

Adams v Gallagher

2011 NY Slip Op 30227(U)

January 13, 2011

Sup Ct, Nassau County

Docket Number: 016529-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**MARY E. ADAMS, Individually and as a Member of
BABYLON CENTURY, LLC, on Behalf of Herself
and in the Right of Said Limited Liability Company,**

Plaintiff,

**A Judicial Dissolution of
BABYLON CENTURY, LLC**

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 016529-10
Motion Seq. No: 1
Submission Date: 1/6/11**

- against -

**THOMAS G. GALLAGHER, MICHAEL P.
LITZNER, BRUCE TORRANI, WANTAGH
CENTURY MANAGEMENT, LLC, GALLIT
PARTNERS and BABYLON CENTURY, LLC
(Nominal Defendant),**

Defendants.

-----x

Papers Read on this motion:

- Order to Show Cause, Affidavit in Support and Exhibits.....x**
- Supplemental Affirmation in Support and Affidavits in Support.....x**
- Memorandum of Law in Support.....x**
- Affidavits in Opposition, Affirmation in Opposition and Exhibits.....x**
- Memorandum in Opposition.....x**

This matter is before the court on the Order to Show Cause filed by Plaintiff on October 14, 2010 and submitted on January 6, 2011. For the reasons set forth below, the Court 1) refers Plaintiff's applications for injunctive relief, an accounting and a declaration that the Management Agreement is void or terminated to a hearing; 2) directs that the temporary restraining order issued by the Court on December 17, 2010 shall remain in effect, pending further court order, and directs Plaintiff to post a bond in the sum of \$2,500 within thirty (30)

days of the date of this Order as a condition of that injunctive relief; and 3) denies Plaintiff's application to disqualify Defendants' counsel.

BACKGROUND

A. Relief Sought

Plaintiff seeks an Order 1) pursuant to CPLR §§ 6301 and 6311, temporarily enjoining and restraining Defendants, their servants, agents, predecessors, representatives, all persons under their dominion and/or control, and all persons acting in concert with them, during the pendency of this action, from a) removing, deleting or otherwise altering, in any way, any signs or advertising materials referable to Plaintiff and/or Babylon Century, LLC including, but not limited to, all websites, print ads, brochures, pamphlets, business cards, letterheads, invoices or bills, etc., and from cancelling or entering into any agreements with any vendors on behalf of Babylon Century, LLC, unless authorized by Plaintiff; b) removing, deleting or otherwise altering, in any way, any telephone numbers, facsimile numbers, email addresses/accounts or other contact information referable to Plaintiff and/or Babylon Century, LLC, unless authorized by Plaintiff; c) opening, closing or otherwise accessing any business and/or bank accounts, presently or in the future, in the name of Babylon Century, LLC, unless authorized by Plaintiff; d) interfering with the day-to-day management, business, affairs and operations of Babylon Century, LLC including, but not limited to, blocking and/or diverting any sales leads derived from Century 21 website and any other websites referable to Babylon Century, LLC, unless authorized by Plaintiff; e) transferring, assigning, selling or attempting to sell, negotiating, depleting, wasting, diverting, misappropriating and otherwise disposing of any assets of Babylon Century, LLC including, but not limited to, any equipment, computers or software thereof; f) soliciting or attempting to solicit, or interfering with, directly or indirectly (through any entity or individual), any customers, accounts, brokers, agents or employees of Babylon Century, LLC; and g) accessing or entering the premises of Babylon Century, LLC located at 72 East Main Street, Babylon Village, New York 11702, unless authorized by Plaintiff; 2) permitting Plaintiff to maintain and manage the *status quo* with respect to the business of Babylon Century, LLC; 3) directing Defendants to provide to Plaintiff a full and complete accounting of all corporate books, records, bank accounts, funds, monies, cash, disbursements, receivables, financial records

and banking statements, including, but not limited to, all negotiated checks, checkbook ledgers, transfers, deposit and withdraw receipts, and corporate credit card statements and payments, respecting Babylon Century, LLC from June 2007 through to the present, and all deposit slips and cancelled checks of any/all financial contributions made by the Defendants into Babylon Century, LLC's bank accounts during that period; 4) declaring the Management Agreement dated June 28, 2007 void *ab initio* or, in the alternative, terminated as of June 28, 2010; and upon such determination, compelling Gallit Partners to return to Babylon Century, LLC all management fees and expenses paid to and received by Gallit Partners during the relevant period; and 5) disqualifying the law firm of Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP ("Abrams Fensterman"), including all Members, Associates, and Of Counsel thereof, from representing the Defendants in this action based upon a conflict of interest, and upon such determination: a) enjoining Abrams Fensterman from representing any of the Defendants in any action involving Babylon Century, LLC; b) enjoining Abrams Fensterman from disclosing to Defendants or their counsel any information respecting Babylon Century, LLC; and c) returning to Plaintiff all of the files and documents in the law firm's possession concerning its prior representation of Babylon Century, LLC.

The Court granted Plaintiff's application for a temporary restraining order ("TRO") to the limited extent that the Court, on December 17, 2010, ordered that Plaintiff is hereby permitted to maintain and manage the *status quo* with respect to the business of Babylon Century, LLC. The Court denied Plaintiff's other applications for a TRO.

Defendants oppose Plaintiff's motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. D to OSC) describes the nature of this action as an action 1) seeking judicial dissolution of Babylon Century, LLC pursuant to Limited Liability Company Law ("LLCL") § 702; and 2) asserting claims for breach of contract, breach of fiduciary duty, fraud, misappropriation, diversion, conversion and misuse of company funds and assets, judicial dissolution, to pierce the corporate veil, accounting, preliminary injunction, declaratory judgment and punitive damages. The Complaint alleges, further, that Plaintiff has not made any demand on the Members of Babylon Century, LLC to bring this action because

such a demand would have been futile.

The Complaint provides the following background:

Babylon Century, LLC (“Babylon Century”) operates under the Century 21 Real Estate Corporation franchise as a real estate brokerage business. On or about June 28, 2007, Mary E. Adams (“Adams”), Thomas G. Gallagher (“Gallagher”), Michael P. Litzner (“Litzner”) and Bruce Torrani (“Torrani”) entered into an Amended and Restated Operating Agreement of Babylon Century (“Operating Agreement”). Pursuant to the Operating Agreement, 1) Adams is the majority Member of Babylon Century, owning a thirty-three percent (33%) interest therein; and 2) Gallagher (25%), Litzner (25%) and Torrani (17%) are the other Members of Babylon Century.

On or about June 28, 2007, Babylon Century entered into a Management Agreement (“Management Agreement”) with Gallit Partners (“Gallit”), pursuant to which Gallit was to serve as the Manager of the business of Babylon Century for three (3) years. Gallit is a New York partnership comprised of Gallagher and Litzner.

In her Affidavit in Support, Mary E. Adams (“Adams”) outlines the allegedly improper conduct of the Defendants, including but not limited to 1) Gallagher and Litzner sought to control the business of Babylon Century through Gallit, allegedly their alter ego; 2) Gallagher and Litzner used Gallit as a means to misappropriate funds from Babylon Century to themselves and their other companies, including Gallit; 3) Defendants have refused to provide Adams with an accounting of Babylon Century, or provide her with access to its books and records; 4) Defendants made false representations to Adams to induce her to merge her existing business, Century 21 Herrick Real Estate, with them and to induce her to provide capital contributions to Babylon Century; 5) prior to the approval of that merger (“Merger”), Gallagher and Litzner misrepresented their respective membership interests in Babylon Century, and other companies, so that they could personally receive Development Advance Funding (“DAN Money”) provided by Century 21; 6) Gallagher and Litzner “forced” Adams (Adams Aff. at ¶ 32) to sign certain documents under the threat that the Merger would not be approved; 7) Gallagher and Litzner misappropriated the DAN money; 8) Defendants made false representations to, and coerced, Adams into making additional capital contributions to Babylon Century; and 9) Defendants have

breached the Operating Agreement by, *inter alia*, permitting Gallit to manage Babylon Century and excluding Adams from the decision-making process.

In his Affirmation in Support, counsel for Plaintiff lists numerous checks (“Checks”) totaling over \$98,000 that, he submits, demonstrate Defendants’ mismanagement of Babylon Century. Counsel for Plaintiff also affirms, on information and belief, that Defendants have committed improprieties, including 1) failing to issue Internal Revenue Service (“IRS”) 1099 forms to themselves for fees they collected from Babylon Century; and 2) paying expenses of other entities from the operating account of Babylon Century, and deducting those expenses from Babylon Century’s income on its tax returns.

Plaintiff provides an Affidavit of Anthony D’Ambrosio (“D’Ambrosio”), a certified public accountant, in which he affirms that he performed a “limited review of certain financial records” of Babylon Century from August 2007 to September 2010 (D’Ambrosio Aff. at ¶ 3). Based on that review, D’Ambrosio concluded that there are numerous disbursements from company accounts to vendors that are inconsistent with its normal operating activities. D’Ambrosio submits that, in light of his observations, a comprehensive review of the books and records of Babylon Century is warranted.

Plaintiff also provides Affidavits of numerous Licensed Sales Associates and Associate Brokers of Century 21 American Homes (Babylon Century) who affirm, *inter alia*, that 1) following their association with Babylon Century in 2007, they noticed that they were receiving minimal leads and inquiries; 2) since Adams has taken back management of their office, the number of leads have increased and the office is busier; and 3) Gallit¹ has overcharged them for access to the website Realtor.com, and for errors and omissions insurance, and has refused to provide them with a refund.

In his Affidavit in Opposition, Gallagher submits that the affidavits of D’Ambrosio and Plaintiff’s counsel are of minimal probative value, both because D’Ambrosio’s affidavit lacks any specificity, and because Plaintiff’s counsel has no personal knowledge of the business operations of Babylon Century. Gallagher submits that D’Ambrosio and Plaintiff’s counsel

¹ The affidavits of the sales associates and brokers refer to “Gallet Partners” and “Gillet Partners.” The Court assumes that they are referring to Defendant Gallit.

“have [no] idea what they are talking about” and “jumped to conclusions without any basis whatsoever for “identifying” checks as improper” (Gallagher Aff. at ¶ 3).

Gallagher addresses the Checks and provides explanations for their issuance. By way of example, 1) with respect to Checks allegedly in excess of the monthly credit card limit, Babylon Century was forced to reduce its credit limit from \$10,000 to \$3,000 in July of 2008 because of Adams’ repeated abuses in using the card for personal items, including a veterinary bill in excess of \$1,500; 2) Checks were paid to Gallit for a management fee, pursuant to Babylon Century’s management agreement with Gallit, which Adams signed; 3) Checks were paid to Merrick Century LLC to repay a loan; 4) Checks were issued to Star Community Publishing to pay for print ads for Babylon Century; and 5) Checks were issued to Advanta Business Card to pay for Babylon Century’s share of a cell phone program called “Open House on the Go” which allowed prospective purchasers to obtain and download open house information to their cell phones. Gallagher also disputes Plaintiff’s claims regarding certain tax improprieties, and affirms that Babylon Century did file 1099 forms for fees paid to Gallit (Ex. A to Gallagher Aff.).

Gallagher affirms, further, that Adams has violated the TRO issued by the Court on November 8, 2010 in the related action (“Related Action”) of *Gallagher et al. v. Adams*, Nassau County Index Number 19589-10 which ordered that, pending the hearing and determination of the motion in that Related Action, Adams, her agents, servants, employees and all others acting in concert or privity with them are restrained and enjoined from interfering with Gallit’s management of Babylon Century. Gallagher avers that Adams, in violation of the TRO in the Related Action, without notifying or obtaining the consent of Defendants: 1) cancelled Babylon Century’s telephone contract with Broadview without paying the outstanding balance on the contract; 2) arranged for a new e-mail service for Babylon Century’s agents; and 3) entered into a \$5,000 contract with Real Pro and paid a \$2,500 deposit to create a new website for Babylon Century. Gallagher affirms that these expenditures duplicate existing expenses and services provided more efficiently by Gallit, and represent Adams’ efforts to take over Babylon Century.

In her Affidavit in Opposition, counsel for Defendants provides copies of Defendants’ supporting papers in the Related Action, in which Defendants (the plaintiffs in the Related Action) have sought injunctive relief.

With respect to Plaintiff's contention that Defendants did not provide Adams with notice of a meeting at which Babylon Century voted to enter into a contract with Gallit, Defendants' counsel notes that New York Limited Liability Company Law ("LLCL") permits members of an LLC to take action without a meeting, prior notice or a vote. Defendants' counsel, by letter dated October 28, 2010 (Ex. D to Lichtenstein Aff.), provided Plaintiff's counsel with a copy of the Notice of Action by Written Consent of members and other documentation regarding the LLC's decision to enter into an agreement with Gallit.

In his Affirmation in Opposition, attorney Steven J. Eisman ("Eisman") of Abrams Fensterman affirms that neither he nor Abrams Fensterman has represented Babylon Century. He affirms that Gallagher and Litzner formed Babylon Century in 2007, and Torrani and Adams then purchased interests in Babylon Century. Abrams Fensterman prepared the Membership Interest Acquisition Agreement, the Amended and Restated Operating Agreement and the Management Agreement between Babylon Century and Gallit. Eisman, who has a matrimonial and litigation practice, had no personal involvement in this work. Moreover, in performing this work, Abrams Fensterman represented Gallagher and Litzner, not Babylon Century. The records of Abrams Fensterman reflect that Torrani and Adams were represented by separate counsel.

Eisman also disputes Plaintiff's claim that the fact that Eisman's wife is the co-owner of a title company with which Babylon Century does business presents a basis for his disqualification.

C. The Parties' Positions

Plaintiff submits that she has demonstrated her right to injunctive relief. First, Plaintiff contends that she has demonstrated a likelihood of success on the merits on her claims for breach of contract and breach of fiduciary duty by establishing, *inter alia*, that 1) Defendants breached the Operating Agreement by permitting Gallit to manage Babylon Century, and excluding Adams from the decision-making process; 2) Defendants breached the Operating Agreement by refusing to provide Plaintiff with a full accounting of Babylon Century business; 3) Defendants breached the Management Agreement by blocking sales leads that would normally run from the Century 21 websites to Babylon Century, and diverting them to Defendants' other companies; 4) Gallit has paid itself unauthorized management fees and expenses, in violation of the Management Agreement; 5) Gallit has improperly withdrawn funds from Babylon Century accounts and used

those funds to pay other expenses of Gallit as well as the personal expenses of the individual Defendants; and 6) Defendants have misappropriated Adams' capital contributions to Babylon Century.

Plaintiff submits, further, that she will suffer irreparable harm without injunctive relief because Defendants' conduct continues to threaten the business operations of Babylon Century and reduce its value. Finally, Plaintiff contends that a balancing of the equities favors injunctive relief because, without it, Defendants will continue to damage the business of Babylon Century. Moreover, injunctive relief will preserve the *status quo* of Babylon Century, and permit Adams to manage Babylon Century appropriately, without interference by Defendants.

Plaintiff also submits that Abrams Fensterman should be disqualified from representing Defendants in this action on the grounds that 1) Abrams Fensterman previously represented Babylon Century; and 2) counsel from Abrams Fensterman may be called as a witness in this action. With respect to its prior representation ("Prior Representation") of Babylon Century, Abrams Fensterman prepared the Operating, Management and Employment Agreements at issue, as well as other relevant legal documents. In that context, Abrams Fensterman learned confidential information about the operation of Babylon Century, which is a central issue in this litigation. Plaintiff contends that the matters involved in this action, and those in the Prior Representation, are substantially related. Plaintiff submits, further, that the interests of the Members of Babylon Century represented by Abrams Fensterman are materially adverse to the interests of Babylon Century. Plaintiff also notes that Eisman's wife is a co-owner of a title company with which Babylon Century does business. Plaintiff argues that, in light of the foregoing, Abrams Fensterman is prohibited from representing the Individual Defendants, as well as Gallit, against whom Plaintiff has asserted claims.

Defendants oppose Plaintiff's application, submitting that Plaintiff has not demonstrated her right to injunctive relief. Defendants contend that Plaintiff has not established a likelihood of success on the merits in light of the following: 1) pursuant to the Operating Agreement, the Individual Defendants, who collectively own 66% of Babylon Century, may make decisions and enter into agreements on behalf of Babylon Century, even if Adams disagrees with those decisions; 2) pursuant to the Operating Agreement, Gallagher and Litzner were permitted to be

partners in Gallit at the same time they were members of Babylon Century; and 3) the affidavits of D'Ambrosio and Plaintiff's counsel regarding the operation of Babylon Century are of minimal value given that the affiants have no personal knowledge of its business operations, and Gallagher has explained the alleged improprieties to which they refer.

Defendants also submit that Adams will suffer no harm in the absence of injunctive relief, and that Adams has incurred unnecessary and duplicative expenses on behalf of Babylon Century. Finally, Defendants submit that the equities balance in their favor in light of Adams' violation of the TRO in the Related Action.

Defendants also submit that Abrams Fensterman should not be disqualified as counsel for Defendants. Defendants argue that Plaintiff's application is based on the flawed premise that Abrams Fensterman has represented Babylon Century in the past. In fact, Abrams Fensterman represented Gallagher and Litzner in preparing the Operating Agreement and other legal documents, and performed no legal services for Babylon Century. Moreover, the legal work performed with respect to the formation of Babylon Century is not substantially related to the current litigation which relates to whether the parties have violated their fiduciary duties to each other.

Defendants also dispute Plaintiff's claim that disqualification is appropriate because Abrams Fensterman may be called as a witness noting that 1) Eisman was not involved in the formation of Babylon Century, or the drafting of any paperwork related to its formation; 2) Babylon Century has entered into a Management Agreement with Gallit which will control the dispute at issue, rendering testimony regarding that agreement unnecessary; 3) Gallagher or Litzner can provide testimony regarding their intent in entering the Management Agreement, should such testimony be deemed relevant; 4) a law firm may continue representing a client even if one of its attorneys ought to be called as a witness; and 5) the concerns underlying the advocate-witness disqualification rule relate to trial counsel, and the trial itself, not to pre-trial phases.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant

establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. See *White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

CPLR § 6312(c) provides as follows:

Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists.

B. Disqualification

Plaintiff, as the movant, has the burden of establishing grounds for the disqualification of Defendant's counsel. *Tekni-Plex, Inc. v. Meyner and Landis*, 89 N.Y.2d 123, 131 (1996), *rearg.*

den., 89 N.Y.2d 917 (1996); *Solow v. W.R. Grace Co.*, 83 N.Y.2d 303, 308 (1994); see also, *S & S Hotel Ventures, Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 445 (1987). A party's valued right to be represented in ongoing litigation by counsel of its own choosing should not be abridged, absent a clear showing that disqualification is warranted. *Horn v. Municipal Information Services, Inc.*, 282 A.D.2d 712 (2d Dept. 2001), citing *Olmoz v. Town of Fishkill*, 258 A.D.2d 447 (2d Dept. 1999); *Feeley v. Midas Props.*, 199 A.D.2d 238 (2d Dept. 1993). A party seeking disqualification of opposing counsel must establish that (1) there is a prior attorney-client relationship between the moving party and opposing counsel; (2) the matters involved in both representations are substantially related; and (3) the interests of the current client and former client are materially adverse. *M.A.C. Duff, Inc. v. ASMAC, LLC*, 61 A.D.3d 828 (2d Dept. 2009) citing *Tekni-Plex, Inc. v. Meyner and Landis*, *supra*, at 131; *Calandriello v. Calandriello*, 32 A.D.3d 450, 451 (2d Dept. 2006); *Columbus Constr. Co., Inc. v. Petrillo Bldrs. Supply Corp.*, 20 A.D.3d 383 (2d Dept. 2005).

When the moving party can demonstrate each of these factors, an irrebuttable presumption of disqualification follows. *Pellegrino v. Oppenheimer & Co., Inc.*, 49 A.D.3d 94, 98 (1st Dept. 2008), citing *Tekni-Plex, Inc. v. Meyner and Landis*, *supra*, at 131. Conversely, the movant's failure to make the requisite showing as to each of the criteria means that no such presumption arises. *Pellegrino v. Oppenheimer & Co., Inc.*, *supra*, at p. 98, citing *Kassis v. Teacher's Ins. & Annuity Assn.*, 93 N.Y.2d 611, 617 (1995); *Tekni-Plex, Inc. v. Meyner and Landis*, *supra*, at 132.

An attorney-witness must be disqualified only when it is likely that the testimony to be given by the witness is necessary. *S & S Hotel Ventures Ltd. Partnership*, 69 N.Y.2d at 445-446; see also, *Davin v. JMAM, LLC*, 27 A.D.3d 371 (1st Dept. 2006). The burden of demonstrating necessity is on the challenging party. *Bentvena v. Edelman*, 47 A.D.3d 651 (2d Dept. 2008). The fact that an attorney has relevant knowledge or was involved in the transaction at issue does not render his testimony necessary. *S & S Hotel Ventures Ltd. Partnership*, *supra*, at 445. See, e.g., *Campbell v. McKeon*, 75 A.D.3d 479 (1st Dept. 2010) (movant failed to meet "heavy burden" of establishing that attorney's testimony was necessary where movant failed to, *inter alia*, identify specific issues requiring attorney's testimony or establish unavailability of

other sources of evidence); *Scafuri v. DeMaso*, 71 A.D.3d 755 (2d Dept. 2010) (plaintiff's "conclusory assertions" of misuse of client confidences or necessity of attorney to testify insufficient to warrant disqualification).

In determining the necessity of an attorney's testimony, the Court should consider factors including the 1) significance of the matters, 2) weight of the testimony, and 3) availability of other evidence. *S & S Hotel Ventures Ltd. Partnership*, 69 N.Y.2d at 446, citing *Comden v Superior Ct.*, 20 Cal.3d 906 (1978), *cert. den.*, 439 U.S. 931 (1978); *Foster Wheeler Corp. v. Babcock & Wilcox Co.*, 440 F.Supp. 897, 903 (S.D.N.Y. 1977).

C. Application of these Principles to the Instant Action

In light of the conflicting affidavits, the Court refers Plaintiff's applications for injunctive relief, an accounting and a declaration that the Management Agreement is void or terminated to a hearing. The Court directs that the TRO shall remain in effect, pending further court order, and directs Plaintiff to post a bond in the sum of \$2,500 within thirty (30) days of the date of this Order as a condition of that injunctive relief.

The Court denies Plaintiff's application to disqualify Abrams, Fensterman and/or Eisman as counsel for Defendants. Plaintiff has not established that there is a prior attorney-client relationship between counsel and Babylon Century. Moreover, even assuming, *arguendo*, that there is a prior attorney-client relationship between Babylon Century and counsel, Plaintiff has not demonstrated that the matters involved in both representations are substantially related. The Court is not persuaded that counsel's preparation of documents related to the formation of Babylon Century is substantially related to Plaintiff's allegations that Defendants have breached the agreements among the parties, or violated their fiduciary duties to Plaintiff. Plaintiff also has not established that counsel's testimony would be necessary, particularly given the ability of the Defendants to testify regarding the relevant agreements among the parties.

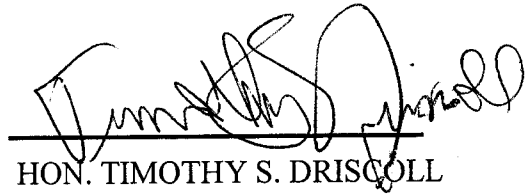
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on February 16, 2011 at 9:30 a.m., at which time the Court will schedule the hearing as directed herein.

ENTER

DATED: Mineola, NY
January 13, 2011



A handwritten signature in black ink, appearing to read 'Timothy S. Driscoll', is written over a horizontal line.

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JAN 21 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE