SCAN

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

**HON. TIMOTHY S. DRISCOLL**
**Justice Supreme Court**

| | |
|---|---|
| ----------x | **TRIAL/IAS PART: 20** |
| **In the Matter of the Application of SALVATORE TORNAMBENE, a Member Holding a 42% interest in AIRPORT GROUND SERVICE & LEASING, LLC,** | **NASSAU COUNTY** |
| | **Index No: 003402-11** |
| | **Motion Seq. Nos. 1 & 2** |
| **Petitioner and Plaintiff** | **Submission Date: 4/7/11** |

**For among other things, a Judgment Under Article 78 of the New York Civil Practice Law and Rules, Compelling AIRPORT GROUND SERVICE & LEASING, LLC, to allow Inspection of their Books and Records by the Petitioner, and the Dissolution of Airport Ground Service & Leasing, LLC Pursuant to Article 7 of the Limited Liability Company Law, and Plenary Action for Declaratory Relief**

**- against -**

**DAVID WU, AIRPORT GROUND SERVICE & LEASING, LLC, AND BRUCE GUREWITZ, ESQ., AND DOES 1 THROUGH 25, INCLUSIVE,**

**Respondents and Defendants**

----------x

**The following papers have been read on these motions:**

**Order to Show Cause, Affirmation in Support and Exhibits.....x**
**Affirmation in Opposition and Exhibits.....x**
**Notice of Cross Motion, Affirmation in Opposition/Support, Affidavits in Opposition/Support and Exhibits.....x**
**Affidavits in Opposition to Cross Motion, Affirmation in Opposition/Further Support and Exhibits.....x**
**Affirmation in Reply, Affidavits in Reply and Exhibits.....x** [1]
**Memorandum of Reply.....x**

---

[1] The Court, in its discretion, permitted Defendants to submit reply papers with respect to their cross motion.

This matter is before the Court for decision on 1) the Order to Show Cause filed by Petitioner/Plaintiff Salvatore Tornambene ("Tornambene" or "Plaintiff") on March 4, 2011, and 2) the cross motion filed by Respondents/Defendants David Wu ("Wu") and Airport Ground Service and Leasing, LLC ("Company") (collectively "Defendants") on March 9, 2011, both of which were submitted on April 7, 2011. For the reasons set forth below, the Court 1) denies Plaintiff's Order to Show Cause and vacates the temporary restraining order previously issued; and 2) denies Defendants' cross motion. As noted below, the Court's denial of Plaintiff's applications for an Order granting him access to the Company's books and records, and for dissolution of the Company, is without prejudice to Plaintiff's filing a future application for such relief in the event that there is a determination, at a trial or hearing of this matter, that Plaintiff is a member of the Company.

## BACKGROUND

### A. Relief Sought

Plaintiff moves for an Order 1) pursuant to CPLR Article 78, and Limited Liability Company Law ("LLCL") § 1102, directing Defendants and their members, servants, employees, directors, officers, representatives, agents, affiliates, attorneys and all persons acting on behalf of or in concert with Defendants, directly or indirectly, to produce for inspection and copying by Plaintiff and/or his agents, including his accountant and/or counsel, all books and records for the Company including, without limitation a) all federal, state and local tax returns for the Company, b) all of the Company's financial statements, c) all profit and loss statements for the Company, d) operating agreements and amendments thereto, e) all articles of organization and amendments thereto, f) all documents reflecting capital calls for the Companies and contributions made in connection with such capital calls, g) all of the contracts entered into by the Company from 2007 to the present, and h) all documents reflecting all salaries and/or distributions paid or otherwise distributed by the Companies; 2) pursuant to Article 7 of the LLC, dissolving the Company; and 3) pursuant to CPLR §§ 6301, 6311 and 6313, a) enjoining Wu and his agents, officers, directors, principals, servants, employees, attorneys, and any and all other persons acting on behalf or in concert with Wu, jointly and severally, directly or indirectly, from i) exercising or attempting to exercise any duties as manager of the Company; ii) performing any acts on behalf of the Company including, without limitation, signing any of the Company's checks or drawing upon any of the Company's accounts, making any transfers of any of the Company's monies or

other assets, or entering into or modifying any contracts on behalf of the Companies; and iii) interfering in any way with the operation of the business operations of the Companies; and b) enjoining Respondent Bruce Gurewitz ("Gurewitz") and his agents, officers, directors, principals, servants, employees, attorneys, and any and all other persons acting on behalf or in concert with Gurewitz, jointly and severally, directly or indirectly, from i) performing any acts on behalf of the Companies including, without limitation, signing any of the Company's checks or drawing upon any of the Company's accounts, making any transfers of any of the Company's monies or other assets, or entering into or modifying any contracts on behalf of the Company (including, without limitation, any leases, loan agreements, mortgages or other contracts); and ii) interfering in any way with the business operations of the Company.

Defendants oppose Plaintiff's application and cross move for an Order dismissing the petition and complaint on the grounds that 1) it violates LLC § 602; 2) it is factually insufficient; and 3) Plaintiff lacks the capacity to maintain the action.

B. The Parties' History

The Verified Petition and Complaint ("Petition") alleges as follows:

Tornambene is a member holding a 42% interest in the Company and Wu is a Member holding a 58% interest in the Company. Gurewitz is an attorney licensed to practice law in the State of New York, and a certified public accountant.

Defendants have refused to provide Plaintiff with access to the Company's books and records, despite Plaintiff's requests, as reflected by the letters provided (Ex. B to Pet.). In that correspondence, Defendants' counsel advised Plaintiff's counsel that, because Plaintiff never perfected his interest in the Company by making the required capital contribution, his rights in the Company never vested.

Tornambene has operated the Company for over thirty (30) years. Wu approached Tornambene regarding a potential joint venture and on or about January 1, 2007, Wu and Tornambene became business associates and co-owners of the Company. On or about January 1, 2007, Wu and Tornambene, under the supervision of Gurewitz, executed the Operating Agreement ("Agreement") (Ex. A to Pet.). Pursuant to the Agreement, 1) Wu is the manager of the Company; and 2) Wu and Tornambene, respectively, maintain a 58% and 42% membership interest in the Company.

The Petition alleges that Gurewitz, notwithstanding his position as legal counsel and

accountant for the Company, aided and abetted Wu in his violation of his fiduciary duty towards Plaintiff by preventing Plaintiff from gaining access to the Company's books and records ("Books and Records") and terminating all payments and distributions to Plaintiff. Plaintiff concedes that he did not contribute directly to the working capital of the Company, but alleges that he "brought substantial consideration well above the initial capital in form of contracts with various other companies" (Pet. at ¶ 32). Plaintiff alleges that it is "financially unfeasible" (*id.* at ¶ 33) to continue the operation of the Company.

The Petition contains twelve (12) causes of action: 1) violation of Plaintiff's right to inspect the Books and Records pursuant to LLCL § 1102, 2) dissolution of the Company pursuant to LLCL § 702, 3) breach of fiduciary duty, 4) aiding and abetting breach of fiduciary duty, 5) legal malpractice, 6) accounting malpractice, 7) removal of Wu as manager of the Company, 8) request for an accounting, 9) conversion, 10) unjust enrichment, 11) declaratory judgment as to Plaintiff's membership rights in the Company, and 12) permanent injunction barring Wu and Gurewitz from transferring or encumbering Company assets, other than in the ordinary course of business.

On March 4, 2011, the Court (Adams, J.) issued a temporary restraining order ("TRO") directing that, pending the hearing of the Order to Show Cause:

> Wu and his agents, officers, directors, principals, servants, employees, attorneys, and any and all other persons acting on behalf or in concert with Respondent/Defendant, jointly and severally, directly or indirectly, except what is necessary in the ordinary course of business transactions, are hereby restrained and enjoined from: i) exercising or attempting to exercise any duties as manager of the Company; ii) performing any acts on behalf of the Company; and iii) interfering in any way with the operation of the business operations of the Companies.

In his Affirmation in Opposition, counsel for Defendants affirms as follows:

In the early stages of the Company, Plaintiff expressed an interest in purchasing an interest in the Company. It was agreed that Plaintiff would be permitted to be a member investor of the Company "subject to a condition precedent" (Bythewood Aff. in Opp. at ¶ 4) that he provide a capital contribution ("Contribution") of $200,000. To date, Plaintiff has failed to make that contribution.

Since the execution of the Agreement, Plaintiff has never offered to make the Contribution. It was not until February of this year that Plaintiff's counsel contacted Defendants, at which time Defendants' counsel advised Plaintiff's counsel of Plaintiff's failure

to make the Contribution, but also gave Plaintiff the opportunity to make that Contribution. In support of this assertion, Defendants' counsel provides a copy of his letter to Plaintiff's counsel dated February 14, 2011 (Ex. D to Bythewood Aff. in Opp.) which includes the following:

> [Tornambene] never perfected his interest in the [Company] and therefore any right that he believe that he might have had never vested. Your client had an obligation to invest in [the Company] by making [the Contribution]. This, he never did.

It is unclear to the Court what portion of this letter, or the other correspondence to which Defendants refer, provides Plaintiff with the opportunity to make the Contribution.

On February 17, 2011, Defendants' counsel received a letter from Plaintiff's counsel (Ex. E to Bythewood Aff. in Opp.) to Defendants' counsel which "made it clear that [Plaintiff] was **NOT** interested in having any rights vest in [the Company]" (Bythewood Aff. in Opp. at ¶ 7). The Court has reviewed that letter and does not concur with Defendants' characterization of it. In the February 17, 2011 letter, Plaintiff's counsel advised Defendants' counsel that 1) it is for the Court, and not counsel or the parties, to determine whether Plaintiff has abandoned his rights with respect to the Company; 2) Plaintiff was again requesting that Defendants provide all documents on which they were basing their determination that Plaintiff had abandoned his rights in the Company; and 3) if Defendants did not provide Plaintiff with the requested records, Plaintiff would commence the instant action.

Defendants' counsel affirms that the Company is an ongoing business, and that any injunctive relief will result in the unemployment of the Company's workers, termination of Company contracts and a loss of the Company's good will. Defendants' counsel submits that this action constitutes "extortion" by Plaintiff (Bythewood Aff. in Opp. at ¶ 16), who is attempting to bring about the end of the Company and operate a competing company with his wife.

In his Affidavit in Opposition/Support, Gurewitz affirms as follows:

Gurewitz is an attorney for the Company and Wu, but his "capacity as attorney is subordinate to that of [Defendants' Counsel]" (Wu Aff. in Opp./Supp. at ¶ 1). Gurewitz has never been the Company's accountant. Gurewitz' representation of the Company was limited to the formation of the Company, preparation of the Agreement, and overseeing of the execution of the Agreement. Gurewitz avers that he "may have performed some small ministerial function when he started doing business with [the Company]" (*id.* at ¶ 3).

Plaintiff had no involvement in the formation or operation of the Company. Gurewitz has never represented Plaintiff and, other than at recent court appearances, had only seen him just prior to the execution of the Agreement and again when the Agreement was executed. As Wu's attorney, Gurewitz knows that Wu has been the full time operator and manager of the Company since its inception, and has never seen Plaintiff involved in any aspect of the Company's operations.

Gurewitz is also aware that Wu agreed that Plaintiff could become a member of the Company in consideration for the Contribution, which Plaintiff never provided. Gurewitz submits that, pursuant to LLCL § 602(b)(1), the Contribution was a condition precedent to Plaintiff's membership in the Company. Gurewitz avers that, several years ago, Plaintiff contacted Gurewitz but has not made any calls to him recently. Gurewitz declined to speak to Plaintiff, both because Gurewitz was Wu's attorney and because he wanted to avoid the appearance of a conflict of interest. Gurewitz affirms that he "may have taken one or two of his calls" (Gurewitz Aff. in Opp./Supp. at ¶ 9) but then "refused to deal with him" (*id.*).

Paragraph 6 of the Agreement, titled "Capital Contributions," provides as follows:

> Each of the Members shall contribute to the capital of [the Company] the amount set forth opposite his name below:
>
> David Wu -- $200,000.00
> Salvatore Tornambene -- $200,000.00
>
> The Members shall not be required to make any additional capital contributions.

Paragraph 14 of the Agreement, titled "Forfeiture of Working Member Interests," provides as follows:

> A Member who does not make a capital contribution to [the Company] is hereby defined as a Working Member.
>
> Whereas a Working Member has not made an equity contribution to the [Company], his financial interest in the Company is predicated upon dedicating his full time and efforts to the business of the [Company].
>
> Therefore, in the event said Working Member is no longer willing or able to work for the Company, he will forfeit his membership interest in the Company with no remuneration for said interest from the company or its members, other than his accrued earnings to the extent of his membership interest up until the date of his withdrawal.

Wu affirms as follows in his Affidavit in Opposition/Support:

Wu formed the Company in October of 2006, at which time he was the only member. Since that time, Wu has been the full time operator/manager of the Company, which has been an ongoing business since its formation. Plaintiff was never involved in the Company's operation or management, and never brought any business or contracts to the Company. Wu affirms that Plaintiff "was involved with the theft of at least one customer" of the Company (Wu Aff. in Supp./Opp. at ¶ 6). Plaintiff did express an interest in investing in the Company, but never made that investment.

On January 1, 2007, Wu and Plaintiff executed the Agreement which, Wu submits, required Plaintiff to make the Contribution. Plaintiff never made the Contribution, and never did anything to benefit the Company. On the contrary, Wu affirms, Plaintiff diverted a Company client to a competing business that Plaintiff owned with his wife.

In his Affidavit in Opposition to the cross motion, Tornambene affirms as follows:

Tornambene affirms the truth of the allegations in the Complaint regarding the formation of the Company, the membership interests of Wu and Tornambene, Gurewitz' involvement in the preparation of the Agreement and the Defendants' refusal to provide him with access to the Books and Records. Tornambene disputes Gurewitz' claim that Tornambene has not contacted him recently, and provides telephone records (Ex. A to Tornambene Aff. in Opp.) reflecting that Tornambene contacted Gurewitz more than fifty (50) times.

Tornambene also disputes Wu's assertion that Tornambene never brought in business, and provides an Affidavit in Support of Michael Falacara ("Falacara") who worked for the Company in 2007 and 2008 outlining Tornambene's contributions to the Company. Tornambene submits that Wu's claims are also not credible in light of Tornambene's extensive experience in the ground transportation business, and Wu's limited knowledge of and connections in that business.

Tornambene concedes that he did not make the Contribution, but submits that he contributed to the Company through work he performed for the Company. He also does not believe that Wu ever made a capital contribution to the Company and has not been permitted to examine the Books and Records to see whether they reflect Wu's contribution.

Falacara affirms that he has worked in the airport ground and service business for over twenty four (24) years, and worked for the Company from January of 2007 until on or about July

of 2008. During that employment, it was Falacara's understanding that Tornambene and Wu were both shareholders and members of the Company. Moreover, Tornambene and Wu were to provide Falacara with a 15% interest in the Company, which Falacara discussed with Tornambene, Wu and Gurewitz, the latter of whom was allegedly drafting an agreement to include Falacara. After "getting the run around for several months" (Falacara Aff. at ¶ 6), Falacara left the Company. During the time that Falacara worked for the Company, Tornambene took care of repairs and restorations for the Company, and Wu handled the Books and Records.

In her Affidavit in Opposition to the cross motion, Susan Lall ("Lall") affirms as follows:

Lall is the office manager of Sunrise Ground Equipment Corp. ("Sunrise"), a company that provides maintenance and repairs on ground equipment such as baggage carts, dollies, freight carts, belt loaders and tugs. During the last several years, the Company has placed numerous orders ("Orders") with Sunrise, as reflected by the invoices provided (Ex. B to Lall Aff. in Opp.). According to Sunrise's records, which are kept in the ordinary course of business and with which Lall is familiar, the Company owes Sunrise over $274,000. Since on or about January of 2007, it was Lall's understanding that Tornambene and Wu were both shareholders and members of the Company, and that Tornambene handled the operation of the Company while Wu oversaw the Books and Records.

In his Affidavit in Reply, Wu disputes Tornambene's assertions that 1) Wu approached Tornambene about working together in the Company; 2) Gurewitz was acting as counsel for the Company; and 3) Tornambene discussed with Lall Sunrise's extension of Credit to the Company. Wu reiterates Defendants' position that the Contribution was a condition precedent to membership in the Company.

Wu also affirms that Falacara was never an employee of the Company, but rather is a friend of Tornambene who provided services to the Company for which a 1099 IRS form was issued (Ex. B to Wu Aff. in Reply). Wu confirms that Falacara was given the opportunity to become a member of the Company, but affirms that he rejected that offer. In support of Defendants' assertion that Tornambene is pursuing this litigation because he wishes to compete with the Company, Wu provides emails (*id.* at Ex. F) that purportedly demonstrate Tornambene's efforts to "steal" a customer (Wu Aff. in Reply at ¶ 16).

C. The Parties' Positions

Plaintiff Counsel submits, *inter alia*, that 1) Defendants have deprived Plaintiff of his statutory right to inspect and copy the Books and Records; 2) Plaintiff is entitled to mandamus relief, pursuant to CPLR Article 78, to compel Defendants to produce the Books and Records; and 3) Plaintiff has demonstrated his right to injunctive relief, pursuant to CPLR Article 63, in light of Defendants' persistent and unreasonable refusal to provide Plaintiff with access to the Books and Records, the irreparable harm that will occur if Plaintiff's interest in the Company's funds is not protected, and a balancing of the equities in favor of Tornambene, in light of Defendants' persistent refusal to provide Plaintiff with access to the Books and Records.

Defendants submit, *inter alia*, that 1) Plaintiff has not demonstrated that he is a member of the Company; 2) mandamus relief is inappropriate because Plaintiff has not demonstrated a clear legal right to the requested relief; and 3 ) Plaintiff has not established his right to any of the requested relief because he has not provided any proof that he satisfied the condition precedent of making the Contribution.

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).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of*

*Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *see Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

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).

B. Standing

CPLR § 3211(a)(3) provides for dismissal of an action where the party asserting the cause of action lacks the legal capacity, or standing, to sue. Standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute. *Matter of Eaton Assoc. Inc. v. Egan*, 142 A.D.2d 330, 334-335 (3d Dept. 1988), citing *Allen v. Wright*, 468 U.S. 737, 750-751 (1984), *reh. den.*, 468 U.S. 1250 (1984). Standing involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution. *Graziano v. County of Albany*, 3 N.Y.3d 475, 479 (2004), quoting *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 (1994). A plaintiff must thus demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law. *Caprer v. Nussbaum*, 36 A.D.3d 176, 183 (2d Dept. 2006), citing *Matter of Fritz v. Huntington Hosp.*, 39 N.Y.2d 339 (1976).

C. Relevant Contract Principles

Agreements are to be construed in accordance with the parties' intent. When parties set down their agreement in a clear complete document, their writing should be enforced according to is terms. *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004), quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). Where the parties' intent is discernible from the plain meaning of the language of the contract, there is no need to look further. *Evan v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004).

Under New York law, the initial interpretation of a contract is a matter of law for the court to decide. *International Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir.), citing *K. Bell & Assocs., Inc. v. Lloyd's Underwriters*, 97 F.3d 632, 637 (2d Cir. 1990), quoting *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 299 (2d Cir. 1996). At this stage, the key inquiry is whether the contract is unambiguous with respect to the question disputed by the parties. *International Multifoods*, 309 F.3d at 83. Whether a contract is ambiguous is a question of law for the court. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002); *Gennis v. Pomona Park Bd. of Managers*, 36 A.D.3d 661, 663 (2d Dept. 2007), quoting *Perciasepe v. Premuroso*, 208 A.D.3d 511, 511-512 (2d Dept. 1994). A contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more meanings. *New York City Off-Track Betting Corp. v. Safe Factory Outlet, Inc.*, 28 A.D.3d 175, 177 (1st Dept. 2006), *rearg. den.*, 2006 N.Y. App. Div. LEXIS 11351 (1st Dept. 2006), quoting *Feldman v. National Westminster Bank*, 303 A.D.3d 271 (1st Dept. 2003), *app. den.*, 100 N.Y.2d 505 (2003).

Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence. *Ruttenberg v. Davidge Date Sys. Corp.*, 215 A.D.2d 191, 193 (1st Dept. 1995). When, however, the meaning of a contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented that cannot be resolved on motion papers alone. *Id.*, quoting *Eden Music Corp. v. Times Sq. Music Publs.*, 127 A.D.2d 161, 194 (1st Dept. 1987). Where interpretation of a contract is susceptible to varying reasonable interpretations, and intent must be gleaned from disputed evidence or from inferences outside the written words, resolution by the fact finder is required. *Time Warner Entertainment Co., L.P. v Brustowsky*, 221 A.D.2d 268 (1st Dept. 1995), *app. den.*, 89 N.Y.2d 809 (1997).

D. LLCL § 602

LLC § 602, titled "Admission of members," provides as follows:

(a) A person becomes a member of a limited liability company on the later of:

(1) the effective date of the initial articles of organization; or

(2) the date as of which the person becomes a member pursuant to this section or the operating agreement; provided, however, that if such date is not ascertainable, the date stated in the records of the limited liability company.

(b) After the effective date of a limited liability company's initial articles of organization, a person may be admitted as a member:

(1) in the case of a person acquiring a membership interest directly from the limited liability company, upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the vote or written consent of a majority in interest of the members;

(2) in the case of an assignee of a membership interest of a member who has the power, as provided in the operating agreement, to grant the assignee the right to become a member, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power; or

(3) unless otherwise provided in an agreement of merger or consolidation or the operating agreement, in the case of a person acquiring a membership interest in a surviving or resulting limited liability company pursuant to a merger or consolidation approved in accordance with subdivision (b) of section one thousand one of this chapter, at the time provided in and upon compliance with the operating agreement of the surviving or resulting limited liability company.

E. Access to LLC Records

Limited Liability Company Law §§ 1102(b) provides as follows:

(b) Any member may, subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the [LLC] for the three most recent fiscal years and other information regarding the affairs of the [LLC] as is just and reasonable.

F. Dissolution of LLC

LLCL § 702, titled "Judicial dissolution," provides as follows:

> On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement. A certified copy of the order of dissolution shall be filed by the applicant with the department of state within thirty days of its issuance.

The appropriateness of an order of dissolution of an LLC is vested in the sound discretion of the court hearing the petition. *Matter of Extreme Wireless, LLC v. Molina*, 299 A.D.2d 549, 550 (2d Dept. 2002).

G. Application of these Principles to this Action

The Court denies Plaintiff's application for injunctive relief. First, in light of 1) the ambiguity of the Agreement regarding whether the Contribution was a condition precedent to membership, and 2) Plaintiff's concession that he did not make the Contribution and the conflicting affidavits regarding the extent of Plaintiff's involvement in the Company, Plaintiff has not demonstrated a likelihood of success on the merits. The Court also concludes that Plaintiff's damages, if any, are compensable by money damages and Plaintiff therefore has not demonstrated irreparable harm without the requested injunctive relief. For these reasons, the Court also vacates the TRO issued on March 4, 2011 by Justice Adams.

The Court also denies Defendants' cross motion, based on the Court's conclusion that the Agreement is ambiguous regarding whether the Contribution was a condition precedent to membership in the Company, particularly given the apparent conflict between paragraphs 6 and 14 of the Agreement. In light of that ambiguity, a question of fact is presented that cannot be resolved on this motion.

In light of the ambiguity of the Agreement, Plaintiff's concession that he did not provide the Contribution and the conflicting affidavits regarding the extent of Plaintiff's involvement in the Company, the Court denies, at this time, Plaintiff's applications for 1) an Order directing Defendants to provide Plaintiff access to the Company's Books and Records, and 2) an Order dissolving the Company. This denial is without prejudice to Plaintiff's filing a future application for such relief in the event that there is a determination, at a trial or hearing of this matter, that Plaintiff is a member of the Company.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court on May 24, 2011 at 9:30 a.m. for a Preliminary Conference.

ENTER

DATED: Mineola, NY
April 19, 2011

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