposition and to have Walters produce documents, the Court finds that such relief is not necessary as the Court will herewith schedule a preliminary conference and will at the conference establish a timetable for the prompt completion of all discovery.

CONCLUSION

The Court has considered the following papers in connection with this motion:

1) Order to Show Cause dated April 5, 2012; Affirmation of Scott Markowitz, Esq., dated April 4, 2012; Affidavit of Edward Ryan, sworn to April 4, 2012, together with the exhibits annexed thereto;

2) Plaintiff's Memorandum of Law in Support of Motion, dated April 4, 2012;

3) Affidavit of Charles Walters, sworn to April 4, 2012, together with the exhibits annexed thereto;

4) Affidavit of Charles Walters, sworn to April 10, 2012, together with the exhibits annexed thereto; and

4) Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction dated April 10, 2012.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion by Plaintiff Edward Ryan a/k/a Ted Ryan, individually and in the right and on behalf of Ryan Associates Technology LLC, to the extent that it is for a preliminary injunction, is granted in part and denied in part as set forth herein; and it is further

ORDERED that, pending the determination of this action and/or further order of this Court, Defendant Charles Walters and Plaintiff Edward Ryan are each enjoined and

restrained from:

a) selling, transferring, pledging, assigning, using, disposing, holding, diverting or otherwise encumbering the monies, assets or business opportunities of Ryan Associates Technologies LLC without the written consents of Plaintiff Edward Ryan and Defendant Charles Walters, except that Plaintiff Edward Ryan and Defendant Charles Walters may each accept funds from third parties in payment of accounts receivable of Ryan Associates Technologies LLC provided that all checks and funds are duly endorsed and deposited only as agreed in writing between Plaintiff Edward Ryan and Defendant Charles Walters and copies of all records of such receipts be provided by the receiving party to the other party forthwith upon receipt;

b) disbursing any funds of Ryan Associates Technologies LLC on deposit at any bank or other financial institution, whether to themselves or others, or incurring any credit card charges or other debt in the name of Ryan Associates Technologies LLC without the written consent of both Plaintiff Edward Ryan and Defendant Charles Walters;

c) applying for or opening any bank accounts, lines of credit, loans, credit cards or other credit accounts in the name of Ryan Associates Technologies LLC without the written consent of both Plaintiff Edward Ryan and Defendant Charles Walters;

d) binding Ryan Associates Technologies LLC to any agreements without the written consent of both Plaintiff Edward Ryan and Defendant Charles Walters; and

e) accessing the post office box of Ryan Associates Technologies LLC to collect payments made to Ryan Associates Technologies LLC without the written consent of both Plaintiff Edward Ryan and Defendant Charles Walters; and it is further

ORDERED that, pending the determination of this action and/or further order of this Court, each party permit the other party full access on an ongoing basis to all books, records, and documents of Ryan Associates Technology LLC, including financial records, in his possession; and it is further

ORDERED that, pending the determination of this action and/or further order of this Court, Defendant Charles Walters and Plaintiff Edward Ryan are each enjoined and restrained from destroying, damaging, or altering all potentially relevant evidence in this action, including but not limited to, all e-mails and correspondence and all bank records, whether in printed or electronic form; and it is further

ORDERED that Plaintiff Edward Ryan shall give an undertaking in the sum of

$25,000 conditioned that Plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to Defendant Charles Walters all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that if the undertaking provided for in the preceding decretal paragraph is not filed with the Clerk of the Court (courtesy copy to Chambers) by May 22, 2012, then Defendant may submit to this Court, on one (1) day's notice to counsel for Plaintiff, an order vacating forthwith all injunctive relief hereinbefore or hereinabove granted; and it is further

ORDERED that, except as hereinabove set forth, the motion by Plaintiff Edward Ryan a/k/a Ted Ryan, individually and in the right and on behalf of Ryan Associates Technology LLC, to the extent that it is for a preliminary injunction, is otherwise denied; and it is further

ORDERED that the motion by Plaintiff Edward Ryan a/k/a Ted Ryan, individually and in the right and on behalf of Ryan Associates Technology LLC, to the extent that it is to compel Defendant Charles Walters to appear for deposition and to produce documents, is denied, without prejudice to the rights of said Plaintiff to participate in disclosure in this action; and it is further

ORDERED that counsel for the parties shall appear before this Court on May 24, 2012 at 9:30 a.m. for a Preliminary Conference at which, *inter alia*, the Court will issue a Preliminary Conference Order for the purposes of establishing a schedule for the timely completion of all pre-trial proceedings, including disclosure; and it is further

ORDERED that the conference hereinabove provided for may not be adjourned except with the prior written approval of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
May , 2012

E N T E R :

_____
Alan D. Scheinkman
Justice of the Supreme Court

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